



U.S. CHAMBER  
Institute for Legal Reform



# Dubious Distribution

*Asbestos Bankruptcy Trust  
Assets and Compensation*

.....  
MARCH 2018



**U.S. CHAMBER**  
**Institute for Legal Reform**

An Affiliate of the U.S. Chamber of Commerce

© U.S. Chamber Institute for Legal Reform, March 2018. All rights reserved.

This publication, or part thereof, may not be reproduced in any form without the written permission of the U.S. Chamber Institute for Legal Reform. Forward requests for permission to reprint to: Reprint Permission Office, U.S. Chamber Institute for Legal Reform, 1615 H Street, N.W., Washington, D.C. 20062-2000 (202.463.5724).

# Table of Contents

---

Executive Summary ..... 1

Trust Financial Activity ..... 3

Trust Operational Expenditures ..... 4

Trust Net Claim Payments ..... 5

Trust Claim Payment Ratios ..... 9

Estimated Trust Distributions By Disease ..... 12

Recent Bankruptcy and Legislative Events ..... 14

Conclusion ..... 18

# Executive Summary

---

During the past three decades, nearly 100 companies have filed for bankruptcy protection due, in large part, to asbestos-related litigation.<sup>1</sup> Many of these companies utilized Section 524(g) of the chapter 11 bankruptcy code to reorganize.

Bankruptcy filings under Section 524(g) are unlike traditional chapter 11 reorganizations in that they are intended to resolve the debtors' financial obligations to future asbestos claimants in addition to current creditors. Due to the latent nature of asbestos-related injuries, where the diagnosis of an asbestos-related disease can occur decades after exposure, Section 524(g) provides a mechanism for contemporaneous resolution for both current and future asbestos personal injury claimants.

Confirmation under Section 524(g) requires a 75% vote of the current asbestos creditor class, whose interests are represented by an Asbestos Claimants Committee (ACC). The members of the ACC are typically comprised of plaintiffs' law firms that represent the largest number of lawsuits pending against the debtor at the time of bankruptcy filing. By representing the largest number of creditor votes, the ACC has immense negotiating influence over the reorganization process, including the terms of settlement fund distribution following confirmation.<sup>2</sup>

To protect the interests of the creditor class of future claimants, the bankruptcy court appoints a Future Claims Representative (FCR). Once established, the settlement trust funds are managed by a board of trustees and advised by both the FCR and ACC representatives, who are collectively referred to as the Trust Advisory Committee (TAC).

Therefore, the confirmation of a bankruptcy plan of reorganization under Section 524(g) theoretically represents a negotiated settlement between the debtors and legal representatives of both current and future claimants, resulting in the creation of settlement trust funds to compensate current and future claimants. However, as the following statistics will show, of the 35 trusts operating as of early 2008, 21 are paying claimants less today than in 2008. And less than three cents for every dollar distributed by the trust system is dedicated to examining the veracity of claim submissions.

To examine the asbestos trust system as a substantial source of claimant compensation, we first began compiling

detailed financial and claim activity information from publicly available bankruptcy disclosures and post-confirmation trust annual reports in 2009. Our initial research and data compilation served as the foundation for the 2010 study by the RAND Institute for Civil Justice on asbestos bankruptcy trusts that included trust asset and compensation data through 2008.<sup>3</sup> Since then we have consulted on issues related to asbestos bankruptcy trust compensation and governance for defendants and insurers, provided resources to the Government Accountability Office (GAO) for their 2011 study on the asbestos bankruptcy trust system, and provided legislative testimony

on asbestos trust transparency bills at both the state and federal level.

The figures included in this report represent a continuation of our work with trust disclosures through 2016.<sup>4</sup> While detailed information about individual claims made to and payments made from trusts is limited, these statistics are intended to serve as a general resource as to the financial and claim-related activity of the asbestos trust compensation system. The numbers are clear: under the current trust distribution scheme and depletion rate, legitimate asbestos victims, including future claimants, will continue to be undercompensated.

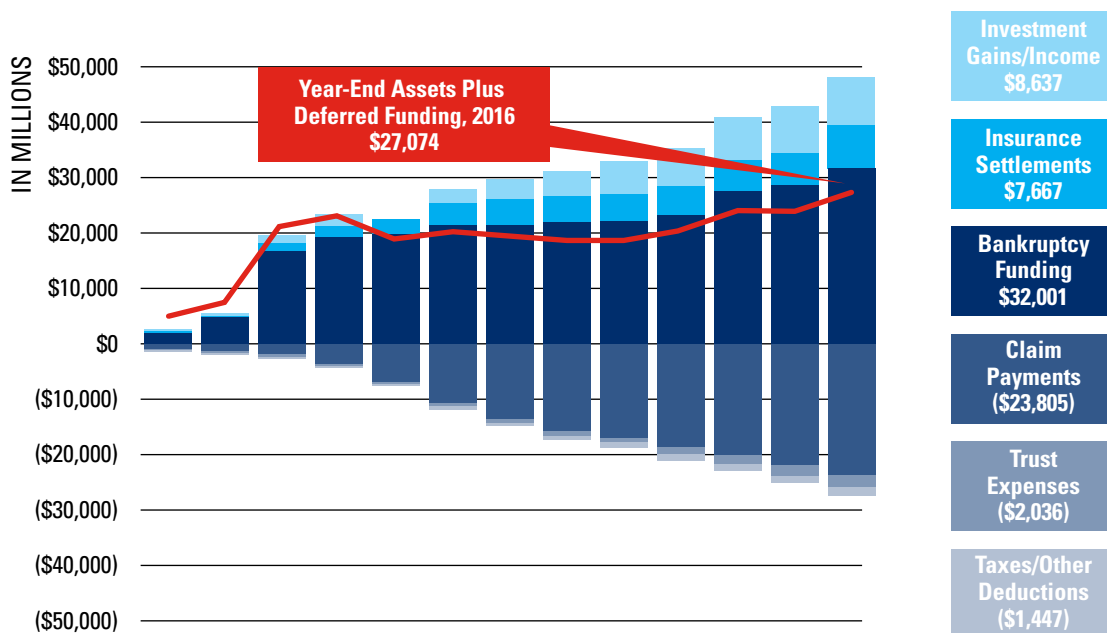
# Trust Financial Activity

Figure 1 below illustrates the cumulative financial activity of the asbestos bankruptcy trust system between 2004 and 2016. During this period, debtors and their insurers contributed nearly \$40B to the trust system, which grew from 14 active, reporting trusts at the beginning of 2004 to 58 active, reporting trusts by the end of 2016.

In addition, the trust system benefited from over \$8B in investment gains and income over that same time period. The trust system paid out nearly \$24B in administratively-processed claims during the same period, which generated approximately \$2B in trust administrative,

oversight, operational, and legal expenses (Trust Expenses). As of year end 2016, the trust compensation system still held nearly \$25B in assets with more than \$2B in deferred funding obligations, totaling just over \$27B.

**Figure 1: Trust Cumulative Financial Activity (2004-2016)**



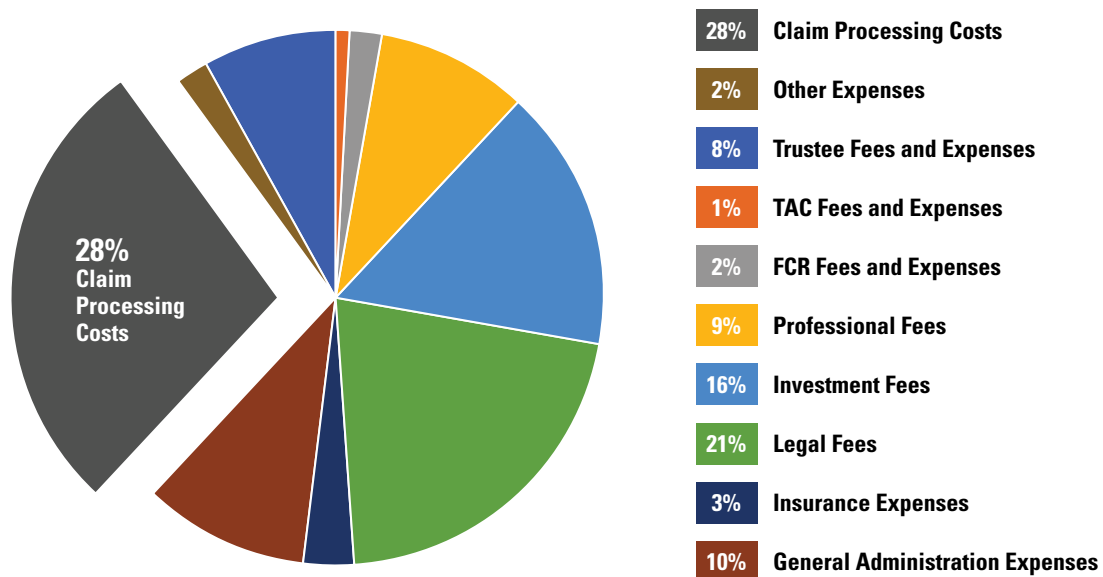
# Trust Operational Expenditures

As noted above, the trust compensation system has distributed nearly \$24B in claim payments since 2004 relative to just \$2B in Trust Expenses. Figure 2 provides a breakdown of Trust Expenses into subcategories. Note that the largest Trust Expense category is for claim processing at 28%.

This implies that approximately \$570M is spent on reviewing, qualifying, and processing claim submissions relative to nearly \$24B in claim payments. To put that

in perspective, for every dollar the trust system distributes to claimants, trusts spend approximately 2.5 cents verifying the veracity of claim submissions.

**Figure 2: Trust Expense Detail**



“ [F]or every dollar the trust system distributes to claimants, trusts spend approximately 2.5 cents verifying the veracity of claim submissions. ”

# Trust Net Claim Payments

---

Asbestos bankruptcy trusts are intended to compensate claimants for decades into the future, and in almost all cases the trust assets are funded at inception or in the years immediately following inception. To preserve assets for both current and future claimants, trusts rely on projections of near- and long-term claim filing and payment rates to manage their cash flows.

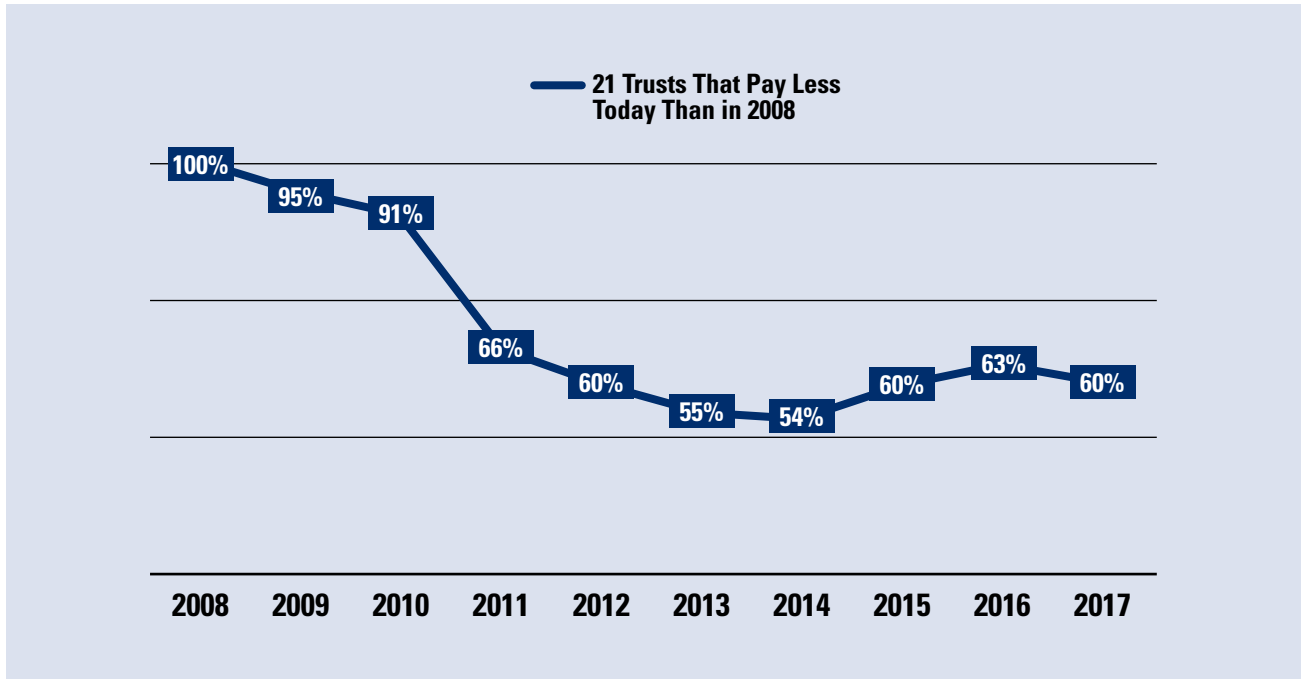
The primary mechanism by which a trust manages its financial obligations is commonly referred to as a “Payment Percentage.” A Payment Percentage uniformly reduces the actual payment a claimant receives. A trust can use this mechanism to manage its payments based on expectations of future financial obligations. For example, a Payment Percentage of 20% on a \$100,000 qualified claim value yields a \$20,000 claim payment. When future liability expectations increase, a trust will normally decrease its Payment Percentage, which in turn reduces the level of individual claim payments and preserves a higher proportion of its current assets to pay future claimants. Conversely, if future liability expectations decrease, then a trust may increase its Payment Percentage, which in turn increases individual claim payments. For many trusts, when payments increase, prior claimants are

given retroactive, or “True-Up” payments equal to the difference between what they previously received from the trust and what the trust is currently paying similarly-situated claimants.

There were 35 confirmed trusts as of the beginning of 2008. Of those 35 trusts, 21 are paying claimants less today than in 2008. If a claimant received payments from all 21 of these trusts today, he or she would receive only 60% of what would have been paid in 2008. In fact, in 2014 the net recovery from the 21 trusts represented a 46% reduction compared to claim payments in 2008. Figure 3 illustrates the impact of Payment Percentage adjustments by these 21 trusts. Note that the first year (2008) is set to 100% and subsequent years represent the level of claim payments relative to 2008.



**Figure 3: Net Claimant Compensation Relative to 2008**



Conversely, only six of the 35 trusts active in 2008 have increased their payments to claimants. Moreover, three of those six higher-paying trusts have only increased compensation for specific regional exposures, which limits the number of individuals who will qualify for increased payments.

Figure 4 itemizes the Payment Percentages of the 57 trusts that reported a Payment Percentage as of 2017. Overall, 25 of the 57 trusts are paying claimants less today as compared to the later of 2008 or their

inception, while 10 trusts are paying claimants more. Overall, the average mesothelioma trust payment net of Payment Percentages has decreased from \$48K in 2008 as measured across the 35 confirmed trusts, to \$37K in 2017 as measured across all 57 trusts. This is a 22% decrease in average trust payout despite the inclusion of recently-confirmed and relatively high-paying trusts, Pittsburgh Corning and W.R. Grace, that are currently paying mesothelioma claimants on average \$62K and \$59K, respectively.

**Figure 4: Trust Payment Percentages as of Year End<sup>5</sup>**

TRUST	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
A-Best Trust	3.6%	17.4%	17.4%	17.4%	17.4%	17.4%	17.4%	17.4%	17.4%	17.4%
AC&S Trust	5.8%	5.8%	5.8%	5.8%	5.8%	5.8%	5.8%	5.8%	5.8%	5.8%
A.P. Green Trust							4.5%	4.5%	4.5%	4.5%
API, Inc. Trust	50%	55%	55%	30%	30%	30%	30%	35%	35%	35%
Armstrong World Industries Trust	20%	20%	20%	20%	20%	35%	35%	35%	43%	43%
ARTRA Trust	7.5%	7.5%	7.5%	0.5%	0.5%	0.5%	0.5%	0.5%	0.5%	0.5%
ASARCO Trust		22%	22%	22%	22%	22%	22%	22%	22%	22%
Babcock & Wilcox Trust	34%	15%	15%	11.9%	7.5%	7.5%	7.5%	11.9%	11.9%	11.9%
E.J. Bartells Trust	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%
Brauer Trust					2.6%	2.6%	2.6%	2.6%	2.6%	2.6%
Burns & Roe Trust		25%	25%	25%	25%	25%	25%	25%	25%	25%
C.E. Thurston & Sons Trust	40%	40%	40%	80%	25%	25%	25%	35%	35%	35%
Celotex Trust <sup>6</sup>	14.1%	14.1%	9.4%	9.4%	9.4%	6.5%	6.5%	7.7%	7.7%	7.7%
Christy Refractories Trust					11%	11%	11%	11%	11%	11%
Combustion Engineering Trust	48.3%	48.3%	48.3%	48.3%	44%	44%	33%	29%	29%	29%
Congoleum Trust				6.3%	6.3%	6.3%	12.5%	12.5%	12.5%	12.5%
DII Industries Trust <sup>7</sup>	100%	52.5%	52.5%	52.5%	52.5%	35.6%	35.6%	35.6%	50%	50%
Durabla Manufacturing Trust					26%	26%	26%	26%	26%	26%
Eagle-Picher Industries Trust	38%	38%	38%	31%	31%	28%	28%	33%	33%	33%
Federal Mogul Trust (T&N/Flexitallic)	6%	6%	6%	6%	6%	6%	6%	6%	6%	6%
Flintkote Trust								8%	8%	8%
G-I Holdings Trust		8.6%	8.6%	7.4%	7.4%	7.4%	7.4%	7.4%	7.4%	7.4%
H.K. Porter Trust	4.6%	6.3%	6.3%	6.3%	4%	4%	3%	3%	3%	3%
Hercules Chemical Company Trust			6.7%	6.7%	6.7%	6.7%	6.7%	6.7%	6.7%	6.7%
J.T. Thorpe Trust (California)	40%	40%	45%	45%	45%	45%	45%	45%	45%	45%
J.T. Thorpe Trust (Texas)	38%	57%	57%	57%	57%	57%	57%	57%	57%	33%
Kaiser Aluminum & Chemical Trust	39.5%	39.5%	39.5%	35%	35%	35%	35%	35%	35%	35%
Keene Trust	1.1%	1.1%	0.8%	0.8%	0.8%	0.8%	0.8%	0.8%	0.8%	0.8%
Leslie Controls Trust				40%	40%	40%	5%	5%	5%	5%
ABB Lummus Trust	100%	100%	100%	10%	10%	10%	10%	10%	14.7%	14.7%
Manville Trust	7.5%	7.5%	7.5%	7.5%	7.5%	7.5%	6.3%	6.3%	5.1%	5.1%
Metex Trust							18%	18%	18%	18%
Motors Liquidation Trust					7%	7%	7%	7%	18.7%	18.7%
Muralo Trust	8%	8%	8%	8%	8%	8%	8%	8%	8%	8%
National Gypsum Trust	55.6%	55.6%	55.6%	18%	18%	18%	18%	18%	18%	18%
NARCO Trust	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Fibreboard Trust (p/o OCFB)	25%	11%	11%	9.5%	7.6%	7.6%	7.6%	10.4%	10.4%	9%
Owens Corning Trust (p/o OCFB)	40%	10%	10%	10%	8.8%	8.8%	8.8%	11.1%	11.1%	11.1%
Pittsburgh Corning Trust										31%
Plant Insulation Trust								8.6%	8.6%	8.6%
Plibrico Trust	8.5%	8.5%	8.5%	1.2%	1%	1%	1%	1%	1.4%	1.4%
Porter Hayden Trust	1.8%	1.8%	1.8%	1.8%	1.8%	1.8%	1.8%	1.8%	1.8%	1.8%

Quigley Trust								7.5%	3.6%	3.6%	3.6%
Raytech Trust	2%	2%	2%	0.8%	0.8%	0.8%	0.8%	0.8%	0.8%	0.8%	0.8%
Shook & Fletcher Trust	100%	100%	100%	100%	70%	70%	83%	83%	76%	76%	
SPHC (Bondex) Trust								22%	22%	22%	
State Insulation Trust									1%	1%	
Swan Trust	20%	20%	20%	20%	20%	20%	20%	20%	20%	20%	
T.H. Agriculture & Nutrition Trust		100%	100%	30%	30%	30%	30%	30%	30%	30%	
Thorpe Insulation Trust			17.5%	17.5%	17.5%	30.5%	30.5%	30.5%	43.6%	43.6%	
U.S. Gypsum Trust	45%	45%	30%	30%	20%	20%	20%	28.2%	28.2%	25%	
U.S. Mineral Products Trust	12.5%	12.5%	12.5%	12.5%	12.5%	12.5%	14%	14%	14%	14%	
UNR Trust	1.1%	1.1%	1.2%	0.8%	0.8%	0.8%	1.4%	1.4%	1.4%	1.4%	
Wallace & Gale Trust	25.6%	25.6%	25.6%	25.6%	25.6%	25.6%	25.6%	25.6%	25.6%	25.6%	
Western Asbestos Trust	40%	40%	44%	44%	44%	44%	48%	48%	48%	48%	
W.R. Grace Trust							26%	26%	26%	26%	
Yarway Trust								25%	25%	25%	

To further quantify the impact of changes in Payment Percentages on net claim payments, Figure 5 summarizes the net claim payment for six large trusts (eight

potential payments) that were processing and paying claims through a shared administrator, the Delaware Claims Processing Facility (DCPF), as of 2008.

**Figure 5: Net Mesothelioma Claim Payments From DCPF Trusts as of Year End<sup>8</sup>  
(In \$ Millions)**

TRUST	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Armstrong World Industries Trust	\$26	\$26	\$26	\$26	\$26	\$46	\$46	\$46	\$56	\$56
Babcock & Wilcox Trust	\$41	\$18	\$18	\$14	\$9	\$9	\$9	\$14	\$14	\$14
Celotex Trust <sup>9</sup>	\$18	\$18	\$12	\$12	\$12	\$8	\$8	\$10	\$10	\$10
Halliburton (p/o DII Trust) <sup>10</sup>	\$68	\$96	\$96	\$96	\$96	\$65	\$65	\$65	\$91	\$91
Harbison-Walker (p/o DII Trust) <sup>11</sup>	\$29	\$40	\$40	\$40	\$40	\$27	\$27	\$27	\$38	\$38
Fibreboard Trust (p/o OCFB)	\$45	\$20	\$20	\$17	\$14	\$14	\$14	\$19	\$19	\$16
Owens Corning Trust (p/o OCFB)	\$108	\$27	\$27	\$27	\$24	\$24	\$24	\$30	\$30	\$30
U.S. Gypsum Trust	\$101	\$101	\$68	\$68	\$45	\$45	\$45	\$63	\$63	\$56
<b>TOTAL NET CLAIM PAYMENT</b>	<b>\$437</b>	<b>\$346</b>	<b>\$306</b>	<b>\$300</b>	<b>\$265</b>	<b>\$238</b>	<b>\$238</b>	<b>\$274</b>	<b>\$322</b>	<b>\$312</b>
<b>PERCENTAGE CHANGE SINCE 2008</b>	<b>—</b>	<b>21%</b>	<b>30%</b>	<b>31%</b>	<b>39%</b>	<b>46%</b>	<b>46%</b>	<b>37%</b>	<b>26%</b>	<b>29%</b>

# Trust Claim Payment Ratios

---

As summarized in Figure 1 above, there are approximately \$27B in confirmed assets (inclusive of deferred and contingent funding), approximately \$24B of which are associated with 32 trusts that govern annual aggregate claim payments to malignant and non-malignant claim groups through the application of a Claims Payment Ratio.

In many cases, a trust will set a Maximum Annual Payment (MAP) prior to each calendar year, which caps the cash payments the trust can make to claimants during the upcoming year. The MAP is often bifurcated into two funds based on the Claims Payment Ratio, establishing a separate MAP for malignant diseases, and in most cases, for severely disabled

non-malignant conditions (Category A). As summarized in Figure 6 below, the percentage of trust assets earmarked for Category A claims based on 2016 year end asset levels is approximately 73%. Conversely, 27% of claim payments are earmarked for less impaired or non-impaired claimants (Category B).

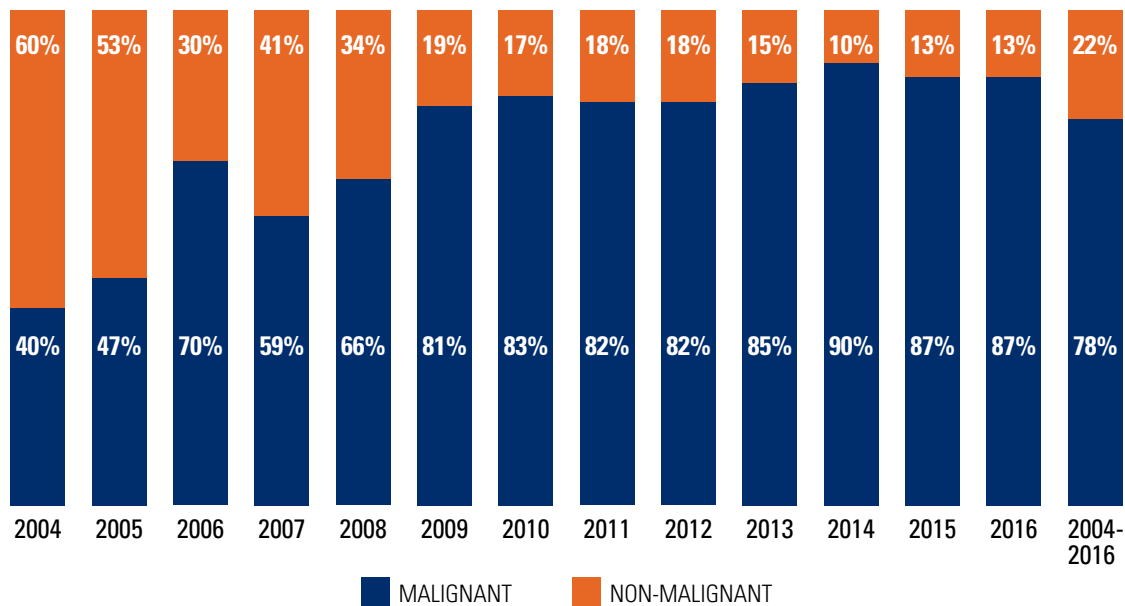
**Figure 6: Trust Assets Earmarked by Disease Category**

<b>TRUST</b>	<b>2016 YE ASSETS</b>	<b>CATEGORY A PAYMENT RATIO</b>	<b>CATEGORY B PAYMENT RATIO</b>
Pittsburgh Corning Trust	\$3,653,567,833	60.0%	40.0%
W.R. Grace Trust	2,995,017,716	88.0%	12.0%
NARCO Trust <sup>12</sup>	2,677,742,394	60.0%	40.0%
DII Industries Trust	1,856,390,172	60.0%	40.0%
U.S. Gypsum Trust	1,492,720,435	85.0%	15.0%
Armstrong World Industries Trust	1,327,688,048	65.0%	35.0%
ASARCO Trust	1,060,707,187	90.0%	10.0%
Flintkote Trust <sup>13</sup>	880,000,000	80.0%	20.0%
Quigley Trust	826,658,890	83.0%	17.0%
Owens Corning Trust (p/o OCFB)	815,456,853	65.0%	35.0%
Combustion Engineering Trust	674,075,948	87.0%	13.0%
Turner & Newall Trust (p/o Federal Mogul)	567,915,606	60.0%	40.0%
Kaiser Aluminum & Chemical Trust	541,846,896	70.0%	30.0%
SPHC (Bondex) Trust	536,568,381	85.0%	15.0%
Western Asbestos Trust <sup>14</sup>	528,140,891	84.0%	16.0%
Babcock & Wilcox Trust	472,584,556	62.0%	38.0%
Fibreboard Trust (p/o OCFB)	465,234,946	65.0%	35.0%
Thorpe Insulation Trust	464,755,164	84.0%	16.0%
G-I Holdings Trust	458,369,815	85.0%	15.0%
T.H. Agriculture & Nutrition Trust	352,906,867	80.0%	20.0%
Yarway Trust	325,986,533	90.0%	10.0%
A.P. Green Trust	288,141,377	60.0%	40.0%
AC&S Trust	220,513,181	82.9%	17.1%
Congoleum Trust	206,713,641	75.0%	25.0%
Motors Liquidation Trust	176,173,860	80.0%	20.0%
J.T. Thorpe Trust (California)	133,240,536	90.0%	10.0%
Burns & Roe Trust	130,314,493	60.0%	40.0%
Plibrico Trust	101,964,644	65.0%	35.0%
Leslie Controls Trust	48,591,352	80.0%	20.0%
ABB Lummus Trust	26,555,945	80.0%	20.0%
Christy Refractories Trust	24,672,490	90.0%	10.0%
ARTRA Trust	21,188,377	65.0%	35.0%
<b>TOTAL</b>	<b>\$24,352,405,027</b>	<b>72.8%</b>	<b>27.2%</b>

The Claim Payment Ratio provides an allocation of maximum allowable payments to each disease group or category. While most trusts do not report claim payments by specific disease level (e.g. mesothelioma, lung cancer, asbestosis, etc.), many do provide a general breakdown by malignant versus non-malignant disease

groupings. As noted in Figure 1, since 2004 nearly \$24B from the trust system has been paid to claimants. Based on trust annual disclosures, it is possible to account for approximately \$14B by malignant or non-malignant disease groupings. Figure 7 illustrates the percentage of claim payments to each disease group since 2004.

**Figure 7: Trust Claim Payments by Disease Group**



Since 2009 the proportional level of non-malignant claim payments has fluctuated between 10% and 20%, with an average of 14% during the last five-year reporting period from 2012 through 2016.<sup>15</sup> Overall since 2004, non-malignant claims have received 22% of trust claim payment distributions. Assuming this proportion holds, it implies that more than \$5B of the nearly \$24B in trust claim payments made since 2004 have been paid to non-malignant claims.

*“ [M]ore than \$5B of the nearly \$24B in trust claim payments made since 2004 have been paid to non-malignant claims. ”*

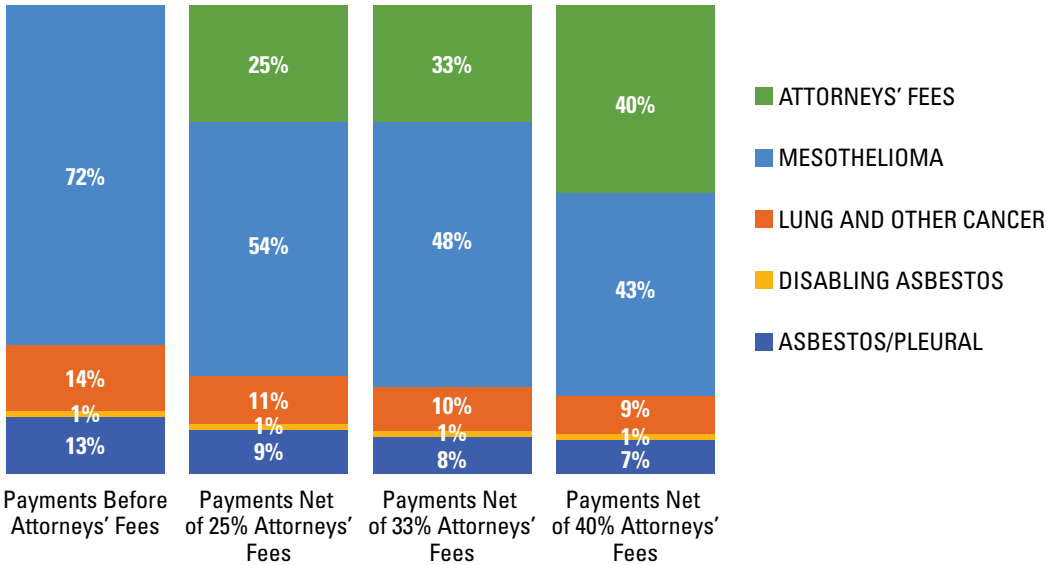
# Estimated Trust Distributions By Disease

As previously noted, most trusts do not provide disease-level statistics in their public annual reports. However, during the most recent five-year reporting period of 2012 through 2016, approximately 11 trusts on average have published aggregated disease-level payment statistics across 54 individual annual reports.<sup>16</sup>

According to these annual reports, nearly 87% of claim payments went to malignant diseases, as compared to 86% in the aggregated data summarized in Figure 7 during that same five-year span. Figure 8 provides a breakdown of claim payments by disease, both before and after estimated attorneys' fees are withdrawn. The level of attorneys' fees is generally based on the contingency fee arrangements that each

plaintiff has with his or her law firm. In rare instances, trusts may cap attorneys' fees. For example, the Manville Personal Injury Settlement Trust limits attorneys' fees to 25% regardless of any prior fee arrangement agreed to with a claimant; however, trusts that cap attorneys' fees generally allow attorneys to charge their clients for additional expenses.<sup>17</sup>

**Figure 8: Trust Claim Payments by Disease Group**



In most instances, trusts do not require a contingency fee cap and allow attorneys to obtain fees from trust payments in the same percentage as the contingency fee collected by the attorneys in the tort system. This fee is often 40% of a client's overall compensation. For example, in the case of *Barbara Jensen-Carpenter, Executrix of the Estate of Henry F. Carpenter v. AstenJohnson, Inc. et al.*, a Philadelphia judge issued orders approving the disbursement of 23 trust payments to the estate of a mesothelioma victim with 40% of the plaintiff's compensation going to the law firm.<sup>18</sup> According to petitions for disbursement filed with the Philadelphia Common Pleas court, the family of Henry Carpenter was entitled to trust payments

totaling \$503,698.10 for his exposure to asbestos from the products of now-bankrupt companies. The plaintiff's law firm received \$197,541.73 in fees (a 40% contingency fee) and an additional \$3,401.59 for the reimbursement of litigation costs associated with the filing of the trust claims.<sup>19</sup> These payments were made pursuant to the fee arrangement reached between the law firm and Henry Carpenter in 2013, prior to the filing of his tort complaint and trust claim forms.<sup>20</sup> As Figure 8 illustrates, it is likely that less than 50% of all trust assets are paid to mesothelioma claimants after attorneys' fees, payments to the other disease categories, and trust expenses are considered.

“ [I]t is likely that less than 50% of all trust assets are paid to mesothelioma claimants after attorneys' fees, payments to the other disease categories, and trust expenses are considered. ”



# Recent Bankruptcy and Legislative Events

---

The bankruptcy trust statistics show that the trust system continues to be a substantial source of compensation. In 2017 there were several events that will expand the resources of the trust system, including the emergence of a \$4 billion trust; the confirmation of a long-standing 524(g) bankruptcy case; and a bankruptcy filing by one of the nation's largest asbestos defendants.

In March 2017, Pittsburgh Corning established its \$4 billion asbestos trust after a 16-year bankruptcy. In June, a North Carolina federal court confirmed the 524(g) plan of reorganization of long-standing debtor Garlock Sealing Technologies, Inc. In addition, Bestwall LLC, which retains liabilities previously defended by Georgia-Pacific, filed for Chapter 11 bankruptcy protection in November, thus removing from the tort system a company that paid over \$150 million annually to defend and resolve asbestos claims. Outside of these cases, several other bankruptcy proceedings head into 2018 with outstanding asbestos-related issues, including *Kaiser Gypsum*, *Energy Future Holdings*, *George V. Hamilton* and *Oakfabco*.<sup>21</sup>

2017 was also busy for state legislatures seeking to enact legislation to bridge the disconnect between the asbestos tort and bankruptcy trust compensation systems. Following the bankruptcies of many primary asbestos defendants in the 2000s, state court systems that handle asbestos dockets continue to grapple with how to properly allocate liability among all potentially liable

parties when bankruptcy trust filings and related exposures to bankrupt products are not disclosed in tort proceedings in a timely manner. One of the solutions has been state legislation that grants courts the discretion to compel the production of trust claim forms early in tort discovery. Prior to 2017, eight states had passed trust transparency legislation; 2017 saw four additional states enact similar transparency bills.

The following section provides more detail on some of the noteworthy bankruptcy litigation events in 2017 and passage of state trust transparency legislation.

“ One of the solutions has been state legislation that grants courts the discretion to compel the production of trust claim forms early in tort discovery. ”

## Asbestos Bankruptcies

### PITTSBURGH CORNING

After 16 years of bankruptcy proceedings, the Pittsburgh Corning Corporation Asbestos Personal Injury Settlement Trust (PCC Trust) opened its doors on March 21, 2017.<sup>22</sup> Pittsburgh Corning filed for bankruptcy in 2000 and was unable to finalize a reorganization plan until April 26, 2016. Under the terms of the plan, Pittsburgh Corning's parent companies PPG and Corning funded the PCC Trust with nearly \$4 billion in assets.

The trust began processing payments at a 31% Payment Percentage; however, its payments were bifurcated with a 20% Payment Percentage applied to the first payment because of a potential shortfall of trust assets due to an unanticipated number of claims.<sup>23</sup>

According to the PCC Trust, "a significant number of identified claimants have asserted through counsel that they hold pre-petition liquidated claims within the meaning of Section 5.2(a) of the TDP, alleging values well in excess of those provided for in Section 5.3(c) of the TDP for each particular disease level... The liability forecast relied upon to derive the Adjusted Payment Percentage of thirty-one percent (31%) did not assume the Disputed Pre-Petition Liquidated Claims would be payable from the Trust at the values alleged by the claimants; nor did it assume a resolution of the Disputed Pre-Petition Claims would not ensure that the Asbestos PI Trust will be in a financial position to pay holders of present and future Channeled PI Trust Claims in substantially the same manner."<sup>24</sup>

The Pre-Petition Liquidated Claims, also known as the *Cimino* claims, consist of approximately 2,000 asbestos claimants that had filed lawsuits against Pittsburgh Corning in the 1990s and whose cases were consolidated but unresolved. In October 2017, the PCC Trust reached a \$178.5 million settlement with the *Cimino* class, agreeing to pay the claimants \$37.9 million and \$140.6 million more if an arbitration panel decides that other *Cimino* claimants hold pre-petition liquidated claims.<sup>25</sup> Previously, PCC argued that the claims should not be paid because they either never went to trial in the tort system or were overturned on appeal.

### GARLOCK SEALING TECHNOLOGIES

On June 12, 2017, a North Carolina federal district court judge confirmed the bankruptcy reorganization plan of Garlock Sealing Technologies, ending a seven-year bankruptcy proceeding.<sup>26</sup> The case gained tremendous attention due to the conclusions the judge reached after holding a hearing to determine the company's estimated liabilities. In particular, he concluded that Garlock's experience in the tort system prior to its bankruptcy filing was "infected by the manipulation of exposure evidence" by plaintiffs and their law firms.<sup>27</sup> The judge's determination was made based on thousands of case files that were produced through extensive discovery of Garlock, asbestos bankruptcy trusts and plaintiffs' law firms, highlighted by 15 exemplar cases that Garlock used to illustrate the suppression of trust evidence it experienced in state court proceedings.

*“Garlock’s experience in the tort system prior to its bankruptcy filing was ‘infected by the manipulation of exposure evidence’ by plaintiffs and their law firms.”*

Prior to its settlement in bankruptcy, Garlock sued several prominent plaintiffs' law firms for civil racketeering under the Racketeer Influenced Corrupt Organizations Act (RICO), alleging a scheme to intentionally defraud Garlock by suppressing evidence in hundreds of asbestos cases filed against the company. Those suits were dismissed as part of Garlock's bankruptcy settlement.

Under Garlock's bankruptcy plan, the trust will be funded with \$480 million in assets to compensate current and future qualifying asbestos claimants. The funding includes \$400 million to be paid immediately, with \$60 million in cash and \$20 million in stock to be paid within a calendar year of the establishment of Garlock's trust.<sup>28</sup> Prior to the district court's order, the bankruptcy court for the Western District of North Carolina entered an order on July 29, 2016, approving Garlock's plan and recommending confirmation subject to a vote on the plan.

## **BESTWALL**

Bestwall LLC (Bestwall) filed for Chapter 11 bankruptcy protection in the Western District of North Carolina on November 2, 2017.<sup>29</sup> Bestwall is a successor to Georgia-Pacific Corp., which was restructured in July 2017 to separate Bestwall from a "new" Georgia-Pacific, align Bestwall's business of defending asbestos claims, and create "additional optionality" for resolving its claims through a 524(g) bankruptcy. In its first-day filings, Bestwall stated that it historically spent approximately \$2.9 billion defending and resolving more than 430,000 asbestos personal injury lawsuits. Bestwall stated that it has paid over \$2 billion of that overall amount net of insurance, and as of September 30, 2017, it is still facing approximately 64,000 pending asbestos cases.<sup>30</sup>

Bestwall's bankruptcy filings disclose how the claims against the company spiked following the 2000-2001 bankruptcy wave both in terms of volume and indemnity. Prior to 2000, Bestwall was named in less than 500 mesothelioma cases a year; however, following the bankruptcy wave of 2000-2001, mesothelioma claims against Bestwall "skyrocketed" and peaked at nearly 2,000 annual claims in 2013. According to Bestwall, the cost to resolve the growing number of claims increased exponentially, with average costs for mesothelioma claims increasing from \$20,000 per claim in the 1990s to more than \$125,000 per claim from 2010-2017. Bestwall's reported overall annual defense and indemnity costs rose to \$184 million in 2015 and \$174 million in 2016. Prior to its bankruptcy filing, Bestwall stated that it had paid approximately \$200 million to resolve asbestos claims through October 2017.<sup>31</sup>

In its filings, Bestwall states that its goal is to "negotiate, obtain approval of and ultimately consummate a plan of reorganization that would, among other things, provide for (a) the creation and funding of a trust established under section 524(g) of the Bankruptcy Code to pay valid asbestos-related claims and (b) issuance of an injunction under section 524(g) of the Bankruptcy Code that will permanently protect the Debtor and its affiliates from any further asbestos claims arising from products manufactured and sold by, or operations or conduct of, Old Bestwall or Old GP."

## Asbestos Legislation

2017 saw a great deal of activity on asbestos bankruptcy trust transparency bills in state legislatures. These bills generally require plaintiffs and their attorneys to disclose trust-related evidence early in an asbestos personal injury case. Prior to 2017, eight states had passed such legislation including Ohio, Texas, Wisconsin, Oklahoma, Utah, Arizona, West Virginia, and Tennessee.<sup>32</sup>

In 2017, legislatures in four additional states similarly passed legislation to address the trust transparency issue: North Dakota, South Dakota, Iowa, and Mississippi.<sup>33</sup> Similar to the other bills, these 2017 laws mandate that trust claim forms and related evidence be disclosed in a timely manner during tort proceedings and work to discourage the suppression of evidence that affected Garlock. An overview of each bill is below.

### **NORTH DAKOTA**

House Bill 1197 was signed into law on April 17, 2017, by North Dakota Governor Doug Burgum. The measure had passed the North Dakota House in February 2017 by an 82-6 vote. The bill then won unanimous approval in the Senate following adoption of an amendment and was approved by the House on April 5 by a 79-7 vote. The law requires asbestos plaintiffs to disclose their trust claims within 30 days after filing an asbestos personal injury action in the state's courts.

### **SOUTH DAKOTA**

Senate Bill 138 was signed into law on March 27, 2017, by South Dakota Governor Dennis Daugaard. The measure had passed the South Dakota Senate on February 22 by a 30-4 vote and the House on March 7 by a 65-1 vote. The law calls for asbestos plaintiffs to disclose trust claims no later than 120 days prior to the date a case is set for trial.

### **IOWA**

Senate File 376 was signed into law on March 23, 2017, by Iowa Governor Terry E. Branstad. The measure passed the Iowa Senate on March 8 by a vote of 27-22 and was approved by the House on March 13 by a 56-39 vote. The law calls for asbestos plaintiffs to disclose trust claims within 90 days after an asbestos personal injury tort case has been filed in the Iowa court system.

### **MISSISSIPPI**

House Bill 1426 was signed into law on April 18, 2017, by Mississippi Governor Phil Bryant. The measure passed the Mississippi House on February 7 by a vote of 73-43 before the final bill was approved by the Senate on March 7 by a 33-18 vote. The bill calls for asbestos plaintiffs to disclose trust claims within 30 days after an asbestos personal injury tort case has been filed in Mississippi.

In addition to the bills that were passed in 2017, trust transparency bills were proposed in several additional states during the year including California, New York, Pennsylvania, North Carolina, and South Carolina.<sup>34</sup>

# Conclusion

---

It is clear from the most recent update of trust statistics that the asbestos bankruptcy trust system remains a substantial source of compensation as billions of dollars in claim payments are distributed each year. However, the trust system also remains a subject of ongoing debate related to: (1) timely disclosure of trust claims and payments in the underlying tort actions; (2) the disparate treatment of current and future claimants as evidenced by falling Payment Percentages; and (3) the proportional level of actual settlement funds that mesothelioma victims receive from the trust system.

Based on our experience tracking the trust system's claim and financial activity for the past decade, and evidenced by the latest trust figures, it is clear that the depletion of trust assets under the trusts' current claim distribution construct will continue to systematically undercompensate legitimate asbestos victims in the future if left unabated.

*“ [I]t is clear that the depletion of trust assets under the trusts' current claim distribution construct will continue to systematically undercompensate legitimate asbestos victims in the future if left unabated. ”*

# Endnotes

---

- 1 "Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases," Mealey's Asbestos Bankruptcy Report, Vol. 11, No. 7 (February 2012).
- 2 11 U.S.C. 524(g)(2)(B)(ii)(IV)(bb) "separate class or classes of the claimants whose claims are to be addressed by a trust . . . is established and votes, by at least 75 percent of those voting, in favor of the plan."
- 3 Dixon, Lloyd, et al., Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trust, RAND Institute of Civil Justice (2010).
- 4 Most 2017 year end disclosures will be available by mid-year 2018; Payment Percentages from 2017 were used when applicable.
- 5 For 2017 the Payment Percentages are as of the end of Q3 (9/30/2017).
- 6 In June 2008 the Celotex Trust increased its TDP values in lieu of increasing the Payment Percentage from 14.1% to 18.3%. Notice is available on Celotex Trust website.
- 7 In October 2009 the DII Trust increased its TDP values by more than double (e.g. Harbison-Walker Mesothelioma average value increased from \$68K to \$182K), prior to decreasing the Payment Percentage from 100% to 52.5%.
- 8 For 2017 the Payment Percentages are as of the end of Q3 (9/30/2017).
- 9 In June 2008 the Celotex Trust increased its TDP values in lieu of increasing the Payment Percentage from 14.1% to 18.3%. Notice is available on Celotex Trust website.
- 10 In October 2009 the DII Trust increased its TDP values by more than double (e.g. Harbison-Walker Mesothelioma average value increased from \$68K to \$182K), prior to decreasing the Payment Percentage from 100% to 52.5%.
- 11 In October 2009 the DII Trust increased its TDP values by more than double (e.g. Harbison-Walker Mesothelioma average value increased from \$68K to \$182K), prior to decreasing the Payment Percentage from 100% to 52.5%.
- 12 The NARCO Trust 2016 YE Assets estimates the present value of future, annual contingent funding available to the trust to pay qualifying claimants.
- 13 Flintkote Asbestos Trust has not at the time of publication filed a 2016 annual report on the bankruptcy docket, but based on bankruptcy funding and settlement disclosures and an estimate of 2016 financial activity we have projected a year end asset balance of approximately \$880M.
- 14 Assumes the predominant number and amount of claims paid and payments are for California-related exposures as opposed to North Dakota and Minnesota exposures that have a 71.5%/28.5% split between malignant and non-malignant claim categories.
- 15 Note that the high proportion of non-malignant claim payments between 2004 and 2008 was likely due to inventory clearing of tens of thousands of non-malignant claims that flooded both the tort and trust systems during the late 1990s and early 2000s.
- 16 A-Best Asbestos Settlement Trust; Porter Hayden Bodily Injury Trust; Plibrico Asbestos Trust; C.E. Thurston & Sons Asbestos Trust; Raytech Corporation Asbestos Personal Injury Settlement Trust; DII Industries, LLC Asbestos PI Trust; H.K. Porter Asbestos Trust; United States Mineral Products Company Asbestos Personal Injury Settlement Trust; Bartells Asbestos Settlement Trust; Keene Creditors Trust; Hercules Chemical Company, Inc. Asbestos Trust; Brauer 524(g) Asbestos Trust; SPHC Asbestos Personal Injury Trust.



- 17 Per Manville Personal Injury Settlement Trust FAQs, No. 9: “No matter what a claimant’s contract with his or her lawyer says, Section J of the 2002 TDP limits attorneys’ fees to 25% of a Manville Trust settlement payment, exclusive of costs chargeable to the claimant.” <http://www.claimsres.com/wp-content/uploads/2016/11/FAQs.pdf>.
- 18 *Barbara Jensen-Carpenter, Executrix of the Estate of Henry F. Carpenter v. AstenJohnson, Inc. et al.*, No. 00182, Pennsylvania Court of Common Pleas, Philadelphia County, June 19, 2015, Order disbursing payments to Barbara Jensen-Carpenter and Simmons Browder Gianaris Angelides and Barnerd, LLC a/k/a Simmons Hanly Conroy LLC.
- 19 *Ibid.*
- 20 *Barbara Jensen-Carpenter, Executrix of the Estate of Henry F. Carpenter v. AstenJohnson, Inc. et al.*, No. 00182, Pennsylvania Court of Common Pleas, Philadelphia County, April 21, 2015, Petition to Authorize the Partial Settlement of a Survival Action and to Authorize Distribution of Settlement Proceeds – Exhibit D, Simmons Browder Gianaris Angelides & Barnerd LLC Contract of Representation (note that the 40% contingency fee arrangement by Carpenter was made with the Simmons firm and Sokolove Law. Under the law firms’ arrangement, 78% of the contingency fees are allocated to the Simmons firm and 22% are allocated to Sokolove).
- 21 *In re Kaiser Gypsum Company, Inc.*, No. 16-31602, (Bankr. W.D. N.C.); *In re Energy Future Holdings Corp., et al.*, No. 14-10979 (Bankr. D. Del.); *In re George V. Hamilton, Inc.*, No. 15-23704 (Bankr. W.D. Pa.); *In re Oakfabco, Inc.*, No. 15-27062. (Bankr. N.D. Ill.).
- 22 <http://www.pccasbestostrust.com/>.
- 23 <http://www.pccasbestostrust.com/>.
- 24 <http://www.pccasbestostrust.com/wp-content/uploads/2017/03/PCC.-Adjusted-Initial-Payment-Percentage-Notice-3.20.17-C0582889x9DB18.pdf>.
- 25 *In re Pittsburgh Corning Corp.*, No. 00-22876, Bankr. W.D. Pa., *Pittsburgh Corning Asbestos Personal Injury Asbestos Settlement Trust v. No Respondent*, Exhibit A, Oct. 18, 2017.
- 26 *In re Garlock Sealing Technologies, Inc.*, No. 10-31607 (Bankr. W.D. N.C.)
- 27 *In re Garlock Sealing Technologies, Inc.*, No. 10-31607, 2014 Bankr. LEXIS 157 (Bankr. W.D. N.C. January 10, 2014), Judge Hodges estimation ruling, pg. 26.
- 28 <http://www.enproindustries.com/press-release/acrp/enpro-industries-reaches-permanent-comprehensive-settlement-current-and-future>.
- 29 *In re Bestwall LLC*, No. 17-31795, (Bankr. W.D. N.C.), Voluntary Petition under Chapter 11, Nov. 2, 2017.
- 30 *In re Bestwall LLC*, No. 17-31795, (Bankr. W.D. N.C.), Declaration of Tyler L. Woolsen in Support of First Day Pleadings, Nov. 2, 2017.
- 31 *Ibid.*
- 32 Ohio H.B. 380 - [http://archives.legislature.state.oh.us/BillText129/129\\_HB\\_380\\_PS\\_Y.html](http://archives.legislature.state.oh.us/BillText129/129_HB_380_PS_Y.html); Texas H.B. 1492 - <http://www.legis.state.tx.us/tlodocs/84R/billtext/html/HB01492F.HTM>; Wisconsin Act 154 - <https://docs.legis.wisconsin.gov/2013/related/acts/154>; Oklahoma S.B. 1792 - [http://www.oklegislature.gov/cf\\_pdf/2011-12%20INT/sb/sb1792%20int.pdf](http://www.oklegislature.gov/cf_pdf/2011-12%20INT/sb/sb1792%20int.pdf); Utah H.B. 403 - <https://le.utah.gov/~2016/bills/static/HB0403.html>; Arizona Rev Stat § 12-782 - <https://www.azleg.gov/ars/12/00782.htm>; West Virginia § 55-7F - <http://www.legis.state.wv.us/wvcode/Code.cfm?chap=55&art=7F>; Tennessee HB 2234 - <https://trackbill.com/bill/tn-hb2234-tort-liability-and-reform-as-enacted-enacts-the-asbestos-bankruptcy-trust-claims-transparency-act-and-the-asbestos-claims-priorities-act-amends-tca-title-28-and-title-29-chapter-34/1238769/>.
- 33 North Dakota HB 1197 - <http://www.legis.nd.gov/assembly/65-2017/documents/17-0403-06000.pdf>; South Dakota SB 138 - [http://www.sdlegislature.gov/Legislative\\_Session/Bills/Bill.aspx?File=SB138ENR.htm&Session=2017&Bill=138](http://www.sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?File=SB138ENR.htm&Session=2017&Bill=138); Iowa SF 376 - <https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=sf376>; Mississippi HB 1426 - <http://billstatus.ls.state.ms.us/documents/2017/html/HB/1400-1499/HB1426IN.htm>.

- 34 New York Assembly Bill 2511 - [http://www.nyasembly.gov/leg/?default\\_fld=&leg\\_video=&bn=S02511&term=2017&Summary=Y&Text=Y](http://www.nyasembly.gov/leg/?default_fld=&leg_video=&bn=S02511&term=2017&Summary=Y&Text=Y); Pennsylvania HB 238 - <https://legiscan.com/PA/text/HB238/2017>; North Carolina SB 470 - <https://ncleg.net/Sessions/2017/Bills/Senate/PDF/S470v3.pdf>; South Carolina S. 452 - [http://www.scstatehouse.gov/sess122\\_2017-2018/bills/452.htm](http://www.scstatehouse.gov/sess122_2017-2018/bills/452.htm).











U.S. CHAMBER

**Institute for Legal Reform**

---

202.463.5724 main  
202.463.5302 fax

1615 H Street, NW  
Washington, DC 20062

[instituteforlegalreform.com](http://instituteforlegalreform.com)