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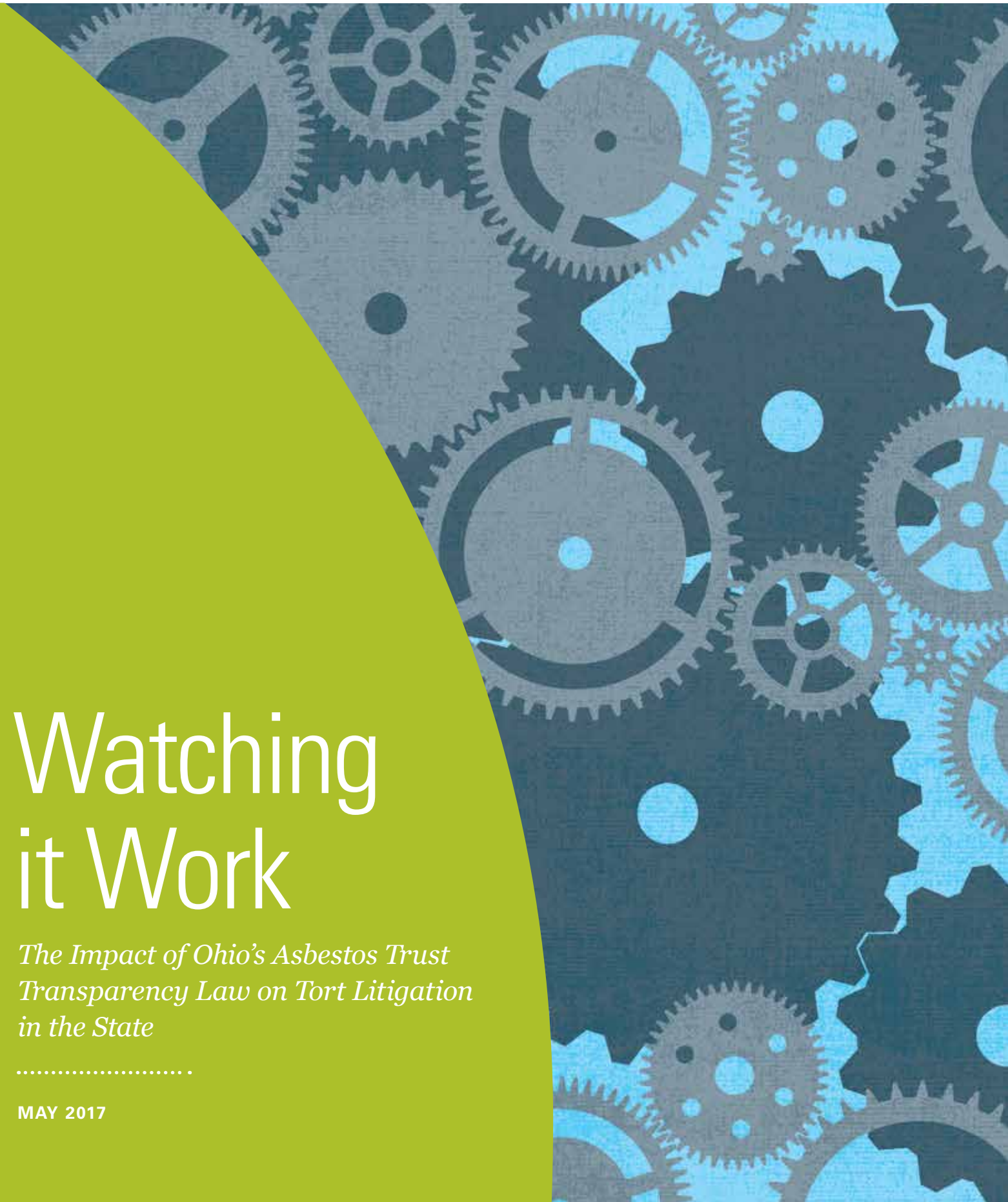

Watching it Work

The Impact of Ohio's Asbestos Trust Transparency Law on Tort Litigation in the State

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Executive Summary

During the first part of the twentieth century, asbestos was widely used in a variety of industrial, commercial and household products. A naturally occurring mineral valued for its flame-retardant and insulating properties, asbestos could be found in products as diverse as pipe and boiler insulation, vinyl floor tiles, automobile brakes and cigarette filters. Many people handled asbestos on the job or at home. Unfortunately, exposure to asbestos has been linked to both malignant and nonmalignant diseases. By the time the use of asbestos began declining in the early 1970s, millions of individuals who had been exposed to asbestos were at risk of developing serious diseases. Due to the long periods, often decades, that pass between exposure and development of symptoms and diagnosis, the legacy of asbestos usage and the litigation it has created are likely to exist for the foreseeable future.

The first successful asbestos-related personal injury judgment was upheld by the federal Fifth Circuit Court of Appeals in 1973.[1] After that case, asbestos litigation exploded. A 2005 report by the RAND Corporation estimated that, through 2002, approximately 730,000 people filed asbestos claims against at least 8,400 corporate defendants.[2]

The size and scope of the asbestos litigation has resulted in more than 100 companies involved with asbestos manufacturing and products filing for bankruptcy protection, with experts expecting that more will do so.[3] At least 60 of those companies have successfully established asbestos bankruptcy trusts to resolve their future claims, with additional requests to establish a trust pending.[4] The asbestos bankruptcy trusts have paid approximately $18 billion in claims to date and have on hand approximately $37 billion for future claims.[5]

The ubiquity of asbestos in products means that individuals frequently were exposed to asbestos from more than one source and thus, plaintiffs often file claims with more than one bankruptcy trust while also filing tort actions against companies that are still solvent. However, the asbestos bankruptcy trust system is separate from state court systems, which makes it more difficult for the courts and each trust to fairly adjudicate responsibility and apportion liability.

Each trust establishes its own procedures and processes for evaluating claims and those procedures and processes are usually designed to pay claims promptly with low administrative and transactional costs.[6] Different standards of proof also exist between the claims that are pursued in court and the claims pursued against the asbestos bankruptcy trusts, with the trusts typically having much lower evidentiary burdens.

Many trusts also contain confidentiality provisions mandating that a claimant's submission to a respective trust and all associated information be treated as confidential.[7] Thus, if a plaintiff does not disclose the asbestos trust claims they have made, state courts and defendants are generally not aware of all claims that a plaintiff has against other potentially responsible parties, putting the defendants at a disadvantage in the court cases.

The differences in filing requirements and the lack of transparency between the two systems also creates a situation where fraud and abuse can flourish. Prior to trust transparency legislation, there was no requirement that a plaintiff file his or her trust claims concurrently with the tort action. This meant that trust claims could be filed after the resolution of the tort action, preventing accurate apportionment of responsibility in the latter. Plaintiffs could also create conflicting exposure narratives in the tort action and trust claims and prevent the court from discovering this discrepancy by keeping the trust claims confidential.

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To alleviate these issues and to ensure full, transparent disclosure of all sources of plaintiffs' asbestos exposure from the start of the tort action, in 2013, Ohio became the first state in the nation to enact legislation to require asbestos bankruptcy trust transparency. Proponents believed that trust transparency reform would ensure that the court and all parties to litigation had the information needed to fairly adjudicate a

plaintiff's claim. Those opposing asbestos trust reform argued that the delays it might cause would prevent terminally ill plaintiffs from living long enough to achieve their day in court. Now that several years have passed since the enactment of the Ohio trust transparency law—H.B. 380—we have the opportunity to examine these claims.

This report analyzes the impact Ohio's asbestos trust transparency law has had on asbestos tort litigation in the state, particularly the impact the transparency requirements have on the time it takes for living mesothelioma plaintiffs' cases to go to trial or reach resolution.[8] It examines actual cases that were pending in 2010, 2012, and 2014 in the Ohio court with the most asbestos cases. These three years were chosen because H.B. 380 became effective in 2013, and cases from the two years prior, as well as the year after it became effective, could be examined. The report specifically identifies and analyzes each case in the Cuyahoga County Court of Common Pleas involving a living mesothelioma plaintiff that was grouped and scheduled for trial during each of the three years studied (2010, 2012 and 2014) to determine how long it took for each case to be resolved and how Ohio's trust transparency law might have affected the process in each case.

> *"[T]rust transparency reforms appear to have accomplished the goal of ensuring transparency and fairness without imposing significant burdens on plaintiffs."*

The report concludes that there is no systemic evidence that the trust transparency reforms enacted in Ohio have caused delays in case resolutions. Rather, when plaintiffs properly disclose their asbestos trust claims in litigation, there is no appreciable delay in the prosecution of cases. Further, despite opponents' concerns, it does not appear that defendants are using the trust transparency provisions to deliberately delay cases. This in-depth examination instead reveals that more often it is plaintiffs' counsel's trial strategies that cause the longest delays. In short, trust transparency reforms appear to have accomplished the goal of ensuring transparency and fairness without imposing significant burdens on plaintiffs.

Ohio's Historical Experience with Asbestos Litigation: A Clarion Call for Asbestos Trust Transparency

In the late 1990s and early 2000s, Ohio was a hotbed for asbestos tort litigation, with thousands of actions filed each year in Cuyahoga County and over 8,000 filed in 2001 alone. By 2004, more than 46,000 suits were pending in the Cuyahoga County Court of Common Pleas. That year, Ohio enacted medical criteria reform legislation, which required some basic threshold demonstration of an illness or injury as a prerequisite to filing suit, thereby disallowing suits where the plaintiff claimed only exposure to asbestos with injuries that might develop in the future. Ohio's law was retroactive and applied to pending claims, which allowed the court to remove more than 34,000 dormant lawsuits from the docket.

While Ohio courts were able to use the medical criteria laws to better manage their dockets by focusing only on those plaintiffs with actual illness and injuries, other concerns with asbestos tort litigation soon became apparent; namely, how to reconcile plaintiffs' claims advancing in both the courts and the asbestos bankruptcy trusts.

"While Ohio courts were able to use the medical criteria laws to better manage their dockets by focusing only on those plaintiffs with actual illness and injuries, other concerns with asbestos tort litigation soon became apparent..."

With these two distinct systems operating in parallel, but generally not in tandem, it became obvious that there was frequently an information deficit between the two, leading to the possibility for misconduct on the part of some plaintiffs' attorneys.

In 2007, Judge Harry Hanna of the Cuyahoga County Court of Common Pleas barred certain plaintiffs' attorneys from appearing in his court again after finding that the attorneys had repeatedly lied to the court about their client's asbestos exposure in *Kananian v. Lorillard Tobacco Company*.[9] In reviewing the multiple lawsuits and trust claims filed on behalf of the plaintiff, Judge Hanna uncovered not only several conflicting versions of how the plaintiff had acquired his cancer—all tailored to extract the maximum recovery from each defendant and asbestos bankruptcy trust—but also instances where the attorneys had concealed documentation of trust claims from the court.

This case validated the defense bar's long-held belief that some plaintiffs' lawyers were practicing "double dipping"—delaying the filing of trust claims until after an asbestos personal injury lawsuit is settled or goes to verdict, in order to withhold information regarding alternative exposures from tort system defendants, thus increasing the amount they receive in recovery from those defendants.[10]

> *"This case validated the defense bar's long-held belief that some plaintiffs' lawyers were practicing 'double dipping'..."*

Ohio House Bill 380

With the *Kananian* case still fresh in the public's mind, Ohio House Bill 380 of the 129th General Assembly (H.B. 380) was introduced in the Ohio House of Representatives on November 15, 2011.[11] H.B. 380's goal was to ensure increased transparency and openness in the asbestos litigation process regarding plaintiffs' trust claims by making the court and all involved parties aware of the trust claims as early in the litigation as possible. Importantly, H.B. 380 did not place a cap on the amount of compensation that could be sought by a plaintiff, nor did it limit the number of trusts with which a claimant could file. Where exposure and damages could be proven, according to the standards required by the court or the trusts, all actions and claims were allowed. The bill was designed to ensure that all legitimate claims were pursued simultaneously and that the court and defendants were made aware of all of them.

H.B. 380 was hotly debated in both the Ohio House and Ohio Senate for more than a year, with multiple committee hearings in each chamber. The plaintiffs' bar vigorously opposed the legislation. Proponents offered multiple perfecting amendments, many of which were incorporated in the bill, in order to appease some concerns raised by the opponents of the bill. Despite these efforts, opponents continued to challenge

the bill even as it was approved by the Ohio General Assembly and signed by Governor John Kasich in December 2012. Aside from a handful of Ohio-specific procedural concerns, the opponents' main argument was that the bill could cause endless delays and deny plaintiffs who were still alive, but at risk of dying, the opportunity to see their cases heard in court because:

- The bill would allow defendants to file unlimited motions to stay the case and placed no limit on when the motions could be filed; and
- The bill would allow defendants to dictate the plaintiff's case by providing a process to require plaintiffs to file trust claims.[12]

Thus, opponents argued, H.B. 380 would essentially allow defendants to run out the clock on very sick plaintiffs who would die before the resolution of their cases. Proponents countered that, in cases where plaintiffs' counsel provide full and appropriate disclosures, only minimal, if any, delays would occur.

> *"[T]he opponents' main argument was that the bill could cause endless delays and deny plaintiffs... the opportunity to see their cases heard in court..."*

Provisions of H.B. 380

H.B. 380, which became effective on March 27, 2013, outlines the timing of the disclosure of a plaintiff's trust claims and the procedures that may be employed to ensure that all appropriate trust claims are disclosed and being pursued.

The law provides as follows:

Requires a plaintiff, after commencement of discovery in an asbestos tort action, to submit a sworn statement identifying each existing trust claim and all supporting materials to the court and all parties.

- Timing of disclosure is tied to discovery, as significant periods of time can pass between filing an action and a case being set for trial by the court, at which point discovery commences.
- If the plaintiff or the plaintiff's attorney later discovers new information giving rise to a potential claim(s) against a previously undisclosed trust, the plaintiff must file an amended statement informing the court and other parties about the claim(s).

Permits a defendant to file, not less than 75 days prior to the commencement of trial, a motion for an order to stay the proceedings setting forth the identities of asbestos trusts not previously disclosed where the defendant in good faith believes that the plaintiff may make a successful claim.

- In response, a plaintiff may:
  - File the trust claim(s) with the trust(s) identified in the defendant's motion and upon submission of materials to the court, have the defendant's motion dismissed or the defendant may withdraw the motion.
  - File a response to modify the information to be provided to the identified trust(s) or contest that the facts in the defendant's motion support a claim(s) with the trust(s) identified by the defendant.
  - File a response seeking a determination from the court that the cost to prepare and file the requested trust claim(s) exceeds the plaintiff's reasonably anticipated recovery from the trust(s).

If the court determines that there is a good faith basis for filing a claim with the trust(s) identified in the defendant's motion, H.B. 380 requires the court to stay the proceedings until the plaintiff files the claim(s).

- Where the court determines that the cost to file a claim exceeds the reasonably anticipated recovery, the plaintiff is not required to file the claim but must file with the court a verified statement of the plaintiff's exposure history to the asbestos products covered by that trust.

Generally permits the parties in the action to introduce at trial of the tort claim any trust claims material to prove alternative causation for the claimed injury, death, or loss, to prove a basis to allocate responsibility, and to prove issues relevant to an adjudication of the tort claim.

If the defendant discovers the plaintiff later filed a trust claim with a trust that was in existence at the time a judgment was entered, the defendant may ask the court to reopen the judgment and adjust the award or provide other relief as necessary for up to one year after the entry of the judgment.

Discovery, Grouping and the Cuyahoga County Local Rules for Asbestos Tort Actions

As noted above, one of the plaintiffs' bar's principal arguments against H.B. 380 was that the procedures it requires would delay cases from going to trial, thus denying living mesothelioma plaintiffs a resolution to their case prior to their death. However, before understanding any impact that H.B. 380 might have on delaying adjudication of claims, it is important to appreciate how the court's local rules for asbestos tort actions and a plaintiff's own counsel's conduct might affect when a case comes to trial.

After an asbestos tort action is filed in Cuyahoga County, the next step is for the case to be placed into a trial group, generally referred to as "grouping" the case. The decision on when to group a case is completely controlled by the plaintiff's counsel.[13] The grouping of cases may occur in various ways, but all are determined by plaintiffs' counsel. A couple of times a year, the court contacts plaintiffs' firms to inquire which of their currently filed cases should be grouped for trial. In addition to the court contacting plaintiffs' counsel, plaintiffs' counsel may, upon their own initiative, file a list of cases to be grouped with the court. In situations in which counsel has only an individual case, he or she will contact the court to group the single case.

In reviewing asbestos case dockets for this report, it became clear that while some cases are immediately grouped for trial, it is often many months or longer before other cases are grouped. This is crucial because only once a case is grouped does the discovery process begin and do the requirements of H.B. 380 apply. Thus, in many cases, whether a case is resolved prior to the plaintiff's death has little or nothing to do with the application of the provisions of H.B. 380, and much to do with how the plaintiff's counsel handles the grouping process.

Case Analysis: Selection Methodology and Observations

Following is an examination of the Cuyahoga County asbestos docket in 2010, 2012 and 2014 for the impact of H.B. 380, if any, on cases grouped for trial where the plaintiff, at time of grouping, was living and had been diagnosed with mesothelioma (a "living mesothelioma plaintiff").

The years 2010, 2012 and 2014 were chosen for study as they represent: (1) a year in which most grouped cases should have been unaffected by H.B. 380 (2010); (2) the year prior to the enactment of H.B. 380 in which some cases became subject to H.B. 380 (2012)[14]; and (3) the year after enactment where all grouped cases were clearly subject to H.B. 380 (2014).

As noted above, Ohio's medical criteria legislation greatly reduced the number of new asbestos tort actions filed each year in Cuyahoga County. Even so, as Table 1 illustrates, approximately 100 new cases were filed in each of 2010, 2012 and 2014, with thousands still pending on the docket at the beginning of each year.

Table 1 | Cuyahoga County Court of Common Pleas Asbestos Docket[15]

Year	Incoming Cases	Still Pending at End of Previous Year	Total Cases Available to be Grouped
2010	114	7,118	7,232
2012	102	6,466	6,568
2014	85	5,167	5,252

While the total number of cases on the docket is declining year over year, Cuyahoga County still has a very large and active asbestos docket. Thus, from this larger pool, we narrowed the focus to only those cases in each year that: (1) were grouped; *i.e.*, were at a point in the procedural process where H.B. 380's procedures might have an impact; and (2) were the subject of the opponents of the legislation's greatest concern—cases with a living mesothelioma plaintiff.

Table 2 | Grouped Cases and Grouped Cases With a Living Mesothelioma Plaintiff

Year	All Grouped Cases	Living Mesothelioma Plaintiff Grouped Cases
2010	103	27[16]
2012	96	14[17]
2014	59	17[18]

Reviewing this carefully controlled data set allowed for an in-depth analysis of the potential impacts of H.B. 380 on the course of each case.

General Observations

The number of cases grouped each year was small relative to the total number of pending cases: in each year, less than 1.5% of all cases on the docket were actually grouped for trial. The overwhelming majority of cases on the docket are delayed because they have not met the medical criteria requirements or have not been selected for grouping.

H.B. 380 requires a plaintiff to provide a sworn statement identifying each existing trust claim and all supporting materials to the court and all parties after the commencement of discovery. A defendant has a right to file a motion under H.B. 380 only if the plaintiff does not file the required sworn statement or if a defendant believes in good faith that the plaintiff may make an additional successful trust claim or claims. Thus, where plaintiffs fully comply with the requirements of H.B. 380, any delays in the progress of the tort action are likely due to factors not related to H.B. 380's requirements.

Under the local court rules, after cases are grouped, the plaintiff's counsel and defense liaison counsel prepare a case management order for an eleven-month trial calendar. It is important to understand that asbestos tort actions can be very complicated cases. They involve complex medical conditions and many parties—one case examined in this study had 173 named defendants. Some cases may take years to conclude. However, the goal is for an asbestos tort

> *This suggests that, on the whole, H.B. 380 is not slowing the progression of cases.*

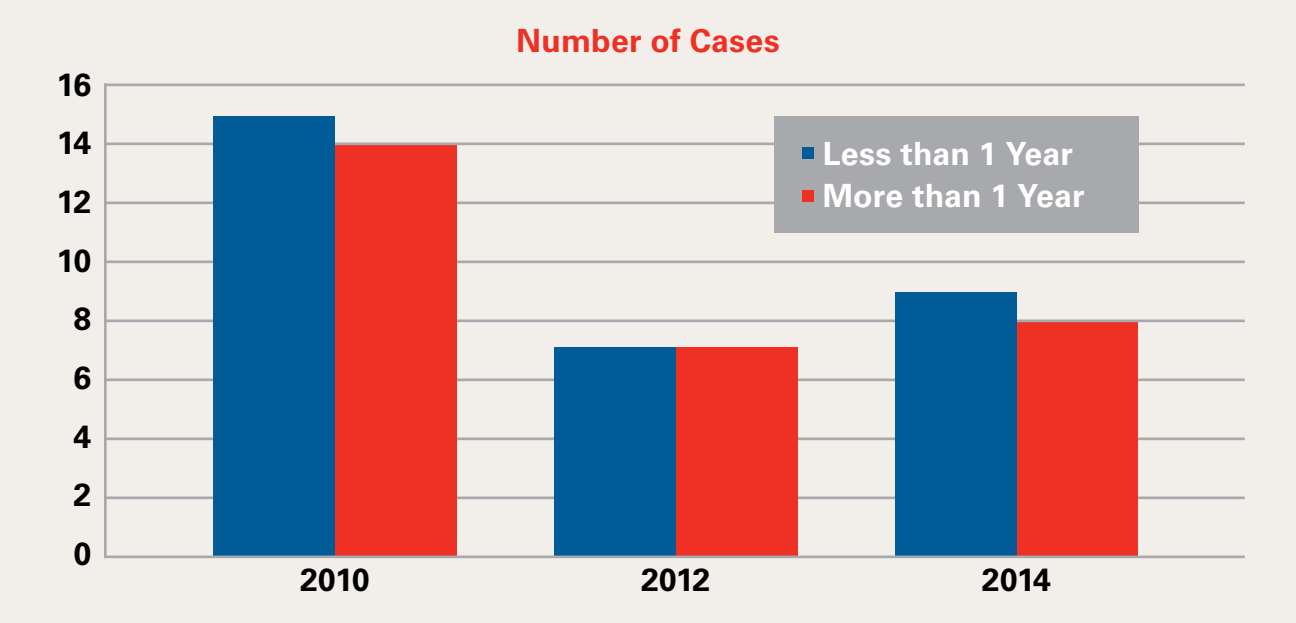
action that is grouped to take approximately one year from the date of grouping until the case is resolved.[19] Thus, we examined the grouped cases to determine how long it took from grouping until the case was resolved and how the H.B. 380 requirements might have impacted that process.

Given that the plaintiff's counsel is largely in control of when a case is grouped and that the goal is for the case to take about a year to either go to trial or settle, we reach two conclusions:

- If the plaintiff passed away less than one year after grouping, it is unlikely that H.B. 380 had any impact on whether the plaintiff would have lived long enough to see the resolution of the case; and
- If the case was resolved within the year time frame, then H.B. 380 did not prolong the case longer than the stated goal for concluding an asbestos tort action.

Table 3 and Chart | Time From Grouping Until Death or Resolution

Year	Living Mesothelioma Plaintiff Grouped Cases	Less Than 1 Year	More Than 1 Year
2010	27	15	12
2012	14	7	7
2014	17	9	8



As seen in the chart above, in approximately half of the cases in each year, the plaintiff either died or the case was resolved within the one-year timeframe. This suggests that, on the whole, H.B. 380 is not slowing the progression of cases.

A notable observation in reviewing cases across all three time periods is the number of times that a case is grouped for trial. Cases are frequently grouped many times over the course of the case and each time a case is grouped anew, a new case management order and trial schedule must be set, thus re-setting the clock. Of the 27 cases examined from 2010, 18 were grouped more than one time. One was grouped seven different times, first in March 2010 and most recently in November 2015, with 13 separate case management orders. Of the 2012 cases, eight of the 14 were grouped more than once, while 12 of the 17 cases from 2014 were grouped more than once. Again, grouping is controlled by plaintiff's counsel and is a key determinant of how long it will take for a case to resolve.

> *"[G]rouping is controlled by plaintiff's counsel and is a key determinant of how long it will take for a case to resolve."*

In-Depth Examination of the Cases

The 2010 Cases

The 2010 cases were examined to provide a better understanding of the pre-H.B. 380 timeline of an asbestos tort action. As the chart above indicates, the 2010 cases look very similar to the 2012 and 2014 cases in terms of time to death or resolution and provide the intended contrast.

Of the 2010 cases where the plaintiff was still living and the case was not resolved within the one-year timeframe, a few were still on the docket in March 2013 when H.B. 380 became effective. Given the length of time that passed between grouping and the effective date of the legislation, we did not conduct an in-depth review of those cases as any delay caused by H.B. 380's requirements at that point would be minor relative to the overall time to resolution.

The 2012 Cases

In researching cases grouped in 2012, as cases can be grouped at any point in the year, it was clear that some of the 2012 cases became subject to the provisions of H.B. 380. Thus, the 2012 cases were not an entirely accurate "before" picture of the docket and hence the addition of the 2010 cases. However, these 2012 cases, particularly in comparison to the 2014 cases, are an interesting window into how parties were adapting to H.B. 380.

Of the 14 living mesothelioma cases grouped for trial in 2012:

- One case was resolved prior the effective date of H.B. 380;
- Four cases have no H.B. 380 plaintiff's sworn statements filed to date;[20]
- One plaintiff filed a notice in compliance with H.B. 380;
- One case involved a defendant filing a letter requesting compliance with H.B. 380, to which the plaintiff responded with a letter declaring that no asbestos trust claims had been filed; and
- Seven defendants filed a motion to compel compliance with H.B. 380.

> *"[A] closer examination shows that plaintiff's counsel's trial tactics had a much larger impact on the timing of the case than any delays associated with H.B. 380 procedures."*

> *[I]n each case where a motion to compel was filed, there was only one motion to compel per case, indicating plaintiffs were likely providing full disclosures in response.*

In seven cases where a defendant filed a motion to compel compliance, we examined whether such a motion delayed or prevented a mesothelioma plaintiff who was still living from seeing his or her case reach trial. For five of these plaintiffs, the defense motion could not have been the cause of delay, because those plaintiffs died before the trust transparency law went into effect in March 2013. Even so, in most of these cases where a defendant filed a motion to compel, the plaintiff responded by filing a notice of compliance within one-to-three weeks of the defendant's motion.

Of the two remaining cases, while dealing with the motions to compel certainly delayed the progress of the case, it only did so for a short time and does not appear to have affected whether or not the plaintiffs were able to have their cases heard prior to death. In each instance, the plaintiff died shortly after the motion was filed and counsel complied by filing a notice. In the first case, the plaintiff died less than a year after his case was grouped; thus, the nine days between filing and compliance had little impact on the delay. Of note, this case is still not fully resolved.

While the second case involved a plaintiff that died more than a year after the case was grouped, a closer examination shows that plaintiff's counsel's trial tactics had a much larger impact on the timing of the case than any delays associated with H.B. 380 procedures. This case was originally grouped by plaintiff's counsel on March 29, 2012. A motion to compel was filed on May 6, 2013, and after the plaintiff's counsel requested two extensions of time to reply, the notice of compliance was filed on May 24, 2013. It appears the plaintiff died on June 25, 2013, more than a year after grouping. While H.B. 380 motion practice delayed proceedings, the delay was minimal: It took only 19 days to resolve the motion to compel.

More importantly to this case, the plaintiff filed four amended complaints, each of which added new defendants. Three of the amended complaints were filed in 2012, and the fourth amended complaint was filed on February 26, 2013, 11 months after the case was originally grouped and just four months before the plaintiff died, each necessitating a new case management order. There were five case management orders filed in 2012 alone and the case was regrouped twice prior to the motion to compel (meaning that a new trial schedule was established). The filing of multiple amended complaints by plaintiff's counsel, which required multiple extensions of the case schedule, was logically a much larger contributor to the delay in this case than the motion to compel, which took only 19 days to resolve.

Also of note in examining the 2012 cases is that in each case where a motion to compel was filed, there was only one motion to compel per case, indicating plaintiffs were likely providing full disclosures in response.[21] Additionally, no motions to stay the case were filed. The fact that there was only one motion to compel per case and no motions to stay also tends to demonstrate that opponents' fears that defendants would use H.B. 380's provisions to file unlimited motions in order to delay the case appear to be unfounded.

The 2014 Cases

The 2012 cases represent a period in which both plaintiffs and defendants were becoming aware of the new procedures and adapting to their requirements. Unlike the 2012 cases, the earliest of the 2014 cases to be grouped were grouped in March 2014, by which point H.B. 380 had been in effect for a year and most counsel should have been fully aware of the requirement to disclose bankruptcy trust claims. As will be described further below, the 2014 cases tend to show that both plaintiffs' and defense counsel were aware of and complying with the requirements of H.B. 380 by 2014.

Of the 17 living mesothelioma cases grouped for trial in 2014:

- Five cases contain no H.B. 380 plaintiff's sworn statements filed to date;
- Nine plaintiffs filed a notice in compliance with H.B. 380;
- Two plaintiffs did not file a notice, but provided the required information as part of the discovery process; and
- One plaintiff filed a notice in compliance with H.B. 380, but a defendant at a later date filed a motion to compel.

In the cases where a notice was filed and disclosure was provided to the defendants, it does not appear that making those filings appreciably delayed procedures. In four of the cases, the notice of compliance was filed with the court only 17 days after the cases were grouped. In the remaining five cases, the notice was filed between one and a half to four months after grouping—presumably to provide notice of trust claims filed after the case was grouped—all well within the one year from grouping to trial goal.

As with the cases where notice was provided, in the two cases where the plaintiff provided the required information

> *"[I]n the 2014 cases ...all plaintiffs were providing the materials as required by the law, or at least provided the information through other means such that the defendants did not file a motion to compel."*

as part of discovery, those disclosures were made in a timely fashion. In one, the information was provided 22 days after filing. In the second, the discovery materials were actually disclosed before the case was grouped for trial.

Additionally, in several of the cases where plaintiffs made the required disclosures, plaintiffs also provided supplemental notices without a defendant filing any motions. Note that in the 2014 cases, no defendants made motions to compel initial compliance with H.B. 380. Unlike in the 2012 cases, all plaintiffs were providing the materials as required by the law, or at least provided the information through other means such that the defendants did not file a motion to compel.

In the only case from 2014 in which a defendant filed a motion, that motion was not to compel initial compliance, but rather to request the plaintiff to file claims with additional trusts. The plaintiff in that case filed the first notice of compliance on September 29, 2014, five months after the case first grouped for trial. A second supplemental notice of compliance was filed on November 26, 2014. On April 29, 2015, one of the 36 defendants in the case filed a motion requesting a stay in the proceedings, as allowed by Ohio Revised Code (R.C.) 2307.953, alleging that the plaintiff's prior disclosures showed that there was at least one additional asbestos trust not previously disclosed where the defendant in good faith believed that the plaintiff could make a successful claim. The plaintiff sought an extension of time to respond and the parties entered a joint stipulation regarding compliance on July 29, 2015. The time from filing the motion for a stay until the joint stipulation was three months.

"It also appears that compliance with H.B. 380 likely did not delay the trial process as most filings were made early in the trial calendar."

While three months was the longest amount of time to resolve an H.B. 380 issue seen in the cases examined, the motion to stay did not prevent a living plaintiff from reaching trial as the plaintiff was already deceased, having died on July 31, 2014. All of the H.B. 380 procedures in this case took place after the plaintiff had died.

Thus, by 2014, it appears both plaintiffs and defendants were aware of and following the procedures of H.B. 380. It also appears that compliance with H.B. 380 likely did not delay the trial process as most filings were made early in the trial calendar. And finally, there was only one motion to stay a case, which was disposed of in three months by the parties working together on a joint stipulation.

Conclusion

The provisions of H.B. 380 were drafted to be limited in scope—to ensure transparency between the asbestos bankruptcy trust claims and tort litigation processes. The bill had two primary goals: (1) to require plaintiffs to disclose all existing bankruptcy trust claims; and (2) to ensure that plaintiffs pursue all legitimate asbestos bankruptcy trust claims. Admittedly, in those instances where a plaintiff does not disclose his or her trust claims and/or does not pursue legitimate trust claims, a defendant's use of the provisions of H.B. 380 could delay the prosecution of an asbestos tort action.

However, as the cases examined for this report demonstrate, when plaintiffs' counsel properly disclose their clients' asbestos trust claims in accordance with H.B. 380, there is no appreciable delay in the prosecution of cases. Further, despite opponents' concerns, it does not appear that defendants are using the provisions of H.B. 380 as a weapon to deliberately delay cases. Though there were clearly some adjustments in the early days of implementation, as seen in the number of motions to compel disclosure in the 2012 cases, it seems that by 2014, most parties had adapted to the new procedures and compliance with H.B. 380 had become routine. In short, H.B. 380 appears to have accomplished its goal: to ensure transparency and fairness without imposing significant burdens on plaintiffs.

> *"[W]hen plaintiffs properly disclose their asbestos trust claims in accordance with H.B. 380 there is no appreciable delay in the prosecution of cases."*

Endnotes

1 *Borel v. Fibreboard*, 493 F.2d 1076 (5th. Cir. 1973).

2 RAND Corporation. Asbestos Litigation, (2005). http://www.rand.org/pubs/monographs/MG162.html.

3 "Where Are They Now, Part Eight: An Update On Developments In Asbestos-Related Bankruptcy Cases," Mealey's Asbestos Bankruptcy Report, Vol. 16, No. 2 (September 2016). Co-Authors: Mark D. Plevin, Tacie H. Yoon, Leslie A. Davis, Brendan V. Mullan, Belinda Y. Liu, and Galen P. Sallomi.

4 www.asbestos.com, maintained by The Mesothelioma Center.

5 *Id.*

6 This is in part because plaintiffs' firms are intimately involved in the establishment of the trust. The formation of a reorganization plan and resultant trust under federal bankruptcy law involves negotiations with representatives of asbestos personal-injury claimants, the debtor, the legal representative for future claimants ("FCR") and other creditor constituencies with standing in the bankruptcy. "Asbestos Bankruptcy Trusts: A 2013 Overview Of Trust Assets, Compensation & Governance," Mealey's Asbestos Bankruptcy Report, Vol. 12, No. 11 (June 2013). Co-Authors: Marc Scarcella and Peter R. Kelso.

7 *Id.*

8 Mesothelioma is one of the diseases linked to exposure to asbestos. It is a type of cancer that develops in the thin layer of tissue that covers many of the internal organs (known as the mesothelial tissue). The most common area affected is the lining of the lungs, chest wall and abdomen. Mesothelioma may also form in the tissue surrounding the heart or testicles, but this is rare. It typically takes 20-50 years for a malignancy to form. In addition to the long latency period, symptoms generally develop slowly, thus many patients' cancer has reached an advanced stage by the time of diagnosis. Due to the current lack of effective treatments, the prognosis for most mesothelioma patients is poor and many die soon after diagnosis. Plaintiffs with mesothelioma typically receive the largest awards from both tort actions and asbestos bankruptcy trust claims. www.cancer.gov, maintained by the National Cancer Institute at the National Institutes of Health; www.asbestos.com, maintained by The Mesothelioma Center.

9 *Kananian v. Lorillard Tobacco Company*, No. CV-07-442750 (Ohio Cuyahoga County Com. Pl.; Order Opinion dated Jan. 18. 2007).

10 See *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (Bankr. W.D.N.C. Jan. 10, 2014), for another examination of "double dipping" in asbestos tort claims. See also, "The Double-Dipping Legal Scam: Bogus asbestos claims break into the open in federal court," The Wall Street Journal, December 26, 2014.

11 The provisions of H.B. 380 were enacted as sections 2307.951, 2307.952, 2307.953, and 2307.954 of the Ohio Revised Code—*see* http://codes.ohio.gov/orc/.

12 Written statements are on file with the authors.

13 Part of the reason the court defers to plaintiff's counsel as to which cases are put into trial groups is due to the production requirements that must be met after a case is grouped. A plaintiff must produce the following information within seven (7) days of grouping:

- Answers and responses to Defendants' Master Consolidated Discovery Requests;
- Medical substantiation that plaintiff suffers from mesothelioma, asbestos related cancer or an asbestos related functional impairment;

- Forms authorizing plaintiff's social security information, medical records, workers' compensation records and tax returns;

- Name and addresses of witnesses upon whose testimony such plaintiff intends to rely to establish product identification;

- Product list and/or work history upon which plaintiffs set forth specific information upon which plaintiff bases the naming of that particular defendant and;

- Notification to each defense counsel of any original radiology or pathology materials.

14 The provisions of H.B. 380 "apply to asbestos tort actions filed on or after the effective date of this act and to pending asbestos tort actions in which trial has not commenced as of the effective date of this act." The effective date of the Act was March 27, 2013.

15 Statistics provided by the Supreme Court of Ohio.

16 *Richard Olup, et al. v. Basf Catalysts LLC, et al.*, CV-09-703101; *Frederick Norton, Jr., et al. v. Bondex International Inc., et al.*, CV-09-700570; *Richard Dean Haynes v. Armstrong International, Inc., et al.*, CV-09-695112; *Jerome Steinker, et al. v. N. L. Industries, Inc., et al.*, CV-09-705550; *Michael Brown v. Ford Motor Company, et al.*, CV-09-702689; *Ervin Wairse, Jr., et al. v. AW Chesterton Co., et al.*, CV-09-712448; *Rudolph Nardo, et al. v. Adience, Inc., et al*, CV-10-723695; *Michael Tucker, et al. v. Compudyne Corp., et al.*, CV-09-711927; *John T. George, et al. v. Oglebay Norton Co., et al.,* CV-06-591242; *Richard Hall v. Clark Industrial Insulation, et al.*, CV-10-719933; *Paul K. Neumayer v. AW Chesterton Co., et al.*, CV-10-718123; *Robert Woidke, et al. v. AW Chesterton Co., et al.*, CV-10-724456; *Oscar J. Porter, et al. v. Foseco, Inc., et al.*, CV-10-725436; *James Tresler, et al. v. AW Chesterton Co., et al.*, CV-10-725047; *Ronald Fellenbaum v. CSR Ltd., et al.*, CV-10-723591; *Ann M. Krist v. AW Chesterton Co., et al.*, CV-10-719863; *Franklin J. Carsey v. AW Chesterton Co., et al.*, CV-10-721091; *Thomas J. Klier, et al. v. AW Chesterton Co., et al.*, CV-06-596014; *James L. Kitts, et al. v. Foseco, Inc., et al.*, CV-09-696442; *Roberts Lester, et al. v. AW Chesterton Co., et al.*, CV-10-724197; *Dale D. Lather, et al. v. AW Chesterton Co., et al.*, CV-10-728597; *Oscar L. Brown, Jr., et al. v. AW Chesterton Co., et al.*, CV-10-730714; *Daniel T. Siwik, et al. v. Foseco, Inc., et al.*, CV-10-730715; *Roland Bailey, et al. v. AW Chesterton Co., et al.*, CV-10-735422; *Ronald D. Schnell, et al. v. BW/IP International, Inc., et al.*, CV-10-730716; *Clyde Hupp, et al. v. Adience, Inc., et al.*, CV-10-742765; *Judith A. Clark v. AW Chesterton Co., et al.*, CV-10-740669.

17 *Arthur E. McClinsey, Sr. et al. v. Allied Corp., et al.*, CV-11-771056; *Joanne Savchek v. AW Chesterton Co., et al.*, CV-12-773555; *Edward C. Majeski, et al v. American Optical Corp., et al.*, CV-12-773075; *Raymond L. Meshnick, et al. v. CSR Limited*, CV-12-774743; *David J. Dyer, et al. v. AW Chesterton Co., et al.*, CV-12-776742; *Roger D. Lenke, et al. v. Allied Corp., et al.*, CV-12-774744; *Robert P. Artz, et al. v. AW Chesterton Co., et al.*, CV-12-779154; *Bruce Wilbur, et al. v. American Bilrite, Inc., et al.*, CV-12-779355; *Roberto R. Perez, et al. v. AW Chesterton Co., et al.*, CV-12-745022; *Gene Applegate, et al. v. Goodyear Tire & Rubber Co., et al.*, CV-05-565913; *John R. Panza, Jr. v. BorgWarner Morse Tech, Inc.*, CV-12-789009; *Terry Spring, et al. v. Ahlstrom Pumps LLC, et al.*, CV-12-789823; *Chester R. Dworaczyk, et al. v. Heidelberg Americas, Inc., et al.*, CV-12-781321; *William J. Witt, et al. v. AO Smith Corp, et al.*, CV-12-794750.

18 *Delores M. Kamcza v. Clark Industrial Inc., et al.*, CV-13-813962; *William McCreery, et al. v. Honeywell International, et al.*, CV-14-822455; *Maria Varveri, Individually and as Executrix of the Estate of James Varveri, et al. v. AC and S, Inc., et al.,* CV-423997; *Richard P. Wilson, et al. v. American Optical Corp., et al.*, CV-14-823122; *Ian W. Blandford, et al. v. A. O. Smith Corp, et al.*, CV-13-818711; *Michael D. Sowards, et al. v. Honeywell International, Inc., et al.*, CV-14-822782; *Larry H. Heckaman v. AW Chesterton, Co., et al.*, CV-14-822146; *Richard Gilb, et al. v. Ford Motor Co., et al.*, CV-14-822147; *Theodore A. Kurela, et al. v. American Optical Corp., et al.*, CV-14-824440; *Marsha A. Newman v. American Optical Corp., et al.*, CV-13-818709; *Richard Frontz, et al. v. BorgWarner Morse Tec. Inc., et al.*, CV-12-781235; *Jimmy Louis Ellison, et al. v. Clark Industrial Insulation Co., et al.*, CV-14-829195; *M.C. Lawler, et al. v. Carlisle Co. Inc., et al.*, CV-14-829464; *Norman B. Toler, et al. v. Donald McKay Smith Inc., et al.*, CV-14-831470; *Donald O. MacLachlan, et al. v. AW Chesterton, Co., et al.*, CV-03-429051; *Alvie Ward, et al. v. A-Best Products Company, et al.*, CV-425918; *Carol L. Zenisek, et al. v. Ford Motor Co., et al.*, CV-14-830170.

19 Case Management Order Implementing LexisNexis Fileandserve, section C, e-filed by Judges Harry A. Hanna and Leo M. Spellacy on July 11, 2003, on fileandservexpress.com, master case number MC CV-073958, transaction number 2140172.

20 H.B. 380 only requires the plaintiff to file a sworn statement regarding asbestos trust claims already filed and to update the court if any filings are made during the course of the proceedings —there is no requirement to file where no asbestos trust claims have been made.

21 In Cuyahoga County, typically the defense liaison counsel files these motions on behalf of all defendants—thus there would only be multiple motions if plaintiff's disclosures indicated additional possible trust claims.

Notes

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