

A MATTER *of* TRUST?

**How Access to Asbestos Trust Claims
Information Affects Cases
in New York Courts**

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New York Civil Justice Institute

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Affects Cases in New York Courts*

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ABOUT THE AUTHORS

Mary Margaret Gay is founding member of Gay Jones & Kuhn PLLC in Jackson, Mississippi. Mrs. Gay's practice is primarily focused on mass tort defense, and she has represented dozens of clients nationally and regionally. As counsel of record for more than 40 defendants in MDL 875, Mary Margaret served as coordinating counsel for the defense liaison committee and helped coordinate the attack on screening-related fraud, which led to dismissals in more than 100,000 cases. She is currently working on unified joint defense efforts arising in the aftermath of Judge Hodges' landmark estimation opinion issued in the Garlock bankruptcy proceedings and has been retained by a number of insurers and defendants to serve as National Trust Transparency Counsel. Through this role, Mary Margaret provides clients with national strategies to effectively utilize records and information contained in asbestos bankruptcy trusts to assist with tort litigation. Mary Margaret has written multiple articles regarding asbestos bankruptcy trust issues, provided testimony on trust claims availability across the country and is frequently called upon to present seminars and workshops on this topic.

Sarah Beth Jones is a founding member of Gay Jones & Kuhn PLLC in Jackson, Mississippi. Mrs. Jones focuses her practice on coordination of special projects and implementation of creative defense strategies designed to reduce risk in the mass tort arena. She possesses extensive knowledge regarding asbestos bankruptcy trusts and works with insurers and defendants involved in litigation nationwide to increase transparency. Sarah Beth has co-authored a number of articles and studies on the topic of bankruptcy trust transparency. She presently works with insurers, defendants and local counsel on efforts to compel compliance with bankruptcy legislation and court orders regarding disclosure of bankruptcy trust claims information. Additionally, Sarah Beth oversees the firm's bankruptcy trust site database designed to generate bankruptcy trust values assessment reports used by defendants involved in asbestos litigation nationwide.

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INTRODUCTION & SUMMARY

In January 2014, Judge George Hodges, a North Carolina federal bankruptcy judge, issued a landmark ruling in the Garlock Sealing Technologies, Inc. asbestos bankruptcy proceedings confirming the lack of transparency between the bankruptcy trust and tort systems. Judge Hodges’ opinion revealed “the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants’ asbestos trusts until after obtaining

Trust information is essential in litigation for parties and juries to properly value cases. recoveries from Garlock (and other viable defendants.)”¹ The Garlock asbestos bankruptcy shined light on how trust information is fundamental to understand the totality

of a plaintiff’s exposures to asbestos and properly value a case. Following *Garlock*, many courts and legislatures around the country recognized that trust information is essential in litigation for parties and juries to properly value cases and have begun requiring production of trust claims information.

Trust claims submissions and supporting documents can provide information regarding a plaintiff’s exposures, worksites, years of work, years of exposure, secondary exposure, military service, trade, job title, specific product references, smoking history, diagnosis date, diagnosing doctor, screening company connections, previous counsel representing the plaintiff, past addresses, relatives, personal representative, death certificates, and numerous other fields of information. Documents, including previously filed complaints, discovery, deposition transcripts, and medical records are also available from some of the trusts. This information is submitted to the trusts by the plaintiff and/or their counsel and sworn under penalty of perjury. This bankruptcy trust information is relevant and indispensable to the defense of a case. It should be used to develop and reveal the complete exposure, medical, causation and liability picture of each plaintiff. Examples include challenging a plaintiff’s memory, providing alternate exposures, identifying additional worksites, and showing alternative causations, to name a few. Defendants’ access to this information is essential to bring to light issues that will allow juries to make fully informed decisions to accurately allocate liability and hold the correct parties accountable for plaintiffs’ injuries.

For cases in New York, the information remains difficult to obtain and is often times intentionally withheld. To better

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understand the issues that withholding of trust information causes and how and when production of

¹ See *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 84 (Bankr. W.D.N.C. 2014).

bankruptcy claims information affects case values and defenses, we reviewed a sample of more than 100 cases set on the New York trial dockets in the last 5 years.

INFORMATION AVAILABLE IN NEW YORK

Bankruptcy trust claims materials are generally discoverable in New York. In upstate New York, scheduling orders entered in each individual case generally require disclosure of bankruptcy trust information by specific deadlines. Plaintiffs in upstate New York do not regularly provide signed authorizations to defendants for the disclosure of bankruptcy trust records. As for New York City, the New York City Asbestos Litigation (NYCAL) case management order has long required plaintiffs file all intended bankruptcy trust claims prior to trial, according to certain deadlines. The current case management order (effective July 20, 2017) contains the following deadlines:

For any case on the Accelerated Docket, a plaintiff who **intends to file** a proof of claim with any bankruptcy entity or trust shall do so no later than ninety days before trial, or if a trial date is set with less than ninety days' notice then plaintiff shall file all intended proofs of claim no later than seven days of the Trial Judge's Order setting a trial date.²

There is some debate as to what "intends to file" requires of plaintiff. Additionally, the current NYCAL case management order contains language requiring plaintiffs to report to the court and defendants any post-deadline asbestos bankruptcy trust claims, as outlined below:

If a plaintiff learns of a Bankruptcy Trust claim for which plaintiff is eligible after the deadlines set forth herein have passed, plaintiff's counsel shall notify the Coordinating Judge and all defendants who remained in the case at the time the relevant deadline passed, explaining why the claim was not filed according to the deadlines of this section. The plaintiff will not submit any such claim before conferring with the court and the applicable defendants. The coordinating Judge shall confer with the parties and take such action as he or she deems appropriate.³

The NYCAL case management order does not require plaintiffs to provide signed authorizations for bankruptcy trust records to defendants, nor do plaintiffs regularly provide signed authorizations to defendants for bankruptcy trust records.

NYCAL's standard interrogatories request specific responses from plaintiffs about bankrupt product exposures and require disclosure of bankruptcy trust claims made, filed, or submitted by plaintiff,

² See July 20, 2017 Case Management Order, *In Re: New York City Asbestos Litigation*, at 41 (emphasis added), available at <http://www.nycal.net/index.php/cmo/case-management-order/843-cmo-case-management-order/file>.

³ See *id.*

including information regarding the date of the claim, entity name, claim number, nature of the claim, and whether any compensation was received (but not the amount).

The primary interrogatory regarding bankruptcy trust information states:

31. State whether or not you have made, filed, or submitted a Claim Against Bankrupt Entity or received funds in settlement from a Bankrupt Entity. If so, for each claim state the following:

- (a) the date and place where each such claim was made;
- (b) the name and nature of the entity with which the claim was made;
- (c) any identifying number, such as a docket or petition number, for each claim;
- (d) the defendant, agency, insurer, employer or other entity to or against whom the claim was made and its file number;
- (e) the nature of the claim;
- (f) whether you were examined by a physician and if so, the name and address of that physician; and
- (g) whether you received any compensation as a result of such claim, but not the amount.⁴

Plaintiffs are not required to disclose any deferred bankruptcy trust claims or trusts to which they are eligible for future claims.

The NYCAL standard requests for production require production of all documents relating to bankruptcy trust claims made by the plaintiff. Specifically, the standard discovery requests: “All documents relating to any claim or demand ever made by the plaintiff or the plaintiff’s decedent for damages, compensation or other benefits allegedly resulting from any illness or injury, including but not limited to Claims Against Bankrupt Entities”⁵

As for timing, NYCAL’s model discovery schedule for plaintiffs in Accelerated Trial Clusters requires that plaintiffs’ answers to interrogatories and responses to request for production be included in letter applications for inclusion in trial cluster, and for plaintiffs in FIFO Trial Clusters, plaintiffs’ answers to interrogatories and requests for production are to be served 11 months in advance of trial. Plaintiffs have an ongoing duty to disclose additional bankruptcy trust claims information, such

⁴ Defendants’ Fourth Amended Standard Set of Interrogatories and Request for Production of Documents, *In Re: New York City Asbestos Litigation*, at 12, available at <http://www.nycal.net/index.php/cmo/case-management-order/4-cmo-exhibit-c-defendants-fourth-amended-standard-set-of-interrogatories-and-request-for-production-of-documents/file>.

⁵ See *id.* at 14.

as proof of claims forms, throughout discovery and up to trial. In actuality, plaintiffs do not always fulfill this obligation.

Additionally, Article 16 of the New York Civil Practice Law and Rules (CPLR), which governs the procedure in civil cases in all courts of the state, allows for the inclusion of nonparties, including bankrupt entities, on the verdict sheet for allocation of fault if adequate evidence is provided. Getting these bankrupt entities on the verdict form can present its own challenges.

One might assume bankruptcy trust information is readily available to defendants, in full, early in a case. That can't be farther from the truth.

Considering these standard discovery requirements and the allowance for inclusion of bankrupt entities on the verdict sheet, one might assume bankruptcy trust information is readily available to defendants, in full, early in a case. That can't be farther from the truth. Based on available case data, it appears in practice that plaintiffs' discovery responses typically contain objections and limited information, and the production of trust claims materials is often incomplete or deficient.

ANALYSIS

Our data set initially consisted of more than 1,100 New York cases which were set on trial dockets or that have been actively litigated and settled in New York since 2013. Cases were then narrowed down to those that formally proceeded to trial settings. The final data set was 175 cases from both NYCAL and other courts in New York which had available case and docket information. The cases reviewed included cases filed by 10 plaintiffs' firms and plaintiffs diagnosed with varying degrees of asbestos-related diseases, including mesothelioma (55%), lung cancer (42%), and other cancer (3%). Approximately 3% of the cases in the data set went to verdict. Of those verdicts, 40% were for the defense, and 60% were for the plaintiff.

The objective was to create a timeline overlay of the cases showing how discovery proceeded, while at the same time looking at the plaintiff's asbestos bankruptcy trust claims history. The information used to create the case timeline came from case dockets, public records and general filing information. The timeline included a specific focus on when cases were filed and resolved for defendants in the case. That information was then overlaid with the claims history for the plaintiff obtained through public sources and provided in the case itself to determine when claims information

was produced. Specifically, we examined the timelines to determine if claims information is produced in a timely manner which allows defendants to properly value and settle cases. It is clear that is not the case in New York. We determined that most plaintiffs’ asbestos bankruptcy trust claims information was made available towards the end of the case or after the tort case was closed.

As part of our analysis, we looked at the top law firms bringing cases to trial in New York. The top 2 firms going to trial accounted for about 65% of the trial settings in our sample. The top 4 firms accounted for about 79% of the trial settings. The firm with the largest number of trial settings disease breakdown included approximately 39% mesothelioma, 55% lung cancer, and 5% other cancers. For the firm in second place for most trial settings, mesothelioma cases accounted for approximately 88% of trial settings with lung cancer cases accounting for 12%.

Trust Claims Availability and Disclosures

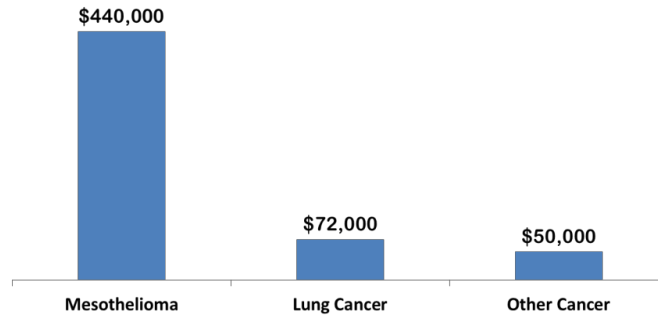
All of the plaintiffs reviewed were entitled to payments from asbestos bankruptcy trusts for their asbestos-related injury. Again, *every plaintiff* reviewed was eligible to receive payments from an asbestos bankruptcy trust—not half of the plaintiffs or a majority, but every single plaintiff in the data set.

Our review determined that, on average, a mesothelioma plaintiff could receive asbestos bankruptcy trusts claims payments estimated at over \$440,000; a lung cancer plaintiff could receive, on average, trust claims payments valued at over \$72,000; and those deemed as “other cancer” plaintiffs could receive an average of more than \$50,000 for trust claims payments.

This is money a plaintiff could receive solely from the asbestos trusts for simply filing a claim and never filing a lawsuit.

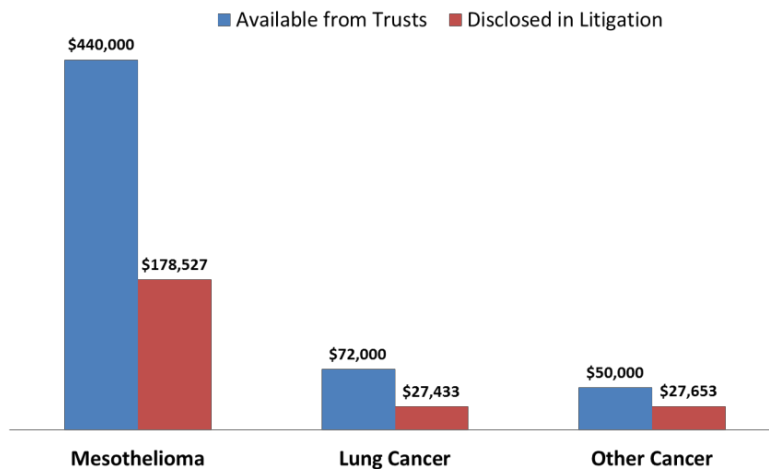
This is money a plaintiff could receive solely from the asbestos trusts for simply filing a claim and never filing a lawsuit. These value estimates are based on information made publicly available by the bankruptcy trusts including which worksites, products, time periods, and locations qualify a person for payment, as well as plaintiffs’ specific case information.

Figure 1. Average Available Trust Claims by Disease for New York Plaintiffs
Average calculated using information available on disease, exposure and diagnosis date in study data.



An extensive review of filing and docket information did not reflect any plaintiffs identifying and providing complete sets of available trust claims at the time of filing. Although plaintiffs produced some information about trust claims during the life of the case, it was disproportionate to the amount of claims which were available to the plaintiff. New York plaintiffs, on average, could have made 21 bankruptcy trust claims.

Figure 2. Average Available Trust Claims by Disease for New York Plaintiffs vs. Average Claims Value Disclosed in Litigation (By Disease)
Available trust claims calculated using information available on disease, exposure and diagnosis date in study data.



Furthermore, our research found that many of the plaintiffs could have made a greater number of trust claims:

- 52 plaintiffs could have made more than 25 bankruptcy trust claims.
- 41 plaintiffs could have made more than 30 bankruptcy trust claims.

- 13 plaintiffs could have made more than 40 bankruptcy trust claims.
- 35 plaintiffs were entitled to an estimated \$500,000 or more in trust claims payments.
- 25 plaintiffs were entitled to more than \$700,000 in estimated trust claims payments.
- 3 plaintiffs were entitled to more than \$1 million in estimated trust claims payments.

Trust claims availability was determined by matching the plaintiffs’ worksites and other locations of potential exposure with the site locations published by the trusts as being approved sites for claim payments.

These claims, by disease, can yield very high returns for many of the plaintiffs.

Figure 3. Available Trust Claims for Top 5 Mesothelioma Plaintiffs

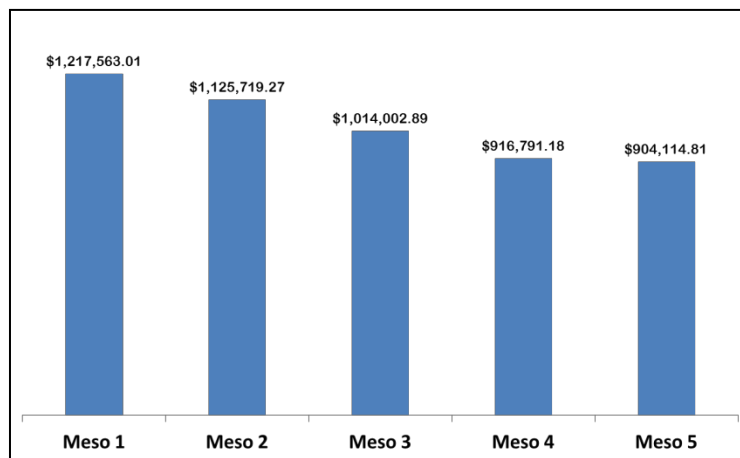
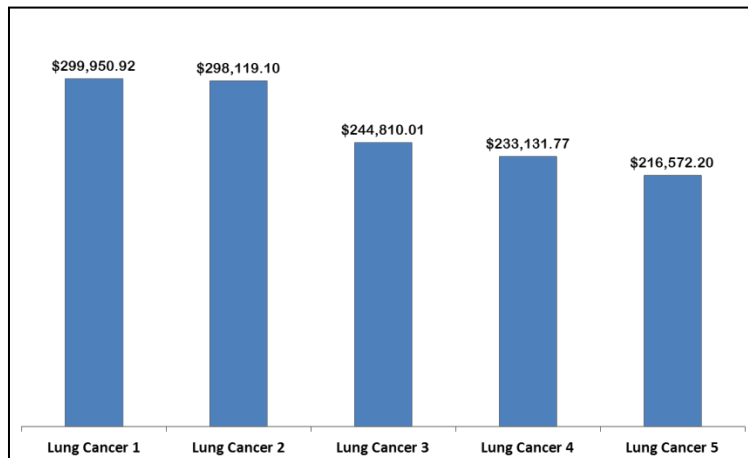
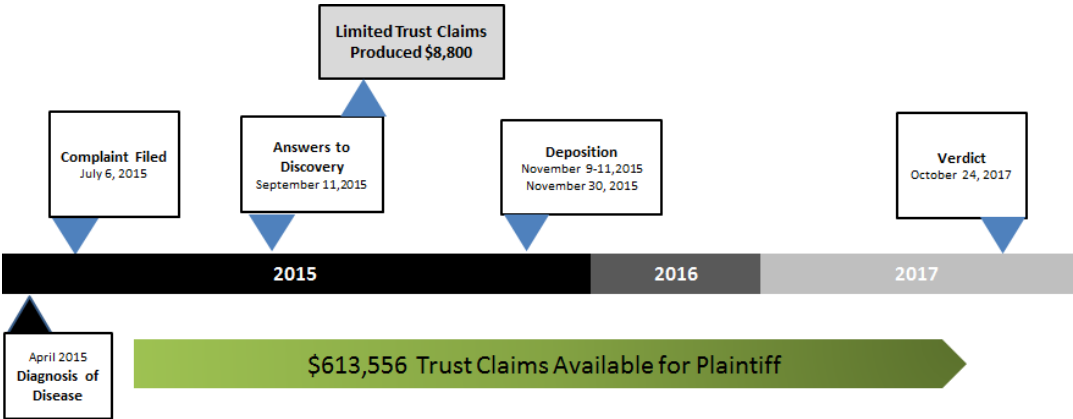


Figure 4. Available Trust Claims for Top 5 Lung Cancer Plaintiffs



Following the review of the filing information, some plaintiffs did respond to standard discovery with specific answers or information regarding their trust claims. Still, there was a persistent pattern of plaintiff responses with objections and/or responses such as “investigation is ongoing,” “to be provided,” and “will supplement.” For the plaintiffs reviewed, 54% identified some filed trust claims. However, 46% of plaintiffs did not identify *any* claims filed with bankruptcy trusts. This is significant considering our review indicated *every* plaintiff was eligible to make bankruptcy trust claims. Figure 5 provides a visual overlay of the timeline for a case with the trust claims information produced in the tort system and an estimation of the trust claims a plaintiff would be entitled to based on disease, exposure and product identification. The example depicted in Figure 5 illustrates what transpired in every case reviewed for this study. Plaintiffs routinely failed to disclose available trust claims payments during the litigation.

Figure 5. Trust Claims Disclosed vs. Funds Available to Plaintiff



To determine if the discovery was being completed accurately, we investigated prior claims history for the plaintiffs. We reviewed information from various trusts and compared trust claim dates with the dates of the case filings. For the sample reviewed, we located prior non-malignancy trust claims to 48 Insulation Trust and/or Manville Trust that were not disclosed in the case for 17% of the plaintiffs.

About 9% of the plaintiffs reviewed did disclose non-malignant bankruptcy trust claims. Interestingly, for those that disclosed non-malignant bankruptcy trust claims, often they did not disclose trust claims for their current malignant disease to those same trusts. The majority of bankruptcy trusts allow for

plaintiffs to file a second disease claim, meaning a plaintiff can get paid for their nonmalignant claim from a trust and also get paid from that same trust again for their later diagnosed malignant disease. Therefore, it is significant if plaintiffs did not disclose bankruptcy trust claims for their malignant disease to these same trusts, as demonstrated by the below examples:

- In a NYCAL mesothelioma case that recently went to verdict, the plaintiff disclosed 19 bankruptcy trust claims for his non-malignancy, yet did not disclose any mesothelioma bankruptcy trust claims even though 18 of these 19 trusts would allow plaintiff to file claims for mesothelioma valued at more than \$500,000.
- In a recent trial-set NY lung cancer case, the plaintiff disclosed 19 bankruptcy trust claims for his non-malignant disease, but no bankruptcy trust claims were disclosed for the subsequent lung cancer diagnosis. 17 of these 19 bankruptcy trusts would allow this plaintiff to also file lung cancer trust claims valued at more than \$110,000.

Overnaming and Dismissal of Defendants

For the cases reviewed, plaintiffs named as many as 122 defendants in individual complaints. On average, about 50 defendants were named in a complaint. Our review revealed New York plaintiffs named more than 700 unique defendants total in the cases in our data set. For the 3% of cases which proceeded to verdict, only 1 defendant remained in the case at the time of the verdict. Our review indicates that plaintiffs were exposed to more culpable defendants who are now bankrupt, and the tendency of plaintiffs to overname viable defendants in their complaints is a grasping of straws to have a viable defendant or few still standing should the case culminate in trial and verdict.

CONCLUSION

A number of courts around the country have addressed trust transparency issues in their respective jurisdictions. Some of these orders are extensive requiring plaintiffs to timely produce any and all information for trust claims which they have made or will make for asbestos injuries, and even call for sanctions if plaintiffs fail to comply. Other orders do not go far enough and limit the information plaintiffs are required to disclose to defendants. To date, sixteen states have enacted trust transparency legislation and now require some form of identification or production of trust claims materials prior to trial of a case. Those states include Ohio (2013), Oklahoma (2013), Wisconsin (2014), Arizona (2015), Texas (2015), West Virginia (2015), Tennessee (2016), Utah (2016), Iowa

(2017), Mississippi (2017), North Dakota (2017), South Dakota (2017), Kansas (2018), Michigan (2018), North Carolina (2018, and Alabama (2019).⁶

The enacted trust transparency laws vary from state to state, but all are designed to create, or at a minimum, improve transparency between the tort and asbestos bankruptcy trust systems by providing parties and the courts with more

To date, sixteen states have enacted trust transparency legislation and now require some form of identification or production of trust claims materials prior to trial of a case.

information about plaintiffs' bankruptcy trust claims. Trust transparency laws vary from state to state with some laws having more stringent requirements than others. Some laws give courts the ability to reopen and adjust the judgment if a plaintiff files bankruptcy trust claims after judgment in an asbestos action. About half of the states' trust transparency laws apply retroactively to cases pending at the time legislation was enacted.

Further, nearly half of the states' trust transparency laws include a provision that before trial, the court must enter into the record a trust claims document identifying each claim the plaintiff has filed against an asbestos bankruptcy trust. A few of the laws go even further and include a provision that the court may dismiss an action for failure to make the required disclosures pursuant to the trust transparency laws.

Despite the developments in trust transparency by courts and legislatures around the country post-*Garlock*, defendants are nonetheless routinely deprived of trust information necessary to properly value and defend their cases in states like New York that have not adopted reforms to prevent gamesmanship. As this study indicates, without legislatively enacted guides in place, plaintiff's counsel in New York will continue to elude the defense and control access to trust information.

⁶ ALA. CODE §§ 6-5-690 - 6-5-694 (2019); ARIZ. REV. STAT. §12-782 (2015), IOWA CODE §§ 686A.1-686A.9 (2017); K.S.A. §§ 60-4912-60-4918 (2018); MICH. COMP. LAWS §§ 600.3010-600.3016 (2018); MISS. CODE ANN. §§ 11-67-1 - 11-67-15 (2017); N.C. GEN. STAT. § 1A-1, RULE 26(b)(2a) (2018); N.D. CENT. CODE §§ 32-46.1-01 - 32-46.1-06 (2017); OHIO REV. CODE ANN. § 2307.951 - 2307.954 (2013); OKLA. STAT. tit. 76, §§ 81-89 (2013); S.D. CODIFIED LAWS §§ 21-66-1 - 21-66-11 (2017); TENN. CODE ANN. §§ 29-34-601 - 29-34-609 (2016); TEX. CIV. PRAC. & REM. CODE §§ 90.051 - 90.058 (2015); UTAH CODE ANN. §§ 78B-6-2001 - 78B-6-2010 (2016); W. VA. CODE §§ 55-7F-1 - 55-7F-11 (2015); WIS. STAT. § 802.025 (2014).

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APPENDIX A: THE TRUSTS

A & I Corporation Asbestos Bodily Injury Trust, information and Trust Distribution Procedures *available at* <http://www.aissettlement.com/> .

ABB Lummus Global Inc.524(g) Asbestos Personal Injury Trust (Bankr. D. Del.), information and Trust Distribution Procedures *available at* <http://abblummustrust.org/> .

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