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BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

"THE NEED FOR TRANSPARENCY IN THE ASBESTOS TRUSTS"

FEBRUARY 3, 2016

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Chairman Grassley, Ranking Member Leahy, and Members of the Committee, thank you for allowing me the opportunity to testify on the need for transparency in the asbestos trusts.

I co-chair the Washington, D.C.-based Public Policy Group of Shook, Hardy & Bacon L.L.P., an international law firm that primarily represents corporate defendants in product liability and complex tort litigation. I spend a substantial amount of my time examining and writing about asbestos litigation trends and issues. My clients include business associations, civil justice organizations, defendants in asbestos cases, and insurers. Some of my testimony today reflects written testimony I provided to a Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association's Tort Trial and Insurance Practice Section in 2013. In addition to my testimony I am submitting a December 2015 ILR report, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims*, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/TheWaitingGame_Pages.pdf.

TESTIMONY

I. OVERVIEW OF THE ASBESTOS LITIGATION

Asbestos personal injury litigation has been going on for over forty years[1] and shows no signs of abating.[2] "Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years."[3]

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1 *See Borel v. Fibreboard Paper Products Corp*., 493 F.2d 1076 (5th Cir. 1973) (asbestos manufacturers found strictly liable for injuries to industrial insulation workers exposed to their products), *cert. denied*, 419 U.S. 869 (1974).

2 *See* Mary Elizabeth Stern & Lucy P. Allen, *Defense Costs Dropped in 2014, While Claim Filings, Dismissal Rates, and Indemnity Dollars Remained Steady*, at 1 (NERA Economic Consulting June 4, 2015) (review of asbestos-related liabilities reported to the SEC by over 150 publicly traded companies revealed that "[f]ilings have shown no decline in the last seven years,

In earlier years, the asbestos litigation typically pitted a "dusty trade" worker with lung cancer, mesothelioma, or impairing asbestosis "against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location."[4] Much of this work involved insulation containing long, rigid amphibole fibers, rather than the more common, but far less toxic, chrysotile form of fiber.[5] Occupations such as shipbuilders and Navy personnel working around heavy amphibole asbestos exposures on World War II ships, insulators blowing large clouds of free amphibole or mixed fibers, and asbestos factory workers exposed to "snowstorms" of raw asbestos were classic settings for older cases and for known sources of asbestos disease.[6]

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a finding that is perhaps inconsistent with predictions of epidemiological models."); *see also* Jenni Biggs *et al*., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013) (mesothelioma claim filings have "remained near peak levels since 2000.").

3 Biggs *et al*., *supra*, at 5.

4 James S. Kakalik *et al*., *Costs of Asbestos Litigation* 3 (Rand Corp. 1983);

5 *See, e.g., In re Asbestos Litig.*, 911 A.2d 1176, 1181 (Del. Super. May 9, 2006) ("[I]t is generally accepted in the scientific community and among government regulators that amphibole fibers are more carcinogenic than serpentine (chrysotile) fibers."), *cert. denied*, 2006 WL 1579782 (Del. Super. June 7, 2006), *appeal refused*, 906 A.2d 806 (Del. Super. June 13, 2006); *Bartel v. John Crane, Inc*., 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) ("While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma."), *aff'd sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

6 *See* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 103 (2013) ("Miners, ship workers, construction workers, and those involved in manufacturing other asbestos-based products were at the highest risk of contracting such [asbestos-related] diseases."); James S. Kakalik *et al*., *Variation in Asbestos Litigation Compensation and Expenses* vi-vii (Rand Corp. 1984) ("For the sample claims closed by all or nearly all defendants in the 32 months we studied…[t]hree worker classifications accounted for the vast majority of asbestos-related litigation: shipyard workers (37 percent of all closed claims); asbestos-related factory workers (35 percent); and insulation workers (21 percent).

By the late 1990s, the asbestos litigation had reached such proportions that the Supreme Court of the United States noted the "elephantine mass" of cases[7] and referred to the litigation as a "crisis."[8] The vast majority of claims in this era were filed by unimpaired plaintiffs diagnosed largely through lawyer-arranged mass screenings.[9] Mass filings by the non-sick pressured many historical asbestos defendants to seek bankruptcy court protection. Each of these bankruptcies put mounting and cumulative financial pressure on other primary defendants, creating a domino effect. The result was a flood of bankruptcies from 2000-2002.[10]

As a result of these bankruptcies, the litigation "spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."[11] The focus of plaintiff

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7 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

8 *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

9 *See* American Bar Association Commission on Asbestos Litigation, *Report to the House of Delegates* (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/recommendations03/302.authcheckdam.pdf; Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1 ("Very few new plaintiffs have serious injuries, even their lawyers acknowledge."); *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."); *Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co*., 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed.").

10 *See* Mark D. Plevin *et al.*, *Where Are they Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11:7 Mealey's Asbestos Bankr. Rep. 1, Chart 1 (Feb. 2012) (documenting four asbestos-related bankruptcies in 2000, 12 in 2001, and 13 in 2002 – nearly as many as in the previous two decades combined).

11 Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract at* 2001 WLNR 1993314; *see also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007) ("The surge of bankruptcies in 2000-2002…triggered higher settlement demands on other established defendants, including those attempting to ward off bankruptcy, as well as a search for new recruits to fill the gap in the ranks of defendants through joint and several liability."); Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiii (RAND Corp.

attorneys shifted "away from the traditional thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products."[12]

The dockets reflect that the litigation has moved beyond the era in which manufacturers, producers, suppliers, and distributors of friable asbestos-containing products such as thermal insulation or raw asbestos are the principal defendants.[13] The expanded range of defendants has produced exponential growth in the dimensions of the litigation. The Towers Watson consulting firm has identified "more than 10,000 companies, including subsidiaries, named in asbestos litigation."[14] Companies that used to be seen as peripheral defendants are "now bearing the

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2005) ("When increasing asbestos claims rates encouraged scores of defendants to file Chapter 11 petitions…the resulting stays in litigation…drove plaintiff attorneys to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.").

[12] Marc C. Scarcella *et al*., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27:19 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012); *see also* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 306 (2013) ("Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years."); Charles Bates *et al*., *The Naming Game*, 24:15 Mealey's Litig. Rep.: Asbestos 1, 4 (Sept. 2, 2009) ("As the bankrupt companies exited the tort environment, the number of defendants named in a complaint increased, on average, from fewer than 30 on average to more than 60 defendants per complaint.").

[13] *See* Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (asbestos suits have expanded "from the original manufacturers of asbestos-related products….").

[14] Biggs *et al*., *supra*, at 1.

majority of the costs of awards relating to decades of asbestos use."[15] One plaintiffs' attorney described the asbestos litigation as an "endless search for a solvent bystander."[16]

In recent years, the disease mix has changed too. By the mid-2000s, state legislation and judicial reforms had greatly diminished the economic incentive for plaintiffs' lawyers to conduct mass screenings and file claims on behalf of the non-sick.[17] The litigation began to focus on mesothelioma claims, and that continues today.[18] There is intense competition among plaintiffs' law firms for these high-value cases. An October 2015 ILR report on trial lawyer marketing found that asbestos-related search terms are "among the most expensive and in-demand search terms on the Internet."[19] In the first half of 2015, for example, "eight of the top ten most expensive keywords on a cost-per-click basis focused on asbestos/mesothelioma."[20] Asbestos plaintiffs' firms spent an estimated $45.6 million on television advertising in 2015 alone.[21]

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15 American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007).

16 *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz,* 17:3 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

17 *See* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009).

18 *See* Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 513 (2008) ("Perhaps the most dramatic change since the dawn of the new century has been the restriction of the litigation to the functionally impaired.").

19 U.S. Chamber Institute for Legal Reform, *Trial Lawyer Marketing: Broadcast, Search and Social Strategies* 2 (Oct. 2015), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/TrialLawyerMarketing.pdf.

20 *Id*. The study also found that 13 of the top 20 most expensive keywords on a cost-per-click basis focused on asbestos/mesothelioma in 2014. *See id*. An earlier study found that "mesothelioma settlement" costs $142.67 per click. *See* Barry Schwartz, *Mesothelioma, Asbestos, Annuity: Google's Most Expensive Keywords*, Search Engine Land (Nov. 9, 2012).

21 *See* U.S. Chamber Institute for Legal Reform, *Trial Lawyer Marketing: Broadcast, Search and Social Strategies*, *supra*, at 10.

II. THE PROLIFERATION OF ASBESTOS BANKRUPTCY TRUSTS

To date, over 100 companies with asbestos-related liabilities have filed bankruptcy.[22] Section 524(g) of the Bankruptcy Code provide a mechanism for such companies to reorganize, channel their asbestos liabilities into trusts, and emerge from bankruptcy with immunity from asbestos-related tort claims.[23]

Many of the companies that filed for bankruptcy protection due in part to asbestos litigation "have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims."[24] According to a 2011 report by the U.S. Government Accountability Office, over sixty trusts—which collectively held *$36.8 billion* as of 2011—have been established to collectively form a privately-funded asbestos personal injury compensation system that operates parallel to, but independent of, the civil tort system.[25] "These trusts answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades."[26]

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22 *See* Mark D. Plevin *et al*., *Where Are they Now, Part Seven: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 13:12 Mealey's Asbestos Bankr. Rep. 1, Chart 1 (July 2014).

23 *See* 11 U.S.C. § 524(g); *see also* Lloyd Dixon *et al*., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Corp. 2010).

24 Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 Mealey's Asbestos Bankr. Rep. 33, 33-34 (June 2013).

25 *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011); *see also* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* 2 (Rand Corp. 2011).

26 William P. Shelley *et al*., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 675-76 (2014).

Asbestos trusts are designed to settle claims quickly. The *Wall Street Journal* has reported, "Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys."[27] If a claimant meets a trust's criteria for payment—criteria which are less rigorous than the tort system—the claimant will receive a payment.[28] Buffalo Law School Professor Todd Brown has noted that "it is possible that some claims may be approved even if the evidence supporting exposure may not survive early dispositive motions in the relevant state court."[29]

It is common for claimants to receive multiple trust payments since each trust operates independently and workers were often exposed to different asbestos products. Cardozo Law School Professor Lester Brickman has said:

> I estimate that mesothelioma victims (and nonmalignant claimants) with exposures to industrial and commercial asbestos-containing products distributed nationally will typically qualify for payment from fifteen to twenty trusts. This estimate does not include three trusts pending confirmation, with billions of dollars in assets to add to the trust compensation system, which also have national industrial or commercial exposure profiles. Finally, thirteen trusts have been formed from the assets of companies that sold or distributed their products only regionally or that had other limited exposures profiles. Trust claimants who allege exposure to products associated with these companies may, in addition to

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[27] Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1, *available at* http://www.wsj.com/articles/SB10001424127887323864304578318611662911912.

[28] *See* U.S. GAO, *supra*, at 21; *see also* Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 The Advoc. (Tex.) 80, 80 (2007) ("it is much easier to collect against a bankruptcy trust than a solvent defendant.").

[29] S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 317 (2013).

all their other trust filings, also file claims with the trusts formed by the regional companies if they can show the requisite exposure.[30]

Thus, asbestos plaintiffs today have two separate paths to obtain compensation. In addition to tort system payments, billions of dollars are available in the asbestos bankruptcy trust system to pay claimants for harms caused by exposures to the former insulation defendants and others that provided the primary compensation to asbestos plaintiffs for many years.[31] In the recent Garlock Sealing Technologies, LLC bankruptcy case, for example, a typical mesothelioma plaintiff's total recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts."[32]

III. ASBESTOS BANKRUPTCY TRUST CLAIM MANIPULATION AND ABUSE

In most states, there is a lack of transparency with respect to asbestos bankruptcy trust claims. The disconnect between the trust and tort systems has led to inconsistencies with respect to plaintiff asbestos exposures allegations, suppression of evidence in asbestos civil actions, and "double dipping," as plaintiffs manipulate the timing of their trust claim filings to maximize their

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30 Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1078-79 (2014).

31 *See* Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* iii (Rand Corp. 2015) ("Plaintiffs now often receive compensation both from the trusts and through a tort case."); *see also* U.S. GAO, *supra*, at 15 ("Although 60 companies subject to asbestos-related liabilities have filed for bankruptcy under Chapter 11 and established asbestos bankruptcy trusts in accordance with § 524(g), asbestos claimants can also seek compensation from potentially liable solvent companies (that is, a company that has not declared bankruptcy) through the tort system.").

32 *In re Garlock Sealing Techs.*, 504 B.R. at 96; *see also* Heather Isringhausen Gvillo, *Database Provides Insight Into How Much Asbestos Claims Are Worth*, Madison-St. Clair Record, May 14, 2015 (Garlock database shows that asbestos claimants represented by a dominant plaintiffs' law firm in Madison County, Illinois, have received on average $804,207, with approximately 41% from an average of 13 bankruptcy trusts and the rest from an average of 13 solvent companies).

tort system recoveries then receive additional asbestos trust payments for the same injury.[33] Many examples of asbestos bankruptcy trust submission abuses have materialized.

A. Inconsistent Claiming Practices Emerge After Bankruptcy Wave

A widely-reported early example of asbestos bankruptcy trust claim abuse occurred in *Kananian v. Lorillard Tobacco Co.*,[34] where Cleveland Judge Harry Hanna barred a prominent California asbestos plaintiffs' firm from his court after he found that the firm and one of its partners failed to abide by the rules of the court proscribing dishonesty, fraud, deceit, and misrepresentation.[35] Judge Hanna concluded that the lawyers had "not conducted themselves

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[33] *See* William P. Shelley *et al.*, *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 679 (2014) (claimants "continue to make trust submissions based upon alleged exposure histories that are at stark variance from the tales they tell in the tort system."); Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1088 (2014) ("In cases where defendants have been able to overcome the attempts to suppress evidence of other exposures, it has become apparent that the product exposures set forth in multiple trust claims differ markedly from, and are inconsistent with, the exposures being asserted by plaintiffs in the tort system."); Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 25, 2014, at A12 (describing "'double-dipping'—in which lawyers sue a company and claim its products caused their clients' disease, even as they file claims with asbestos trusts blaming other products for the harm. This lets them get double or multiple payouts for a single illness, with a huge cut for the lawyers each time."); *see also* William P. Shelley *et al.*, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. Bankr. L. & Prac. 257 (2008).

[34] No. CV-442750 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 17, 2007), *available at* 2007 WL 4913164. The *Kananian* discussion in this testimony was published earlier in Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501, 550-552 (2009).

[35] *See* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501, 550-552 (2009); *see also Ohio Judge Bars Calif. Firm from His Court*, Nat'l L.J., Jan. 22, 2007, at 3 ("An Ohio state court judge has barred Novato, Calif.-based Brayton Purcell and one of its lawyers from appearing in that court due to their alleged dishonesty in litigating a mesothelioma case."); Thomas J. Sheeran, *Ohio Judge Bans Calif. Lawyer in Asbestos Lawsuit*, Cincinnati Post, Feb. 20, 2007, at A3 ("A low-key judge fed up with disrespectful behavior and alleged lies by an attorney created a stir with a courtroom ban on the lawyer from a nationally known San Francisco-area law firm that handles asbestos-related lawsuits coast-to-coast.").

with dignity" and had "not honestly discharged the duties of an attorney in this case."[36] An Ohio Court of Appeals and the Ohio Supreme Court let Judge Hanna's ruling stand.[37] Judge Hanna said later, "In my 45 years of practicing law, I never expected to see lawyers lie like this."[38] Judge Hanna added, "It was lies upon lies upon lies."[39]

Judge Hanna's ruling received national attention for exposing "one of the darker corners of tort abuse" in asbestos litigation: inconsistencies between allegations made in open court and those submitted to trusts set up by bankrupt companies to pay asbestos-related claims.[40] As the *Cleveland Plain Dealer* reported, Judge Hanna's decision ordering the plaintiff to produce proof of claim forms "effectively opened a Pandora's box of deceit…. Documents from the six other compensation claims revealed that [plaintiff's lawyers] presented conflicting versions of how Kananian acquired his cancer."[41] Emails and other documents from the plaintiff's attorneys also

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[36]. *Kananian*, slip op. at 19; *see also* Paul Davies, *Plaintiffs' Team Takes Hit on Asbestos*, Wall St. J., Jan. 20, 2007, at A4 ("In a harshly worded opinion . . . Judge Harry Hanna listed more than a dozen instances where attorneys . . . either lied to the court, intentionally withheld key discovery materials, or distorted the degree of asbestos exposure alleged.").

[37] *See Kananian v. Lorillard Tobacco Co.*, No. 89448 (Ohio Ct. App. Feb. 21, 2007) (dismissing appeal as moot, sua sponte), *review denied*, 878 N.E.2d 34 (Ohio 2007).

[38] James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit*, Cleveland Plain Dealer, Jan. 25, 2007, at B1.

[39] *Id.*

[40] Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14; *see also* Kimberly A. Strassel, Opinion, *Trusts Busted*, Wall St. J., Dec. 5, 2006, at A18 ("[One] law firm filed a claim to one trust, saying Kananian had worked in a World War II shipyard and was exposed to insulation containing asbestos. It also filed a claim to another trust saying he had been a shipyard welder. A third claim, to another trust, said he'd unloaded asbestos off ships in Japan. And a fourth claim said that he'd worked with 'tools of asbestos' before the war. Meanwhile, a second law firm . . . submitted two more claims to two further trusts, with still different stories…. [The second law firm then] sued Lorillard Tobacco, this time claiming its client had become sick from smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s.").

[41] McCarty, *supra*, at B1.

showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was "completely fabricated."[42] The *Wall Street Journal* editorialized that Judge Hanna's opinion should be "required reading for other judges" to assist in providing "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts."[43]

In a Maryland case, *Warfield v. AC&S, Inc.*,[44] defendants aggressively pursued discovery of trust claims and were forced to file motions to compel, despite the fact that prior rulings made it clear that trust claims materials must be produced.[45] "At a hearing on the matter, plaintiff's counsel explained that he had been slow in producing the trust materials because he disagreed with the court's prior ruling, some two years previously, and went on to complain that the court had 'opened Pandora's Box' by requiring their disclosure."[46] When production was finally made on the eve of trial, the "reasons for counsel's reluctance to produce the trust materials were made clear. There were substantial and inexplicable discrepancies between the positions taken in [c]ourt and the trust claims."[47] "Despite specific and explicit discovery requests, plaintiff had failed to disclose nine trust claims that had been made. As revealed in the claim forms, the period of exposure alleged in the litigation versus that alleged in the trust submissions was materially different."[48] In the tort system, Mr. Warfield claimed under oath that he was exposed

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42 Daniel Fisher, *Double-Dippers*, Forbes, Sept. 4, 2006, at 136, 137.

43 *Cuyahoga Comeuppance*, *supra*, at A14.

44 No. 24X06000460, Consolidated Case No. 24X09000163, Jan. 11, 2011 Mesothelioma Trial Group (M 112).

45 *See* Problems with Asbestos Compensation System, Hearing Before The Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 111th Cong. (Sept. 9, 2011) (statement of James L. Stengel), *available at* 2011 WLNR 24791123.

46 *Id*.

47 *Id*.

48 *Id*.

to asbestos exclusively between 1965 and the mid-1970's, focusing on the products of the solvent defendants and avoiding application of a Maryland statutory damage cap for later exposures. In the trust claim submissions, however, Mr. Warfield claimed exposure from 1947 to 1991, "both different in scope, but also clearly triggering the damage cap."[49] "Of note, eight of the trust forms had been submitted before Warfield testified" in court.[50]

In another Maryland case, "*Edwards*, the plaintiff had, prior to trial, failed to disclose whether or not he had filed any claims with bankruptcy trusts. In addition, as trial drew near, plaintiff amended his discovery responses to assert that the only asbestos-containing material to which he had been exposed was that of the only remaining solvent defendant."[51] Two weeks prior to trial, however, the plaintiff produced claims materials relating to sixteen trusts. "Again, there was a clear inconsistency in the alleged exposure. Significantly, most of the trust forms had been filed in 2008, before the initial discovery responses."[52]

In a Virginia case, *Dunford v. Honeywell Corp.*, the plaintiff asserted that his asbestos-related illness was due to exposure only to friction products.[53] In fact, the plaintiff "had made numerous trust claims certifying exposure to products made by many of the traditional defendants and had even filed a separate tort action against the traditional defendants."[54] The

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49 *Id*.

50 *Id*.

51 *Id*.

52 *Id*.

53 *See* Asbestos Claims Legislation, Hearing Before The Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, 112th Cong. (May 10, 2012) (statement of Leigh Ann Schell), *available at* 2012 WLNR 9840045 [hereinafter May 2012 Testimony of Leigh Ann Schell].

54 *Id*.

Loudon County Circuit Judge dismissed the plaintiff's case with prejudice, describing it as the "worst deception" used in discovery that he had seen in his twenty-two years on the bench.[55]

Delaware Superior Court Judge (ret.) Peggy Ableman provided another example of abuse in testimony before a House subcommittee.[56] Judge Ableman discussed a case she presided over in which the plaintiffs filed a lawsuit against twenty-two asbestos defendants. Although the court had a standing order requiring plaintiffs to disclose all bankruptcy trust claims materials, and the defendants specifically requested this information in interrogatories, "nowhere did plaintiffs identify exposure through any of the twenty entities to whom bankruptcy claims were submitted."[57] Instead, plaintiffs claimed the decedent was exposed to asbestos solely through laundering her husband's work clothes throughout his career as an electrician, and "emphatically reported" to the court and the sole remaining defendant, Foster Wheeler, that no bankruptcy submissions had been made and no monies had been received.[58] Two days before trial was set to begin, however, plaintiff's counsel reported the existence of two bankruptcy trust settlements – a disclosure that was "directly inconsistent with [counsel's] unequivocal representations to the Court and to opposing counsel at the pretrial conference."[59] By late afternoon of the following day, the day before trial, Foster Wheeler learned that a total of twenty bankruptcy trust claims

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55 *Id*.

56 *See* Asbestos Claims Transparency, Hearing Before The Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 113th Cong. (Mar. 13, 2013) (statement of Hon. Peggy L. Ableman), *available at* 2013 WLNR 7440143.

57 *Id*.

58 *Id.*

59 *Id.*

had been submitted.[60] Judge Ableman explained, "[a]lthough Foster Wheeler had been led to believe that [the decedent's] exposure was solely the result of take-home fibers on her husband's clothing, at this late point in the litigation, it became obvious that one or more of Plaintiffs attorneys had been claiming exposure through [decedent's] own employment" and that "representations to the bankruptcy trusts painted a much broader picture of exposure to asbestos than either Plaintiff or any of Plaintiffs attorneys had acknowledged during the entire course of the litigation."[61]

In an Oklahoma case, *Bacon v. Ametek, Inc.*,[62] defendant CertainTeed Corp. learned at a pretrial hearing that the plaintiff failed to disclose nineteen asbestos bankruptcy trust claims and eleven signed affidavits from product identification witnesses that were submitted with the claims. The trust claim submissions and co-worker affidavits disclosed exposures to many asbestos products that were never identified during discovery.[63] The plaintiff had been paid approximately $185,000 from five trusts, but "deferred" fourteen other claims worth at least $313,000.[64]

In a New Jersey case, *Barnes and Crisafi v. Georgia Pacific*,[65] plaintiff's counsel disclosed the existence of bankruptcy trust claims submissions during the pre-trial conference.

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60 *See id.*

61 *Id.*

62 No. CJ-08-328 (Okla. Dist. Ct. Dec. 2011) (Memorandum in Support of Defendant CertainTeed Corporation's Motion to Strike the Testimony of Jasper Hubbard and for Sanctions Due to Plaintiff's Discovery Abuse).

63 *See id*. at 1.

64 *See id*.; *see also* May 2012 Testimony of Leigh Ann Schell, *supra*.

65 Nos. MID-L-5018-08 (AS) & MID-L-316-09 (AS) (N.J. Super. Ct. Middlesex County June 12, 2012) (Pre-Trial Conf. Trans.), *available at* http://www.stopasbestostrustfraud.com/wp-content/uploads/2012/10/Barnes_Crisafi_Pre-Trial_Conference_Transcript.pdf.

The disclosure came about only after defense counsel independently reached out to a representative of the Johns-Manville Trust who confirmed that a claim had been made on behalf of one of the plaintiffs.[66] Counsel for plaintiff subsequently disclosed the existence of multiple other trust filings, and attempted to explain the lack of earlier disclosure on the grounds that the filings were "deferred claims" intended to preserve the trust statute of limitations and seek compensation at a later time, and were filed by another law firm.[67] In response, the court stated that no such distinction in the type of trust claims filed was expressed in the court's discovery order and that the plaintiffs clearly had an obligation to identify and produce this information.[68] The court admonished plaintiff's counsel for violating its order, saying, "You cannot be blind, deaf and dumb," and reminded counsel, "You're an officer of The Court."[69] The court went on to repeatedly state that this failure to disclose the trust submissions constituted "a major problem," questioning: "How can I try this case now?"[70] After discussing with the parties how this lack of disclosure prejudiced the defendants, the court decided to postpone the trial that was scheduled to begin the following week.[71]

In a New York case, DaimlerChrysler Corporation argued that a verdict against it should be overturned and the case tried again after discovering almost one year after the jury's verdict that "the plaintiff had made sworn admissions to five asbestos bankruptcy trusts certifying exposure to products made by Johns-Manville (brakes), Am[e]tek, Celotex, Eagle-Picher and

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66 *See id.* at 126.

67 *See id.* at 128-29.

68 *See id.*

69 *Id.* at 129-30.

70 *Id.* at 133-134.

71 *See id.* at 152.

Combustion Engineering."[72] At trial, the "plaintiff denied exposure to Am[e]tek, Celotex, and Eagle-Picher products and mentioned only one category of Johns-Manville product (building material)."[73]

In a Texas case, *Stoeckler v. American Oil Co.*,[74] plaintiff's counsel waited until the third day of trial to disclose the existence of additional bankruptcy trust claims submissions. Within a few hours of the disclosure, after the defendants had an opportunity to review the trust submissions while the trial continued, defense counsel moved for a mistrial.[75] The trust claims submissions revealed exposures to asbestos products over a longer period of time, starting with the year of the plaintiff's birth, and to a broader range of asbestos products.[76] Counsel for defendant Dana Corp. explained to the court that "[o]ur trial strategy, our pretrial strategy, which was fixed weeks ago, is now thrown up in the air,"[77] and "[n]ot only are our experts not prepared and we have to do more discovery, I think we now need to go back and depose [the plaintiff]."[78] Defense counsel continued:

> It is too late. There is nothing I can do. I cannot – I don't get to open again tomorrow and say, ladies and gentlemen of the jury, I just found out some stuff yesterday that I didn't know before, and now let me tell you what the evidence is going to be. My credibility, my client's credibility is at risk with this jury, and there is no cure for that.[79]

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72 May 2012 Testimony of Leigh Ann Schell, *supra*.

73 *Id*.

74 No. 23,451 (Tex. Angelina County Dist. Ct. Jan. 28, 2004) (Trial Trans.).

75 *See id.* at 63.

76 *See id.* at 63-65.

77 *Id.* at 19.

78 *Id.* at 66.

79 *Id.*

In addition, the court took issue with the discrepancies between the trust submissions and statements made in the plaintiff's multiple depositions that no additional asbestos exposures existed.[80] Plaintiff's counsel attempted to defend these discrepancies on the grounds that the plaintiff had never seen the trust submission documents because they were submitted by counsel; an explanation to which the court replied: "And you know where this goes, to the Code of Professional Conduct."[81]

Another Texas case, *Brassfield v. Alcoa, Inc.*,[82] demonstrates what appears to be a purposeful disconnect or willful blindness on the part some plaintiff's attorneys in tracking claims submitted to the trusts and within the tort system. During a cross-examination of plaintiff's counsel Edward Moody at a motion's hearing, Mr. Moody stated that his law practice was set up in a manner in which neither he nor any single individual could verify for the purposes of discovery what claims were pending with which asbestos trusts. Rather, Mr. Moody testified that his computer system could only verify trust claims that had been paid. Mr. Moody also stated that he was not certified to submit claims to any trust, and that all trust submissions were handled in a separate law office by a team of paralegals, each responsible for submissions to a specific trust, such that no individual could readily provide a complete record of every trust submission.[83] Mr. Moody further testified that there was no communication regarding bankruptcy trust submissions with another plaintiffs' firm retained in the case.[84] In response to

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80 *See id.* at 74.

81 *Id.*

82 No. 2005-61841 (Tex. Harris County Dist. Ct. Nov. 22, 2006) (Trans. of Motions Hearing).

83 *See id.* at 9-10.

84 *See id.* at 12.

this lack of coordination, the presiding judge found that Mr. Moody had not made a good faith effort to comply with discovery.[85] The judge went on to say, "I am frankly ashamed to be part of a process that allows [Mr. Moody] to collect a fee for things that somebody else does that he is not authorized to do, and then he gets a fee on the work [in the tort action]."[86]

Gasket and packing manufacturer Garlock Sealing Technologies, LLC's pre-bankruptcy comparison of its own case history to voting ballots from the Pittsburgh Corning Corporation (PCC) bankruptcy reorganization showed significant inconsistencies with respect to plaintiff asbestos exposures allegations in the trust and tort systems. Garlock obtained access to approximately 100,000 voting ballots cast by personal injury plaintiffs on PCC's proposed plan then compared them to a random sample of 255 tort cases in which the plaintiffs were asked by Garlock's counsel to identify all of their exposures to asbestos-containing products. "In 236 of the 255 cases (92.5%), the plaintiff and plaintiff counsel failed to identify or disclose any potential exposures to PCC products, even though they eventually voted as a creditor" in PCC's bankruptcy."[87] Further, as noted by asbestos litigation defense expert Leigh Ann Schell in congressional testimony in 2012:

> In its own bankruptcy filing, Garlock advised that it had entered settlements of over $100,000 each with 37 sampled plaintiffs. Only 6 of those plaintiffs had mentioned exposure to a [PCC] product in their tort suit. Yet the attorneys for each of the 37 plaintiffs certified in the [PCC] bankruptcy that their client did have such exposure.[88]

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85 *See id.* at 41.

86 *Id.*

87 U.S. Chamber Institute for Legal Reform, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* 3 (Dec, 2015), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/TheWaitingGame_Pages.pdf.

88 May 2012 Testimony of Leigh Ann Schell, *supra*.

Garlock's findings from its analysis of the PCC voting ballots foreshadowed the landmark findings (described below) by a federal bankruptcy judge in Garlock's own bankruptcy.

B. *In re Garlock Sealing Technologies, LLC*: A Watershed Event

When I testified before a Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association's Tort Trial and Insurance Practice Section in 2013 and identified many of the abuses discussed above, I opined that as further evidence of trust claiming practices came to light, it would become clear that these examples were not rare outliers. Instead, I opined, it would become evident that these abuses were the just tip of the iceberg. Time has proven my prediction to be true.

In January 2014, U.S. Bankruptcy Judge George Hodges in Charlotte, North Carolina, issued a watershed opinion in *In re Garlock Sealing Technologies, LLC,*[89] making crystal clear the need for greater transparency with respect to asbestos bankruptcy trust claims in civil asbestos cases.[90] Judge Hodges' decision documents how plaintiffs' lawyers abuse the opaqueness between the asbestos trust and tort systems to gain an unfair litigation advantage.[91]

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89 *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014).

90 *See Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp*., 2015 WL 4773425, at *5 (W.D. Pa. Aug. 12, 2015) ("The evidence uncovered in the *Garlock* case arguably demonstrates that asbestos plaintiffs' law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system."); *see also* Peggy L. Ableman, *The* Garlock *Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 Am. J. Trial Advoc. 479, 486, 488 (2014); Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071 (2014); Mark A. Behrens & Cary Silverman, *The Garlock Bankruptcy Order and What it Means for Defense Counsel*, 56 No. 5 DRI For the Def. 10 (May 2014).

91 *See generally* Daniel J. Ryan & John J. Hare, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock's Bankruptcy*, 15:1 Mealey's Asbestos Bankr. Rep. 1, 2 (Aug. 2015) ("[T]here has been a recent focus on ensuring trust transparency in order to avoid the potential for abuse. The abuse occurs most often when claimants allege certain facts to support their trust claims and then allege inconsistent facts to support their tort claims. For instance, claimants have alleged exposure to the products of bankrupt entities in their trust filings, but then ignore or flatly deny those

Following a trial that lasted several weeks, Judge Hodges found that Garlock's settlements of mesothelioma claims in the tort system were "infected by the manipulation of exposure evidence by plaintiffs and their lawyers."[92] Prior to the Bankruptcy Wave, Garlock had been a relatively small player in the asbestos tort system and was "very successful in settling (and rarely trying) [its] cases."[93] Things changed in the early 2000s as the remaining thermal insulation companies filed bankruptcy and exited the tort system.[94] In this new environment, where plaintiffs' counsel could control exposure evidence, Garlock was put at a major disadvantage. Judge Hodges explained, "As the focus of plaintiffs' attention turned more to Garlock as a remaining solvent defendant, evidence of plaintiffs' exposure to other asbestos products often disappeared."[95] This "occurrence was a result of the effort by some plaintiffs and

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exposures when they target solvent defendants in tort litigation. Claimants also attempt to shield their trust recoveries from disclosure in tort suits by concealing their trust claims or not filing the claims until the tort suit has concluded.").

92 *In re Garlock Sealing Techs., LLC*, 504 B.R. at 82; *see also* Peggy L. Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims*, 88 Tul. L. Rev. 1185 (2014); Mark D. Plevin, *The* Garlock *Estimation Decision: Why Allowing Debtors and Defendants Broad Access to Claimant Materials Could Help Promote the Integrity of the Civil Justice System*, 23 No. 4 J. Bankr. L. & Prac. NL Art. 2 (Aug. 2014); Allen C. Schlinsog, Jr., *Safeguarding the Law: Exposing Fraud in Mass Torts*, 57 No. 9 DRI For the Def. 49 (Sept. 2015); Mary Margaret Gay *et al*., *Asbestos Litigation and the Bankruptcy Trust System: Mastering a Plaintiff's Game*, 15:3 Mealey's Asbestos Bankr. Rep. 1 (Oct. 2015); Tom Hals & Jessica Dye, *Unsealed Lawsuits Tell of Alleged Fraud by Asbestos Law Firms*, 11:20 Westlaw J. Bank. 6 (Feb. 6, 2015).

93 *In re Garlock Sealing Techs., LLC*, 504 B.R. at 73.

94 *See generally* Victor Schwartz & Mark Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59 (2013).

95 *In re Garlock Sealing Techs., LLC*, 504 B.R. at 73; *see also* Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* (Rand Corp. 2015) (finding that bankruptcy reduces the likelihood that interrogatories and depositions in subsequent tort cases will identify exposure to the asbestos-containing product of the bankrupt entity), *available at* http://www.rand.org/pubs/research_reports/RR907.html; Marc

their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."[96] Judge Hodges concluded that "[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock…."[97]

For instance, "[o]ne of the leading plaintiffs' law firms with a national practice published a 23-page set of directions for instructing their clients on how to testify in discovery."[98]

The court also said that in fifteen settled cases in which Garlock was permitted to have full discovery, "Garlock demonstrated that exposure evidence was withheld in *each and every one* of them."[99] The court said that Garlock presented "substantial evidence"[100] of this practice, providing several examples to demonstrate the pattern.

In a California case that resulted in a $9 million verdict against Garlock, the plaintiff "did not admit to any exposure from amphibole insulation . . . and claimed that 100% of his work was

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C. Scarcella *et al*., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27:19 Mealey's Litig. Rep.: Asbestos 1, 11 (Nov. 7, 2012) ("The results from the study of the Philadelphia asbestos cases indicate that while exposures to thermal insulation products remain prevalent among today's plaintiff population, the identification of exposure to those products is greatly diminished compared to the claims filed prior to the Bankruptcy Wave that had comparable (or even identical) exposure histories.").

96 *In re Garlock Sealing Techs., LLC*, 504 B.R. at 84.

97 *Id*. at 86; *see also id*. at 94 (withholding of exposure evidence by asbestos plaintiffs' counsel was "widespread and significant."). Judge Hodges estimated Garlock's liability for pending and future mesothelioma claims to be $125 million—about *one billion less* than the $1–1.3 billion requested by plaintiff committees.

98 *Id.* at 84.

99 *Id.*

100 *Id.*

on gaskets."[101] Discovery in the bankruptcy case revealed that the plaintiff's lawyers had filed fourteen trust claims after verdict, including several against amphibole insulation manufacturers. "And most important," said the court, "the same lawyers who represented to the jury that there was no Unibestos insulation exposure had, seven months earlier, filed a ballot in the Pittsburgh Corning bankruptcy that certified under 'penalty of perjury' that the plaintiff had been exposed to Unibestos insulation."[102] In total, the plaintiff's lawyers failed to disclose the plaintiff's exposure to twenty-two other asbestos products.[103]

In a Philadelphia case that Garlock settled for $250,000, the plaintiff "did not identify any exposure to bankrupt companies' asbestos products" in his tort lawsuit.[104] Further, in answers to written interrogatories, the plaintiff's lawyers said the plaintiff had "no personal knowledge" of such exposure.[105] Discovery in Garlock's bankruptcy case showed, however, that "just six weeks earlier, those same lawyers had filed a statement in the Owens Corning bankruptcy case, sworn to by the plaintiff, that stated that he 'frequently, regularly and proximately breathed asbestos dust emitted from Owens Corning Fiberglas's Kaylo asbestos-containing pipe covering.'"[106] In total, the judge said, "this plaintiff's lawyer failed to disclose exposure to 20 different asbestos products for which he made Trust claims."[107] "Fourteen of these claims were

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101 *Id*.

102 *Id*.

103 *Id*.

104 *Id*.

105 *Id*. at 85.

106 *Id*.

107 *Id*.

supported by sworn statements, that contradicted the plaintiff's denials in the tort discovery," said the court.[108]

The court also described a New York case that Garlock settled during trial for $250,000. "The plaintiff had denied any exposure to insulation products,"[109] but after the case settled, the plaintiff's lawyers filed twenty-three trust claims on the plaintiff's behalf, including eight trust claims that were filed within twenty-hours of completing the settlement with Garlock.[110]

In another California case that Garlock settled for $450,000, a former sailor denied that he ever saw anyone installing or removing pipe insulation on his ship. After the plaintiff settled with Garlock, however, the plaintiff's lawyers filed eleven trust claims on his behalf, seven of which were "based on declarations that [the plaintiff] personally removed and replaced insulation and identified, by name, the insulation products to which he was exposed."[111]

It was more of the same in a Texas case that resulted in a $1.35 million verdict against Garlock. The plaintiff denied knowing the name "Babcock & Wilcox" and his lawyers told the jury in his tort case that there was "no evidence that the plaintiff's injury was caused by exposure to Owens Corning insulation."[112] Discovery in the Garlock bankruptcy case established that the day before the plaintiff denied any knowledge of Babcock & Wilcox, his lawyers had filed a claim against that trust on his behalf. After the verdict, the lawyers filed a claim with the Owens Corning Trust. The court in *Garlock* said, "Both claims were paid—upon the representation that

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108 *Id*.

109 *Id*.

110 *See id*.

111 *Id*.

112 *Id*.

the plaintiff had handled raw asbestos fibers and fabricated asbestos products from raw asbestos on a regular basis."[113]

Judge Hodges remarked that the fact that exposure evidence was withheld in "*each and every one*" of the fifteen settled cases in which Garlock was permitted broad discovery was "surprising and persuasive."[114] The court acknowledged that the fifteen cases were just a "minute portion of the thousands that were resolved by Garlock in the tort system," but the "fact that *each and every one them* contain[ed] demonstrable misrepresentation [wa]s surprising and persuasive."[115] "For fifteen plaintiffs represented by five major firms," the court said, "the pattern of nondisclosure [wa]s the same."[116] The court added that it appeared "certain that more extensive discovery would show more extensive abuses."[117]

In contrast to the cases in which exposure evidence was withheld, there were several cases in which Garlock obtained trust claims that had been filed by plaintiffs and was able to use them in its defense at trial. "In three such trials, Garlock won defense verdicts, and in a fourth [Garlock] was assigned only a 2% liability share."[118]

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113 *Id*.

114 *Id*.

115 *Id*.

116 *Id*.

117 *Id*. at 86; *see also* Peggy L. Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims*, 88 Tul. L. Rev. 1185, 1201 (2014) ("It would strain one's credulity to believe that these cases are mere anomalies or that Garlock is the sole asbestos defendant who has been prejudiced by this practice.").

118 *In re Garlock Sealing Techs., LLC*, 504 B.R. at 86.

Judge Hodges bluntly characterized Garlock's tort litigation as infected by a "startling pattern of misrepresentation"[119] that unfairly inflated plaintiffs' recoveries against Garlock following the surge of asbestos bankruptcies by insulation defendants in the early 2000s. The court explained that "while it is not suppression of evidence for a plaintiff to be unable to identify exposures, it *is* suppression of evidence for a plaintiff to be unable to identify exposure in the tort case, but then later (and in some cases previously) to be able to identify it in Trust claims."[120]

The frank language and documented abuses in the *Garlock* opinion made waves in the legal profession and mainstream media. The coverage was reminiscent of the 2005 ruling by the manager of the federal silica multidistrict litigation, U.S. District Judge Janis Graham Jack, who recommended the dismissal of all but one of 10,000 federal court silica claims because the plaintiffs' diagnoses were fraudulently prepared.[121]

For example, a *Wall Street Journal* editorial characterized Judge Hodges' opinion as a "a reminder to other judges that their courtrooms are supposed to be places that render justice, not rubber stamps for plaintiff scams."[122] *Forbes* decried the "shenanigans plaintiff lawyers have engaged in for years as they sucked billions of dollars out of otherwise solvent companies in

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119 *Id*.

120 *Id*.

121 *See In re Silica Prods. Liab. Litig*., MDL 1553, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

122 Editorial, *Busting the Asbestos Racket: A Federal Judge Finds Evidence of Deliberate Legal Deception*, Wall St. J., Feb. 7, 2014, at A16; *see also* Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 25, 2014, at A12, *available at* http://www.wsj.com/articles/the-double-dipping-legal-scam-1419535915.

search of money."[123] *Bloomberg Businessweek* declared that asbestos litigation "has reached a truly repulsive phase" as "ever-more-troubling evidence emerges that influential members of the plaintiffs' bar have lost their moral bearings."[124] Cardozo Law School Professor Lester Brickman, who has researched asbestos litigation for more than twenty years and testified on behalf of Garlock, said that Judge Hodges' opinion "laid bare the massive fraud that is routinely practiced in mesothelioma litigation."[125]

The response by media outlets that do not traditionally lean pro-business has been particularly interesting. For instance, a *New York Times* columnist wrote:

> As to why anyone should care whether innocent companies have to pay millions to asbestos victims and their lawyers, I would offer three reasons. First, when victims get more than they should under the rules, it means that someone else down the road will wind up with less than he or she should. Second, litigation designed to bring innocent companies to their knees is an impediment to economic growth and job creation. And, finally, there is the rule of law, which the asbestos lawyers suing Garlock clearly flouted.[126]

National Public Radio said: "No one argues that people suffering from mesothelioma shouldn't get compensated. Instead, it's a matter of the right companies paying the right amounts."[127] A

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123 Daniel Fisher, *The Judge Won't Call Asbestos-Lawyer Shenanigans Fraud, But it Sure Smells Like It*, Forbes.com, Jan 11, 2014, *available at* http://www.forbes.com/sites/danielfisher/2014/01/11/the-judge-wont-call-asbestos-lawyer-shenanigans-fraud-but-it-sure-smells-like-it/#21a069c41430.

124 Paul M. Barret, *Judge Finds Fraud and Deceit by Plaintiffs' Lawyers in Asbestos Cases*, Bloomberg Businessweek, Jan. 13, 2014, *available at* http://www.bloomberg.com/bw/articles/2014-01-13/garlock-asbestos-claims-cut-90-percent-because-of-plaintiffs-lawyers-deceit.

125 Sara Warner, *Court Order Disrupts Asbestos World, But What of the 'Perjury Pawns'?*, Huffington Post, Feb. 28, 2014, *available at* http://www.huffingtonpost.com/sara-warner/court-order-disrupts-asbestos-world_b_4859569.html (quoting Prof. Brickman).

126 Joe Nocera, Editorial, *The Asbestos Scam, Part 2*, N.Y. Times, Jan. 14 2014, at A27, *available at* http://www.nytimes.com/2014/01/14/opinion/nocera-the-asbestos-scam-part-2.html?_r=0.

127 Michael Tomsic, *Case Sheds Light On The Murky World Of Asbestos Litigation*, Nat'l Pub. Radio, All Things Considered, Feb. 4, 2014, *available at* 2014 WLNR 3168502, and

Huffington Post commentator said that plaintiffs who have played by the rules by honestly seeking compensation from the companies that actually caused them harm will lose out to plaintiffs willing "to become perjury pawns for those who would game the system."[128]

C. 2015 Crane Co. and ILR Studies Reinforce The Need For Transparency

A November 2015 analysis of the publicly available discovery data from Garlock's bankruptcy case in relation to asbestos defendant Crane Co. showed "a similar pattern of systemic suppression of trust disclosures that was documented on the Garlock bankruptcy."[129] The study examined 1,844 mesothelioma lawsuits resolved by Crane Co. from 2007 to 2011 that could reliably be matched to the Garlock data. The data revealed the following:

- "In cases where Crane was a codefendant with Garlock, plaintiffs eventually filed an average of 18 trust claim forms."[130]
- *"On average, 80% of these claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings."* [131]
- "Overall, nearly half of all trust claims were filed after Crane had already resolved the tort case."[132]

To "help crystallize the nature of non-disclosure experienced by Crane in the tort system," the report details "one case that was settled (Moors) and one case that went to verdict (Brewer)."[133]

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http://www.npr.org/2014/02/04/271542406/case-sheds-light-on-the-murky-world-of-asbestos-litigation.

128 Sara Warner, *Court Order Disrupts Asbestos World, But What of the 'Perjury Pawns'?*, Huffington Post, Feb. 28, 2014, *available at* http://www.huffingtonpost.com/sara-warner/court-order-disrupts-asbestos-world_b_4859569.html.

129 Peggy Ableman *et al*., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 30:19 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 4, 2015).

130 *Id*.

131 *Id*. (emphasis added).

132 *Id*.

133 *Id.* at 5.

The Gerald Moors complaint was filed by an asbestos plaintiffs' firm in New York City. Mr. Moors "testified at his deposition that he never worked with asbestos containing products from 11 now-bankrupt companies including Combustion Engineering, H.K. Porter, Keene, Unarco (UNR), National Gypsum and Owens Corning."[134] At trial, just prior to defense opening statements, Moors' attorneys successfully moved the court to prevent defense counsel from mentioning Owens Corning's asbestos insulation product, arguing that mention of the products would be prejudicial to Moors "because Moors never affirmatively said he was exposed to the product."[135] In contrast, the Garlock discovery data show that the law firm representing Moors filed twenty-six trust claims on his behalf—including Owens Corning and the other "bankrupt companies cited above—despite Moors' sworn testimony that he did not work with the products from those (now bankrupt) companies."[136]

Further, the trust claims filed in the Moors case reveal inconsistencies regarding site exposure in addition to product exposures. In Moors' tort case, Moors denied being exposed to asbestos at the Ravenswood Powerhouse:

> Q: So with respect to the six months that you worked at the Ravenswood powerhouse, sir, do you believe you were exposed to asbestos in any way?
>
> A: No.[137]

In trust filings, however, "[Moors' attorneys] list the Ravenswood Powerhouse as a site where Moors was exposed to asbestos."[138]

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134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.* at 6.

138 *Id.* at 5.

The report also discusses the case of Chief Brewer filed in Los Angeles by a different asbestos plaintiffs' firm. At deposition and trial, Mr. Brewer "could not recall any of the manufacturers or suppliers of the thermal pipe insulation" on the naval ship where he worked.[139] A co-worker testified that he saw Mr. Brewer work with Johns Manville dry putty insulation. Beginning six months after Mr. Brewer received a $9.7 million verdict with responsibility apportioned 50% to the U.S. Navy, 35% to twelve valve, pump, turbine, and gasket defendants (including Crane Co.) and 15% to Johns Manville, "[Brewer's attorneys] filed claims against asbestos bankruptcy trusts including Armstrong World Industries, Fibreboard, Halliburton, Harbison Walker, Owens Corning, and U.S. Gypsum."[140] Brewer "also case ballots to vote in the pending (at that time) bankruptcy reorganizations of Pittsburgh Corning, Flintkote and W.R. Grace."[141] An appellate court later overturned the Brewer verdict against Crane for reasons unrelated to the then unknown suppression of evidence, but the case still raises a legitimate issue about how much fault might have been allocated to the other bankrupt companies if the plaintiff's trust claims for those exposures were produced before, and not *after*, trial.

Even more recently, in December 2015, the U.S. Chamber Institute for Legal Reform issued a report detailing additional case examples from the Garlock discovery data that "further expose the inconsistent claiming behavior and allegations between the tort and trust systems."[142]

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139 *Id.* at 6.

140 *Id*.

141 *Id.* at 6-7.

142 U.S. Chamber Institute for Legal Reform, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* 8 (Dec, 2015), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/TheWaitingGame_Pages.pdf.

One such example involves the case of Robert Wood in Kanawha County (Charleston), West Virginia state court against over 100 defendants. At his deposition, Mr. Wood "could not recall the names or manufacturers of the asbestos-containing thermal insulation products to which he alleged exposure,[143] while somehow recalling the products of more than a dozen non-insulation defendants.[144] Despite Mr. Wood's lack of lack of disclosures regarding specific thermal insulation companies potentially responsible for his injuries, the Garlock discovery data show that "Wood's counsel eventually filed claims against 20 trusts, a majority of which represent predecessor companies that once engaged in the manufacturing, distribution, or installation of asbestos-containing thermal insulation products."[145]

Another example of inconsistent claiming behavior identified in the ILR report involves the James Ginter case in New York. At trial, Mr. Ginter's attorneys focused on his alleged exposures to asbestos at a plastics facility, particularly his exposure to asbestos friction products. Counsel reportedly downplayed Mr. Ginter's exposure to asbestos-containing thermal insulation at another site, describing the exposures as "very limited" bystander exposures.[146] In contrast, the Garlock discovery data show that Mr. Ginter's counsel eventually filed eleven trust claims, many of which involved exposures to thermal insulation products.[147] In each instance for which filing date information was available (i.e., seven of the eleven trust claims), the trust claim was filed just three months after trial.[148] Further, disclosures in the Celotex, Owens Corning, and

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143 *Id.* at 9.

144 *See id.*

145 *Id.*

146 *Id.*

147 *See id.* at 12.

148 *See id.*

Eagle-Picher trust claim forms reportedly assert exposures to specific products that "do not appear to have been disclosed during the underlying court proceedings or at trial."[149]

The John Koeberle case in Philadelphia is also discussed in the ILR report. Mr. Koeberle alleged asbestos exposure to gasket, valve, and packing products during naval service, as well as exposure to home improvement products during a home construction project in the 1960s. At his deposition, Mr. Koeberle testified that he did not come into contact with any insulation in the Navy and that his duties did not take him near the boilers on any of the ships he served aboard.[150] He also testified that he could not recall the names of any bankrupt companies that manufactured drywall or insulation products he may have come into contact with during a home renovation in 1962. In fact, he answered "no" during his deposition when asked about his exposures to specific thermal insulation products and their companies (now bankrupt):

> Q: How about, have you ever heard of Kaylo?
> A: No.
> Q: Any kind of pipes or pipe covering?
> A: No.
> Q: Eagle Picher, did you ever hear of that?
> A: I heard the name but I didn't know what to associate it to.
> Q: Like a cement, have you ever heard of an Eagle Picher cement?
> A: No.
> Q: Armstrong?
> A: Oh yeah.
> Q: Did you ever work with any Armstrong products?
> A: No.
> Q: You're just familiar with their name?
> A: That's tile, right?

149 *Id.* at 13.

150 *See id.* at 14.

> Q: That's one thing, yes. Did you ever with or around – ?
>
> A: No.
>
> Q: — Philip Carey or Celotex, does the name ring a bell to you at all?
>
> A: No.
>
> Q: Unibestos, a kind of pipe covering, did you ever hear of that?
>
> A: No.
>
> Q: Do you have any knowledge whether you ever worked around any kind of sprays, spray insulation?
>
> A: No.
>
> Q: Did you work with or around any products made by National Gypsum or U.S. Gypsum or Gold Bond?
>
> A: I've heard of them, but no.[151]

In June 2010, the Philadelphia Common Pleas Court confirmed a $4.5 million jury award to Koeberle based on the evidence of his stated exposure to asbestos gaskets, valves, and packing.[152] Despite "zero allegations of exposure" by Mr. Koeberle and in "direct contradiction to Koeberle's own testimony," the Garlock discovery data show that asbestos bankruptcy trust claims were filed on Koeberle's behalf "less than three months after the verdict against trusts that indemnify Armstrong World Industries, Babcock & Wilcox, Fibreboard, and Owens Corning."[153] Later, Mr. Koeberle's law firm filed trust claims against Harbison-Walker, Halliburton, and U.S. Gypsum.[154] It is possible, if not probable, that additional asbestos trust claims were filed that were not part of the Garlock data, because that data was obtained through discovery on a claims processing facility that handles only a fraction of all operational asbestos bankruptcy trusts.[155]

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151 *Id.* at 15.

152 *See id.*

153 *Id.*

154 *See id.*

155 *See id.* at 16.

The Garlock discovery data also show that before trial, "a bankruptcy voting ballot was filed by Koeberle's attorneys in the pending Chapter 11 reorganization of Pittsburgh Corning, despite Koeberle's own sworn testimony that he was not exposed to Pittsburgh Corning's insulation product Unibestos."[156]

The ILR report also discusses the case of David Kelemen in Los Angeles. At deposition and in answers to interrogatories, Kelemen positively identified over thirty-five defendants associated with turbines, purifiers, pumps, valves, steamtraps, gaskets, packing, and other component-part products – yet he could not positively identify a single insulation product or manufacturer.[157] The Garlock data reveal, however, that claims against Armstrong, Fibreboard, and U.S. Gypsum were filed in the months leading up to trial, and against Owens Corning nearly six months prior to trial.[158] In the two months following the verdict, Kelemen's attorneys filed three more trust claims (Flexitallic, Halliburton, and Harbison-Walker), and made subsequent trust claims against the Ferodo and Turner & Newall trusts.[159]

IV. HURDLES IMPOSED BY THE TRUSTS THWART TRANSPARENCY

The vast majority of asbestos trusts – sixty-five percent according to one expert[160] – have provisions that are intended to frustrate discovery of plaintiff exposure allegations, thus facilitating inconsistent claiming activity.

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156 *Id.* at 15-16.

157 *See id.* at 16.

158 *See id.* at 17.

159 *See id.*

160 *See* May 2012 Testimony of Leigh Ann Schell, *supra*.

A. Confidentiality Provisions in TDPs

Many trust distribution procedures (TDPs) have been modified post-confirmation to include a "confidentiality" provision.[161] For example, the Owens Corning/Fibreboard Asbestos TDPs now provides:

> 6.5 Confidentiality of Claimants' Submissions. All submissions to the PI Trust by a holder of a PI Trust Claim or a proof of claim form and materials related thereto shall be treated as made in the course of settlement discussions between the holder and the PI Trust and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including, but not limited to, those directly applicable to settlement discussions. The PI Trust will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only, with the permission of the holder, to another trust established for the benefit of asbestos personal injury claimants pursuant to section 524(g) and/or section 105 of the Bankruptcy Code or other applicable law, to such other persons as authorized by the holder, or in response to a valid subpoena of such materials issued by the Bankruptcy Court. Furthermore, the PI Trust shall provide counsel for the holder a copy of any such subpoena immediately upon being served. The PI Trust shall on its own initiative or upon request of the claimant in question take all necessary and appropriate steps to preserve said privilege before the Bankruptcy Court and before those courts having appellate jurisdiction related thereto. Notwithstanding anything in the foregoing to the contrary, with the consent of the TAC and the Future Claimants' Representative, the PI Trust may, in specific limited instances, disclose information, documents, or other materials reasonably necessary in the PI Trust's judgment to preserve, litigate, resolve, or settle coverage, or to comply with an applicable obligation under an insurance policy or settlement agreement within the OC Asbestos Personal Injury Liability Insurance Assets; provided, however, that the PI Trust shall take any and all steps reasonably feasible in its judgment to preserve the further confidentiality of such information, documents and materials, and prior to the disclosure of such information, documents or materials to a third party, the PI Trust shall receive from such third party a written agreement of confidentiality that (a) ensures that the information, documents and materials provided by the PI Trust shall be used solely by the receiving party for the purpose stated in the agreement and (b) prohibits any other use or further dissemination of the information, documents and materials by the third party.[162]

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161 *See id.*

162 Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures, Revised Dec. 2, 2015, *available at* http://www.ocfbasbestostrust.com/wp-content/uploads/2015/12/OC-FB.-Amended-TDP.12.2.2015-C0463534x9DB18.pdf.

Thus, the TDPs not only require "a valid subpoena" for the trust to produce claims information, but the subpoena must be "issued by the Bankruptcy Court."[163] Further, the trustee is ordered to "take all necessary and appropriate steps" to fight the subpoena.[164]

According to a defense practitioner, "[s]uch constraints are not surprising given that plaintiffs' firms often are part of the group responsible for developing the trust's distribution procedures."[165] In fact, the TDP "confidentiality" provision is contrary to the majority rule in the civil courts, where trust claim submissions are routinely held to be discoverable.[166]

B. Sole Benefit Provisions in TDPs

Many TDPs also include language that "expressly authorizes claimants to assert exposure histories that are inconsistent with representations made in the tort system."[167] For example, Owens Corning/Fibreboard TDP ¶ 5.7(b)(3) states that evidence submitted in support of trust claims "is for the sole benefit of the PI Trust, not third parties or defendants in the tort system."[168] Owens Corning/Fibreboard TDP ¶ 5.7(b)(3) further states that:

> The PI Trust has no need for, and therefore claimants are not required to furnish the PI Trust with evidence of, exposure to specific asbestos products other than those for which OC or Fibreboard has legal responsibility…. Similarly, *failure to identify OC or*

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163 *Id.*

164 *Id.*

165 *See* May 2012 Testimony of Leigh Ann Schell, *supra*.

166 *See, e.g., Willis v. Buffalo Pumps, Inc.*, 2014 WL 2458247, at *1 (S.D. Cal. June 2, 2014) ("Federal and state courts have routinely held that claims submitted to asbestos bankruptcy trusts are discoverable."); *see also Volkswagen of Am., Inc. v. Superior Court of San Francisco*, 139 Cal. App. 4th 1481, 1485, 1497 (1st Dist. Div. 3 2006); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, 2012 WL 628493, at *4 (D. Md. Feb. 24, 2012); *Ferguson v. Lorillard Tobacco, Co., Inc.*, MDL 875, 2011 WL 5903453, at *1 (E.D. Pa. Nov. 22, 2011).

167 S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 Buff. L. Rev. 537, 562 (2013).

168 Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures, *supra*.

> *Fibreboard products in the claimant's underlying tort action,* or to other bankruptcy trusts, *does not preclude the claimant from recovering from the PI Trust*, provided the claimant otherwise satisfies the medical and exposure requirements of this TDP.[169]

Cardozo Law School Professor Lester Brickman has explained that this language "vitiates any consequences of failing to identify product exposures in responses to interrogatories, depositions, and trial testimony in tort cases."[170] "For example," he has written, "if a plaintiff suing an asbestos defendant responds to interrogatories or gives testimony in a deposition or at trial in which they deny that they were exposed to any other asbestos-containing products besides the defendant's products or denies that they were exposed to specific asbestos products not manufactured or sold by the defendant," and then files claims with asbestos trusts "attesting to 'meaningful and credible' exposure to their products," TDP ¶ 5.7(b)(3) provides that, "regardless of their trial testimony, as long as the claimant has satisfied the medical and exposure requirements in the TDPs, the trust claim is valid."[171]

C. Statute of Limitations Provisions in TDPs

A third common TDP provision "that appears intended to suppress evidence of plaintiffs' exposures to the products of reorganized companies so as to inflate the value of tort claims involves the timing of trust claim filings."[172] Professor Brickman has explained:

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169 *Id.* (emphasis added).

170 Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1106 (2014).

171 *Id.*; *see also* Marc C. Scarcella & Peter R. Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, 14:7 Mealey's Asbestos Bankr. Rep. 1, 14 (Feb. 2015) ("the trusts do not seem to be concerned with inconsistent allegations that may be made in the underlying tort case as evident by inclusion of 'Sole Benefit' clauses in many TDPs").

172 Furthering Asbestos Claim Transparency Act, Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 114th Cong. (Feb. 4, 2015) (statement of Lester Brickman), *available at* 2015 WLNR 3578295.

> Most TDPs have a three-year statute of limitations requiring that trust claims be filed within three years of diagnosis of an asbestos-related disease or, if later, within three years after the 'initial claims filing date' or the date of the asbestos-related death. This allows plaintiffs to file and resolve many tort actions before filing trust claims. In the event that plaintiffs are unable to resolve their tort claims within the allowed time period, most TDPs . . . allow a claimant to file a trust claim to meet the applicable statute of limitations first and then to withdraw the claim 'at any time . . . and file another claim subsequently without affecting the status of the claim for statute of limitations purposes.'[173]

Further, a claimant may ask the trust to defer processing a claim for up to three years without affecting the status of the claim for statute of limitations purposes.[174]

The impact of these provisions is that "a plaintiff suing in the tort system can have filed trust claims, then withdrawn or deferred them, completed the tort suits during which they testified that they had not filed any trust claims, and then immediately refile or revive the trust claims asserting product exposures that controvert the plaintiff's testimony in the tort action."[175]

V. TRANSPARENCY WOULD DETER POTENTIAL FRAUD ON TRUSTS

Today, because asbestos trusts operate independently, there is not an effective way for trusts to compare exposure histories across various trusts to identify potential abuses. Greater transparency with respect to asbestos bankruptcy trust claims would benefit the trust system and future claimants by helping the trusts identify inconsistencies that may signal an improper claim.

In 2013, the *Wall Street Journal* reviewed trust claims and court cases of roughly 850,000 persons who filed claims against the Manville Trust since the late 1980s until as

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173 *Id.*

174 *See id.*

175 *Id.*

recently as 2012.[176] "The analysis found numerous apparent anomalies: More than 2,000 applicants to the Manville trust said they were exposed to asbestos working in industrial jobs before they were 12 years old."[177] "Hundreds of others claimed to have the most-severe form of asbestos-related cancer in paperwork filed to Manville but said they had lesser cancers to other trusts or in court cases."[178] The study also identified a trust claim that was filed against the Manville Trust by an individual who did not exist.[179]

A 2011 U.S. Government Accountability Office report on interviews with eleven trusts that conducted audits said that none of the trusts that conducted audits had identified cases of fraud.[180] The defense perspective, especially in light of the *Wall Street Journal* study, is that the self-reported record of accurate claiming is "less a function of a lack of fraud, but more a function of the inability for trusts under the current procedures to identify inconsistent claiming patterns in a cost-effective way."[181] Trusts are "severely lacking processes for identifying inconsistent and potentially fraudulent exposure allegations across multiple trust and tort claims."[182]

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176 *See* Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1, A14, *available at* http://www.wsj.com/articles/SB10001424127887323864304578318611662911912.

177 *Id*. at A14.

178 *Id*.

179 *See id.*

180 *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 23 (Sept. 2011).

181 *See* Furthering Asbestos Claim Transparency Act, Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 114th Cong. (Feb. 4, 2015) (statement of Marc Scarcella), *available at* 2015 WLNR 3578593 [hereinafter February 2015 Testimony of Marc Scarcella].

182 *Id*.

VI. THE FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT IS A SOUND SOLUTION TO THE NEED FOR GREATER ASBESTOS BANKRUPTCY TRUST CLAIM TRANSPARENCY AT THE FEDERAL LEVEL

The Furthering Asbestos Claims Transparency Act (formerly H.R. 526), which was included in the Fairness in Class Action Litigation Act (H.R. 1927) and passed out of the House of Representatives on January 8, 2016, by a 211–188 vote, provides a sound solution to the need for greater asbestos bankruptcy trust transparency. The FACT Act simply requires asbestos trusts to file quarterly reports that will be available on the bankruptcy court's public docket. The reports would describe "each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant." To protect claimant privacy, "any confidential medical record or the claimant's full social security number" is to be excluded from the report. Finally, upon written request, a trust shall provide in a timely manner any information related to payment from, and demands for payment from, the trust, subject to appropriate protective orders, to any party in a legal action relating to liability for asbestos exposure. Before producing the information, the trust may demand payment for any reasonable cost incurred by the trust to comply with the request.

VII. NO MEANINGFUL CASE EXISTS AGAINST TRANSPARENCY

A. The FACT Act Does Not Reduce Claimant Recoveries

The FACT Act does not cap or otherwise reduce claimant recoveries. The FACT Act does not even address this issue. As Pittsburgh attorney and asbestos defense expert Nicholas Vari testified before a House subcommittee in 2015: "[T]he FACT Act provides only for the disclosure of information possessed by the trusts, so that the tort system defendants and asbestos

bankruptcy trusts can have a complete picture of a tort claimant's asbestos-exposure history…. The present legislation deals only with access to the information.[183]

B. Transparency Does Not Violate Anyone's Privacy

When someone brings a tort claim, they provide releases for defendants to obtain that person's medical history, work records, and earnings history. This must be done for the defendant to be able to ascertain the validity of the person's health claims, determine the source of the alleged injury, and determine the amount of any compensatory damages. Any information that is provided to trusts is discoverable in the tort system today.

Furthermore, the publicly available quarterly reports required to be filed by the trusts under the FACT Act are not to include any confidential medical records or claimants' full social security numbers.

C. Transparency Does Not Impose Unreasonable Burdens on Trusts

The reporting requirements in the FACT Act would not impose an unreasonable burden on the asbestos trusts. Marc Scarcella, a principal in Bates White Economic Consulting and a former data analyst and statistician for Claims Resolution Management Corporation (a wholly owned subsidiary of the Manville Personal Injury Settlement Trust), has testified that "any out-of-pocket expense the trusts incur in complying with the quarterly reporting and disclosure requirements of the FACT Act will be minimal."[184] He testified in the House in 2015:

> Asbestos bankruptcy trusts receive and collect claim level data electronically, store and process claim level data electronically, and track claim status and

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183 Furthering Asbestos Claim Transparency Act, Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 114th Cong. (Feb. 4, 2015) (statement of Nicholas P. Vari), *available at* 2015 WLNR 3481846.

184 *See* February 2015 Testimony of Marc Scarcella.

> payment information electronically. As a result, extracting quarterly summary tables at the claim level or responding to third party data requests is an efficient and cost-effective process for the trusts. Based on my extensive experience working for and with claim processing facilities on issues of data management and reporting, I can say with confidence that the trusts and facilities are well equipped to produce these quarterly reports at minimal cost.[185]

Furthermore, the FACT Act would allow trusts to require any third party that requests trust claim information to pay for the reasonable costs incurred by the trust to comply with the request.

It also should be remembered that because many TDPs require trusts to challenge defendant subpoenas, the current system is inefficient and costly to the trusts as well as to defendants. In fact, a 2011 U.S. Government Accountability Office report on asbestos trusts cited an instance in which a trust incurred $1 million in attorneys' fees responding to a discovery request.[186] According to Mr. Scarcella, "This example is exactly the type of costly and burdensome discovery request the FACT Act will limit in the future through standardized reporting requirements and cost-shifting provisions that will ultimately result in significant cost-savings for the trusts."[187]

D. Required Reporting of Information Not Otherwise Available in Many Cases

Opponents of the FACT Act may argue that because trust claims submissions are routinely required to be produced in asbestos tort actions, the legislation is unnecessary. As the *Garlock* court noted, however, it is "a regular practice by many plaintiffs' firms to delay filing Trust claims for their clients so that remaining tort system defendants [do] not have that

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185 *Id*.; *see also* Asbestos Claim Transparency, Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 113th Cong. (Mar. 13, 2013) (statement of Marc Scarcella), *available at* 2013 WLNR 6234066.

186 *See* U.S. GAO, *supra*, at 30.

187 February 2015 Testimony of Marc Scarcella, *supra*.

information."[188] Plaintiffs' attorneys have acknowledged this strategy.[189] The FACT Act does not provide a mechanism to compel plaintiffs to file trust claims before trial, like several states have done,[190] but the knowledge that inconsistent claiming activity will eventually come to light will promote honesty in litigation and reduce the type of gamesmanship that is prevalent in asbestos litigation today. The FACT Act provides an "additional check on the tort system discovery process," including the "prospect of omission in the tort system discovery process."[191]

Opponents also may argue that information found in trust claim submissions is available through plaintiff depositions or interrogatory responses. Theoretically, that is true (assuming a plaintiff is alive to be deposed). If plaintiffs and their attorneys were forthcoming in discovery and their exposure histories were consistent across the trust and tort systems, then trust claims

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188 *In re Garlock Sealing Technologies*, 504 B.R. at 84.

189 *See* George Mason Judicial Education Program, 7th Annual Judicial Symposium on Civil Justice Issues, *The Asbestos Litigation Tsunami - Will It Ever End?*, 9 J.L. Econ. & Pol'y 489, 512 (2013) (quoting New York City asbestos plaintiffs' lawyer Joseph Belluck of Belluck & Fox: "In my practice, the way we do things, we do not file the bankruptcy claims until after the case is resolved. In New York, we are not obligated to do it before. And unless my client is in a particular situation where he would benefit from the filing of the claims we do not file them during the pendency of the action."); Peggy Ableman *et al*., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 30:19 Mealey's Litig. Rep.: Asbestos 1, 7 (Nov. 4, 2015) ("[T]wo prominent plaintiff attorneys in Garlock's bankruptcy gave sworn deposition testimony that it is their practice to wait until the tort case has concluded to file bankruptcy trust claims.") (quoting Dallas asbestos plaintiffs' lawyer Peter Kraus of Waters & Kraus: "If in my judgment it would benefit the litigation case to delay the filing of a claim, and it was lawful to delay filing the claim, then we would do that.") (also quoting Philadelphia asbestos plaintiffs' lawyer Benjamin Shein of The Shein Law Center: "We file trust claims after the completion of tort litigation.").

190 *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 90.051-.058; Ariz. Rev. Stat. § 12-782; Ohio Rev. Code §§ 2307.951 to 2307.954; Okla. Stat. tit. 76, §§ 81 to 89; W. Va. Code §§ 55-7F-1 to 55-7F-11; Wis. Stat. § 802.025.

191 Furthering Asbestos Claim Transparency Act, Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 114th Cong. (Feb. 4, 2015) (statement of Nicholas P. Vari), *available at* 2015 WLNR 3481846.

information would simply bolster the information already obtained by the defendant. Unfortunately, that is not happening today.

The *Garlock* case, a 2015 RAND study, the November 2015 Crane Co. study, the December 2015 ILR report, and the many other examples provided in this testimony make crystal clear that plaintiffs often fail to identify trust-related exposures in underlying tort litigation against solvent defendants.[192] The reporting requirements in the FACT Act would help defendants identify all of a plaintiff's exposures to asbestos and help ensure that liability in civil cases is apportioned in a fair manner.

CONCLUSION

Nobody can credibly claim today that inconsistencies between exposure allegations made by asbestos claimants in the trust and tort systems are isolated events. Instead, inconsistent claiming by plaintiffs appears to be the norm. The disconnect between the trust and tort systems and lack of transparency with respect to asbestos trust claims has resulted in suppression of evidence in asbestos tort cases, prevents juries from reaching fully informed decisions as to fault, and promotes gamesmanship. The trust system itself suffers from the lack of any meaningful way for trusts to compare exposure history information across multiple trusts.

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192 *In re Garlock Sealing Techs., LLC*, 504 B.R. at 73; *see also* Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* (Rand Corp. 2015) (finding that bankruptcy reduces the likelihood that interrogatories and depositions in subsequent tort cases will identify exposure to the asbestos-containing product of the bankrupt entity), *available at* http://www.rand.org/pubs/research_reports/RR907.html; Marc C. Scarcella *et al*., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27:19 Mealey's Litig. Rep.: Asbestos 1, 11 (Nov. 7, 2012) ("The results from the study of the Philadelphia asbestos cases indicate that while exposures to thermal insulation products remain prevalent among today's plaintiff population, the identification of exposure to those products is greatly diminished compared to the claims filed prior to the Bankruptcy Wave that had comparable (or even identical) exposure histories.").

The FACT Act provides a common sense federal solution to these problems. The limited reporting requirement in the legislation does not require trusts to disclose any confidential medical record or a claimant's full social security number – only the claimant's name, exposure history, and basis for any payment from the trust. This information is not privileged or work product. Opponents' arguments against transparency are either false or exaggerated.