CHAPTER ONE

Introduction and Background on Asbestos Bankruptcies

Exposure to asbestos, once widely used in industrial and consumer products, can result in asbestosis and mesothelioma, a cancer that is inevitably fatal.[1] As a consequence, companies that produced or used asbestos and asbestos-containing products faced enormous liability. Asbestos litigation began in earnest in the 1970s and continues to this day, the longest-running mass tort in U.S. history.[2] One of the most significant developments in asbestos litigation in the past 15 years involves the scores of asbestos defendants that have filed for bankruptcy because of the large volume of lawsuits and their expected liability. As a result of these bankruptcies, compensation for injuries caused by asbestos

[1] According to the National Library of Medicine of the National Institutes of Health, average survival time for a patient with malignant mesothelioma ranges from four to 18 months, depending on the stage of the tumor, the patient's age and general health, whether surgery is an option, and the patient's response to treatment:

> There is usually no cure, unless the disease is found extremely early and the tumor can be completely removed with surgery. Most of the time when the disease is diagnosed it is too advanced for surgery. Chemotherapy or radiation may be used to reduce symptoms. Combining certain chemotherapy drugs may help decrease symptoms, but it will not cure the cancer. ("Mesothelioma: Malignant," MedlinePlus, updated May 29, 2014)

[2] Stephen J. Carroll, Deborah R. Hensler, Jennifer Gross, Elizabeth M. Sloss, Matthias Schonlau, Allan Abrahamse, and J. Scott Ashwood, *Asbestos Litigation*, Santa Monica, Calif.: RAND Corporation, MG-162-ICJ, 2005.

now involves both regular tort suits and claims filed with specially created asbestos bankruptcy trusts.[3]

How the two systems interact is a hotly debated topic. Our previous research has explored how the bankruptcies can affect the total amount a plaintiff can recover from trusts and the tort case combined and the amount paid by defendants that remain solvent.[4] The outcomes depend fundamentally on whether evidence of exposure to the products of the bankrupt parties is introduced in the tort case. The remaining solvent defendants could end up paying more when such evidence is not developed than when it is developed. Similarly, plaintiffs could receive more when such evidence is not developed than when it is.

This report examines the extent to which exposures to a firm's asbestos-containing products cease to be identified in tort cases once the firm declares bankruptcy. It examines changes caused by bankruptcy in the nature of the exposure information provided in plaintiffs' responses to interrogatories and in depositions of plaintiffs and plaintiffs' family members and coworkers. As we discuss below, additional exposure information could be introduced after the interrogatories and depositions, but a change in the information provided in interrogatories and depositions signals a change in plaintiff, and possibly defendant, behavior versus what would have happened without bankruptcy. This report explores possible explanations for the observed change in product identification and examines the significance of the findings for asbestos litigation.

In the remainder of this introductory section, we summarize how the structural linkages between the tort and trust systems affect incentives to identify the asbestos-containing products of bankrupt firms in tort cases. We also summarize bankruptcy's effect on product identification in asbestos cases. Then, in Chapter Two, we describe this study's methodology for examining product-identification trends pre-

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[3] For a recent overview of asbestos litigation, see Georgene Vairo, "Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?" *Tulane Law Review*, Vol. 88, No. 6, 2014, pp. 1039–1044.

[4] See Lloyd Dixon and Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, Santa Monica, Calif.: RAND Corporation, MG-1104-ICJ, 2011.

and postbankruptcy. Chapter Three presents the results of the analysis, and Chapter Four discusses the significance of the findings.

The Importance of Evidence of Exposures to the Products of Bankrupt Parties

The high volume of cases brought against asbestos manufacturers beginning in the 1970s and large payouts encouraged scores of companies to seek novel ways to manage their asbestos liabilities. The main innovation was the establishment of special asbestos bankruptcy trusts created pursuant to Section 524(g) of the Bankruptcy Code.[5] As part of the reorganization plan, a company provides substantial funding for a trust (including stock, insurance recoveries, and cash) and, in exchange, is shielded from the predecessor company's asbestos liabilities. A channeling injunction diverts all current and future claims arising from asbestos exposure to the trust rather than the company. The trust provides compensation via court-approved distribution rules for current and future claims.[6] In short, the bankruptcy-trust approach allows companies to shed their asbestos liabilities, to reorganize as viable businesses, and to establish funds to compensate current and future claimants.

Trusts are typically not funded at levels that allow full payment of the estimated amount the plaintiff would have received had the defendant remained solvent. Each trust sets a payment percentage that is used to determine the actual payment a claimant will be offered. A review of 26 of the largest trusts puts the median payment percentage at 25 percent, with the range running from 1.1 percent to 100 percent.[7] Thus, a plaintiff can receive less from a trust than if he or she had sued

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[5] U.S. Code, Title 11, Bankruptcy, Chapter 5, Creditors, the debtor, and the estate, Subchapter II, Debtor's duties and benefits, Section 524, Effect of discharge.

[6] See Lloyd Dixon, Geoffrey McGovern, and Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, Santa Monica, Calif.: RAND Corporation, TR-872-ICJ, 2010.

[7] Dixon, McGovern, and Coombe, 2010, p. xv.

the predecessor company prior to its bankruptcy. However, we learned during our interviews that defendants sometimes argue that the payment percentage is applied to an estimated claim value that exceeds what the plaintiff would have received had the firm remained solvent and thus that the net effect on plaintiff compensation is not always clear.

The advent of trusts as a mechanism for managing asbestos liabilities has fundamentally altered the course of asbestos litigation. At a basic level, asbestos litigation has changed because now more than 100 companies have claimed the protections of Chapter 11 of the Bankruptcy Code in part because of their asbestos liabilities.[8] These companies, many of which were the major producers of asbestos-containing products, are no longer subject to lawsuits. Hence, there are both bankrupt parties whose putative share of liability is now represented by the trust funds (which held assets in excess of $18 billion as of 2012)[9] and solvent defendants that are facing lawsuits for asbestos-related injuries.

The fact that there are now bankruptcy trusts and solvent defendants has complicated the business of establishing liabilities and calculating the appropriate compensation due deserving plaintiffs in the tort system. Whereas all claims for compensation were once managed in the tort system, a parallel system of compensation now exists through the trusts. This parallelism has raised concerns among current asbestos defendants that all exposures will not be considered in determining the responsibility of the remaining solvent defendants and that plaintiffs could receive more than they would have had the firms not declared bankruptcy.

Our previous research examined the linkages between the tort system and asbestos bankruptcy trusts.[10] We found a great deal of vari-

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[8] Crowell and Moring, "Chart 1: Company Name and Year of Bankruptcy Filing (Chronologically)," 2660535, revised September 19, 2014.

[9] Marc C. Scarcella and Peter R. Kelso, "Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation and Governance," *Mealey's Asbestos Bankruptcy Report*, Vol. 12, No. 11, June 2013, p. 35.

[10] Four potential linkages were examined: the information linkage, the setoff linkage, the indirect-claim linkage, and the trust payment–limitation linkage (Dixon and McGovern, 2011, p. xii).

ation across states with regard to how trust compensation enters into the determination of tort awards, with the variation caused by

- differences in liability standards and rules on when trust claims must be filed during a tort case
- whether setoffs for trust payments are allowed in determining tort awards
- whether fault can be assigned to bankrupt parties.

Informed by our analysis of these linkages, we identified the potential effects of bankruptcy on plaintiff compensation from trusts and tort combined. We also identified the effects of bankruptcy on the payments by defendants that remain solvent.

Table 1.1 summarizes findings from our previous work on the potential differences in compensation received by the same plaintiff if (1) the tort case were filed before any parties had declared bankruptcy and (2) the case were filed after some parties had declared bankruptcy and set up trusts.[11] It also reports differences in payments by parties that remain solvent. As can be seen, the outcomes depend significantly on whether evidence of exposures to the products of bankrupt parties is developed in the tort case.

In states with joint and several liability, one would expect the compensation received by plaintiffs from trusts and tort combined to remain unchanged whether or not evidence about exposure to bankrupt parties' products is developed.[12] Because, under joint and sev-

[11] Although the vast majority of asbestos cases settle, the settlements are guided by expected outcomes at trial, taking into account legal, expert, and other costs associated with going to trial. For a detailed discussion of how bankruptcy can affect outcomes of plaintiffs and remaining solvent defendants, see Dixon and McGovern, 2011.

[12] Joint-and-several-liability doctrine holds each individual defendant liable for the full damages; the onus is then placed on the defendant to seek contribution from the other responsible parties. In contrast, several-liability doctrine is a legal rule that limits a defendant's liability for a harm to the portion of the harm that the defendant caused. If, for example, three defendants each contributed 33 percent of the fault for an injury, a several-liability jurisdiction would hold each defendant responsible for one-third of the damages. Recently, some states have shifted away from the traditional joint-and-several-liability rule. For a discussion of the various liability regimes, see Robert S. Peck, "The Development of the Law of

Table 1.1
Bankruptcy's Potential Effects on Plaintiff Compensation and Payments by Remaining Solvent Defendants

	Bankruptcy's Effect on Outcome If Evidence of Exposure to Products of Bankrupt Parties Is or Is Not Developed	
Outcome	**Is Developed**	**Is Not Developed**
State with joint and several liability		
Plaintiff compensation from trusts and tort combined	Unchanged	Unchanged
Payments by remaining solvent defendants	Increase	Increase by more than when exposure is developed[a]
State with several liability		
Plaintiff compensation from trusts and tort combined	Can decrease	Can increase
Payments by remaining solvent defendants	Remain unchanged	Increase

SOURCE: Based on Dixon and McGovern, 2011.

[a] Or, put another way, payments by remaining solvent defendants increase more than when the evidence is developed.

eral liability, a single liable defendant is responsible for compensating 100 percent of a plaintiff's injuries, it makes no difference whether there is evidence of exposure to a bankrupt party's products. If such evidence of exposures is developed, one would expect any payments by remaining solvent defendants to increase by the amount of the bankrupt firms' pre-reorganization liability that the trust does not cover.[13] Such an increase would be consistent with the intent of joint and sev-

Joint and Several Liability," *Federation of Defense and Corporate Counsel Quarterly*, Vol. 55, No. 4, Summer 2005, pp. 469–478.

[13] A defendant that pays the full judgment in a joint-and-several-liability jurisdiction gains the right to pursue trust claims. As discussed earlier in this section, trusts apply a payment percentage that creates a wedge between the trust payment and what would have been the value of the claim had the predecessor firm remained solvent. The paying defendant could thus end up covering the difference between the claim value and the amount paid by the trust.

eral liability. However, when exposure to the product of a bankrupt party is not developed in the tort case, any remaining solvent defendants would not have the information needed to take advantage of resources available from the trusts and thus would pay more than if all product exposures were identified.[14]

The potential outcomes are quite different in several-liability states. If information is developed on the exposure to the products of the bankrupt parties when the case is filed postbankruptcy, plaintiff compensation from trust and tort combined can decrease. Such an outcome would occur to the extent that the trust does not cover a bankrupt firm's prebankruptcy liability. Payments by remaining solvent defendants would remain unchanged. In contrast, if evidence of exposure to a product of a bankrupt party were not developed, both plaintiff compensation and payments by the remaining solvent defendants could increase. Plaintiff compensation would increase if, for example, all fault were assigned to the remaining solvent defendants at trial and the plaintiff then recovered additional amounts from the trusts. The remaining solvent defendants would pay more because fault was not appropriately allocated to the bankrupt parties.

Plaintiffs therefore have disincentives to develop evidence of exposure to the product of a bankrupt party. Failure to develop such evidence can increase the likelihood that at least one of the remaining solvent defendants will be found liable.[15] Also, in several-liability states, less exposure to the products of bankrupt parties can mean that more fault is assigned to and larger payment received from the remaining solvent defendants.

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[14] Now, instead of just covering the difference between the claim value and the trust payment, the paying defendant covers the entire claim value.

[15] Exposure to an asbestos-containing product does not automatically result in the product's producer being held liable. As discussed in Chapter Two, asbestos cases can be subject to maritime law. For a defendant to be found liable under maritime law, the plaintiff must show that the relevant products were a substantial contributing factor in causing the injury. Some defendants with whose representatives we spoke during the course of this study argue that reducing the number of other exposures identified in the case can increase the likelihood that the products of the remaining parties will be found to have substantially contributed to the injury.

In contrast to the disincentives that plaintiffs have, remaining solvent defendants have incentives to develop evidence of exposure to the products of bankrupt parties. Traditionally, in tort, each side develops its own evidence of causes of the injury.

As pointed out in our previous work, there is a great deal of dispute between plaintiffs' and defense attorneys in asbestos cases about who is responsible for developing evidence of the products and practices of bankrupt firms. Plaintiffs' attorneys argue that defense attorneys can use discovery tools to uncover exposure information and that, in many cases, both parties already know the likely exposures even before the case begins because of other cases from the same workplace. Defense attorneys respond that plaintiffs' attorneys can influence which exposures plaintiffs recall during the case proceedings and that, without plaintiff cooperation, it is much more expensive to establish exposure and the result much less persuasive to a jury. It is important to note, however, that, regardless of who is to blame, a plaintiff's failure to identify exposure to the product of a bankrupt party or a defendant's failure to develop exposure evidence can alter the outcomes for both plaintiffs and defendants.

Previous Investigations of Bankruptcy's Effect on Product Identification

Previous investigations provide initial evidence that exposure to a product of a bankrupt party is identified less frequently postbankruptcy than prebankruptcy. In a recent bankruptcy case estimating the asbestos liabilities of Garlock Sealing Technologies,[16] Judge George Hodges found "substantial evidence" of efforts by some plaintiffs' firms to "withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until obtaining recoveries from Garlock (and other viable defendants)."[17] These conclusions were based on numerous types of evidence, includ-

[16] Garlock is a company that has made gaskets that contained asbestos.

[17] *In re Garlock Sealing Techs., LLC*, 2014 Bankr. LEXIS 155, January 10, 2014, p. 30.

ing deposition of lawyers involved in the litigation and 220 high-value cases in which plaintiffs' discovery responses conflicted with information provided to bankruptcy trusts or with voting in bankruptcy cases.[18] Judge Hodges permitted Garlock to have full discovery in 15 of the 220 cases. In summarizing evidence of misrepresentations he found "surprising and persuasive," Judge Hodges concluded that

> Garlock demonstrated that exposure evidence was withheld in *each and every one* of [the 15 cases.] The discovery in this proceeding showed that what had been withheld in the tort cases—on average plaintiffs disclosed about 2 exposures to bankruptcy companies' products, but after settling with Garlock made claims against about 19 such companies' Trusts [italics in original].[19]

The court's findings imply that, for these 15 cases, exposures were disclosed for approximately 10 percent of the bankrupt firms to whose products the plaintiff had been exposed.[20] However, these 15 cases are not a random or necessarily a representative sample and might well be the most extreme examples of incomplete disclosure. In addition, plaintiffs' attorneys question the relevance of the findings. They point out that some trusts will pay compensation on the basis of evidence that would be insufficient to establish liability in the tort case. It can thus be appropriate, in their view, to file trust claims while not disclosing the exposures in the tort case.

A study of mesothelioma cases filed in the Court of Common Pleas of Philadelphia County between 1991 and 2010 also provides evidence that product identification declines postbankruptcy.[21] Scarcella,

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[18] As creditors in the bankruptcy case, plaintiffs are eligible to participate in creditor votes on the reorganization plan. To qualify as a creditor, a plaintiff must allege injury caused by exposure to the bankrupt party's products.

[19] *In re Garlock Sealing Techs.*, 2014, p. 31.

[20] Data on the number of exposures disclosed and not disclosed in the 15 cases are included in the opinion. Thirty-two of a total of 316 total exposures were disclosed. *In re Garlock Sealing Techs.*, 2014, p. 34.

[21] During the period covered by the Scarcella, Kelso, and Cagnoli study (Marc C. Scarcella, Peter R. Kelso, and Joseph Cagnoli, Jr., "The Philadelphia Story: Asbestos Litigation, Bank-

Kelso, and Cagnoli (2012) examined 107 mesothelioma cases and compared the products positively identified in plaintiffs' interrogatory responses and depositions in cases filed before the bankruptcy wave that began in 2000 with cases filed during and after the bankruptcy wave. They found that, prior to the bankruptcy wave, plaintiffs identified approximately eight defendants that produced thermal insulation or refractory products and eventually filed for bankruptcy reorganization. For cases filed between 2006 and 2010 after the bankruptcy wave, approximately four of the now-bankrupt defendants were identified per case, on average.[22] One possible explanation for the findings is that the exposure histories of plaintiffs who filed claims prior to the bankruptcy wave were different from those of plaintiffs who filed after the bankruptcy wave. Scarcella, Kelso, and Cagnoli (2012) presented evidence that the exposure histories of the two groups are similar; however, in their statistical analysis, they did not explicitly control for differences in plaintiff exposure history.

The extent to which exposures to the products of bankrupt parties are identified less frequently postbankruptcy across the litigation as a whole is, as yet, unknown. Judge Hodges believed that "more extensive discovery would show more extensive abuse," and Scarcella, Kelso, and Cagnoli (2012) concluded that it would not be surprising if the findings in Philadelphia were "just as pronounced or even more dramatic in other asbestos dockets across the country."[23] Nonetheless, it is possible that experiences in Philadelphia and in the Garlock case are not common: that the products and litigation history are unrepresentative of the experiences of other asbestos defendants.

To better understand this issue, this report examines how bankruptcy affects product identification in mesothelioma cases filed in two

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ruptcy Trusts and Changes in Exposure Allegations from 1991–2010," *Mealey's Litigation Report: Asbestos*, Vol. 27, No. 17, October 10, 2012, pp. 1–13), liability for asbestos injuries was joint and several in Pennsylvania. Under a law enacted on June 28, 2011, liability is now several in Pennsylvania, with some exceptions (see Dixon and McGovern, 2011, p. 71).

[22] Scarcella, Kelso, and Cagnoli, 2012, p. 4.

[23] Scarcella, Kelso, and Cagnoli, 2012, p. 12.

other states, California and New York. We explain the methodology in Chapter Two.