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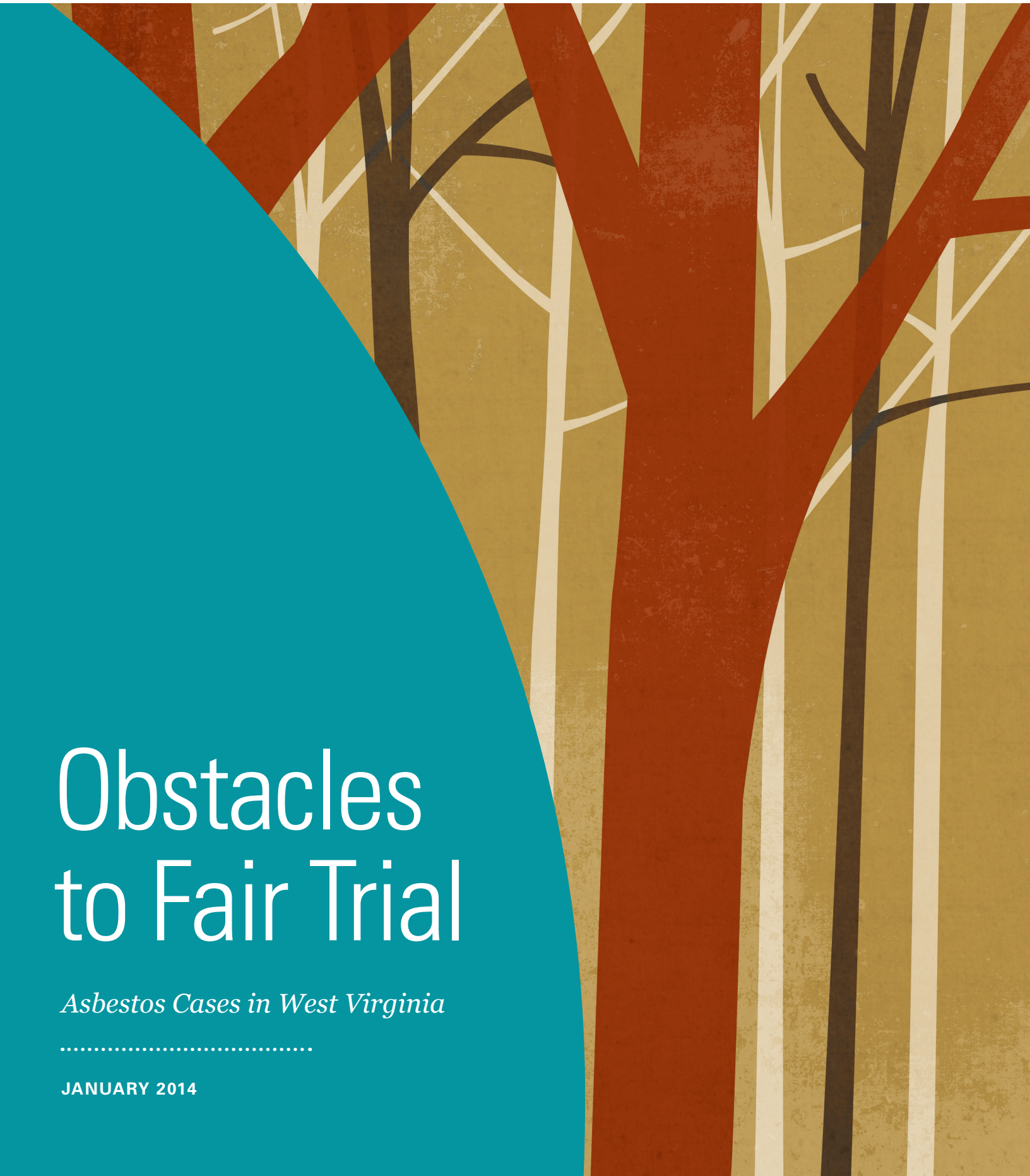

Obstacles to Fair Trial

Asbestos Cases in West Virginia

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Introduction

Asbestos litigation has become an increasingly critical issue to West Virginia's civil justice system over the past few decades. Despite the West Virginia courts' efforts to efficiently administer asbestos litigation, the current system has significant problems that interfere with defendants' right to justice. The asbestos litigation process in West Virginia effectively constrains defendants' ability to defend cases on the merits and, conversely, incentivizes plaintiffs' counsel to pursue and file questionable claims. This white paper addresses the history of asbestos litigation in West Virginia, identifies some of the significant problems with the current system, and proposes meaningful reforms.

An Overview of Asbestos Litigation in West Virginia

Asbestos—a substance once renowned for its heat resistance, tensile strength, and insulating properties—became a mainstay in industrial settings in the late 19th century. Over the following decades, individuals employed in a variety of jobs, trades, and industries worked with asbestos until the adverse health impacts associated with asbestos exposure became known.

The health conditions most closely associated with asbestos exposure are mesothelioma and lung cancer. The symptoms associated with mesothelioma are significant, and the prognosis for diagnosed individuals is often poor. The manifestation of symptoms and the subsequent mesothelioma diagnosis may not occur until decades after the actual asbestos exposure occurred. Similarly, lung and other cancers may also not manifest until years after any asbestos exposure. This prolonged latency period for lung and other cancers poses unique legal issues because, unlike mesothelioma, such diseases are not unique to asbestos. Rather, the cancers most often attributed to asbestos exposure are either not tied to any particular substance/environmental factor or, as is the case with lung cancer, are closely tied to other, independent environmental factors, such as smoking.

Because of the widespread use of asbestos and the severe and latent nature of many of the health conditions related to exposure, asbestos litigation has been prevalent for the past thirty years, and the claims of asbestos-related health conditions continue to grow. Asbestos litigation is the longest-running mass tort litigation in U.S. history.

Defendants and their insurers have spent billions of dollars defending asbestos-related claims brought under a variety of legal theories. Data from 1982 and 2002 reveal that the number of claimants alleging asbestos-related injuries rose from 1,000 to 730,000, and the number of companies sued in such cases increased from 300 to 8,400.[1] As a result of the volume and

expense of asbestos litigation, many of the major manufacturers of thermal insulation products (which contained high percentages of the most dangerous asbestos fiber types)—e.g., Johns Manville and Owens Corning—have declared bankruptcy in part because of asbestos liabilities. In fact, it is estimated that asbestos litigation has been the primary cause of nearly 100 corporate bankruptcies.[2]

While the bankruptcies of these major players left more peripheral (yet solvent) entities as the focus and target of ongoing litigation, many of the bankrupt companies established trusts to compensate injured individuals who were exposed to asbestos through use of their products. Estimates suggest that the cumulative trusts have "tens of billions in assets to pay claims" and that established asbestos trusts paid out more than $15 billion to claimants between 2006 and 2012.[3]

Increase in Asbestos Claimants and Defendants[4]

	1982	2002
Claimants	**1,000**	**730,000**
Defendants	**300**	**8,400**

Trial-and-Error: Efforts to Manage the High Volume of Asbestos Litigation

In order to manage the high volume of asbestos litigation, West Virginia courts consolidated thousands of cases to conduct mass trials. This approach had many flaws, not the least of which were the effective removal of plaintiffs' burden of proof and the overwhelming expense inherent in preparing for a consolidated trial.

In light of such drawbacks, settlement became the only practical option for defendants, and inflated settlement values resulted. Not surprisingly, the resulting "settlement culture" also drew attention to West Virginia as a plaintiff-friendly forum. This consolidated system created a strong disincentive for defendants to bring cases to trial, no matter how weak a claim a plaintiff presented. Settlement of all claims—regardless of their merit—became the only way in which a defendant could handle asbestos litigation.

In the early 2000s, a Case Management Order (CMO) was adopted and imposed on all asbestos cases with the goal of better managing the large docket, providing a fairer trial system, and ensuring that plaintiffs with the most serious illnesses were afforded a day in court.[5]

One of the earliest iterations of the CMO in May 2001 established the practice of filing master pleadings and discovery (i.e., pleadings that are not specific to any particular plaintiff or case) to be later

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supplemented with plaintiff-specific information sheets.[6] Notably, the May 2001 CMO also provided for three group trials to be held during a five-month period and contemplated that 170 distinct cases would be litigated and disposed of during those three trials.[7]

The CMO has evolved significantly over the last 12 years, with at least four subsequent CMOs substantially altering the trial group system.[8] For example, in March 2003, less than two years after the entry of the May 2001 CMO, a revised CMO was entered that:

- contemplated initial proceedings before the Mass Litigation Panel that were later transferred to a sitting Circuit Court judge for administration and trial;
- required each plaintiff to disclose asbestos-related bankruptcy claims filed against any defendant;
- established a trial group system that consisted of six annual trial groups, provided strict restrictions on when multiple plaintiffs could be tried together, and prohibited a trial group from including more than ten cases; and
- provided that cases would be selected for trial based on the date on which the case was filed.[9]

Notably, the restriction on the number of cases to be included in a trial group was revised just 16 months later, as Judge Wilson entered an Addendum to the CMO in September 2004 that permitted trial groups over which he was presiding to include 20 cases.[10]

The most recent significant revision to the CMO occurred in 2010. At that time, Section 22 of the CMO (titled "Claims Against Bankruptcy Trusts") was revised such that:

- each plaintiff is required to disclose at least 120 days prior to trial "a statement of any and all existing claims that may exist against asbestos trusts[,]" as well as "when a claim was or will be made, and whether there has been any request for deferral, delay, suspension or tolling of the asbestos trust claims process";
- each plaintiff must "produce final executed proofs of claim" as well as any information or documentation related to claims made with asbestos trusts;
- defendants are "entitled to set-offs or credits of the paid liquidated value of the trust claims against any judgment rendered against them in the asbestos action"; and
- sanctions may be imposed for failure to comply with the bankruptcy trust-related requirements.[11]

This revision dramatically expanded plaintiffs' obligations with respect to bankruptcy trust claims. Specifically, this more robust requirement would guard against the risk of "double-dipping" (i.e., a plaintiff recovering from bankruptcy trusts, failing to disclose such recovery, and then recovering a second time from other defendants through civil litigation), and uncover any prior inconsistent representations a plaintiff may have made regarding the source of his or her exposure

(e.g., contending that one entity was the sole source of exposure in a bankruptcy trust claim, only later to accuse other defendants of exposure in a civil case). Information from trust claims is relevant and important to defendants considering whether to pursue a case through trial. The information also impacts defendants in settlement discussions with plaintiffs.

After more than a decade of significant asbestos litigation and a CMO that has evolved to address the challenges presented by litigation, asbestos litigation in West Virginia can be described as follows:

- all asbestos cases are assigned to one judge and his/her staff;
- three trial groups are held each year;
- each trial group consists of 20 plaintiffs;
- plaintiffs unilaterally disclose the 20 selected plaintiffs/cases for each trial group 275 days before the trial date; and
- plaintiffs must provide various disclosures, releases, and information, including the bankruptcy affidavit contemplated by the 2010 amendment to the CMO and discussed above within prescribed deadlines.[12]

Work to be Done: Lingering Obstacles to a Fair Trial

The courts' efforts and current CMO have produced some positive results. For example, the current system provides predictability with respect to the timing and volume of cases that defendants will litigate in a given year. Because many defendants have developed "historical settlement values" over the past decade of litigation, the current system also permits defendants to estimate their annual potential liability.

Despite these efforts, it remains difficult to achieve a fair and just resolution of an asbestos claim in West Virginia. Defendants continue to face many obstacles that impose undue pressure to settle asbestos cases, even when the merits strongly suggest otherwise. Specifically, the number of cases defendants must litigate in each trial group, the overlapping timing of the trial groups, and plaintiffs' repeated failure to comply with the CMO, including the newly-expanded bankruptcy trust disclosure requirements, impose a tremendous strain on defendants. These burdens impact defendants' ability to meaningfully contest the merits of a particular case, bring a case to trial, and engage in fair settlement negotiations.

SO MUCH LITIGATION, SO LITTLE TIME

The 275-day timeframe from the disclosure of selected plaintiffs and cases to trial is inadequate for defendants to meaningfully defend these cases. Nine months is an ambitious litigation timeframe in any context. However, in West Virginia's asbestos litigation system, nine months is standard for the full development of all 20 cases in a trial group (each of which involves dozens of defendants and often decades of alleged exposure). Three other trial groups (collectively consisting of 60 additional cases) are "in the pipeline" at the same time.

October 2012 Trial Group	Date	Concurrent Deadlines for Other Trial Groups
Plaintiffs' counsel designates 20 cases for trial group	Jan. 2012	Feb 2012 TG: Close of discovery Feb 2012 TG: Dispositive motions due Feb 2012 TG: Motions in limine due June 2012 TG: Plaintiffs disclose product and premises ID witnesses June 2012 TG: Plaintiffs disclose expert witnesses
Plaintiffs' initial disclosures due; Plaintiffs' medical releases provided	Feb. 2012	Feb 2012 TG: Trial of 20 distinct cases June 2012 TG: All parties' exhibit lists due
Plaintiffs' Fact Sheets due	Mar. 2012	June 2012 TG: Last day to serve written discovery
Plaintiffs' bankruptcy affidavits due	Apr. 2012	
Plaintiffs disclose product and premises ID witnesses; Plaintiffs disclose expert witnesses	May 2012	June 2012 TG: Close of discovery June 2012 TG: Dispositive motions due June 2012 TG: Motions in limine due Feb 2013 TG: Plaintiffs' counsel to designate 20 cases for trial group Feb 2013 TG: Plaintiffs' initial disclosures due
All parties' exhibit lists due	June 2012	June 2012 TG: Trial of 20 distinct cases Feb 2013 TG: Plaintiffs' medical releases provided
Last day to serve written discovery	July 2012	Feb 2013 TG: Plaintiffs' Fact Sheets due
	Aug. 2012	Feb 2013 TG: Plaintiffs' bankruptcy affidavits due
Close of discovery; Dispositive motions due; Motions in limine due	Sept. 2012	Feb 2013 TG: Plaintiffs disclose product and premises ID witnesses Feb 2013 TG: Plaintiffs disclose expert witnesses
TRIAL of 20 distinct cases	Oct. 2012	Feb 2013 TG: All parties' exhibit lists due

> *When plaintiffs fail to abide by the court's deadlines, defendants are deprived of the opportunity to efficiently and effectively defend against the subject cases.*

As evidenced by this timeline, the 275 days provided for the development of the 20 cases in any trial group are hardly reserved exclusively for those 20 cases. Rather, three other trial groups (60 additional cases) will also be litigated during that 275-day period.

Further, it is important to consider that the CMO timeline does not reflect the actual pace of litigation, as plaintiffs routinely fail to make timely disclosures, respond to properly-served discovery, and/or make witnesses and parties available for deposition. Considering that so little time is afforded defendants to defend the selected cases, plaintiffs' disregard for the established schedule further burdens an already stressed system. When plaintiffs fail to abide by the court's deadlines, defendants are deprived of the opportunity to efficiently and effectively defend against cases.

ANOTHER DAY, ANOTHER 9,000 MOTIONS

To understand and appreciate the burden of voluminous asbestos filings, consider the June 2013 Trial Group.

As with every trial group, a deadline was established by which all parties involved in the June 2013 Trial Group were required to file motions in limine (motions in which the filing party asks the court to rule, in advance of trial, on the admissibility of evidence of a certain nature). For the June 2013 Trial Group, the motion in limine deadline was May 23, 2013, which was less than one month before trials were set to begin on June 18, 2013.

A review of the file for just one of the 20 cases designated as part of the June 2013 Trial Group reveals that more than 450 motions in limine were filed in that single case on May 23, 2013.

When that number is extrapolated to the other 19 cases in the June 2013 Trial Group, it is possible that more than 9,000 motions in limine were filed with the court that day.

This projection reflects only motions in limine. It does not take into account motions to dismiss, motions for summary judgment, motions to compel discovery, or other types of pre-trial motions that are also regularly filed in significant quantities. It is easy to understand, then, how the process—even after years of modification in an effort to make it manageable for the court and the parties—is simply overwhelming and creates a serious impediment to fair and just results.

CMO REQUIREMENTS — PLENTY OF BARK, NOT ENOUGH BITE

Solutions to a problem are only helpful if they are followed and enforced. Unfortunately, violations of the schedules mandated in the CMO are not the only instances in which plaintiffs' disregard for the CMO burdens defendants.

The promise of the 2010 expansion of the bankruptcy trust disclosure requirement has gone largely unfulfilled, as plaintiffs' counsel often submit incomplete and/or incorrect affidavits. Such failures defeat the purpose of the requirement, which is to provide defendants with accurate knowledge regarding a plaintiff's prior representations regarding alleged exposure, as well as accurate knowledge regarding the amount of a judgment in the event of a plaintiff's verdict at trial. Without complete and correct information regarding plaintiffs' bankruptcy trust claims, defendants are hard-pressed to reasonably assess their actual exposure at trial and are deprived of information that is highly relevant to settlement discussions. Given the volume of filings and the amount of time available to devote to each case, any efforts to compel compliance with the bankruptcy trust disclosure requirement (or any other aspect of the CMO) are futile.

These examples of over-scheduling, mass filings, and CMO non-compliance illustrate that reasonable adjudication of issues—including potential non-compliance with the 2010 bankruptcy trust disclosure requirements—is not currently available. In fact, the current system forces so much litigation into so small a timeframe that a *de facto* settlement system has resulted. Defendants are essentially extorted into paying settlements to plaintiffs.

Non-target defendants (defendants who are parties to a case only because they have previously been sued in asbestos cases) are forced to spend significant time and money because dismissal for lack of product or premises identification rarely (if ever) occurs prior to trial. The environment is equally hostile to target defendants (those defendants that a plaintiff has cause to believe may have actually been responsible for his or her alleged exposure).

The system operates such that all defendants—regardless of the merit of the claims levied against them—are forced to invest significant effort and resources in each case, yet have no reasonable opportunity for a merit-based adjudication of the same.

> *"The current system forces so much litigation into so small a timeframe that a* de facto *settlement system has resulted, and defendants are essentially extorted into paying settlements to plaintiffs."*

Next Steps: Embracing Meaningful Reform

For the reasons discussed herein, among others, the current asbestos litigation system in West Virginia creates significant barriers to defendants who have legitimate defenses to claims and want fair settlement discussions. These same barriers that work against defendants function as incentives to plaintiffs' counsel, who understandably view West Virginia as a plaintiff-friendly forum to file and pursue claims.

PROPOSAL: CODIFY THE CMO'S BANKRUPTCY TRUST DISCLOSURE REQUIREMENT

The 2010 expansion of the bankruptcy trust disclosure requirement was intended to counter the existing "settlement culture" by arming defendants with relevant information regarding plaintiffs' prior recoveries. The plaintiffs' bar has continued to disregard the requirements of the CMO. One critical proposal for strengthening enforcement of the CMO's bankruptcy trust disclosure requirement is to enact that requirement into law.

A statutory obligation to comply with the bankruptcy trust disclosure requirement (as opposed to an order issued by the court) would be a strong step in the right direction. Legislative action would provide defendants that are prejudiced by incomplete and/or incorrect bankruptcy trust disclosures with rights that could be enforced by law. Imposition of civil penalties for failure to disclose bankruptcy trust claims and recoveries would also encourage compliance with the disclosure requirement.

PROPOSAL: EXTEND THE TIME ALLOTTED FOR THE LITIGATION OF EACH TRIAL GROUP

The current timeframe provided for the development of claims and defenses prior to trial renders impossible the comprehensive development and adjudication of defenses. While 20 cases are litigated for one trial group in a 275-day period, 60 additional cases are also in various stages of litigation. This never-ending cycle of asbestos litigation damages the integrity of the system.

To mitigate these problems, the designation of cases for a trial group should begin significantly earlier than 275 days prior to trial. Providing additional time for the preparation of cases (in a manner that does not simply result in more trial groups proceeding simultaneously) would permit three trial groups to be litigated and resolved annually, while affording the parties and the court more time to consider the issues presented in each subject case. Providing additional time for parties to develop a case and/or a defense and for the court to substantively consider and rule on the issues would undoubtedly improve the opportunity for fair and just asbestos litigation.

Endnotes

1 Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. Econ. Persp. 183-204 (2004).

2 Marc C. Scarcella & Peter R. Kelso, *Where Are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11 Mealey's Asbestos Bankruptcy Report (2012).

3 Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12 Mealey's Asbestos Bankruptcy Report (2013).

4 Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. Econ. Persp. 183-204 (2004).

5 First Master Case Management Order, *In re* Asbestos Personal Injury Litig., No. 01-C-9000 (W. Va. Cir. Ct. Kanawha County May 23, 2001).

6 *Id.*

7 *Id.*

8 As is apparent from the brief discussion herein, the trial group system has varied significantly over time. For example, the various CMOs have sometimes mandated the trial of 300 cases in a single year (as planned for 2002) and at other times have capped the annual number of cases at 60 (as has been the case since at least May 2010). Similarly, the annual number of trial groups has significantly fluctuated: the March 2003 CMO provided for only two trial groups in 2003, whereas that same CMO contemplated six trial groups in 2005. While some significant revisions and the current system are addressed in this paper, this document does not purport to provide a fully-comprehensive review of the evolution of asbestos CMOs in West Virginia.

9 Case Management Order, *In re* Asbestos Personal Injury Litig., No. 03-C-9600 (W. Va. Cir. Ct. Kanawha County Mar. 25, 2003).

10 Addendum to Case Management Order, *In re* Asbestos Personal Injury Litig., No. 03-C-9600 (W. Va. Cir. Ct. Kanawha County Sept. 22, 2004).

11 2010 Asbestos Case Management Order with Attached Exhibits, *In re* Asbestos Personal Injury Litig., No. 03-C-9600 (W. Va. Cir. Ct. Kanawha County May 14, 2010).

12 2012 Asbestos Case Management Order with Attached Exhibits, *In re* Asbestos Personal Injury Litig., No. 03-C-9600 (W. Va. Cir. Ct. Kanawha County Jan. 6, 2012).

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