

Did You Get That?

By Mary Margaret Gay
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The information that you need to develop a plaintiff's full-exposure picture and available trust compensation continues to grow.

Maximizing Alternative Exposures and Bankruptcy Trust Information at Depositions

In the ever-changing post-*Garlock* world of asbestos litigation, lawyers struggle to keep up with the information available on asbestos bankruptcy trusts. Legislation requiring production of trust information has been

enacted in more than a dozen states. Trust information, although inherently elusive, has been cultivated by a number of companies and law firms to provide greater access to claim information for defendants and their lawyers. Although information may be required to be produced or may be available from various sources, it remains difficult to locate and obtain. However, with the correct tools and access to accurate information, lawyers around the country can use the trust information to maximize alternative exposures and reveal

a more accurate picture of plaintiffs' asbestos exposures. Ultimately, having access to and using this valuable alternative exposure and trust information allows defendants to value and defend cases better. So how do you access it, and how do you put it to use in a case?

Where Is the Information?

The information that is most critical to determining a plaintiff's exposures and compensation accurately is not likely in a single outline or database or folder in your



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office. The information can span more than 30 years of litigation in courts in every corner of the country. There is no central location for historical asbestos information or one place to get everything possibly needed in a specific case or on a specific plaintiff. Resources have been created to make locating the information easier, but there is no one primary source. Creating

a checklist for you and the other attorneys in your office is imperative to understand collectively the available information and how to obtain it. Not having an organized checklist will result in unnecessary time spent researching and re-researching every potential source of exposure and compensation. Most importantly, the attorneys in your office who have litigated and

tried asbestos cases for years are uniquely positioned to provide guidance on finding and accessing this information. Even though they may not be taking a plaintiff's deposition or preparing the discovery, they can often share their knowledge of a worksite, product, or exposure history with you to help develop testimony on the plaintiff at issue.

Can You Get Information from Asbestos Bankruptcy Trusts?

Plaintiffs' attorneys do not make it easy to get trust information and surely do not hand it over willingly. The asbestos bankruptcy trust system and the tort system are parallel systems moving forward with very different objectives and goals. The asbestos bankruptcy trust system is set up solely to

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compensate claimants and protect assets of the bankrupt entity. No overlying responsibility is created requiring the asbestos bankruptcy trust to work with or provide information in the tort system. The trusts are created and overseen by the plaintiffs' attorneys who are representatives of creditors in the bankruptcy trust system. They have little or no responsibility to make information available that could also reduce or affect the compensation that they receive in the tort system. Therefore, information about compensation or trust claims submissions that would provide the most complete picture of a plaintiff's exposures and compensation are often not readily accessible by defendants in the tort system.

Although this information is challenging to access and voluminous, there are a number of ways to get information about bankrupt entities' products and locations, the amount that the trust has paid or may pay a plaintiff, and the potential alterna-

tive exposures that a plaintiff has already admitted to in a claim. In some states, legislation has been enacted or courts have entered orders requiring the production of the information.

Thanks to the diligent efforts of a number of companies and legal experts, legislation requiring plaintiffs to provide information about the claims that they make to asbestos bankruptcy trusts has increased substantially in the past three years. Fifteen states 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), and North Carolina (2018). 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 information about plaintiffs' bankruptcy trust claims.

For defendants and their lawyers this means that when they are defending cases in these states, or cases for which the law of these states may apply, remedies are in place to force the production of trust information. These laws vary from state to state, requiring things such as pre-discovery identification of potential trust claims or establishing an ongoing duty to supplement trust claims information, as well as forcing courts to stay a case and continue a trial date if a plaintiff has yet to make an available claim.

Defense lawyers should request and even demand information early in cases where legislation is applicable and can be used to obtain this valuable information.

Reach Out to the Experts for Reliable, Correct Information

While the role of trusts in providing compensation to asbestos claimants has expanded, information about the operating procedures and activities of these trusts is not readily available in a convenient form. Only a handful of law firms and companies have spent the time to pioneer databases that allow you to search the

voluminous, available trust information in a single location. This vast amount of information and data is not something that a paralegal or associate can easily throw together overnight. The trust information consists of hundreds of thousands of data points, and information about trust values and exposures sites changes constantly. The information is cumbersome, and without specific knowledge of how each trust compiles, saves, and distributes its information, it is all but impossible for an unsophisticated user to obtain trust information and trust claims data.

It is imperative for the credibility of the trust information in the tort system that you acquire your information from a knowledgeable source. Our team worked for several years with clients to build an electronic library of information. We routinely assist law firms, defendants, and insurers seeking information about potential, available trust claims for their cases. Specifically, we have the ability to take basic plaintiff information provided in a complaint and help create a map for potential avenues of alternative exposure development and available trust claims. For example, we can tell you every potential exposure site for a plaintiff in the town in which the plaintiff resides. At a deposition, you are then prepared to question the plaintiff about how many times he or she visited a local hospital, library, or public building that is a confirmed exposure location for a trust, thereby confirming an alternative exposure to that trust product and opening the door for additional compensation. The information extends to products as well. If a plaintiff alleges that he or she performed home repairs, we can provide information about bankrupt companies' asbestos-containing products that a plaintiff may have used, such as trade names and pictures that you can use for questioning at a deposition.

Where Else Can You Get Information?

Those of you who have taken depositions and tried cases for the life of asbestos litigation likely see the same worksites and co-workers pop up again and again in the litigation. The information that you previously developed on cases may be some of your best sources of information on alternative exposures. Many of the bankrupt

companies were targets in cases before their demise, which means depositions and discovery were focused on their products. Look for that information. Ask your colleagues what they have in old files, and seek out the information that you know is out there. If you have not been taking depositions in this litigation for a lifetime, go to the people who have and get their input.

In the world of Google searches, information is publicly available on just about everything, such as industrial sites, military locations, products, personal plaintiff exposures, and co-workers. Years ago, before filing for bankruptcy, counsel for Owens-Corning Fiberglass Company used a “picture book” in defense of asbestos claims. The “OCF picture book,” as it was known to those in the litigation, allowed defense counsel for the company to “refresh” a plaintiff’s memory with pictures of products manufactured by other (some still solvent) companies. This “refresh and identify” strategy is now being used for bankrupt products. Pictures of product packaging, pictures of the products themselves, and pictures of various brand names and labels are now being compiled and used again in the litigation.

Specific information is available on products that contained asbestos through government registries, asbestos bankruptcy dockets, and numerous other public record forums. Pictures of bankrupt products come from a number of sources. As part of the Asbestos Information Act of 1988, the Federal Register published a list of certain manufacturers and their asbestos products. *See* 55 Fed. Reg. 5144 (Feb. 13, 1990). This voluminous information regarding asbestos products includes specific product trade names of many now-bankrupt manufacturers and includes some pictures.

The Federal Register information has been captured recently in an accessible digital platform available to defendants for real-time searching. Some defendants have even resurrected the OCF picture book, which is also now digitally available for searching. While a quick Google search of a product will return product photographs, defense counsel must proceed cautiously. If the picture is not credible, using the picture during questioning could result in implicating viable defendants. When using product pictures during a deposition,

the defense attorney should be certain that the source is credible and the pictures are, in fact, of bankrupt companies’ products. There are even subscription services that provide counsel access to these product pictures and information.

Be Prepared to Ask a Plaintiff Direct, Leading Questions About the Specifics

Start gathering your information early and continue to update it as your case develops. Every location where a person has been in his or her life can be a potential exposure site. Do not be fooled by a plaintiff wanting to skip parts of his or her life history, saying that it is not relevant to the allegations in this case. Every place that a plaintiff has ever been is part of his or her personal exposure profile. The public library where a plaintiff spent years studying as an undergraduate may be a potential exposure site,

identified by a company that has filed for bankruptcy as a place that had the company’s asbestos-containing products. The old hotel where a plaintiff helped as a janitor before he joined the military could be one, too. The same goes for the apartment building that a plaintiff lives in, the church that he or she attends, and on and on. Ask the questions that get you the specifics about the locations and time periods. The details are critical for the development and analysis of alternative exposures and potential trust claims.

The information that you need to develop a plaintiff’s full-exposure picture and available trust compensation continues to grow. Ensure that you are staying ahead of the curve and tapping all available resources for the defense of your client. Every exposure and every trust claim makes a difference in the defense of a case. 



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