WRITTEN STATEMENT OF LESTER BRICKMAN
PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW

Hearing on H.R. 526: *Furthering Asbestos Claim Transparency (FACT) Act of 2015*.

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I. INTRODUCTION

Exposures to asbestos-containing materials, mostly in the 1940s and 1950s, and to a lesser extent in the 1960s and 1970s, have exacted and continue to exact an enormous toll on occupationally exposed industrial and construction workers.[1] By about 2047, when this scourge will have mostly run its course, several hundred thousand deaths will have resulted from asbestos exposures. The litigation spawned by these exposures has no counterpart in our history. Over 10,000 corporations have been named as defendants, leading to over 100 bankruptcies (and counting). The bankruptcies have led to the creation of a dual system for compensating claimants, with the bulk of the funds being paid out for mesothelioma claims.[2] Personal injury lawsuits continue to be brought against a dwindling number of solvent defendants that manufactured, sold, or distributed asbestos-containing products. The companies that were bankrupted by asbestos litigation continue to be a second source of compensation through the

[1] For the source material upon which this Statement is based, *see* LESTER BRICKMAN, *Fraud and Abuse in Mesothelioma Litigation*, 88 TULANE L. REV. 1071 (2014).

[2] Mesothelioma is a rare, aggressive, and mostly fatal cancer of the mesothelium, the protective covering surrounding many of the internal organs of the body. The most common locus of mesothelioma is the mesothelial cells lining the pleura (the lining around the lung)—a condition called malignant pleural mesothelioma. The main cause of malignant pleural mesothelioma is exposure to manufactured asbestos- containing materials. Approximately 80% of those who develop pleural mesothelioma have a history of such asbestos exposure; the other 20% (some studies indicate that the percentage is as high as 40%) are considered idiopathic, that is, having no known cause. The latency period of the disease—the length of time from first exposure to manifestation—is mostly in the twenty-to forty-year range.

creation of trusts as part of their emergence from bankruptcy. There are sixty of these asbestos bankruptcy trusts ("trusts") with current and anticipated assets totaling between $30 billion and $37 billion. The trusts—funded with cash, debtors' insurance assets, and securities in the reorganized companies—assume the legal responsibilities of the reorganized companies to compensate current and future claimants injured by exposure to the companies' products. Upon approval of the plan of reorganization, a channeling injunction is issued to direct all asbestos claims based on exposure to debtors' products to the trusts. As part of the process of reorganization, the bankruptcy court conducts an estimation proceeding to determine the amount of assets to be conveyed to the trusts based on estimates of the value of the pending claims that were stayed by the bankruptcy filing and projections of the number of future claims and their anticipated values had the debtor remained in the tort system. Based on the court's determination, a range of compensation to be paid to claimants for each category of disease, along with other criteria, is then determined. In setting the amounts to be paid to current claimants, the interests of future claimants must be taken into account so that the assets of the trust are equitably distributed. Because of plaintiffs' counsel's control over the drafting of the provisions setting forth the trusts' criteria for payment and the adoption of extremely lax standards for paying trust claimants—many of whom are represented by the same counsel who drafted the standards—actual claims filed with the trusts have far exceeded the plaintiffs' counsel's own projections. As a consequence, trusts have been repeatedly forced to dramatically lower the percentage of the liquidated values of claims that are actually paid to claimants. Nonetheless, discovery undertaken in a currently ongoing asbestos bankruptcy proceeding indicates that recoveries for a representative sample of mesothelioma plaintiffs who responded to information questionnaires, average a total of about $600,000 from 22 trusts.

Despite these reductions, trusts have been paying billions of dollars a year to claimants. Nonetheless, there is virtually no public accountability or oversight independent of the trustees who are selected by the plaintiffs' lawyers, who also set the terms for payment of claims. This motivated the United States Court of Appeals for the Third Circuit to express concern that trusts "place the authority to adjudicate claims in private rather than public hands, a difference that has at times given us and other observers pause, since it endows potentially interested parties with considerable authority." In addition, trusts provide no public disclosure of individual claims including what exposures were claimed or the amounts paid. In fact, trusts zealously guard this information and seek to hide it from tort defendants.[3] Mesothelioma victims typically qualify for payment from multiple trusts, depending upon the sources of their exposures to asbestos-containing products. If the products responsible for the exposures were distributed on a national basis for industrial or commercial use, then a substantial percentage of those mesothelioma claimants are likely to be eligible for compensation from as many as twenty- five trusts invested with assets provided by the reorganized companies that produced and distributed these products.

When companies that were providing substantial compensation to mesothelioma plaintiffs go bankrupt, the flow of money to plaintiffs and their counsel from these companies is stayed by the bankruptcy filing. Although at some later time there will be payments from the trusts to be created, there can be a delay of as many as four years (and, in some cases, even longer) before the plan of reorganization is approved. Moreover, because of the volume of claims and the need for the trusts to retain funds to pay future claimants, the individual amounts paid by the trusts are usually substantially less than the amounts that plaintiffs were receiving

[3] The Manville Trust used to be receptive to my requests for data which I used in my published writings. When Dr. Mark Peterson, plaintiffs' counsel's leading expert witness in asbestos bankruptcy estimation proceedings, was appointed to the Trust's Board of Trustees, all data availability ceased. When I asked one of the trustees why Manville had ceased providing access to its data, he answered: "come on, you know the answer."

when they successfully sued these companies in the tort system, offset by the fact that the requirements for receiving payments from trusts are far less rigorous than what needs to be proven in the tort system.

From 2000 to 2001, a "Bankruptcy Wave" took ten top-tier defendants that had produced thermal insulation and refractory products and had accounted for a substantial share of the compensation then being paid by defendants in the tort system. Some analysts believe that top-tier companies were paying upwards of 80% of what plaintiffs were receiving as compensation in the tort system during the late 1990s. Payments from the resulting trusts would not mount to substantial sums until 2006. Continuing to name the top-tier companies that had gone bankrupt as defendants would have resulted not only in substantial delays in receiving payment but also much reduced amounts. Not surprisingly to those who have studied asbestos litigation, in the immediate aftermath of the Bankruptcy Wave, plaintiffs stopped identifying exposures to the asbestos-containing thermal insulation and refractory products of these top-tier companies. Instead, they stepped up litigation efforts against formerly peripheral companies that prior to the Bankruptcy Wave were paying nominal amounts to settle claims. In addition, they started to bring suit against a new group of defendants involved in the manufacture and distribution of such asbestos-containing products as gaskets, pumps, automotive friction products, and residential construction products, rather than the thermal insulation and refractory products that were the dominant sources of exposures alleged prior to the Bankruptcy Wave. When trust payments began to mount to substantial sums in 2006, it apparently proved too lucrative for plaintiffs' counsel to abandon a system of seeking payments from multiple trusts by asserting their clients' exposures to the products of the reorganized companies while, in the same time frame, also suing defendants in the tort system, on behalf of the same claimants who then denied exposures to the

very same products of the reorganized companies, stating under oath that defendants' products were the only ones or nearly the only ones to which they were exposed.

This is borne out in a recent estimation proceeding before Judge George R. Hodges of the United States Bankruptcy Court for the Western District of North Carolina, who is presiding over the bankruptcy of Garlock Sealing Technologies ("Garlock"). Judge Hodges agreed with Garlock's expert, Dr. Charles E. Bates, who had determined Garlock's liability for present and future mesothelioma claims to be $125 million. Experts selected by counsel for the current and future asbestos claimants maintained that Garlock's liability was between $1 billion and $1.3 billion. In rejecting the claimant's experts, Judge Hodges found that their calculations were flawed because of their reliance on Garlock's settlement history in the period from 2005 to 2010, when Garlock filed for bankruptcy, as the basis for determining the values of pending and future asbestos claims. Echoing my testimony as an expert witness for the debtor in that bankruptcy proceeding, he found that "[t]he estimates of Garlock's aggregate liability. . . are infected with the impropriety of some law firms and inflated by the costs of defense."

Garlock is a leading producer of gaskets and sheet gasket material that contained chrysotile asbestos encapsulated in a polymer substance. Garlock's name was printed on its gaskets, making it well-known in the industry and to workers who installed gaskets and replaced worn gaskets. Gaskets were installed in pipes, flanges, and valves, which were then wrapped in a thick covering of asbestos-containing thermal insulation produced by other manufacturers. Garlock's gaskets only emitted asbestos fibers when they were cut to size or removed by use of chisels and abrading tools. To get to the gasket to be replaced, the thermal insulation had to be removed—usually done by hammering the material—a process that created a great deal of dust containing a far more virulent form of asbestos. By comparison, the chrysotile asbestos used in

Garlock's gaskets was 1/100 to 1/2000 as carcinogenic as friable amphibole asbestos used in thermal insulation. According to Judge Hodges, the process of removal was commonly described by workers as producing a "snowstorm of dusts." In a key finding, Judge Hodges found that Garlock had demonstrated that its products resulted in relatively low exposure of a relatively lower-potency asbestos to a limited population and that the population exposed to Garlock's products was necessarily exposed to far greater quantities of higher-potency asbestos from the products of others.

Though Garlock was a minor producer of asbestos products that were insignificant with respect to the density and carcinogenic quality of asbestos-containing products from the 1940s to 1970s, it was named as a defendant hundreds of thousands of times in its thirty-five-year asbestos litigation history and paid more than $1.3 billion in liability and defense costs until its insurance ran out and it filed for bankruptcy in 2010.

My testimony today focuses on the interplay between trust payments to claimants and suits against solvent defendants in the tort system and how that is affected by plaintiffs' counsel's effective control over the production of evidence of exposure to asbestos-containing products and their use of that control to suppress evidence of plaintiffs' exposures to the products of reorganized companies. Defendants seek to reduce the amount of compensation they pay to plaintiffs by asserting that (1) plaintiffs have received or will receive payments from trusts that should be credited against defendants' tort liabilities; (2) in states such as California, New York, and Pennsylvania, which allow juries to allocate shares of the liability to the bankrupts, plaintiffs were exposed to the products of the bankrupts, thus reducing defendants' liability share and therefore its trial risk; and (3) plaintiffs' exposures to products of the reorganized companies that funded the trusts were so much more intense and extensive than the exposures to defendants'

products that defendants' share of the total liability to plaintiffs should be determined to be significantly less than the share accorded to the reorganized companies. Defendants further assert that even when—over the strenuous objections of plaintiffs' counsel—they are able to obtain evidence of other exposures by engaging in extensive discovery including filing subpoenas with trusts, motions to compel and so on, they are still at a considerable disadvantage. Because courts limit the amount of time available for discovery, when plaintiffs' counsel disclose trust claims on the eve of trial, the closer to trial that the evidence is uncovered, the less time is available to follow up the evidence with new interrogatories, demands for documents, and other discovery. Defendants contend that when there is suppression, they have to go to trial with an out-of-date trial plan and without having been able to investigate plaintiffs' other exposures adequately and gather the necessary evidence to counter plaintiffs if they fail to disclose or deny other exposures in pretrial discovery or at trial. These factors also drive up defense costs, which in a mesothelioma case can easily run $100,000 or even multiples thereof. Defendants are typically willing to settle claims for amounts determined by their expectations of the outcomes of trials and also their defense costs. This calculation applies as well to claims they expect to win if taken to trial where settlement costs are lower than the cost to litigate the claim. Thus, the higher the costs to defendants to resolve claims, the greater the willingness of defendants to settle claims, including nonmeritorious claims, for higher amounts than would otherwise be the case.

Countering defendants' efforts to reduce their share of liability, plaintiffs and plaintiffs' counsel seek to suppress defendants' access to evidence of plaintiffs' exposures to asbestos-containing products manufactured, sold, or distributed by the reorganized companies that funded the trusts. This practice of suppression of evidence of exposures increases tort claim values while often denying defendants a fair trial. Judge Peggy L. Ableman, formerly the Delaware Superior

Court judge responsible for all asbestos litigation in the state of Delaware, strongly denounced the practice of plaintiffs denying exposures to the products of reorganized companies when, in fact, plaintiffs and their counsel had asserted just such substantial exposures in claims submitted to trusts:

> In the final analysis, there can be no real justice or fairness if the law imposes any obstacles to ascertaining and determining the complete truth. From my perspective as a judge, it is not simply the sheer waste of resources that occurs when one conducts discovery or trials without knowledge of all of the facts . . . although that circumstance is indeed unfortunate and one that courts can ill afford in this day and age. . . . What is most significant is the fact that the very foundation and integrity of the judicial process is compromised by the withholding of information that is critical to the ultimate goal of all litigation—a search for, and discovery of, the truth.

The conclusion I draw from the research I have undertaken is that to provide "real justice or fairness" and restore the "integrity of the judicial process," there is a critical need to adopt legislation at the federal level to prevent plaintiffs and their counsel from denying defendants access to evidence of other exposures of plaintiffs to asbestos-containing products. H.R. 526 is designed to do just that by mandating the transparency of evidence of plaintiffs' exposures to the products that make them eligible for payments from trusts. While three states have now enacted legislation that requires plaintiffs to provide the evidence of their exposures that they currently suppress and access to the claims they filed with trusts, there nonetheless remains a compelling need for federal legislation to amend federal bankruptcy law to require the trusts to cease throwing up these many roadblocks to production of their claims filings and instead, to make that information readily accessible to defendants in the tort system and their insurers.

II. THE ENTERPENEURIAL MODEL

In a 2004 law review article, I identified an "entrepreneurial" model used to generate the

hundreds of thousands of nonmalignant asbestos claims that were supported by unreliable medical reports that were not the product of good faith medical practice.[4] My conclusion that the vast majority of these nonmalignant asbestos claims were spurious was largely corroborated by a report issued by United States District Court Judge Janis Jack who presided over a multidistrict litigation involving approximately 10,000 silica claims and who found that the medical reports supporting the claims were "manufacture[d] . . . for money."

Although the entrepreneurial model I described was based on nonmalignant claims, it does have specific application to mesothelioma litigation. In both nonmalignant and malignant asbestos litigation, plaintiffs' counsel exercise near complete control over the production of evidence as manifested by the phenomenon of widespread changes in witness testimony concerning the products to which plaintiffs were exposed whenever a top-tier asbestos defendant is driven into bankruptcy—an event that significantly depreciates the value of claims against that company.

There is evidence that this phenomenon is attributable to plaintiffs' counsel's use of witness preparation techniques to produce testimony that denies or minimizes plaintiffs' exposures to asbestos-containing products that were manufactured by top-tier defendants that had filed for bankruptcy and instead identifies only or mostly the products manufactured by the defendants being sued in the tort system.

This practice first became evident in the aftermath of the bankruptcy of the Johns-Manville Corporation ("Manville") in 1982. Prior to 1982, the focus of asbestos litigation was on Manville, then the largest producer of asbestos-containing products. Plaintiffs and their witnesses testified that the company produced the dominant share of the asbestos-containing

[4] LESTER BRICKMAN, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33 (2004).

construction materials encountered by claimants, and as a consequence, the company paid out the most funds to claimants. The 1982 bankruptcy of the company imposed an immediate stay on all payments to tort claimants, thus halting the main flow of revenue derived from asbestos litigation. Payments would not resume until 1988 when a "run on the bank" by plaintiffs' lawyers quickly depleted the assets of the trust that was created to pay Manville's asbestos claims, resulting in a further delay in payments and a series of substantial reductions in the amounts paid out for each disease category. Accordingly, the more witnesses would continue to identify the company's products as dominating the list of asbestos-containing products to which claimants claimed exposure, the less funds would then be available to pay to claimants and their counsel. However, immediately after the bankruptcy, witness testimony underwent a sea change. Whereas testimony in the Philadelphia Navy Yard cases, for example, put Manville's share of asbestos- containing workplace products as high as 80%, after bankruptcy, witnesses testified that Manville products accounted for an increasingly declining percentage of asbestos-containing products used at work sites. In the Brooklyn Navy Yard cases, for example, after hearing witness testimony, the jury apportioned only 9-11% of the overall liability to Manville. Letting the cat out of the bag, a witness who was deposed just months after the Manville bankruptcy testified that only 25% of the asbestos containing products used at a shipyard were manufactured by Manville. Earlier in that deposition, the witness had at first estimated that "basically, most of the [asbestos-containing] materials [were made by] Johns-Manville." He then quickly added, "I wasn't supposed to mention that, was I?"

The phenomenon of witness testimony switching from identifying exposures to companies that had entered bankruptcy to identifying products of solvent companies that had formerly been peripheral defendants, or simply not defendants at all, has become a salient feature

in mesothelioma litigation as well.

A method by which plaintiffs' counsel have been able to bring about sea changes in witness testimony was revealed in an extensive series of reports in 1998 by newspaper reporters who investigated the litigation screening practices of Baron & Budd, a leading plaintiffs' law firm in asbestos litigation. This investigation revealed the extensiveness of the practice of witness preparation that focused on implanting false memories in asbestos claimants. In 1997, a novice lawyer at Baron & Budd inadvertently produced a twenty-page internal memo titled "Preparing for Your Deposition," which I have referred to as the "Script Memo." Claimants were instructed to memorize the information that a paralegal had filled out for them on their Script Memos but to never mention it. The Script Memo included instructions for clients on how to prepare for their deposition including specific answers, even if false, that were to be given regarding product exposure. The newspaper reported that in filling out the form, former employees of Baron & Budd told them that "[w]orkers were routinely encouraged to remember seeing asbestos products on their jobs that they didn't truly recall," and where necessary, employees would "implant false memories." One former paralegal explained that by the time she finished preparing a client, she had a product "ID for every manufacturer that we needed to get ID for." Baron & Budd paralegals were also instructed to steer clients away from identifying the products of bankrupt companies, such as Manville, and to "warn . . . [the client] not to say you were around [a certain product]—even if you were—after you knew it was dangerous" and "deny that they ever saw warning labels on product packages." Finally, clients were assured that defense lawyers who questioned them in a deposition would have no way of knowing what products were actually used at relevant job sites, signaling that anything the client testified to, no matter how false, could not be challenged.

Fred Baron, the late lead partner of Baron & Budd, justified the use of the Script Memo, arguing that there was nothing unethical or illegal about its contents. Indeed, he asserted that the way the firm prepared its asbestos clients to testify was how "'any lawyer in the country that is worth a damn' works."

III. THE DUAL COMPENSATION SYSTEM IN MALIGNANT LITIGATION

As noted, asbestos litigants suing on the basis of a malignancy seek to obtain compensation both from suits filed in state and federal courts and claims filed with bankruptcy trusts. The amounts of money disbursed by the trusts have soared in the past decade due in particular to the creation of nearly thirty bankruptcy trusts since 2006. From 1988, when the first trust was established, through 2008, trusts paid about 2.4 million claims totaling $10.9 billion. An additional $5 billion to $6 billion was paid by certain debtors prior to plan confirmation as part of prepackaged bankruptcy settlements. Trust claim payments rose rapidly from 2006 onward. From 2006 through 2012, trusts paid out over $15 billion to asbestos claimants. In 2008, trusts paid about 575,000 claims totaling $3.3 billion; in 2009, an additional $3.6 billion was paid, and in 2010, $3 billion. Nonetheless, total trust assets grew substantially in this period because of the establishment of new trusts with substantial assets. As of 2011, sixty trusts had been established or were in the process of being established with assets totaling between $30 billion and $37 billion.

Malignant claimants also seek compensation from defendants in the tort system whose ranks have been considerably thinned by over 100 bankruptcies. When the 2000 to 2001 Bankruptcy Wave occurred, plaintiffs' counsel increased their settlement demands to make up for the interruption of payments from solvent defendants. Defendants reasonably anticipated that

after all of the United States Bankruptcy Code § 524(g) trusts became operational, substantially increasing bankruptcy trust assets, their share of the compensation paid to those injured by exposure to asbestos would significantly decline as trusts were in position to, and did, pay billions of dollars to claimants. This did not happen. What follows is an explanation of why mesothelioma claim values in the tort system have actually risen in recent years despite the payouts of billions of dollars to mesothelioma claimants by trusts since 2006.

A. *Plaintiffs' Counsel's Control over the Formation and Operation of Bankruptcy Trusts*

The same baker's dozen or so law firms that represent the large majority of asbestos claimants also represent the majority of claimants in asbestos-related bankruptcy proceedings. In most cases, these leading asbestos law firms largely control the asbestos bankruptcy process and the operation of the trusts created under § 524(g). In the bankruptcy process, creditor committees are appointed by the United States Trustee Program to represent the interests of classes of creditors. One of those committees, the asbestos creditors' committee (ACC) initially consists of tort creditors who are selected by the U.S. Trustee. However, the practice is for those tort creditor/clients to cede control to their attorneys through powers of attorney. Thereafter, the appointed members of the committee fade from view. A handful of law firms constitute most representation on the ACCs. The leading asbestos law firms also draft the trust distribution procedures (TDPs) that contain the medical and exposure criteria for determining eligibility and a schedule of payments by disease. Claimants can elect to receive (1) scheduled values applied to various levels of disease and length of exposure, (2) amounts determined by individual evaluation, or (3) a "quick pay" minimal documentation option. Thus, the leading plaintiffs' counsel establish the criteria for the payment of the very claims that they are and will be asserting on behalf of their clients. These criteria are designed to allow asbestos claimants to

obtain funds on the basis of claims of exposure that must meet far less stringent standards than those required in the tort system. Indeed, the exposure requirement can be satisfied by an affidavit—submitted by the claimant, a coworker, or family member— or by having been employed at various work sites identified in the TDPs. As testified to by a plaintiffs' counsel, the TDPs are designed to permit claimants to withdraw as much money as possible from the trusts as quickly as possible.

In addition to their control over the ACCs, though formally appointed by the bankruptcy judge, these plaintiffs' counsel effectively select the trustees to operate the § 524(g) bankruptcy trusts that will be created to actually pay the claims, the administrator of the trust, and also the "future claimants representative" (FCR) who is to represent the interests of future claimants. Finally, they also constitute the membership of trust advisory committees (TACs), which represent the interests of current asbestos claimants. While trustees have the authority to amend TDPs, it can only be done with the consent of the TAC and FCR. Essentially, it is the TACs that exercise effective control over trusts' TDPs after they have been initially adopted.

The FCRs, though appointed by the bankruptcy court, in reality, are selected by the ACC, aka, plaintiffs' counsel. The appointment is most lucrative for FCRs, and some FCRs have proven so congenial with the plaintiff's bar that they have been appointed to be FCRs in multiple trusts. Prior to the Garlock case, I am aware of no occasion when an FCR ever took a position opposed to the interests of plaintiffs' counsel. It does not appear to be a coincidence that the deals struck by asbestos claimants in past asbestos cases have often been abysmal for future claimants. In a common scenario, trusts substantially reduce payment levels for future claimants after present claimants have been fully resolved and paid.

Unlike all other bankruptcies, the FCR appointed by Judge Hodges had no prior

connection with any stakeholder in asbestos litigation. The FCR represents *future claimants* who appear to far exceed in both numbers and claim values, *current claimants.* In a series of unprecedented acts, the Garlock FCR has broken rank with the Garlock ACC. He first moved the bankruptcy court to impose a bar date for present asbestos claims in order to ensure that the court could identify truly deserving claimants and avoid overpaying those claims to the detriment of future claimants. He also refused to adopt the standard TDPs used in other asbestos bankruptcies which, as explained earlier, have resulted in inequitable treatment for future claimants. Finally, he negotiated a plan of reorganization with Garlock that guarantees funding of at least $357 million for present asbestos claimants, an amount almost three times Judge Hodges $125 million estimation. Central to the deal between Garlock and the FCR are claims resolution procedures that preserve money for claimants with injuries based on real medical diagnoses who demonstrate that they really worked with Garlock's products. Not surprisingly, the ACC, composed of plaintiffs' lawyers, currently opposes the plan.

B. *The Use of TDPs to Suppress Evidence*

Plaintiffs' counsel, who have effective control over the creation and administration of asbestos bankruptcy trusts have used that power to include, amend, or add provisions to TDPs designed to limit, if not preclude, defendants' ability to use discovery to access evidence that a tort plaintiff has filed trust claims. In filing a trust claim, a "claimant must demonstrate "meaningful and credible exposure" to the products of the company funding the trust. As of 2011, 65% of asbestos trusts had modified their TDPs after confirmation to include provisions designed to allow claimants who are also suing defendants in the tort system to prevent tort defendants from accessing exposure evidence and other vital information submitted by the

claimants as part of their trust claims.

One such provision is a "confidentiality" provision, which generally states that all information submitted to trusts by an asbestos claimant is to be treated as made in the course of settlement negotiations and is intended to be confidential and protected by all applicable privileges. Not only does this provision require a subpoena for production of claims information, it requires that the subpoena issue from the bankruptcy court, not simply the trial court. This is intended by plaintiffs' counsel to at least delay defendants' access to possibly vital information by having to run an additional gauntlet of bankruptcy judges, thus imposing increased costs on defendants. Additionally, the provision instructs the trustees of the trusts to take the initiative to challenge subpoenas seeking trust claim information, thus magnifying the increased costs and delay.

Plaintiffs' counsel maintain, as they have set forth in section 6.5 of most TDPs, that because trust claims and all materials related to the claim are made in the course of settlement discussions, they are therefore privileged. This argument does not rise to featherweight status. Over their strenuous opposition, more than twenty trial courts have held that claim forms submitted to asbestos bankruptcy trusts and factual information such as medical records submitted in support of trust claims are not confidential records and are discoverable in civil litigation.

Nonetheless, plaintiffs' counsel continue to erect barriers to tort defendants' accessing trust claim filings. Written discovery propounded to plaintiffs related to bankruptcy trusts is almost always met with objection. Even subpoenas served on the trusts are vigorously opposed by plaintiffs' counsel. Indeed, on December 28, 2011, the three plaintiffs' firms representing all plaintiffs within the Rhode Island asbestos docket filed a joint motion for a blanket protective order asking the court to prevent "the disclosure of the terms and supporting documentation of

any settlement entered into between any plaintiff and any named or unnamed defendant or bankruptcy trust." On August 7, 2012, Judge Hodges, presiding over the Garlock bankruptcy, denied the requests by the Delaware Claims Processing Facility, which processed claims for these trusts, joined by the numerous trusts that had been subpoenaed by Garlock to provide trust claim filings by those who had sued Garlock and the Garlock ACC, to make anonymous the trust claim data before submitting it to Garlock. Doing so would have disabled Garlock from determining whether plaintiffs who had sued Garlock had also submitted trust claims and what exposures were alleged in the claims.

Furthermore, there is evidence that plaintiffs and their counsel, in some cases, simply ignore the requirement in standing orders of courts that plaintiffs provide defendants with a statement of any and all claims that may exist against asbestos trusts. In addition to "confidentiality" provisions—many added by amendment after confirmation of the plan of reorganization, plaintiffs' counsel have also had trusts' TDPs amended after confirmation to add a paragraph that provides that evidence submitted to the trust is for the "sole benefit" of the trust and claimants are not required to list any other exposures in filing a claim except those for which the trust is responsible. In addition, if an asbestos plaintiff in a tort action fails to identify exposure to products of a reorganized company or fails to do so when filing claims with other trusts, then the plaintiff would not be precluded from recovering as an asbestos claimant from that trust.

This provision appears intended to enable plaintiffs and their counsel to limit the exposure evidence they must provide in support of trust claims, thus minimizing the evidence of exposures that a defendant may acquire by obtaining a court ruling enforcing a subpoena directed to a trust to produce any trust claims that a plaintiff filed with that trust. This provision also

vitiates any consequence of failing to identify product exposures in responses to interrogatories, depositions, and trial testimony in tort cases. For example, if plaintiffs suing an asbestos defendant respond to interrogatories or give testimony in a deposition or at trial or all three in which they deny that they were exposed to any other asbestos-containing products besides the defendant's products, indeed deny that they were exposed to specific asbestos products not manufactured or sold by the defendant, for example, Unibestos (manufactured by Pittsburgh Corning) or Kaylo (Owens Corning), and then file claims before, during, or after conclusion of the tort case with, *inter alia*, the Pittsburgh Corning and Owens Corning Trusts attesting to "meaningful and credible exposure" to their products, section 5.7(b)(3) of the TDPs provides that, regardless of any such perjurious trial testimony, as long as the claimant has satisfied the medical and exposure requirements in the TDPs, the trust claim is valid.

A third 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. 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, in section 6.3, 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." Section 6.3 further provides:

> A claimant can . . . request that the processing of his or her PI Trust Claim by the PI Trust be deferred for a period not to exceed three (3) years without affecting the status of the claim for statute of limitations purposes, in which case the claimant shall also retain his or her original place in the

FIFO Processing Queue.

Thus, 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. Section 6.3 further facilitates plaintiffs' and their counsel's denials in the course of pretrial discovery that they had filed trust claims, despite their having done so. Upon refiling or reviving the trust claims, plaintiffs and their counsel will almost certainly assert product exposures that are inconsistent with the claims of causation advanced in the tort litigation. The practice of using section 6.3 of TDPs for this purpose is laid bare in *Barnes & Crisafi v. Georgia-Pacific*. There, plaintiffs' counsel justified plaintiffs' denial of filing any trust claims—when they had in fact filed at least four trust claims—on the grounds that the claims were deferral claims and therefore were not filed trust claims. An irate judge emphatically rejected that excuse stating that her order required all trust claims to be disclosed, including "deferral claims," and that "[t]he defense is entitled to know that." She then reopened discovery to permit the defendant to further investigate the plaintiffs' trust filings.

The timing of the TDP changes is noteworthy. The "sole benefit" and "deferral" provisions were mostly added or adopted during the years 2006 to 2010. It was during this period when the current version of the "confidentiality" provisions became standard in TDPs and when there was an influx of new trusts with substantial assets and the bulk of the trust money began to be paid out. This was also the time when concerns about "double-dipping," i.e., asserting trust claims with work histories and exposure claims that are inconsistent with plaintiffs' testimony in tort actions, were gaining national attention because of *Kananian v. Lorillard Tobacco Co.* This case (which I will not be discussing in detail) illuminated the practice

of plaintiffs and their counsel falsely denying exposure to the products of reorganized companies, even though counsel had not only filed claims with several trusts but had received payment from one of them.

In my view, the TDP changes discussed above are an effort by plaintiffs' counsel, who exercise effective control over the trusts, to prevent defendants from demonstrating that plaintiffs' denials of exposure to other products are belied by plaintiffs' having filed multiple trust claims before the tort case was filed, during the tort case, or after the conclusion of the tort case, which assert product exposures that were denied by plaintiffs during the course of pretrial discovery and trial testimony. To curb this abusive practice, it is incumbent on Congress to pass H.R. 526.

C. *Rule 2019 Statements*

Other evidence of plaintiffs' counsel's suppression of evidence of plaintiffs' exposures to asbestos-containing products not manufactured, sold, or distributed by defendants and thus the need for a federal low curbing this illegal scheme involves Federal Rule of Bankruptcy Procedure 2019 statements ("2019 Statements"). Section 2019(a) requires that attorneys representing more than one creditor file a verified statement listing the creditors, the amount and nature of their claims (as well as the acquisition date of claims acquired within the last year), the facts surrounding the attorney's employment in the case, and the nature and amount of any claims or interests owned by the attorney at the time they were hired. This requirement enables the court to identify actual or potential conflicts that may require conflicted counsel to withdraw from representing one or more of the lawyer's clients. Every law firm representing more than one plaintiff with a claim against the debtor is required to file this statement.

In 2019 Statements, claimants' counsel provide a verified statement that their clients have

claims against the debtor because their clients were exposed to the asbestos-containing products of the debtor and that these exposures caused the claimant's disease. For example, in the Pittsburgh Corning bankruptcy, counsel filed the following 2019 Statement:

> 2. I have personal knowledge of the facts set forth herein. I make this Verified Statement ("Statement") pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure and the Court's Order of October 22, 2004.
>
> . . . .
>
> 4. As of the date of this Verified Statement, the Firm Claimants (the "Claimants" or individually "Claimant") who have been injured by asbestos products manufactured, marketed, distributed, sold, or produced by Pittsburgh Corning Corporation ("Debtor") and others, and thus hold claims against, inter alia, the Debtor.
>
> . . . .
>
> 6. The nature of the claim held by each Claimant is a personal injury tort claim for damages caused by asbestos products manufactured by the Debtor.

In practice, in order to further their scheme to suppress evidence of their client's exposures, plaintiffs' lawyers representing asbestos claimants numbering in the hundreds and thousands in bankruptcy proceedings, routinely failed to file 2019 Statements and strongly resisted efforts to secure compliance with the rule. These filings contain statements of plaintiffs' exposures to numerous products of the reorganized companies. If copies are secured by defendants, they could impeach testimony by plaintiffs denying such exposures. Only in the last decade have courts begun mandating compliance with Rule 2019. In 2004, United States Bankruptcy Judge Judith Fitzgerald, who has presided over twelve asbestos bankruptcies, issued an omnibus order requiring all counsel representing more than one creditor in several specified asbestos bankruptcy proceedings to comply with Rule 2019 or else the votes of their clients would not be counted in the voting on approval of the plan of reorganization. However, although Judge Fitzgerald ordered counsel to submit exhibits in compliance with Rule 2019, she further ordered that the exhibits were not to be scanned into the docket and instead would be kept confidential and only accessible if the bankruptcy court ruled favorably on a motion to access the

exhibits. In contrast, United States Bankruptcy Judge Kathryn C. Ferguson, presiding over the Congoleum bankruptcy, ordered full compliance with Rule 2019, including public disclosure of personal injury and wrongful death claimants represented by firms. Judge Ferguson's order was in response, *inter alia*, to a motion to compel the law firm of Motley Rice to provide the information called for by Rule 2019. United States District Court Judge Stanley R. Chesler affirmed Judge Ferguson's order, holding that complete disclosure in compliance with Rule 2019 is necessary to ensure the overall fairness of the reorganization plan.

During the course of the Garlock bankruptcy proceeding, the debtor's counsel, recognizing the potential value of having access to these statements, for the first time in asbestos bankruptcy proceedings, filed motions to access the exhibits to the 2019 Statements in the twelve bankruptcies presided over by Judge Fitzgerald. This was done so that the debtor could use the 2019 Statements in an attempt to prove that in asbestos litigation against Garlock, plaintiffs and their counsel had failed to disclose or denied exposure to the products of reorganized companies, even though their counsel had filed 2019 Statements attesting that their clients had valid claims against the companies in bankruptcy. Judge Fitzgerald denied Garlock's request. She then entered essentially identical orders and opinions in each of nine Delaware bankruptcy cases and the three Western District of Pennsylvania bankruptcy cases. Garlock appealed these orders to the United States District Court for the District of Delaware, which overruled Judge Fitzgerald on this point and permitted Garlock access to the 2019 Statements and exhibits that had been kept from public access.

D. *Master Ballots*

In order to be eligible to vote on a plan of reorganization in an asbestos bankruptcy as set

forth in §524(g), plaintiffs' counsel, on behalf of their claimant-clients, are required to certify, under penalty of perjury, that they have a claim against the debtor because of exposure to asbestos-containing products for which the relevant debtor is responsible. Here too, plaintiffs' counsel seek, to preclude, or at least impede any attempts to obtain the Master Ballots filed by plaintiffs' counsel on behalf of their clients. Moreover, although these ballots are court filings, they are generally filed with a balloting agent and not made readily available to the public.

Garlock's bankruptcy counsel, in another "first," sought access to the Master Ballots but was only allowed to view Master Ballots cast on behalf of personal injury claimants in the Pittsburgh Corning proposed plan of reorganization. Garlock then did a random sampling of discovery responses by asbestos plaintiffs who had sued Garlock. Of 255 Garlock mesothelioma plaintiffs who had voted, via their counsel, on the Pittsburgh Corning plan, with counsel certifying under penalty of perjury that their clients were injured by exposure to Pittsburgh Corning products and therefore had a valid claim against the debtor, only 19 had disclosed in their suits against Garlock that they had been exposed to Pittsburgh Corning products. Garlock indicated in its own bankruptcy filing that it had entered settlements with thirty-seven of the sampled plaintiffs for at least $100,000 each. Only six of these plaintiffs had mentioned exposure to a Pittsburgh Corning product in their tort suits.

One of the thirty-seven plaintiffs "ha[d] been asked by his own counsel in deposition, 'Have you ever been exposed to Unibestos insulation [a Pittsburgh Corning product]?' The plaintiff testified, 'No.'" Three months later, Garlock settled his mesothelioma claim for $400,000. Nine months after the payment, the law firm cast a ballot on his behalf, certifying under penalty of perjury that he had indeed been exposed to Pittsburgh Corning's asbestos-containing products.

Another one of the thirty-seven plaintiffs insisted repeatedly in his deposition that he had never been exposed to pipe insulation (such as Unibestos). Garlock settled this mesothelioma claim for $450,000 in January 2010. Two months later and only eight months after his deposition, his attorney certified under penalty of perjury that his client had been harmed by exposure to Pittsburgh Corning products and was therefore entitled to vote on the plan of reorganization. Forty-one different Pittsburgh Corning voters in the sample submitted discovery after casting a ballot in the Pittsburgh Corning bankruptcy. All but two of these plaintiffs (95%) *failed* to identify exposure to Unibestos or another Pittsburgh Corning product despite their lawyers' prior certification to the contrary under penalty of perjury. This record explains why plaintiffs' counsel opposed Garlock's attempts to subpoena the balloting agents to obtain this information and is further evidence, if further evidence is needed, that federal legislation is needed to curb practices which amount to a fraud on courts.

E. *The Kananian Case*

Plaintiffs' counsel's efforts to increase tort claim values are not limited to (1) opposing disclosure of 2019 Statements, exhibits, and Master Ballots cast to approve plans of reorganization; (2) adopting or adding TDP provisions designed to prevent defendants from accessing product exposure claims contained in trust filings; and (3) concealing the existence of trust claims that have been filed prior to filing the tort suit or thereafter that assert "meaningful and credible exposure" to the products of reorganized companies that are not disclosed, and even denied, in pretrial discovery. To conceal trust claim filings, plaintiffs and their counsel, according to some judges, have engaged in fraudulent actions in pretrial discovery. Plaintiffs' counsel have argued that fraudulent actions to suppress the production of exposure evidence submitted with trust filings are extremely rare—that, indeed, the widely reported case of

Kananian v. Lorillard Tobacco Co. was a one-off, an "isolated incident."

According to the presiding judge, the facts in Kananian reveal fraudulent conduct by plaintiff's counsel on a massive scale.

Judge Peggy L. Ableman, has characterized the deceptive practices of some asbestos plaintiffs and their counsel as "dishonesty at its highest level," observing, "This is trying to defraud. . . . [I]t happens a lot [in asbestos litigation]." Judge Ableman's comments are supported by a number of cases demonstrating patterns of deceptive and fraudulent conduct by plaintiffs and their counsel that can be accessed in my recent article.[5]

F. *Lies, Damned Lies, and Discovery Responses*

There are many documented incidents of plaintiffs and their counsel, throughout discovery and trial, withholding information about asbestos trust claims that they filed. Even where a court's rulings make clear that trust claim materials must be produced, tort defendants are nonetheless often forced to file motions to compel the production of trust claim information. If production is finally made, trust materials can reveal "substantial and inexplicable discrepancies between the positions taken in Court and the trust claims." In *Warfield v. AC & S, Inc.,* the plaintiff failed to disclose nine trust claims, eight of which had been filed before he testified in the litigation. Though egregious, this kind of deceit is by no means exceptional. In another case, the plaintiff denied having filed trust claims despite having received payment of approximately $185,000 from five trusts and "deferring" fourteen other claims worth at least $313,000—a total of nineteen undisclosed filed claims.

Another tactic employed by plaintiffs and their counsel is to postpone filing trust claims that would undermine a particular theory of liability at trial until after disposition of the suit.

[5] *Supra* note 1 at 1112-1118.

G. *Plaintiffs' Counsel's Explanations for Their Failure To Disclose*

Plaintiffs and plaintiffs' counsel often pose specious explanations for their failure to disclose trust claims. One excuse tendered is that the undisclosed claims are merely "deferral claims," filed only to toll the statute of limitations. As noted, the court in *Barnes & Crisafi* categorically rejected the argument that the distinction between a claim and a "deferral claim" could excuse nondisclosure and admonished the plaintiff 's counsel: "You cannot be blind, deaf and dumb."

Another excuse is for trial counsel to claim ignorance of claims that have been filed on behalf of the client by other law firms. In one case where nondisclosure was brought to light, counsel claimed that his client had lied to him about product exposures and concealed the fact of applications to numerous trusts and the receipt of payment.

In *Stoeckler v. Am. Oil Co.*, trial counsel denied any prior knowledge of the plaintiff 's multiple trust filings. Once revealed, one of the plaintiff 's trial counsel first argued that the claim forms contained no assertion by Stoeckler that he was actually exposed to products of the reorganized companies. The court rejected this contention, pointing out that trust forms Stoeckler submitted required claimants to provide information regarding their exposures to products for which the trusts were responsible and that the trust claims filed had identified specific products to which he claimed exposure. Another trial counsel then argued that the trust filings, including the product identifications, were not made by Stoeckler but rather by another firm that represented him, and therefore Stoeckler could still maintain that he was not exposed to the products of the four reorganized companies.

In her opinion in *Montgomery v. American Steel & Wire Corp.* as well as in her recent congressional testimony and her article that appeared along with mine in the Tulane Law Review,

Judge Ableman discussed abusive, if not fraudulent, practices in a pretrial hearing.

In *Montgomery*, plaintiffs' failed to identify twenty bankruptcy trusts to which they had submitted claims. In response to an interrogatory asking plaintiffs to identify all entities who were not defendants to whose products plaintiff June Montgomery had been exposed, plaintiffs identified none of the trusts to which claims had been submitted. Indeed, counsel for plaintiffs stated that no bankruptcy submissions had been made and no monies received. Two days before a two-week trial was to commence, plaintiffs' counsel reported that his client had received two bankruptcy settlements of which he was previously unaware. The following day, the defendant learned that, in fact, twenty bankruptcy trust claims had been submitted.

According to Judge Ableman, the fraudulent scheme was only exposed because one of the named defendants knew of other instances of plaintiffs' counsel submitting "conflicting work histories *to* multiple trusts [and] filed a motion in advance of trial requesting that the Court order disclosure of all pretrial settlements, including monies received from bankruptcy trusts." The court called the failure to report those twenty trust claim filings examples of "dishonesty and disreputableness," stating, "The core of this case has been fraudulent." This is trying to defraud," the jurist stated. "[I]t happens a lot [in asbestos litigation].

In the teeth of the overwhelming evidence that some plaintiffs' counsel's practices are designed to defraud defendants, plaintiffs' counsel continue to deny any fraudulent practice in mesothelioma litigation. For example, Elihu Inselbuch, the lead lawyer for Caplin & Drysdale which has represented plaintiffs' counsel's interests in the vast majority of asbestos bankruptcies, has argued that fraudulent actions to suppress the production of exposure evidence submitted with trust filings are extremely rare.[6] As for the massive fraud in *Kananian*, he testified before

[6] *See* Elihu Inselbuch et al., *The Effrontery of the Asbestos Trust Transparency Legislation Efforts*, MEALEY'S LITIG. REP.: ASBESTOS Feb. 2013, at 17.

this Subcommittee that it "was an isolated incident, remedied by a state court, involving inconsistent trust claims with respect to a single claimant one of the millions who have filed claims with asbestos trusts."[7] Inselbuch's denial of plaintiffs' counsel's involvement with fraud is echoed by the plaintiffs' asbestos bar.[8] Congressional testimony from Charles S. Siegel, then of the plaintiffs' firm of Waters, Krause & Paul LLP, is to the same effect:

> "The few examples that we have of fraud in the system today I think show that the system works. The Kananian case is a terrible example. That lawyer was disbarred, and that claim was dismissed. And so once in a while we have a situation like that, the system deals with it, and the parties go on down the road.").[9]

There is no evidence, however, that the Brayton Purcell lawyer whose *pro hac vice* status was revoked by the presiding Judge in *Kananian*, was ever subjected to discipline further let alone disbarred for his conduct which the judge characterized as "lies upon lies upon lies."

H. *The Results of Garlock's Limited Discovery*

Judge Albeman's words that "it happens a lot" has been corroborated by Judge Hodges in the Garlock bankruptcy. Though Garlock sought to undertake extensive discovery to establish that evidence of exposures to the products of the top-tier reorganized companies had been

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[7] *Furthering Asbestos Claim Transparency (FACT) Act of 2013*: *Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 66 (2013) (prepared statement of Elihu Inselbuch, Member, Caplin & Drysdale) [hereinafter *Inselbuch Statement*]

[8] *See e.g. id*. at 68 ("Indeed, there is not a scintilla of evidence of [fraud in he trust system]."); Task Force on Asbestos Litigation and the Bankruptcy Trusts, ABA 165-66 (June 6, 2013), http://www.americanbar.org/content/dam/aba/administrative/tips/asbestos_tf/revised_task_force_on_asbestos_litigation_and_the_bankruptcy_trusts_06-06-2013.auth checkdam.pdf (testimony of John Ruckdeschel, Ruckdeschel Law Firm) ("I'm not aware of a single instance where anybody has come forward and said [during the course of an asbestos trial that 'I was not exposed,' and then after that files a bankruptcy claim attesting to just such exposure]. I'm not aware of any instance where that has happened.").

[9] *Furthering Asbestos Claim Transparency (FACT) Act* of 2012: *Hearing on H.R. 4369 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 58 (2012) (statement of Charles S. Siegel, Partner, Waters, Kraus, & Paul LLP).

suppressed, most of Garlock's attempts were vigorously contested by counsel for the Garlock ACC and were denied by the court.

Judge Hodges did, however, at a later point during discovery, allow Garlock to conduct discovery regarding fifteen plaintiffs represented by five law firms with which Garlock had settled mesothelioma cases for substantial sums. Judge Hodges' findings were both illuminating and inculpating:

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

In the fifteen cases, plaintiffs disclosed a total of thirty-two exposures but failed to disclose an additional 284 exposures—a failure-to-disclose rate of 90%.

Judge Hodges then went on to provide details on five of the fifteen cases:

> In a California case involving a former Navy machinist mate aboard a nuclear submarine, Garlock suffered a verdict of $9 million in actual damages. The plaintiff did not admit to any exposure from amphibole insulation, did not identify any specific insulation product and claimed that 100% of his work was on gaskets. Garlock attempted to show that he was exposed to Unibestos amphibole insulation manufactured by Pittsburgh Corning. The plaintiff denied that and, moreover, the plaintiff's lawyer fought to keep Pittsburgh Corning off the verdict form and even affirmatively represented to the jury that there was no Unibestos insulation on the ship. But, discovery in this case disclosed that after that verdict, the plaintiff's lawyers filed 14 Trust claims, including several against amphibole insulation manufacturers. And most important, 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. In total, these lawyers failed to disclose exposure to 22 other asbestos products.
>
> A Philadelphia case involved a laborer and apprentice pipefitter in the Philadelphia shipyard which Garlock settled for $250,000. The plaintiff did not identify exposure to any bankrupt companies' asbestos

> products. In answers to written interrogatories in the tort suit, the plaintiff's lawyers stated that the plaintiff presently had "no personal knowledge" of such exposure. However, 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." In total, this plaintiff 's lawyer failed to disclose exposure to 20 different asbestos products for which he made Trust claims. Fourteen of these claims were supported by sworn statements, that contradicted the plaintiff 's denials in the tort discovery.
>
> Another case in New York was settled by Garlock for $250,000 during trial. The plaintiff had denied any exposure to insulation products. After the case was settled, the plaintiff 's lawyers filed 23 Trust claims on his behalf—eight of them were filed within twenty-four hours after the settlement. In another California case, Garlock settled with a former Navy electronics technician for $450,000. The plaintiff denied that he ever saw anyone installing or removing pipe insulation on his ship. After the settlement, the plaintiff 's lawyers filed eleven Trust claims for him— seven of those were based on declarations that he personally removed and replaced insulation and identified, by name, the insulation products to which he was exposed.
>
> In a Texas case, the plaintiff received a $1.35 million verdict against Garlock upon the claim that his only asbestos exposure was to Garlock . . . gasket material. His responses to interrogatories disclosed no other product to which he was exposed. The plaintiff specifically denied any knowledge of the name "Babcock & Wilcox" and his attorneys represented to the jury that there was no evidence that his injury was caused by exposure to Owens Corning insulation. Garlock's discovery in this case demonstrated that the day before the plaintiff 's denial of any knowledge of Babcock & Wilcox, his lawyers had filed a Trust claim against it on his behalf. Also, after the verdict, his lawyers filed a claim with the Owens Corning Trust. Both claims were paid—upon the representation that the plaintiff had handled raw asbestos fibers and fabricated asbestos products from raw asbestos on a regular basis.

Judge Hodges then addressed the issue of how representative these fifteen cases were of the mesothelioma cases that Garlock settled in the years 2005 to 2010.

> These fifteen cases are just a minute portion of the thousands that were resolved by Garlock in the tort system. And they are not purported to be a random or representative sample. But, the fact that each and every one of them contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those

> cases appears to have been sufficiently widespread to have a significant impact on Garlock's settlement practices and results. Garlock identified 205 additional cases where the plaintiff 's discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases. Garlock's corporate parent's general counsel identified 161 cases during the relevant period where Garlock paid recoveries of $250,000 or more. The limited discovery allowed by the court demonstrated that almost half of those cases involved misrepresentation of exposure evidence. It appears certain that more extensive discovery would show more extensive abuse. But that is not necessary because the startling pattern of misrepresentation that has been shown is sufficiently persuasive.

I. *The Extent of Suppression of Exposure Evidence*

The examples I present here and those I further set out in my published scholarship, as well as the findings by Judge Hodges in the Garlock bankruptcy, support the conclusion that plaintiffs and their counsel are routinely employing deceptive and in many cases fraudulent practices in contravention of law, the rules of discovery and often in defiance of direct court orders. These *known* attempts at deceit can only be the tip of the iceberg. As Judge Hodges concluded, there are undoubtedly many cases in which plaintiffs' and their counsel's efforts to suppress defendants' ability to uncover evidence of plaintiffs' other exposures have succeeded. In his own words, the evidence in the Garlock bankruptcy despite "limited discovery allowed by the court demonstrated that almost half of [the several hundred cases that Garlock was able to investigate] involved misrepresentation of exposure evidence [, to the extent that it] appears certain that more extensive discovery would show more extensive abuse [beyond that demonstrated by the] startling pattern of misrepresentation." Although much of the evidence that Garlock presented still remains under seal, the Garlock evidence that Judge Hodges did disclose in his order as to the frequency of apparently perjurious denials of exposures to products to which plaintiffs had asserted "credible and meaningful exposure," coupled with plaintiffs' counsel's brazen manipulation of TDPs to facilitate such denials, leads in my opinion, to an

inexorable conclusion: the practice of deliberately failing to disclose evidence of other exposures is far closer to the norm that the exception. Or, as Judge Ableman stated, what the asbestos lawyers are doing "is trying to defraud. . . . [I]t happens a lot." Indeed, it is likely that cases in which fraud has been successfully employed dwarf the number of cases in which abuse has been uncovered.

J. *The Effect of Inconsistent Trust Claims on Payments to Trust Claimants*

The evidence discussed by Judge Hodges as well as the evidence I have set forth in my scholarship demonstrates that plaintiffs and their counsel seek to suppress evidence of other exposures and trust claim filings so that in pretrial discovery and trial testimony they can deny, with impunity, any other exposures than those to defendants' products. It is also the case that they file trust claims that are inconsistent with each other with regard to claims of exposure. Trusts do not compare the work histories of claimants with the work histories submitted by the claimants to other trusts to support their claims. Indeed, work histories of those filing claims with trusts appear to be fungible. The Wall Street Journal did a study of approximately 850,000 claims filed with the Manville Trust since the late 1980s up to 2012.

> 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.
>
> 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.

The result of trusts' failures to provide for a single clearinghouse to which all claims would be first submitted so that sampling can be done to compare work histories submitted by a claimant to multiple trusts to check for inconsistencies is that trusts are paying out substantial sums to claimants who are not entitled to those payments, at the expense of future claimants.

As a consequence, trusts are receiving claim submissions that far exceed their projections. This, in turn, has caused most trusts, mainly at the expense of future claimants, to decrease substantially the percentage of the liquidated value of claims to be paid to eligible claimants as set forth in the TDPs for specified diseases and exposures.

K. *The Source of the Scheme to Suppress Evidence of Exposure to the Products of Reorganized Companies*

Improper trust payments no doubt have amounted to billions of dollars. As for tort defendants, it is simply not possible even to begin to estimate how much money they have paid out as a consequence of plaintiffs making false claims as to product exposures. Undoubtedly, it amounts to hundreds of millions, if not billions, of dollars. It is improbable, to say the least, that the scheme to suppress evidence of other exposures is being hatched by plaintiffs. The account of how the firm of Baron & Budd prepared their clients to identify only the "right" products as the ones to which they were exposed and reassured their clients that defendants and their counsel had no way of knowing if they lied about their product exposures is instructive with regard to the question of how plaintiffs' counsel in mesothelioma cases may be going about instructing their tort clients to tailor their testimony to further the scheme to suppress evidence of their other exposures and thus maximize the value of their claims. One manifestation of the effect of such preparation, as discussed earlier, is the abrupt change in plaintiffs' testimony about which products they were exposed to after a top-tier asbestos company declares bankruptcy. A prominent example is the comparison of product exposures that plaintiffs' asserted prior to the 2000 to 2001 Bankruptcy Wave and those products they named after the Wave. Prior to the Wave, asbestos litigation focused on companies that manufactured, sold, or distributed thermal insulation and refractory products. After the Wave, product identification changed just as it had in the aftermath of the Manville Bankruptcy in 1982; plaintiffs stopped identifying the products

of the bankrupts and maintained that their sole exposures were to the products of the defendant or defendants they were suing. Up until the Bankruptcy Wave, Garlock was a peripheral defendant in asbestos litigation. Though named as a defendant along with top-tier companies hundreds of thousands of times mostly in nonmalignant litigation, Garlock was able to settle the vast majority of these cases for nominal amounts. Not so after the Bankruptcy Wave. When suing Garlock, plaintiffs stopped identifying exposures to the products of ten of the top-tier companies—all of which declared bankruptcy between 2000 and 2001—and claimed that their only exposures were to Garlock's products and, in some cases, to the products of a few other gasket and pump manufacturers.

Plaintiffs' counsel argue that elderly plaintiffs' inability to identify the products of the reorganized companies to which they had been exposed is a combination of their having forgotten or not ever having known the names of the manufacturers or distributors of products to which they were exposed thirty, forty, and even fifty years earlier. Judge Hodges, echoing my testimony in Garlock, responded forcefully to that argument.

> [W]hile 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. It is that practice that prejudiced Garlock in the tort system—and makes its settlement history an unreliable predictor of its true liability.

IV. MESOTHELIOMA LITIGATION

Mesothelioma litigation is highly lucrative and will continue to be so for perhaps two more decades. Retainer agreements typically provide for 40% contingency fees. This helps to explain why it is the most heavily recruited form of litigation in the United States today, with massive and expensive efforts devoted to finding the small number of people diagnosed each

year and bringing suit on their behalf. For example, the mesothelioma practice of certain law firms appears to be devoted almost entirely to recruiting mesothelioma plaintiffs and then referring them to other firms to handle the tort litigation, with the referral firm often handling the trust filings. These firms employ cutting-edge marketing techniques to obtain clients, using Internet search engine advertising, techniques for ensuring that they appear high in search results, and networks of Web sites, Facebook pages, and Twitter handles purporting to provide information to people with disease but actually guiding individuals to the law firm. Demonstrating the level of competition in this field, "mesothelioma" and other phrases containing that word such as "mesothelioma settlement" and "mesothelioma asbestos attorney" are among the most expensive Google AdWords in the Google search engine, commanding as much as $80 a click according to one report and $143 a click according to another report.

Once these referral firms refer a case to a trial firm, they usually retain the right to file the trust claims for the client and receive a contingency fee on both the trust recoveries and tort recoveries, while the trial firm, on the other hand, often receives a contingency fee only on the tort recoveries and not on the trust recoveries. Trial firms therefore have an obvious financial incentive to minimize any evidence of plaintiffs' exposures to the products of reorganized companies because if that evidence were available before the tort cases were resolved, it would impair the value of the tort cases. The referral firms have an interest in the value of the tort claims being maximized (because they receive a substantial percentage of the trial lawyer's contingency fees), but they also have an incentive to maximize fees from the trust claims by filing as many claims as possible with multiple trusts. Thus, the trial firms have a financial incentive to request referral firms to delay filing trust claims until all tort cases have been concluded in order to maximize the value of tort litigations. If the trust claim filings are

thus delayed which is the practice of some firms, then when defendants conduct discovery and request disclosure of trust claim filings and the accompanying statements of exposures, they will come up bare. Once the tort claims are resolved, however, counsel will typically file 15-25 trust claims including those based on the very exposures denied in pretrial discovery.

Nonetheless, as the evidence in Garlock indicates, referral firms often file trust claims *before* the tort actions are completed. Part of the incentive for doing so is the time value of money and the fact that trusts are significantly decreasing their payment percentages in response to the claims filing rates, which far exceed projections. Especially in view of the recent rapid increase in lung cancer filings, it is likely that payment percentages will continue to decrease in coming years. Another factor that may influence referral firms is the differing economic interests of clients and their counsel. From time of diagnosis, mesothelioma clients may have four to eighteen months to live. Their economic interest is to obtain payment as soon as possible, if only to provide for their families.

If referral firms file some or all of their trust claims before the tort case is concluded, then CMOs and standard interrogatory requests adopted by courts require plaintiffs' counsel to identify these trust claims in pretrial discovery. However, trial counsel may take steps to be consciously unaware of referral counsel's trust claim filings. Plaintiffs and their trial counsel are then in a position to deny exposures to the products of the reorganized companies that were the basis for the referral firm's filing of trust claims. If prior to the termination of the tort litigation, evidence is adduced that trust claims had been filed by referral counsel, then trial counsel can profess ignorance of the trust claim filings by the referral firms. Notably, such claims of ignorance are not uncommon when failures to identify trust claims become known.

The same incentive to suppress evidence of exposures to the products of reorganized

companies exists even when a referral firm is not involved. Many trial firms also spend massive amounts of money on advertising and client recruitment. Here too, it is to the financial benefit of these trial firms to delay filing trust claims until after the tort cases have been concluded and to have their clients deny any exposures to the products of reorganized companies—exposures that will very likely be asserted when the trust claims are filed. Even when trust claims are filed before tort suits have been resolved, some trial firms that directly obtain mesothelioma clients employ a strategy of erecting "Chinese walls" within their own firms to enable their counsel to maintain plausible deniability if their scheme to hide trust claim filings is discovered. In such cases, the lawyer defending the deposition of the plaintiff or arguing at trial may claim that a plaintiff 's sole exposure was to the defendant's products (or to the products of a few companies that do not detract from the value of the tort claims), even though the firm's intake lawyer had previously filed numerous trust claims on behalf of the plaintiff alleging "meaningful and credible exposures" to the products of reorganized companies. If, however unlikely given the control exercised by plaintiffs' counsel over the production of evidence, trial counsel are confronted with regard to false interrogatory responses and testimony, trial counsel can steadfastly maintain that they were unaware of any previous trust filings. Even if, after the settlement (based on the plaintiff 's testimony of solitary exposure to the defendant's products), it somehow were to come out that the plaintiff and trial counsel had denied exposure to the products of the reorganized companies, even though the plaintiff had previously asserted just such "meaningful and credible exposures" in trust claim filings, 2019 Statements and exhibits, and Master Ballots cast on accepting plans of reorganization, based upon the record of mesothelioma litigation, there is a substantial likelihood that neither plaintiffs nor their counsel would suffer any financial consequence or disciplinary sanction.

V. THE FACT ACT

The most effective immediate way to eliminate the fraudulent suppression of evidence of exposures to the products of the reorganized companies is to enact H.R. 526. Plaintiffs' counsel offer a number of arguments against the FACT Act. They maintain (1) that there is no double-dipping problem, claiming that courts take trust payments into account and reduce tort judgments accordingly; (2) that the system of dual compensation is necessary because asbestos victims are not fully compensated by asbestos trusts and because trust payments usually cover only a fraction of the value of the claim; (3) there is no evidence of fraud in the asbestos trust system; (4) the *Kananian* case is an aberration; and (5) the FACT Act will slow the administration of payments—leaving more claimants to die before ever receiving compensation—and impose significant costs on the trusts, and violate the privacy of trust claimants.

These arguments are simply makeweight -- an attempt to avoid passage of a law that would deprive them of hundreds of millions of dollars of fees by maintaining the current fraudulent practices. As Mark Scarella previously testified, the FACT Act will not be burdensome on trusts because trusts are merely required to compile quarterly reports—for which they can employ basic data processing systems—and to comply with third-party disclosure requests—for which they can charge reasonable processing fees. Moreover, as Scarcella also testified, that based on his own experience as a statistician for the Manville Trust, the FACT Act will not drain asbestos trust resources. Professor S. Todd Brown of SUNY Buffalo Law School also testified previously that the potential privacy implications of the FACT Act are likely minimal because trust claimants waive some of their reasonable expectations of privacy by

making the decision to pursue compensation and because the disclosures required under the FACT Act are typically less than can be expected by an asbestos tort litigant or, for that matter, any tort litigant. Furthermore, the FACT Act provides that the publicly available quarterly reports generated by the trusts will not include confidential medical records or full social security numbers of trust claimants. As for counsel's claim that *Kananian* is an aberration and that there is no evidence of fraud in the asbestos trust system, the Garlock case, my testimony today and my published scholarship serves as a response.

VI. THE CONSEQUENCES OF UNSEALING THE GARLOCK PROCEEDINGS

As noted previously, Judge Hodges sealed the record in Garlock in response to requests from plaintiffs' counsel. In my article on Garlock,[10] I predicted that Judge Hodges' decision would be overturned on appeal -- as it was. Many asbestos defendants and their insurers are eagerly awaiting for the record to become available. Presumably, these companies, as well as others, may then seek to depose successful plaintiffs and their counsel suspected of having concealed evidence of plaintiffs' exposures beyond those identified in responses to CMOs, pretrial discovery, and at trial. This may then lead to lawsuits being filed against asbestos plaintiffs and their counsel who are believed to have provided false exposure evidence, seeking to disgorge payments that were received. It may also lead to Racketeer Influenced and Corrupt Organizations (RICO) actions being brought against law firms just as Garlock has filed such suits against four law firms that frequently brought mesothelioma actions against Garlock.

Lawsuits claiming fraud or RICO violations may, in the fullness of time, have a significant impact on double-dipping in mesothelioma litigation. But action is needed in the short term to check the fraudulent practices that abound in this litigation. H.R. 526, which

[10] *See supra* note 1.

requires asbestos trusts to file publicly available quarterly reports with bankruptcy courts detailing claims filed with trusts, is the most effective, efficient and timely way to breach the walls plaintiffs' counsel have erected to insulate the fraudulent practices from public scrutiny.

Judge Hodges, in his estimation order in the Garlock bankruptcy, has allowed us to peer behind the asbestos curtain that shrouds the inner workings of the highly successful scheme to use the judicial system to defraud asbestos defendants and their insurers out of billions of dollars in mesothelioma litigation.

It is now up to Congress to take the critically important step of enacting H.R. 526 to contain the massive fraud that now permeates mesothelioma litigation.