

CLEARING UP THE FALSE PREMISES UNDERLYING THE
PUSH FOR ASBESTOS TRUST "TRANSPARENCY"

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I. INTRODUCTION

In recent years, asbestos defendants have increased their calls for asbestos personal injury trust "transparency"—the vaguely Orwellian name they have applied to what is nothing more than tort reform.

In this article, we explore the federal and state-level legislation that has emerged in 2012 and 2013, the negative effects of that legislation on plaintiffs, and the disconnect between the role the trusts actually play in the compensation of asbestos victims and the defendants' expectations of what that role should be. What underlies the concept of "transparency" is a misunderstanding of the purpose and the operation of the asbestos personal injury trusts.¹

Asbestos personal injury trusts are formed through the Chapter 11 reorganization process²—when a company is facing asbestos-related liability caused by exposure to asbestos and asbestos-containing products for which it bears legal responsibility that it is

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¹ Elihu Inselbuch et al., *The Effrontery of the Asbestos Trust Transparency Legislation Efforts*, 28:2 MEALEY'S LITIG. REP. ASBESTOS 1 (Feb. 20, 2013), available at www.capdale.com/files/8122_ASB022013cm.pdf.

² *Id.* at 4.

unable to pay, it can file for bankruptcy protection, and through a special provision of the Bankruptcy Code (11 U.S.C. § 524(g)), channel its present and future asbestos-related liabilities to an asbestos personal injury trust.³

Because the debtor was made insolvent by its asbestos-related liability, the resulting section 524(g) trust pays only a percentage of what the debtor paid prior to its bankruptcy to settle each claim—a ratio called the trust's "payment percentage."⁴ As a result, there is a shortfall between what a plaintiff would have received in compensation from a tortfeasor prior to its bankruptcy and from the trust that assumed its liabilities.⁵ The trusts are paying only a small fraction of the amounts that their predecessors had been paying⁶—an investigation by the Government Accountability Office (GAO) found "[t]he median payment percentage across trusts is 25 percent."⁷ We argue that the movement for greater "transparency" is driven, not by a concern for the public good, but as a means to transfer the burden of this shortfall from the remaining solvent defendants to the innocent victims of asbestos exposure.⁸

³ See *infra* at Part III.B. (exploring section 524(g) more thoroughly); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 2-3 (2011) [hereinafter GAO REPORT].

⁴ GAO REPORT, *supra* note 3, at 21; see also *infra* at Part III (discussing the operation of the trusts in greater detail).

⁵ Inselbuch, et al., *supra* note 1, at 9.

⁶ GAO REPORT, *supra* note 3, at 21.

⁷ *Id.*

⁸ Inselbuch, et al., *supra* note 1, at 9. States have different liability regimes allocating the risk that one of several responsible tortfeasors does not pay its share of the liability for an injury to either the plaintiff or to remaining solvent defendants at the time of verdict. *Id.* at 7. In a jurisdiction with joint and several liability, "each defendant the jury finds at fault can be required to pay the entire judgment and then seek contribution from others jointly responsible, whether another tort system defendant or a trust, bearing the risk that one or more of those jointly responsible cannot pay," while in a jurisdiction with several liability, "when a responsible defendant cannot pay, the plaintiff cannot recover that defendant's liability share from co-defendants; the plaintiff bears the loss." *Id.*

The transparency legislation we discuss has been promulgated at both the federal and state levels.⁹ The federal bill, House Bill 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013" (FACT Act) was first introduced in the United States House of Representatives (House) in March 2013.¹⁰ At the time of writing,¹¹ it had been passed by the full House.¹² The state law is the "Asbestos Claims Transparency Act," and was drafted by the American Legislative Exchange Council (more commonly known as ALEC).¹³ The Asbestos Claims Transparency Act was passed in Ohio in December 2012 and became effective in March 2013;¹⁴ it was also passed in Oklahoma in 2013.¹⁵ It has been introduced in Illinois, Louisiana, Mississippi, Texas, and Wisconsin, but was not enacted in any of those states at the time of writing.¹⁶

⁹ *Id.* at 1.

¹⁰ See H.R. 982, 113th Cong. (2013) [hereinafter FACT ACT OF 2013]. The bill was originally introduced during the previous session as H.R. 4369. See H.R. 4369, 112th Cong. (2012).

¹¹ This article was written in December 2013.

¹² See *Final Vote Results for Roll Call 579*, OFF. OF CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2013/roll579.xml> (last visited May 13, 2014).

¹³ *Asbestos Claims Transparency Act, Model Legislation*, AM. LEGIS. EXCHANGE COUNCIL (Jan. 28, 2013), <http://www.alec.org/model-legislation/asbestos-claims-transparency-act/>. ALEC is funded by a variety of corporations, including those facing liability for injuries and deaths caused by their asbestos-containing products. See *ALEC: Ghostwriting the Law for Corporate America*, AM. ASS'N FOR JUST. 4, 8-9 (May 2010), http://www.justice.org/cps/rde/xbcr/justice/ALEC_Report.pdf; see also Inselbuch, et al., *supra* note 1, at 7.

¹⁴ See *Status Report of Legislation*, OHIO LEGIS. SERVICE COMMISSION, <http://lsc.state.oh.us/coderev/hou129.nsf/House+Bill+Number/0380?OpenDocument> (last visited May 13, 2014).

¹⁵ See S. 404, 2013 Reg. Sess. (Okla. 2013).

¹⁶ In Mississippi, the bill died in committee (both House and Senate). See *Senate Bill 2373*, BILL STATUS, MISS. LEGIS., <http://billstatus.ls.state.ms.us/2013/pdf/history/SB/SB2373.xml> (last visited May 13, 2014); see also *House Bill 529*, BILL STATUS, MISS. LEGIS., <http://billstatus.ls.state.ms.us/2013/pdf/history/HB/HB0529.xml> (last visited May 13, 2014). In the other jurisdictions, the session ended. See *2013 Legislative Session Calendar*, NAT'L CONF. OF STATE LEGIS., <http://www.ncsl.org/legislatures-elections/legislatures/session-calendar-2013.aspx> (last updated Aug. 7, 2013); see also Bill Status of HB0153, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?>

II. ORIGINS OF THE "TRANSPARENCY" ARGUMENT

This call for "transparency" did not arise organically; rather, it was developed after the failure of asbestos defendants to avoid their liability through other means.¹⁷ It should be viewed in the context of more than a decade of failed legislative attempts by defendants to minimize their liability for injuries and deaths caused by exposure to their asbestos products.¹⁸ From 1999 through 2006, asbestos defendants and their insurers focused on attempts to have Congress create a global solution, beginning with the Fairness in Asbestos Compensation Act of 1999 and concluding with the Fairness in Asbestos Injury Resolution Act of 2005 (FAIR Act).¹⁹ These bills (and similar bills introduced in intervening legislative sessions) would have created a trust fund based on defendant and insurer contributions to compensate individuals whose health would have been affected by asbestos, effectively transferring liability to a statutorily created fund.²⁰

As the passage of the FAIR Act began to appear less likely, the asbestos defense industry (including attorneys, consultants, and ALEC) looked to existing asbestos personal injury trusts crafted in bankruptcy to pay for their clients' liabilities.²¹

DocNum=0153&GAID=12&DocTypeID=HB&LegID=69135&SessionID=85&GA=98&SpecSess=0 (last visited May 13, 2014); *Bill: HB 2545*, TEX. LEGIS. ONLINE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB2545> (last visited May 13, 2014); *HB 481*, LA. STATE LEGIS., <http://www.legis.la.gov/Legis/BillInfo.aspx?s=13RS&b=HB481&sbi=y> (last visited May 13, 2014).

¹⁷ See generally GAO REPORT, *supra* note 3, at 31 (noting various proposals made by proponents of increasing transparency and that at least one proponent, the Institute for Legal Reform (ILR), claims transparency is needed to reduce the depletion of trust assets).

¹⁸ Inselbuch, et al., *supra* note 1, at 7 (explaining how asbestos defendants claim transparency is needed to prevent fraud rather than the companies trying to minimize liability).

¹⁹ GAO REPORT, *supra* note 3, at 37-39.

²⁰ *Id.* at 33, 37-39.

²¹ *Id.* at 2-3, 33.

The "transparency" theme first appeared with the suggestion of "double-dipping" put forth by Charles Bates and Charles Mullins of Bates White Consulting in a 2006 article: "[c]laimants may be able to double collect for their injuries: once from solvent defendants and again from trusts. Alternatively, trust payments may be viewed as an offset to the obligations of solvent defendants, just as settlement payments by the trusts' predecessor companies were viewed."²² These two theories have developed into the principal justifications for trust transparency—that claimants will be collecting funds to which they are not entitled, and that solvent defendants are paying funds that they should not have to pay.²³

The first theory treads a well-worn path of attacking the asbestos plaintiffs' bar.²⁴ The second appears to originate in the

²² Charles Bates & Charles Mullin, *Having Your Tort And Eating It Too?*, 6:4 MEALEY'S ASBESTOS BANKR. REP. 4 (Nov. 2006).

²³ For the latter, see, e.g., *Testimony in Support of H.R. 4369, The "Furthering Asbestos Claim Transparency (FACT) Act of 2012": Hearing Before the Comm. on the Judiciary Subcomm. on Courts, Commercial and Admin. Law*, 112th Cong. 3 (2012) (written statement of Leigh Ann Schell, Esq.), available at http://judiciary.house.gov/hearings/printers/112th/112-120_74122.PDF [hereinafter Schell Statement] (arguing that with bankruptcies, defendants who used to pay 5% of tort judgments are now paying 100%).

²⁴ See, e.g., *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy and the Legal System: Hearing Before The Subcomm. on the Constitution of the U.S. House of Representatives Comm. on the Judiciary* 1, 2-3 (2011) (written statement of Lester Brickman), available at http://judiciary.house.gov/_files/hearings/pdf/Brickman%2009092011.pdf. The idea of "double-dipping" is, of course, meaningless. Inselbuch, et al., *supra* note 1, at 1. As explained in Inselbuch, et al.,

It is a fundamental principle of American law that an injured person can recover damages from every entity that has harmed him, and as litigation progresses can settle his claim against one or another of the wrongdoers as he and they may agree. His compensation for his injury is, then, the sum of all the settlements reached. Only in the very rare case that goes to verdict, judgment, and payment (where the payment amount is reduced by an amount determined by the relevant state law to account for payments by settling co-defendants or bankruptcy trusts), is the victim's claim fully satisfied. Only if after verdict, judgment, and payment were a plaintiff to recover from a bankruptcy trust could he be overcompensated and be said to have

consulting the Bates White firm did for asbestos defendants²⁵ – including, for example, the EnPro Industries subsidiary, Garlock Sealing Technologies, LLC.²⁶ In 2004, Bates White was retained by EnPro "to assist . . . in . . . estimate[ing] [our subsidiaries'] liability for pending and . . . future asbestos claims."²⁷ By 2006-2007, EnPro, at the urging of Bates White, was considering the potential impact of funds in trusts formed under section 524(g) of the Bankruptcy Code²⁸ on its future settlement payments and liability.²⁹ This consideration was given greater weight in the EnPro 2007 Form 10-K, in which EnPro explained that the assumptions underlying its reported estimated liability for asbestos claims included "the timing and impact of large amounts that will become available for the payment of claims from the 524(g) trusts of former defendants in bankruptcy."³⁰

"double-dipped." Out of the millions of trust claims filed and considered by trusts since 1988, defendants have identified just one case where a trust claim was filed by a plaintiff after judgment and paid by a trust. In that case the judgment was on appeal and had not yet been paid when the trust claim was filed. There is no "double-dipping" problem that needs to be fixed.

Id.

²⁵ ENPRO INDUSTRIES, INC., FORM 10-K 1, 34 (Mar. 7, 2006), <http://markets.financialcontent.com/mi.newsob/quote/filings/quarterly?Symbol=321%3A1426380> [hereinafter ENPRO INDUSTRIES, INC. 2006].

²⁶ Garlock Sealing Technologies, LLC filed for bankruptcy in June 2010. *See In re: Garlock Sealing Techs., LLC*, Case No. 10-31607, at 11 (W.D.N.C. June 5, 2010). Mr. Sackett's firm is counsel for the Committee of Asbestos Creditors in the Garlock bankruptcy case. *See* Inselbuch, et al., *supra* note 1 (listing Mr. Sackett as employed by Caplin & Drysdale Chartered on the title page); *In re: Garlock Sealing Techs., LLC*, Docket No: 3:10:BK-31607 (docket listing Caplin & Drysdale, Chartered as counsel).

²⁷ *See* ENPRO INDUSTRIES, INC. 2006, *supra* note 25, at 34.

²⁸ *See infra* note 30 and accompanying text.

²⁹ *See* ENPRO INDUSTRIES, INC. 2006, *supra* note 25, at 37.

³⁰ ENPRO INDUSTRIES, INC., FORM 10-K 27 (Mar. 8, 2010), <http://markets.financialcontent.com/mi.newsob/quote/filings/quarterly?Symbol=321%3A1426380> [hereinafter ENPRO INDUSTRIES, INC. 2010]; *see also* ENPRO INDUSTRIES, INC., FORM 10-K 26 (Feb. 26, 2008), <http://markets.financialcontent.com/mi.newsob/quote/filings/quarterly?Symbol=321%3A1426380> [hereinafter ENPRO INDUSTRIES, INC. 2008].

This theory—that payments by asbestos personal injury trusts would reduce the amount solvent defendants would have to pay to settle asbestos claims—was nothing more than a theory.³¹ And, it did not come to pass.³² The trusts, after all, are paying only a small fraction of the amounts their predecessors were paying.³³ Rather than acknowledge that the rules of the tort system and their own liability were such that they would sometimes be held responsible for injuries caused by their products, defendants and their proxies cast about for an explanation.³⁴

The next year, citing Bates and Mullins (2006) and an article in *Forbes Magazine*,³⁵ attorneys for insurers with asbestos liability who publish an intermittent survey of asbestos bankruptcies noted that the "lack of transparency may have allowed certain asbestos plaintiffs to 'double-dip' – that is, receive full compensation for their claims in the tort system, then receive additional compensation from one or more bankruptcy trusts."³⁶

³¹ See ENPRO INDUSTRIES, INC. 2010, *supra* note 30, at 34 (stating that the estimated amount of liability was based on "assumptions").

³² It is uncertain why defendants believed it would—after all, in the late 1980s, when the Manville Trust paid hundreds of millions of dollars in a very short time, there was no measurable effect on payments by other defendants. See Testimony of Dr. Mark Peterson, Transcript of Estimation Trial, *In re: Garlock Sealing Techs., LLC*, Case No. 10-BK-31607, at 11 (W.D.N.C. Aug. 8, 2013).

³³ Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 MEALEY'S ASBESTOS BANKR. REP. 3 (June 2013).

³⁴ See *infra* notes 35-36 and accompanying text.

³⁵ See Daniel Fisher, *Double-Dippers: Aided by Their Lawyers and Secrecy Oaths, Asbestos Victims are Finding Bankruptcy Trusts Easy Pickings*, FORBES, Sept. 4, 2006, at 136.

³⁶ Mark D. Plevin et al., *Where Are They Now, Part Four: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, 6:7 MEALEY'S ASBESTOS BANKR. REP. 6-7 (Feb. 2007). In the first "Where are They Now" article, published in MEALEY'S in 2001, Plevin and Kalish noted that they represent insurers in asbestos and mass tort coverage litigation, and represent the "Coalition for Asbestos Justice" – an organization formed by eight major insurance companies and led by Victor E. Schwartz. See Steven Brostoff, *Insurer Coalition To Probe Asbestos Litigation*, PROPERTY CASUALTY 360 (Oct. 14, 2000), <http://www.propertycasualty360.com/2000/10/14/insurer-coalition-to-probe-asbestos-litigation>. Mr. Schwartz is also the co-chair of the ALEC Civil Justice Task Force. See *Civil Justice Task Forces*, AM.

Concurrently, in 2007, the model legislation for the Asbestos Claims Transparency Act was originally approved by ALEC.³⁷

An April 2008 article in the *Norton Journal of Bankruptcy Law and Practice* picked up on this theme, arguing that since "the 524(g) trusts are answering for the liability of many of the most culpable companies and are, in fact, paying significant sums, the emergence and expansion of these alternative compensation mechanisms should result in a significant reduction in the liabilities of the remaining solvent defendants in the tort system."³⁸ This did not happen, however.³⁹ Ignoring the elementary maxim that the hypothesis with the fewest assumptions is most likely correct, defendants attempted to craft a complex narrative of fraud and conspiracy involving asbestos personal injury trusts and their control by the plaintiffs' bar.⁴⁰

By 2010, defendants had mobilized sufficiently to draw the government into the fight on their side.⁴¹ In April 2010, Congressman Lamar Smith (R-TX) sent a letter to the GAO requesting that the GAO examine asbestos trusts in order to determine whether they are adequately disclosing information and whether transparency was necessary.⁴² While the GAO report found no evidence of fraud,⁴³ the campaign continued.⁴⁴

LEGIS. EXCHANGE COUNCIL, <http://www.alec.org/task-forces/civil-justice/> (last visited May 13, 2014).

³⁷ *Asbestos Claims Transparency Act, Model Legislation*, AM. LEGIS. EXCHANGE COUNCIL (Jan. 28, 2013), <http://www.alec.org/model-legislation/asbestos-claims-transparency-act/>.

³⁸ William P. Shelley et al., *The Need For Transparency Between The Tort System And Section 524(g) Asbestos Trusts*, 17 NORTON J. BANKR. L. & PRAC. 257, 257-58 (2008).

³⁹ See Schell Statement, *supra* note 23, at 2 (demonstrating how solvent defendants who have not declared bankruptcy are held liable in the tort system due to the allowance of double-dipping).

⁴⁰ See, e.g., *infra* notes 41-47 and accompanying text (showing the methods used to prove fraud in the system).

⁴¹ See *id.* (describing the government's role in the fight for transparency).

⁴² Letter from Lamar Smith, Ranking Member, House of Representatives, Comm. on the Judiciary, to Gene L. Dodoro, Acting Comptroller of the U.S., Gov't Accountability Office (Apr. 29, 2010), available at http://www.hunt.onfiles.com/files/webupload/BusTort_GAO_Letter_re_Asbestos_Trusts.pdf.

Smith cited the usual suspects as evidence that "a lack of transparency is

Also, in 2010, the United States Chamber of Commerce's Institute for Legal Reform (ILR) submitted a proposal for a new rule of bankruptcy procedure "to address the pressing need for greater transparency in the operation of trusts established under 11 U.S.C. § 524(g)."⁴⁵ In that proposal, the Chamber of Commerce proposed a rule of bankruptcy procedure that would require asbestos personal injury trusts to "report on demands for payment, the exposure allegations upon which demands are based and amounts paid for those demands," as well as cooperate with tort litigants and provide information regarding trust claims.⁴⁶ This proposed rule was virtually identical to the FACT Act.⁴⁷

The Advisory Committee on Bankruptcy Rules referred the ILR's suggestion to its Subcommittee on Business Issues,⁴⁸ which evaluated the ILR's suggestion on three grounds: whether the proposed rule exceeded the Supreme Court of the United States' "rulemaking power under the Bankruptcy Rules Enabling Act;" "whether implementation of the proposed rule would exceed the scope of bankruptcy jurisdiction;" and "whether there was a bankruptcy need for reporting of the information sought by ILR."⁴⁹ The first two were procedural questions about jurisdiction.⁵⁰ The

undermining the asbestos trust system"—the *Kananian* case, the Shelley and Fisher articles referenced above, and an editorial in the *Wall Street Journal*. *Id.* at 1-2 & n.3-5.

⁴³ GAO REPORT, *supra* note 3, at 23.

⁴⁴ See *infra* notes 45-47 and accompanying text.

⁴⁵ Letter from Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, to Peter G. McCabe, Sec'y, Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S. (Nov. 22, 2010), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Suggestions%202010/10-BK-H-Suggestion%20Harold%20Kim.pdf>.

⁴⁶ *Id.* at 2.

⁴⁷ Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 312, 117 Stat. 1952 (2003).

⁴⁸ Memorandum from Subcomm. on Bus. Issues, to Advisory Comm. on Bankr. Rules (Sept. 19, 2011), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Bankruptcy/BK201109%20Addendum.pdf>.

⁴⁹ *Id.* at 1-2.

⁵⁰ *Id.* at 1 (demonstrating the first two questions in the memorandum dealt with court power restraints and jurisdictional issues).

Subcommittee found on the third, however, that there was no need for the proposed rule, as "the comments have pointed only to anecdotal evidence of abuse."⁵¹ The Subcommittee found that there was no reason that the information sought could not be located through the discovery process, and, furthermore, that it might create an imbalance between trusts and solvent defendants.⁵²

III. HISTORY AND STRUCTURE OF ASBESTOS TRUSTS

A. *The Nature of Asbestos Litigation*

Evaluating the call for "transparency" requires a brief detour into the history of asbestos litigation and, in particular, the origins of the asbestos personal injury trust as a means of compensating victims.⁵³

"Asbestos is the name given to a group of six different fibrous minerals . . . that occur naturally in the environment."⁵⁴ For more than a century asbestos was used extensively in industrial settings and to produce a wide range of manufactured goods, including "building materials (roofing shingles, ceiling and floor tiles, paper products, and asbestos cement products), friction products (automobile clutch, brake, and transmission parts), heat-resistant fabrics, packaging, gaskets, and coatings."⁵⁵

Asbestos, however, is inherently dangerous.⁵⁶ Whenever materials containing asbestos are "damaged or disturbed by repair,

⁵¹ *Id.* at 31; *see infra* note 179 (illustrating that three years later there are still only anecdotes).

⁵² Memorandum from Subcomm. on Bus. Issues, *supra* note 48, at 31-32.

⁵³ *See* Peter S. Murphy, *Asbestos Trust and Tort Litigation Compensation in Delaware: A Call for Transparency*, 27:22 MEALEY'S LITIG. REPORT: ASBESTOS 1, 4 (Dec. 19, 2012); STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 22-24 (2005), available at <http://www.rand.org/pubs/monographs/MG162.html>; *see also In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. 710, 884-85 (E. & S.D.N.Y. 1991).

⁵⁴ *Asbestos*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY 1 (Sept. 2001), <http://www.atsdr.cdc.gov/tfacts61.pdf>.

⁵⁵ *Id.*

⁵⁶ *See Learn About Asbestos*, EPA, <http://www2.epa.gov/asbestos/learn-about-asbestos#asbestos> (last visited May 13, 2014) (listing the possible health effects from asbestos exposure).

remodeling or demolition activities, microscopic fibers become airborne and can be inhaled into the lungs, where they can cause significant health problems."⁵⁷ As a result of the pervasive use of asbestos in American industry, "[m]illions of American workers have been exposed to asbestos, some for long periods of time and/or at high levels."⁵⁸ A leading epidemiological study estimated that more than 27 million people were occupationally exposed to asbestos in this country between 1940 and 1979.⁵⁹ Asbestos has historically been "the largest single cause of occupational cancer in the United States and a significant cause of disease and disability from nonmalignant disease."⁶⁰ Because asbestos-related diseases have long latency periods, epidemiologists anticipate that thousands more people each year, for decades to come, will fall ill as a result of their long-ago exposures to asbestos.⁶¹

Of the diseases caused by exposure to asbestos, mesothelioma is the most serious.⁶² It is "a rare form of cancer in which malignant (cancerous) cells are found in the mesothelium, a protective sac that covers most of the body's internal organs."⁶³

⁵⁷ *Clarification on Blower Door Testing in the Presence of Asbestos Containing Materials*, BUILDING PERFORMANCE INST., INC., <http://www.builditgreenutility.org/sites/default/files/ASBESTOS%20AND%20BLOWER%20DOOR%20TESTING.pdf> (last visited Mar. 22, 2014).

⁵⁸ CARROLL ET AL., *supra* note 53, at 11; *see also In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. at 745.

⁵⁹ William J. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1989-2030*, 3 AM. J. OF INDUS. MED. 259, 259 (1982).

⁶⁰ American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, 170 AM. J. OF RESPIRATORY AND CRITICAL CARE MED. 691, 691 (2004).

⁶¹ *See* Nicholson et al., *supra* note 59, at 259, 300, 302-08 (showing that the Nicholson Study predicted the incidence of mesothelioma and asbestos-related lung cancer in the United States from 1980 through 2027). It has proven to be remarkably accurate over time, and is often cited by courts. *See, e.g., In re Fed.-Mogul Global, Inc.*, 330 B.R. 133, 147 (D. Del. 2005); *see also In re Armstrong World Indus., Inc.*, 348 B.R. 111, 115 (D. Del. 2006).

⁶² *See* CARROLL ET AL., *supra* note 53, at 12 (illustrating that mesothelioma is the most serious because it is inevitably fatal).

⁶³ *Fact Sheet Mesothelioma: Questions and Answers*, NAT'L CANCER INST. 1, <http://www.cancer.gov/images/Documents/67e63bef-d6e0-4c0f-9c7a-e8aa56e>

Asbestos exposure is the only generally accepted cause of mesothelioma.⁶⁴ The latency period for mesothelioma is particularly long: "A minimum of 10 years from the first exposure is required to attribute the mesothelioma to asbestos exposure, though in most cases the latency interval is longer (e.g., on the order of 30 to 40 years)."⁶⁵ Mesothelioma is inevitably fatal and most victims die within two years of diagnosis.⁶⁶ A verdict for a mesothelioma claim can be tens of millions of dollars.⁶⁷

By the beginning of the 20th century, medical scientists and researchers had uncovered "persuasive evidence of the health hazards associated with asbestos."⁶⁸ For decades, asbestos manufacturers were well aware of the dangers but did not protect their workers or the end-users of their products.⁶⁹ In an exhaustive discussion of the history of asbestos use and litigation in the United States, Judge Weinstein noted that:

Reports concerning the occupational risks of asbestos . . . have been substantial in number and publicly available in medical, engineering, legal and general information publications since the early 1930s. There is compelling evidence that asbestos manufacturers and distributors who were aware of the growing knowledge of

d969c/fs6_36.pdf (last visited Mar. 16, 2014) [hereinafter *NCI Fact Sheet – Mesothelioma*].

⁶⁴ CARROLL ET AL., *supra* note 53, at 12.

⁶⁵ Antti Tossavainen, *Asbestos, Asbestosis, and Cancer: The Helsinki Criteria for Diagnosis and Attribution*, 23 SCANDINAVIAN J. WORK ENVTL. HEALTH 311, 313 (1997).

⁶⁶ CARROLL ET AL., *supra* note 53, at 12.

⁶⁷ *See, e.g.*, Marc C. Scarcella, Peter R. Kelso, & Joseph Cagnoli, Jr., *Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts: The Economic Incentives Behind the New Recruitment of Lung Cancer Cases*, 13:4 MEALEY'S ASBESTOS BANKR. REP. 1, 12 (Nov. 2013); Charles E. Bates & Charles H. Mullin, *Show Me the Money*, 22:21 MEALEY'S LITIG. REPORT: ASBESTOS 1, 5 (Dec. 3, 2007).

⁶⁸ *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 737 (E. & S.D.N.Y. 1991).

⁶⁹ *Id.* at 738.

the dangers of asbestos sought to conceal this information from workers and the general public.⁷⁰

The first products liability civil action against the manufacturers of asbestos-containing products was brought in December of 1966 in federal court in Beaumont, Texas.⁷¹ However, it was not until the plaintiff's success in *Borel v. Fibreboard Paper Products Corp.*,⁷² upholding a \$79,436.24 verdict in favor of a victim of asbestosis and mesothelioma against six asbestos companies, that asbestos litigation began to expand nationwide.⁷³ For example, by 1982, Johns-Manville Corporation, the largest manufacturer and distributor of asbestos products,⁷⁴ had settled or tried to verdict more than 3,570 claims against it at an average cost of \$20,000 each.⁷⁵ Moreover, at that time it had more than 17,500 pending civil actions against it and estimated that 35,000 claims would follow.⁷⁶ It is the scale of this litigation and the large estimated numbers of future claims that led to the creation of the asbestos personal injury trusts through bankruptcy.⁷⁷

⁷⁰ *Id.* at 737-38 (internal citation omitted).

⁷¹ *See* UNR Indus., Inc. v. Cont'l Ins. Co., 682 F. Supp. 1434, 1437 (N.D. Ill. 1988) (describing the genesis of asbestos litigation).

⁷² *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

⁷³ *Id.* at 1102; Kenneth Pasquale & Arlene G. Krieger, *Combustion Engineering and the Interpretation of Section 524(g)*, 1 NORTON ANN. SURV. OF BANKR. L. at 1-2 (Apr. 2007).

⁷⁴ Pasquale & Krieger, *supra* note 73, at 2.

⁷⁵ *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 751 (E. & S.D.N.Y. 1991) (describing the events surrounding the Johns-Manville bankruptcy).

⁷⁶ *Id.*

⁷⁷ There were other options, including attempts to settle claims through the class action process, which were rejected by the Supreme Court of the United States. *See, e.g.*, *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597, 628-29 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821, 864-65 (1999). In retrospect, observers have argued that this would have been a better method of resolving asbestos litigation. *See, e.g.*, Patrick M. Hanlon, *An Experiment in Law Reform: Amchem Products v. Windsor*, 46 U. MICH. J.L. REFORM 1279, 1279-80 (Summer 2013).

B. The Creation of Asbestos Trusts and Section 524(g)

Attempts to achieve global settlements that would provide for the treatment and payment of future claims were hampered by the difficulty of ensuring that any such settlement agreements would "in fact, provide for all future claimants who come forward, so that all who are eligible for compensation are properly compensated and all who are required to pay compensation have taken into account this responsibility in their business planning"—often referred to as "the futures problem."⁷⁸ The overwhelming volume of asbestos claims and the intractability of the futures problem have led dozens of asbestos manufacturers to conclude that bankruptcy is the only viable method to deal with future claims.⁷⁹ To establish a bankruptcy plan that is feasible, and to ensure that the reorganized debtor will not be forced back into bankruptcy,⁸⁰ the plan in an asbestos-driven bankruptcy must, of course, deal with future claims.⁸¹

The first major asbestos-driven bankruptcy was that of the Johns-Manville Corporation, which filed its Chapter 11 petition for reorganization in August of 1982.⁸² To resolve the problem of future claims, the Manville plan pioneered the use of a trust dedicated to resolution and payment of asbestos claims.⁸³ The

⁷⁸ CARROLL ET AL., *supra* note 53, at 46.

⁷⁹ *See id.* at 46, 48.

⁸⁰ *See* 11 U.S.C. § 1129(a)(11) (2012) (stating that a reorganization plan may only be confirmed if it "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan"); *see also In re Johns-Manville Corp.*, 36 B.R. 743, 757 (Bankr. S.D.N.Y. 1984) (noting the need to address future claims in order for reorganization to occur).

⁸¹ *See In re UNR Indus., Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984) ("If future claims cannot be discharged before they ripen, UNR may not be able to emerge from bankruptcy with reasonable prospects for continued existence as a going concern.").

⁸² *See In re Johns-Manville Corp.*, 68 B.R. 618, 620 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407, 409 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 636, 638 (2d Cir. 1988).

⁸³ *See In re Johns-Manville Corp.*, 68 B.R. at 621-22 (explaining the two trusts set up by Manville and the method by which asbestos claims would be paid).

Manville Trust assumed the debtors' present and future asbestos liabilities, and all asbestos claims against the debtors were directed to the Trust by a channeling injunction.⁸⁴ Although the future claims were not discharged, what the debtor benefited from was, from their perspective, the functional equivalent of a discharge of those claims as future claimants were enjoined from seeking recovery from the reorganized company and were required to seek recovery only from the Trust.⁸⁵

It soon became apparent that the number and value of future claims had been seriously underestimated⁸⁶ and that the Trust did not have an adequate mechanism in place to ensure that present and future claims would be treated the same.⁸⁷ The Trust's already depleted funds rapidly dwindled as claims were paid in full as they were filed.⁸⁸ Within a year and nine months after it began operating, the Johns-Manville Trust was, effectively, out of funds.⁸⁹ Subsequently, the Trust was restructured by order of the court to have the reorganized debtor contribute additional funds, and procedures were implemented for the distribution of trust funds designed to ensure that present and future claimants would be treated in substantially the same manner.⁹⁰

To alleviate concerns about the validity of the Johns-Manville model, and to provide for the reorganization of asbestos debtors, Congress, in 1994, enacted 11 U.S.C. § 524(g), which was "modeled on the injunction/trust mechanism pioneered in the Johns-Manville bankruptcy case."⁹¹ "The statute gives a debtor the

⁸⁴ *See id.* at 624.

⁸⁵ *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988).

⁸⁶ *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 754-55 (E. & S.D.N.Y. 1991) (describing the events surrounding the Johns-Manville bankruptcy and the insufficient funds available).

⁸⁷ *See generally id.* (noting that there were insufficient funds to pay all claims).

⁸⁸ *Id.* at 753, 760.

⁸⁹ *Id.* at 762.

⁹⁰ *Id.* at 762-63.

⁹¹ *In re Congoleum Corp.*, No. 03-51524, 2008 WL 4186899, at *5 (Bankr. D.N.J. Sept. 2, 2008); *see also* H.R. REP. 103-835, at 3348-49 (1994) (Conf. Rep.) (explaining that section 524(g) is intended to emulate the "creative solution to help protect the future asbestos claimants, in the form of a trust into

right to propose and have confirmed a plan that will create a trust to which all of the debtor's present and future asbestos personal injury liabilities will be transferred, or channeled, for post-confirmation claims evaluation" and settlement (or, if necessary, trial).⁹² The debtor is freed of asbestos claims in return for funding the trust, and the present and future asbestos claimants will have available to them the assets of the trust.⁹³ Since 1994, more than fifty-four defendants have utilized section 524(g) to create a trust.⁹⁴

The section 524(g) process has protected and stimulated the profitability of many companies.⁹⁵ For example, since 2010, Owens Corning, which originally filed for bankruptcy in 2000, has earned nearly \$1.2 billion of net profit on more than \$15 billion worth of sales.⁹⁶ Armstrong World Industries, Inc., having filed for bankruptcy in 2000, emerged in 2006 and has a net profit of more than \$260 million in the last two years on more than \$5.3 billion in sales.⁹⁷

There are certain requirements that must be satisfied before a court will issue a channeling injunction directing all future asbestos claims to a section 524(g) trust.⁹⁸ The court must appoint

which would be placed stock of the emerging debtor company and a portion of future profits, along with contributions from [the debtor's] insurers" devised in the Johns-Manville case). Section 524(h), which was enacted at the same time, makes clear that the channeling injunction in Johns-Manville would be deemed retroactively to comply with section 524(g) and was valid. *See* Inselbuch et al., *supra* note 1, at 4, 11 n.28.

⁹² Inselbuch et al., *supra* note 1, at 4.

⁹³ *See* LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS AND TORT COMPENSATION 7 (2010), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR_872.pdf.

⁹⁴ *See id.* at 25-28.

⁹⁵ *See infra* notes 96-97 and accompanying text.

⁹⁶ OWENS CORNING, FORM 10-K 47 (Feb. 15, 2012), <http://markets.financialcontent.com/mi.newsob/quote/filings/quarterly?Symbol=321%3A2718263>.

⁹⁷ ARMSTRONG WORLD INDUSTRIES, INC., FORM 10-K 20 (Feb. 27, 2012), <http://markets.financialcontent.com/mi.newsob/quote/filings/quarterly?Symbol=321%3A2741269>.

⁹⁸ *In re* Combustion Eng'g, Inc., 391 F.3d 190, 234 (3d Cir. 2004).

a legal representative (commonly known as the Future Claims Representative or FCR) to represent the interests of the future claimants.⁹⁹ Among other things, the court also must find that the debtor is "likely to be subject to substantial future demands" from parties injured by asbestos-containing products, and that "the actual amounts, numbers and timing of such future demands" are uncertain.¹⁰⁰ The court must also find that the benefits provided to the debtor by the channeling injunction are "fair and equitable" to future demand holders in light of the contribution made to the section 524(g) trust by or on behalf of the debtors.¹⁰¹ Finally, the court must determine that "the trust will operate through mechanisms that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner."¹⁰²

C. Structure and Governance of the Trusts

An asbestos personal injury trust is established and governed by a trust agreement,¹⁰³ which sets out the purpose of the trust and delineates the responsibilities of the three key parties—the trustees, responsible for managing the trust, much like a board of directors,¹⁰⁴ the Trust Advisory Committee (TAC), which

⁹⁹ 11 U.S.C. § 524(g)(4)(B)(i) (2012). The FCR does not vote on the plan—rather, the statute requires that, to be confirmed, a section 524(g) plan must win the acceptance of a seventy-five percent super-majority of votes cast by those claimants whose claims are to be addressed by the trust. *Id.* § 524(g)(2)(B)(ii)(IV)(bb).

¹⁰⁰ *Id.* § 524(g)(2)(B)(ii)(I)-(II).

¹⁰¹ *Id.* § 524(g)(4)(B)(ii). The plan must also provide that the trust will: (1) assume the liabilities of the debtor for current and future claims; (2) be funded at least in part by the securities of the debtor; (3) either own, or be entitled to own upon the occurrence of specified contingencies, the majority of the voting shares of the debtor, its parent, or its subsidiary; and (4) use its assets to pay future claims. *Id.* § 524(g)(2)(B)(i)(I)-(IV), (ii)(V).

¹⁰² *Id.* § 524(g)(2)(B)(ii)(V).

¹⁰³ See generally GAO REPORT, *supra* note 3, at 15 (noting that most asbestos trusts are privately governed by a trust agreement).

¹⁰⁴ See *id.* (explaining that the trustees are key actors to the trust agreement).

represents present claimants;¹⁰⁵ and the FCR, who, as mentioned above, represents future claimants.¹⁰⁶ The operation of such a trust is further governed by a document containing a series of trust distribution procedures (TDP), approved by the bankruptcy court when confirming a plan of reorganization providing for creation of the trust.¹⁰⁷

Defendants and others have suggested that the trusts are controlled by the plaintiffs' bar.¹⁰⁸ Arguments that this is so focus on the provision of section 524(g) that requires a supermajority of present asbestos claimants to approve a plan.¹⁰⁹ That plan, however, must also be approved by the bankruptcy court (like any other plan of reorganization),¹¹⁰ and once it is approved, the resulting trust is not governed by the plaintiffs' bar.¹¹¹ Instead, asbestos personal injury trusts (as trusts) are governed by trustees,¹¹² who oversee the "daily operations of the trusts," including managing their investments, "hiring and supervising support staff and advisers," implementing the TDP, and

¹⁰⁵ See *id.* (stating that present claimants are represented by the TAC).

¹⁰⁶ See *id.* (noting that future claimants are represented by the FCR).

¹⁰⁷ See, e.g., *In re Burns & Roe Enters., Inc.*, No. 08-4191(GEB), 2009 WL 438694, at *32, *37 (D.N.J. Feb. 23, 2009) (showing that the relevant sections of the Bankruptcy Code provide guidance on acceptance of the plan).

¹⁰⁸ See, e.g., Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 MEALEY'S ASBESTOS BANKR. REP. 2, 5 (June 2013) (noting that this claim is often made by proponents of transparency legislation); James L. Stengel, *The Asbestos End-Game*, 163 N.Y.U. ANN. SURV. AM. L., 223, 265 (2006).

¹⁰⁹ See, e.g., S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 537 n.1, 538 (2013); 11 U.S.C. § 524(g)(ii)(2)(B)(IV)(bb) (2012) (showing the provision of the code implicated by these arguments).

¹¹⁰ 11 U.S.C. §§ 1128, 1129(a) (showing that the court must approve the plan at a hearing, which is held after receiving notice).

¹¹¹ See *id.* § 1129(a)(6)(11) (noting that the Bankruptcy Code sets out the details of how the plan is governed and by whom). See generally *In re Burns & Roe Enters., Inc.*, 2009 WL 438694, at *32, *37 (noting that the Bankruptcy Code provides guidance for governing the plan once it is approved).

¹¹² See *In re Burns & Roe Enters., Inc.*, 2009 WL 438694, at *32 (stating that trustees oversee and operate the trust).

"submitting annual reports to the bankruptcy court."¹¹³ The trustees have a fiduciary duty to manage the trust for the sole benefit of the present and future claimant beneficiaries and to treat them as equally as possible.¹¹⁴ They are not dependent on the goodwill of the plaintiffs' bar to maintain their positions, but control their own reappointment and the appointment of their successors.¹¹⁵ The present and future claimants are represented by the TAC and the FCR, respectively.¹¹⁶ Both the TAC, established by the trust agreement and consisting of members of the plaintiffs' asbestos bar,¹¹⁷ and the FCR, "a position statutorily required by § 524(g),"¹¹⁸ advise the trustees and "must generally consent to significant changes in trust administration and the implementation of the TDP."¹¹⁹ The FCR has powers identical to that of the TAC in terms of the administration of a trust.¹²⁰ He or she can also retain experts and consultants at the trust's expense.¹²¹

In addition to this management structure, the trusts themselves are structured in such a way as to ensure that the claimants—both present and future—are trust beneficiaries and, therefore, enjoy fiduciary protections.¹²² The trust, as a legal form, is designed to protect beneficiaries and has been refined over hundreds of years of Anglo-American jurisprudence.¹²³ Should the trustees of an

¹¹³ GAO REPORT, *supra* note 3, at 15.

¹¹⁴ *See, e.g.,* DIXON ET AL., *supra* note 93, at 13, 14 n.6 (noting that the fiduciary duties split between the FCR and the TAC ensure that present and future claimants' interests are adequately protected).

¹¹⁵ *See generally id.* at 7 (noting that the FCR is appointed to ensure that the rights and remedies of claimants are protected).

¹¹⁶ GAO REPORT, *supra* note 3, at 15.

¹¹⁷ *See id.* (noting that the TAC is a privately managed trust agreement).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See* DIXON ET AL., *supra* note 93, at 13.

¹²¹ *See, e.g., In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 599 (E. & S.D.N.Y. 1995).

¹²² *See generally* DIXON ET AL., *supra* note 93, at 13, 14 n.6 (explaining that the trust administration outlines the trustee's powers, structure and management of the daily operation of the Trust).

¹²³ *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. at 515 ("The modern trust is uniquely the product of over half a millennium of the exercise of

asbestos personal injury trust, or the FCR for that matter, breach their fiduciary duty and fail to ensure that future claimants are equitably compensated, those claimants, as beneficiaries, will have a wide range of remedies available to them.¹²⁴

D. Operation – Asbestos Personal Injury Trusts are Settlement Trusts

Asbestos personal injury trusts are not litigants; rather, they are designed to resolve cases by settlement, as the vast majority of cases are resolved in the tort system.¹²⁵ The amounts that the trusts will pay claimants are set by reference to the several shares of the predecessor debtor, particularly its settlement history.¹²⁶

equity jurisdiction. . . . Correlatively, modern equity jurisdiction owes its vitality in large part to the extraordinary historic popularity of trusts.").

¹²⁴ See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 83 (2007) (ordering the trustee to account); *id.* § 71 (instructing the trustee as may be necessary regarding the terms of the trust or the powers and duties of the trusteeship, including perhaps directing the trustee to administer the trust accordingly); *id.* § 87 (noting the abuse of discretion, enjoining the trustee to take or refrain from taking certain action(s) or otherwise to avoid committing a breach of trust); *id.* §§ 50, 104 (setting aside an improper action of the trustee and, if necessary, compelling the trustee to recover property improperly distributed to beneficiaries); see also *id.* § 107 (improperly transferred to third parties); *id.* §§ 38 cmt. c(1), Reporter's Note cmt. c (denying or reducing the trustee's compensation); *id.* § 37 cmt. b-f(1) (removing the trustee); *id.* §§ 37 cmt. g, 34 cmt. d-e (noting that if it is necessary or conducive to sound administration of the trust, an additional trustee or a successor co-trustee can be appointed); *id.* §§ 37 cmt. g, 78 cmt. c(1), Reporter's Note cmt. c(1)-(3) (appointing a temporary trustee, or a receiver or other special fiduciary, to take possession of the trust property and administer the trust, or a trustee ad litem to make certain decisions and perhaps handle certain transactions); *id.* § 95 cmt. c. (issuing such other orders or taking such other action as may be appropriate to the circumstances and in the interest of sound administration of the trust).

¹²⁵ See Stengel, *supra* note 108, at 237 (noting that trusts help resolve substantial viable claims and do not increase litigation costs).

¹²⁶ See, e.g., *Asbestos Personal Injury Trust Distribution Procedures*, FED. MOGUL 3, [http://www.federalmogulasbestostrust.com/files/Federal-Mogul%20TDP%20FINAL%20APPROVED%20AUGUST%202010%20\(D0184775\).PDF](http://www.federalmogulasbestostrust.com/files/Federal-Mogul%20TDP%20FINAL%20APPROVED%20AUGUST%202010%20(D0184775).PDF) (last visited Feb. 14, 2014). Given that asbestos personal injury trusts are paying the *several* share of their predecessors, the innocuous nature of the provisions stating that evidence submitted to the trusts is for the sole benefit of

To file a claim with an asbestos personal injury trust, the claimant typically submits a form, either electronically or in paper, with evidence of his or her exposure to the products for which that trust bears responsibility and his or her asbestos-related disease.¹²⁷

For a claimant to recover from an asbestos trust, the medical evidence must demonstrate that the claimant has an asbestos-related disease, and the exposure evidence must satisfy the trust that it has responsibility for the claimant's injuries.¹²⁸ The evidence required depends on the nature of the claimant's disease.¹²⁹ A claimant with mesothelioma, for example, must provide a diagnosis of that disease by a physician who physically examined the claimant, a diagnosis by a board-certified pathologist, or a pathology report prepared at or on behalf of an accredited hospital, as well as appropriate evidence of product identification, as noted above.¹³⁰

This is designed to be similar to the quantum of evidence a trust's non-debtor predecessor entity would have required prior to bankruptcy when settling claims.¹³¹ Turner & Newell (T&N), for example, one of the largest asbestos companies in the world,¹³²

the trust and not third parties or defendants in the tort system becomes clear. *Id.* at 60.

¹²⁷ See, e.g., *USG Asbestos Personal Injury Settlement Trust Proof of Claim Form*, USG ASBESTOS TRUST, <http://www.usgasbestostrust.com/files/USG%20Trust%20Proof%20of%20claim%20form%20%20version%201%20-%20FINAL.pdf> (last visited May 13, 2014) [hereinafter *Claim Form*].

¹²⁸ See *Asbestos PI Settlement Trust Distribution Procedures*, BABCOCK & WILCOX CO. 24-25, 37, 40 (Dec. 3, 2013), [http://www.bwasbestostrust.com/files/B%20W%20TDP%20DEC%202013%20POST%20TO%20WEBSITE%20\(P0325875\).PDF](http://www.bwasbestostrust.com/files/B%20W%20TDP%20DEC%202013%20POST%20TO%20WEBSITE%20(P0325875).PDF).

¹²⁹ *Claim Form*, *supra* note 127, at 3 (showing the claim form section where a claimant designates diagnosed asbestos-related injuries).

¹³⁰ See *Asbestos Personal Injury Settlement Trust Distribution Procedures*, U.S. GYPSUM 38 (Mar. 29, 2010), <http://www.usgasbestostrust.com/files/USG TDP.pdf>.

¹³¹ *Mesothelioma Compensation, Trusts & Settlements*, DRUGWATCH.COM, <http://www.drugwatch.com/mesothelioma/trusts/> (last visited Mar. 7, 2014).

¹³² See *Information on Company History & Asbestos Product Lines*, FED. MOGUL: CHAPTER 11 CLAIMS ADMIN. WEBSITE, <http://www.fmoclaims.com/products.php3> (last visited Feb. 8, 2014).

resolved claims made *in the tort system* with evidence of exposure to a T&N product and evidence of asbestos-related disease.¹³³

The evidence that satisfies a trust that it should make a payment (or a defendant to settle with a plaintiff) is not necessarily equivalent to that required to win a jury trial. The TDP sets forth procedures for the administration of the trust and establishes a process for assessing and paying valid claims.¹³⁴ The TDP also includes the settlement amounts that the trust will offer a claimant with an asbestos-related disease who meets the exposure and medical criteria set out in the TDP, and thus, can presumptively establish the trust's liability.¹³⁵ Claimants who believe that they are entitled to a larger payment from a trust because, for example, they have higher than normal damages or manifested illness at an early age, can reject the standard settlement and seek "individual review" of their claims, which may or may not result in a higher settlement.¹³⁶ In either case, the trust is designed to value claims at the tort system settlement share of its debtor,¹³⁷ not the joint and several total value of the claim against all responsible parties that would be fixed by a jury.¹³⁸

¹³³ Official Committee of Asbestos Property Damage Claimants' Proposed Findings of Fact and Conclusions of Law in Connection with the Estimation of Turner and Newell's Pending and Future United States Asbestos Personal Injury Liability, *In re Fed.-Mogul Global, Inc.*, No. 01-10578 (RTL), at 13-15 (D. Del. June 14, 2005), available at <http://bankrupt.com/misc/PDCommFindings&Conclusions.pdf>.

¹³⁴ *Welcome to the Federal-Mogul Asbestos Personal Injury Trust*, FED. MOGUL ASBESTOS PERS. INJURY TRUST, <http://www.federalmogulasbestostrust.com/> (last visited Feb. 9, 2014).

¹³⁵ See, e.g., *Asbestos Personal Injury Settlement Trust Distribution Procedures*, *supra* note 130, at 24-26 (explaining the medical exposure criteria).

¹³⁶ See, e.g., *id.* at 31 (explaining that the individual review may result in a lower payment than the standard settlement amount).

¹³⁷ *Id.* at 32.

¹³⁸ *Id.*

IV. THE THEORETICAL BASES OF "TRANSPARENCY"

A. *The Trusts are Not Public Entities*

Supporters of "transparency" have also conceptualized asbestos personal injury trusts as though their operation were part of their predecessors' bankruptcy cases,¹³⁹ a conceptualization that leads to the ideas that trusts should remain under the control of bankruptcy courts as long as possible and that their claims processing should, therefore, be public.¹⁴⁰ The trusts, however, are private, legal entities organized and regulated under state law.¹⁴¹ They are funded by contributions from their debtor predecessors.¹⁴² In considering a similar concept, however, the Court of Appeals for the Third Circuit in *In re: Resorts International, Inc.*¹⁴³ distinguished between a bankruptcy estate and a continuing trust, rejecting the argument that the trust's assets were "effectively those of the estate."¹⁴⁴

¹³⁹ See, e.g., Brown, *supra* note 109, at 589 (explaining that there should be sufficient information for an outsider to match trust claims to the applicable tort claim).

¹⁴⁰ See *id.* (explaining that many closed asbestos cases are not currently available on the internet, but the courts are able to modify this where necessary).

¹⁴¹ See, e.g., Asbestos PI Trust Agreement, *In re: W.R. Grace & Co.*, Case No. 01-01139 (JFK), at 3 (D. Del. Mar. 17, 2014), available at <https://www.grace.com/About/Reorganization/documents/Exhibit2.pdf> (noting that the trust was created as a statutory trust under Chapter 38 of title 12 of the Delaware Code and referencing the filing of a Certificate of Trust with the Delaware Secretary of State).

¹⁴² See, e.g., Sixth Amended Joint Plan of Reorganization (as Modified), *In re Owens Corning*, Case No. 00-03837, at Appendix A § 10.3 (D. Del. June 5, 2006).

¹⁴³ *In re: Resorts Int'l, Inc.*, 372 F.3d 154 (3d Cir. 2004).

¹⁴⁴ *Id.* at 169. This argument is analyzed more fully in the Memorandum from the Subcommittee on Business Issues. Memorandum from Subcomm. on Bus. Issues, *supra* note 48, at 23-24 (explaining that the connection of the litigation trust to the bankruptcy was not the same as that of the estate).

B. Defendants Already Have Access to the Information They Need

Defendants already have the ability to understand what trust claims a plaintiff has made or will likely make.¹⁴⁵ Trust claims have been discoverable in many jurisdictions since at least the mid-2000s.¹⁴⁶ In addition, defendants know the plaintiff's occupation and when and where he or she worked,¹⁴⁷ which is often sufficient to establish that a plaintiff would be entitled to file trust claims with numerous trusts.¹⁴⁸ Most trusts publish approved site and occupation lists, based on evidence amassed by their predecessors during their years in asbestos litigation.¹⁴⁹ These documents are published and available on websites maintained by the trusts,¹⁵⁰ and identify sites where their predecessors' products are acknowledged to have been present and job functions that are known to have routinely brought workers into contact with those products.¹⁵¹ Claimants can use these lists to qualify for payments from the trusts.¹⁵² Likewise, by studying a claimant's work history and the information made public by the trusts, litigating defendants can readily discern what trust recoveries may be anticipated for a

¹⁴⁵ See Scarcella & Kelso, *supra* note 108, at 12.

¹⁴⁶ See *e.g.*, Porter Hayden Co. v. Bullinger, 713 A.2d 962, 969 (Md. 1998); Volkswagen of Am., Inc. v. Superior Ct. of S.F., 43 Cal. Rptr. 3d 723 (Cal. Ct. App. 2006). *But see* Sweredoski v. Alfa Laval, Inc., No. PC 2011-1544, 2013 WL 3010419, at *16-17 (R.I. Super. Ct. June 13, 2013) (holding that trust claims are not discoverable). Given this reality, the claim that amendments to TDPs requiring confidentiality absent a subpoena from the bankruptcy court or the plaintiff's consent have created an impossible situation falls flat. See, *e.g.*, Schell Statement, *supra* note 23, at 14.

¹⁴⁷ *Significant Occupational Exposure Rating*, U.S. GYPSUM ASBESTOS PERS. INJURY SETTLEMENT TRUST (Dec. 19, 2011), http://www.usgasbestos.com/page.asp?page_id=28 (providing a link to a document showing significant occupational exposure ratings).

¹⁴⁸ *Mesothelioma Compensation, Trusts & Settlements*, *supra* note 131.

¹⁴⁹ See, *e.g.*, *USG Approved Site List*, USGASBESTOSTRUST.COM (June 7, 2012), <http://www.usgasbestostrust.com/files/USG%20Site%20List%2006-7-12.xls>.

¹⁵⁰ *Significant Occupational Exposure Rating*, *supra* note 147 (containing links to site and occupation lists which have been approved and published by trusts).

¹⁵¹ *USG Approved Site List*, *supra* note 149.

¹⁵² See *Claim Form*, *supra* note 127.

given claimant. Consulting firms can use asbestos trusts' public information to create these kinds of analyses.

Tort defendants can figure out not only whether a plaintiff could make a claim to a trust and be paid, but also the likely amount of a settlement payment by the trust.¹⁵³ In the tort system, settlement amounts paid by co-defendants are disclosed only when there is a verdict.¹⁵⁴ Asbestos personal injury trusts, however, publish their court-approved TDP and "payment percentages,"¹⁵⁵ including the scheduled values for each recognized type of asbestos disease (for example, their liquidated values assigned for claims that have been qualified by expedited review),¹⁵⁶ their "maximum values" (for example, the most they will pay for a claim),¹⁵⁷ and their "average values" (for example, the liquidated values they aim to achieve across the aggregate of all accepted claims, under individual review as well as the more routine expedited review).¹⁵⁸ A defendant already has far more information about trust claims than it has about settlements with either current or trust predecessor co-defendants in the tort system.

Apart from those pieces of information (routinely disclosed in the tort system) and the existence of the trust's site list (a fact equally available to a defendant), a claimant and his or her counsel may well know nothing else relevant to the particular trust claim. Such a claim requires no evidence or representation by the

¹⁵³ See *infra* notes 154-57 and accompanying text.

¹⁵⁴ See 3 LAW OF TOXIC TORTS § 25:7 (2013) ("The settlement of toxic tort cases often requires that the parties maintain the confidentiality of particular aspects of the settlement or even of the existence of the settlement itself.").

¹⁵⁵ See generally Mark Davidson et al., *Asbestos Bankruptcy Trusts and Their Impact on the Tort System*, 7 J.L. ECON. & POL'Y. 281, 289 (2010) (noting that TDPs "are effectively standing settlement grids" that are available to the public).

¹⁵⁶ Jeb Barnes, *Rethinking the Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos*, 28 JUST. SYS. J. 157, 168 (2007) ("The TDP designates categories of asbestos-related diseases and sets values for each.").

¹⁵⁷ See, e.g., *Asbestos Personal Injury Settlement Trust Distribution Procedures*, *supra* note 130, at 33-34.

¹⁵⁸ See, e.g., *Asbestos PI Settlement Trust Distribution Procedures*, *supra* note 128, at 32-33.

claimant, other than the relevant medical evidence and evidence that he or she worked at an approved site at a pertinent time and in a relevant occupation.¹⁵⁹ For these reasons, courts have recognized that asbestos defendants seeking to apportion liability to bankrupt entities cannot prove the debtor's responsibility merely by introducing the plaintiff's trust claims.¹⁶⁰ Furthermore, in many jurisdictions, even application of the actual trust payments as a setoff is not automatic, but requires proof that a settling entity is a joint tortfeasor.¹⁶¹

C. There Are Negotiated Means to Share the Necessary Information in Individual Cases Built into the Discovery Process

Furthermore, the discovery process, as regulated by courts, has led to procedures that are adequate to meet defendants' needs. In West Virginia, after consultation with attorneys for asbestos plaintiffs and defendants, the court charged with handling all the asbestos cases in the state has instituted procedures to integrate trust claims into the tort system without the need for legislative interference.¹⁶² The central provision of these procedures states:

No later than one hundred twenty (120) days prior to the date set for trial for the asbestos action, a claimant shall

¹⁵⁹ See, e.g., *Claim Form*, *supra* note 127, at 3-5.

¹⁶⁰ See *Scapa Dryer Fabrics, Inc. v. Saville*, 16 A.3d 159, 179 (Md. 2011) ("One will not be considered a joint tortfeasor, however, merely because he or she enters a settlement and pays money."); *In re Asbestos Litig.*, No. 2004-03964, 2004 WL 5183959, at *3 (Tex. Dist. Ct. Harris Cnty. Jan. 20, 2004) (letter order from MDL Judge Davidson) (stating that materials submitted to a trust are generally insufficient to establish that the trust is a responsible third party, because the trusts do not generally require any proof of causation, let alone proof sufficient to satisfy the rigorous standard required under Texas law).

¹⁶¹ See, e.g., *Baker v. ACandS*, 755 A.2d 664, 671-72 (Pa. 2000) ("[A] non-settling defendant is not entitled to a set-off in light of the settling defendant's release unless the settling and non-settling defendants are both deemed to be joint tortfeasors.").

¹⁶² See 2002 Asbestos Case Management Order with Attached Exhibits, *In re: Asbestos Personal Injury Litigation*, No. 03-C-9600, at 28-31 (W.Va. Cir. Ct. 2012) (creating rules pertaining to trust claims within the purview of the tort system).

provide to all parties a statement of any and all existing claims that may exist against asbestos trusts. In addition, the statement shall also disclose when a claim was or will be made, and whether there has been any request for deferral, delay, suspension or tolling of the asbestos trust claims process. The statement must contain an Affidavit of the Plaintiff or Plaintiff's counsel that the statement is based upon a good faith investigation of all potential claims against asbestos trusts.¹⁶³

In the event that a plaintiff has already filed a claim with a trust, the plaintiff is required to provide to defendants the executed proof of claim, along with all supporting documentation.¹⁶⁴ Defendants then have the ability to challenge the sufficiency of a plaintiff's disclosures, and the court has the power to impose sanctions on a plaintiff that the court finds lacked good faith in making such disclosures.¹⁶⁵ The burden is on the defendants to show lack of compliance,¹⁶⁶ and they are subject to sanctions as well if the court finds that a sufficiency motion was not brought in good faith.¹⁶⁷ Defendants are entitled to setoffs or credits in the amount of the value of the trust claims against any judgment rendered against them in an asbestos action.¹⁶⁸

D. Given That Most Cases Are Settled, Defendants Do Not Need Additional Access to this Information

One of the most puzzling aspects of the drive for trust transparency is the apparent unwillingness of its proponents to recognize that practically no asbestos cases go to trial.¹⁶⁹ In this

¹⁶³ *Id.* at 28.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 29.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *In re: Asbestos Personal Injury Litigation*, No. 03-C-9600, at 30.

¹⁶⁹ See Michelle J. White, *Understanding the Asbestos Crisis*, YALE L. SCHOOL 4 (May 2003), <http://www.law.yale.edu/documents/pdf/white.pdf> (noting that "less than one percent of asbestos claims are tried in court").

regard, asbestos cases are not an outlier¹⁷⁰ – whereas, as late as 1936, one-fifth of civil cases filed in the federal courts were resolved at trial,¹⁷¹ by 1992, this was 3.5%,¹⁷² and by 2002, only 1.2% culminated in jury trials.¹⁷³ Similarly, in state courts, by 2002, only 0.6% of state court dispositions were by jury trial.¹⁷⁴ The idea that the United States tort system evaluates or determines the worth of individual asbestos cases is, for all practical purposes, a myth.¹⁷⁵

Roughly 2,000 mesothelioma cases are still filed each year, as well as large numbers of lawsuits based on other diseases caused by asbestos.¹⁷⁶ Of those, a miniscule percentage will actually go to trial.¹⁷⁷ Indeed, between 1993 and 2001, there were only 527 asbestos trials that went to verdict (with 1,598 plaintiffs) in the entire United States,¹⁷⁸ and this was during the height of non-malignant claim filing, with hundreds of thousands of claims filed.¹⁷⁹ This, too, belies the need for the information – most cases

¹⁷⁰ See *infra* note 173 and accompanying text.

¹⁷¹ See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlements: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1571 (2004) (suggesting that individual case evaluation is no longer common due to the frequency of mass tort settlements).

¹⁷⁶ Ben Berkowitz, *Special Report: The Long, Lethal Shadow of Asbestos*, REUTERS (May 11, 2012), <http://www.reuters.com/article/2012/05/11/us-usa-asbestos-lawsuits-idUSBRE84A0J920120511>.

¹⁷⁷ Langbein, *supra* note 171 (explaining the small percentage of cases that actually go to trial).

¹⁷⁸ Stephen Carroll & Deborah Hensler, *Facts & Figures About Asbestos Litigation: Highlights from the New RAND Study*, INST. FOR LEGAL REFORM 27 (Jan. 2003), http://www.instituteforlegalreform.com/hooks/1/get_ilr_doc.php?fn=012303.pdf.

¹⁷⁹ Michelle J. White, *Asbestos and the Future of Mass Torts*, 18:2 J. ECON. PERSPECTIVES 183, 183 (2004) (explaining that by the end of 2002, 730,000 individuals had filed lawsuits against 8,400 defendants).

are not litigated.¹⁸⁰ These facts provide further evidence that there is no need for "transparency" legislation.

V. THE FACT ACT

A. *The FACT Act Harms Both Trusts and Plaintiffs*

As noted above, the FACT Act was passed by the House of Representatives in a close-to-party line vote in November 2013.¹⁸¹ Asbestos trusts, future claimants' representatives, and asbestos victims' groups all opposed the FACT Act.¹⁸² There are two sections to the bill – one requiring asbestos personal injury trusts to publish certain claims information, and a second requiring them to disclose their records upon request.¹⁸³

i. The Trusts Will Be Burdened

Section 8(A) of the FACT Act requires that each trust file with the bankruptcy court that oversaw its predecessor's bankruptcy case a public report "with respect to such quarter . . . [that] describes 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."¹⁸⁴

Proponents of the FACT Act argue that the reporting and disclosure requirements of the FACT Act will not place a burden on asbestos personal injury trusts.¹⁸⁵ They argue that because the

¹⁸⁰ Langbein, *supra* note 171 ("[T]rials have become 'vanishingly rare.'").

¹⁸¹ H.R. 982: *Furthering Asbestos Claim Transparency (FACT) Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/113-2013/h579> (last visited May 13, 2014) (showing that the FACT Act was passed by a 221-199 vote on November 13, 2013).

¹⁸² *Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the Comm. on the Judiciary*, 113th Cong. 108, at 9-16, 129 (2013), available at http://judiciary.house.gov/hearings/printers/113th/113-39_79879.PDF [hereinafter *Hearing Transcript*].

¹⁸³ H.R. 982, 113th Cong. § 2 (2013).

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., Testimony of Mark Scarcella, *Hearing Transcript*, *supra* note 182, at 78.

asbestos personal injury trusts receive most claims electronically, it would be easy for the trusts to automate the production of quarterly reports called for by the new section 8(A) of section 524(g).¹⁸⁶

Contrary to the position put forth by proponents of the legislation, an asbestos personal injury trust would not be able to provide this report by simply reproducing electronically-submitted claim forms.¹⁸⁷ As the Owens Corning/Fibreboard Asbestos Personal Injury Trust, the United States Gypsum Asbestos Personal Injury Trust, the Babcock & Wilcox Company Asbestos Personal Injury Trust, and the Federal-Mogul Asbestos Personal Injury Trust explained in submissions to the House Judiciary Committee and the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law, neither "exposure history" nor "basis for any payment" is a simple data field.¹⁸⁸ Instead, exposure information is typically provided to the trusts in supporting documents submitted with the claim form – a report that did not incorporate this information would be incomplete and misleading.¹⁸⁹

The trusts explained that to figure out the exposure history required by the FACT Act, an experienced claim reviewer would have to analyze the supporting documents and prepare a special report, a task that would take roughly fifteen minutes.¹⁹⁰ This, of course, would require the asbestos personal injury trust to either hire extra staff to prepare the special reports or take staff away from the task of processing claims. The "basis for payment" portion of the reporting would be more complicated, requiring an analysis of both the claimant's medical history and exposure history.¹⁹¹

¹⁸⁶ *Id.* at 89.

¹⁸⁷ Letters from Douglas Campbell to Committee Members, *Hearing Transcript, supra* note 182, at 142-43 ("A trust could not provide such a report providing only information taken from the claim form or pre-set data fields as informed judgment (as opposed to simple electronic copying) would be required.").

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

The asbestos personal injury trusts estimate, given the number of claims they receive and pay, that the FACT Act would require each trust to assign experienced managers and claims reviewers to spend 20,000 hours per year on compliance with the Act.¹⁹² In other words, the FACT Act creates a substantial burden for these entities, whose sole purpose is to compensate injured victims.¹⁹³

The new section 8(B) created by the FACT Act is even worse – it allows any asbestos defendant to demand "any information related to payment from, and demands for payment from, [a] trust."¹⁹⁴ The requests are not limited to information about the exposure at issue in the case and the Act could require an asbestos personal injury trust to provide information regarding all claims it has ever received multiple times to multiple parties.¹⁹⁵

ii. Plaintiffs Will Be Harmed by the Disclosure of this Information

In addition to the burden on the trusts, much of the opposition to passage of the FACT Act by the House¹⁹⁶ also focused on the potential harm to asbestos claimants that would come from having sensitive personal information published.¹⁹⁷ The White House's policy statement on House Bill 982, for example, after noting "[t]he legislation is based on the false assertion that there is endemic fraud in the asbestos trust system,"¹⁹⁸ explains that:

¹⁹² *Id.*

¹⁹³ Letters from Douglas Campbell to Committee Members, *Hearing Transcript, supra* note 182, at 142-43 (explaining all of the extra time and steps that would be required by the trusts in order to be compliant with the FACT Act's requirements under the new section 8(A) of section 524(g)).

¹⁹⁴ H.R. 982, 113th Cong. § 2 (2013).

¹⁹⁵ Letters from Douglas Campbell to Committee Members, *Hearing Transcript, supra* note 182, at 144.

¹⁹⁶ At the time of writing, the FACT Act has not been considered by the Senate. *See H.R. 982*, CONGRESS.GOV, <http://beta.congress.gov/search?q=%7B%22congress%22%3A%22113%22%2C%22source%22%3A%22legislation%22%2C%22search%22%3A%22%5C%22FACT%20Act%5C%22%22%7D> (last visited Apr. 7, 2014).

¹⁹⁷ *See* H.R. REP. NO. 113-254, pt. 1, at 37 (2013), *available at* <http://beta.congress.gov/congressional-report/113th-congress/house-report/254/1>.

¹⁹⁸ STATEMENT OF ADMINISTRATION POLICY H.R. 982 – FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2013, EXEC. OFFICE OF THE

Claimants' sensitive personal information – including their names and exposure histories – would be irretrievably released into the public domain and thus available to parties unrelated to the claims (including insurance companies, prospective employers, lenders, and data collectors). These parties could then use this personal information for purposes entirely unrelated to compensation for asbestos exposure, potentially to the detriment of asbestos victims. The information on this public registry could be used to deny employment, credit, and insurance. Victims would be more vulnerable to identity thieves and other types of predators.¹⁹⁹

This statement identifies a major problem with the FACT Act; for the trusts to actually provide the information that is required—the exposure history and the basis for payment—they would have to publish (not merely turn over) many of the documents submitted by claimants, including depositions, medical records, social security work histories, and military records.²⁰⁰ In a state court lawsuit to the extent the state courts publish the content of filings on Internet sites accessible to the public, discovery is not typically available as part of the online docket.

PRESIDENT OF THE U.S., OFFICE OF MGMT. & BUDGET (Nov. 12, 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr982h_20131112.pdf.

¹⁹⁹ *Id.*

²⁰⁰ See H.R. REP. NO. 113-254, *supra* note 197, at 31; *Instructions for Filing Asbestos Personal Injury Claims*, CONGOLEUM PLAN TRUST at 3-4, http://www.congoleumtrust.com/documents/docs/Congoleum_Filing_Instruction_s.pdf (last visited Mar. 16, 2014) (documenting the array of documents that asbestos trusts require victims to file when making a claim; most of these documents are within the purview of the FACT Act and would be required to be published); *Veterans and Asbestos Exposure*, ASBESTOS.COM, <http://www.asbestos.com/veterans/> (last visited Mar. 16, 2014) (demonstrating that in order for a veteran to hold the state accountable for asbestos injury, there must be documented proof that mesothelioma occurred from working in the military, and implying that these military records would also need to be published if reporting to a trust).

B. The Justifications for the FACT Act Are Misguided

i. Future Claimants are Already Protected

When advocates of transparency legislation seek to justify the legislation, it is usually on the grounds that such legislation will somehow protect future claimants.²⁰¹ For example, William P. Shelley's influential article stated that effects arising from the lack of transparency "ultimately threaten the ability of future claimants to receive full compensation for their claims."²⁰² Similarly, Bob Goodlatte (R-VA), Chairman of the House Judiciary Committee, claimed that:

The *Fact Act* is common-sense legislation that is designed to promote transparency, discourage fraud, and ensure that funds meant to benefit legitimate future asbestos victims are not used to pay abusive claims. If asbestos trusts are to have assets available to pay the claims of deserving future claimants tomorrow, Congress must take steps to assure that trust assets will be better protected today.²⁰³

Congress, of course, already took such steps many years ago with the enactment of section 524(g), which, as noted above, provides that if under a plan of reorganization a trust fund is to be established to pay asbestos claims, a representative must be appointed to protect the rights of people that might assert such

²⁰¹ See H.R. REP. NO. 113-254, *supra* note 197, at 2.

²⁰² Shelley et. al, *supra* note 38, at 259.

²⁰³ *Committee Approves Bill to Strengthen Asbestos Trust System*, JUDICIARY COMM. CHAIRMAN BOB GOODLATTE PRESS RELEASES (May 21, 2013), <http://judiciary.house.gov/index.cfm/press-releases?ID=1B5B3B95-EC97-7C06-24C7-3617E7702D93>; *see also Coburn Introduces Furthering Asbestos Claim Transparency (FACT) Act*, TOM COBURN, M.D., U.S. SENATOR FROM OKLA. (May 10, 2012), http://www.coburn.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=2005CB48-3B2E-40F8-A543-B82947AAFAD0. "Transparency ensures that limited trust funds needed to compensate future asbestos claimants are not squandered away by current abusive practices." Murphy, *supra* note 53, at 7.

claims in the future.²⁰⁴ Furthermore, before confirming a plan to channel the future liabilities of debtors or third parties to a trust with an injunction protecting those parties from future lawsuits, a court must find that this "is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party."²⁰⁵ Finally, the bankruptcy court must determine that "the trust will operate through mechanisms . . . that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner."²⁰⁶

In the mid-2000s there were a number of attacks on future claimants' representatives for failing to adequately protect the interests of their constituencies, drawing on the example of prepackaged bankruptcies.²⁰⁷ Regardless of the merits of these

²⁰⁴ 11 U.S.C. § 524(g)(4)(B)(i) (2012).

²⁰⁵ *Id.* § 524(g)(4)(B)(ii).

²⁰⁶ *Id.* § 524(g)(2)(B)(ii)(V).

²⁰⁷ *E.g.*, Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1448-49 (2004).

Several factors undermine the FCR's ability to match the advocacy of other representatives in bankruptcy negotiations. The FCR's clients are unidentified and unknown. As such, future claimants cannot monitor the FCR's performance in the negotiations. Other parties in interest to a bankruptcy reorganization (such as present claimants or unsecured debtholders), by contrast, may be actively involved in the negotiations and insist on certain features in any reorganization plan. These pressures tilt the negotiations in favor of the more actively involved parties. When negotiations become difficult, it is easier for the FCR, with no direct monitoring and accountability, to "bend" in order to clinch a deal.

Id. (footnotes omitted); *see also* Mark D. Plevin et al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. 271, 273, 291 (2006) (arguing that the FCR is actually, or at least apparently, beholden to the debtor and current claimants, and focusing on prepackaged bankruptcies as a method for present claimants and debtors to negotiate a better settlement of present claims outside the bankruptcy process and leaving minimal resources for future claimants in the eventual trust, whose interests are represented during the negotiation of the prepack by a

attacks,²⁰⁸ the structural conflicts they supposedly identify do not apply to the same extent once a trust has been established.²⁰⁹ The primary conflict that critics saw was that the FCR in a prepack is dependent upon the debtor for payment.²¹⁰

Revealing a lack of knowledge of the context in which these criticisms (outdated and rejected by courts) evolved, the report on the FACT Act submitted by the Committee on the Judiciary brushed aside the concept of the FCR.²¹¹ Thus, the only official

"pseudo-FCR" employed by the debtors). Notably, the plans created in the pre-packaged bankruptcies that Plevin et al. found most objectionable were rejected by the courts. *See In re: Combustion Eng'g, Inc.*, 391 F.3d 190, 240, 247 (3d Cir. 2004); *In re: Congoleum Corp.*, 426 F.3d 675, 691, 693 (3d Cir. 2005). Another, simpler argument about the ability of the FCR to function effectively came from Lester Brickman, who argued that the FCR would breach its fiduciary duty because "it is in the financial interest of the FCR that a plan be approved since the FCR's fees, after approval, are typically quite lucrative." Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 876 (2005). Professor Brickman supported this claim with an *ad hominem* attack on the FCR in the Mid-Valley bankruptcy. *Id.* at 876 n.183-84. A number of FCRs responded to the concerns raised about prepacks in Eric D. Green et al., *Prepackaged Asbestos Bankruptcies: Down But Not Out*, 63 N.Y.U. ANN. SURV. AM. L. 727, 735 (2008).

[A]sbestos prepacks are fully consistent with the goals of § 524(g) and the fiduciary duties and obligations undertaken by an FCR. An FCR's chief motivation for supporting a prepackaged asbestos bankruptcy process in lieu of a conventional bankruptcy in a specific case would be that the FCR believes that a prepack will be most advantageous to the future claimants.

Id.

²⁰⁸ For example, reliance on the experience of the Manville Trust during its first incarnation, before that trust was structured with the pattern now standard among trusts, with a matrix of suggested values and a payment percentage, is a myopic basis on which to criticize current trusts. *See, e.g.*, Listokin & Ayotte, *supra* note 207, at 1436, 1450.

²⁰⁹ For example, the argument made by Professor Brickman that a FCR will compromise to get a plan confirmed just so that he or she can be paid to be the FCR post confirmation fails to even note any supposed failure of an FCR to represent future claimants properly post petition. Brickman, *supra* note 207, at 880 n.184.

²¹⁰ Brickman, *supra* note 207, at 878-80.

²¹¹ *See* H.R. REP. NO. 113-254, *supra* note 197, at 10-11 (giving short shrift to the FCR issue).

consideration of the FCR in the debate over the FACT Act appears in a single short paragraph of the Republican majority's section of the House Report on the bill,²¹² and after introducing the concept, the authors of the report dismiss the FCR as ineffective:

Section 524(g) also requires the appointment of a legal representative on behalf of individuals who may file claims with a proposed asbestos trust in the future, referred to as a "future claims representative" or an "FCR." Courts generally appoint an individual suggested by the current claimants and the debtor company. Congress envisioned the appointment of an FCR as a due process protection for future claimants; however, the debtor company and the attorneys representing current claimants stand to benefit from the appointment of a weak or pliant representative. Moreover, FCR work can be extremely lucrative, and academic commentators have expressed concern that FCR's are "punch-pulling" in an effort to be seen as "reliable negotiating partners who [will] not 'rock the boat' " and increase the likelihood of future FCR appointments. Indeed, many representatives serve several trusts concurrently.²¹³

This rejection of the FCR is superficial and meaningless.²¹⁴ First, the analysis is based on references to articles that attacked the role of the FCR in the limited context of prepack bankruptcies.²¹⁵ Second, those articles themselves do not present any evidence suggesting that a FCR has ever actually "punch-

²¹² *See id.* at 10.

²¹³ *See id.* (footnotes omitted).

²¹⁴ This failure to consider the FCR is not limited to the government. A recent article by Professor Brown arguing that bankruptcy trusts "adopt—or . . . courts and congress to demand—a more transparent and aggressive framework for protecting trust assets for the benefit of legitimate future victims" virtually ignores the FCR, other than noting the existence of the position. Brown, *supra* note 109, at 552, 593-94.

²¹⁵ Plevin et. al, *supra* note 207, at 271-72; Brickman, *supra* note 207, at 868 n.144; RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 177 (2007).

pulled"; as noted above, any such conclusion is based primarily on innuendo, speculation, and a circular set of references.²¹⁶

The conflicts of interest fall into two categories—first, that the FCR in a prepack is hired by the debtors prior to appointment by the court and, therefore, beholden to them; and second, that the FCR is a repeat player whose greatest concerns are reappointment and generous compensation post bankruptcy.²¹⁷

Concerns about the prepack system, ignoring their questionable validity,²¹⁸ are irrelevant when applied to a trust. If *ad hominem* attacks about greed were sufficient to support arguments in favor of transparency (which, of course, they are not), they could also be used to oppose it: is it not also in the interest of the FCR to preserve funds for future claimants in order to keep the trust active as long as possible?²¹⁹

ii. There Is No Evidence of Widespread Fraud to be Combated

In their testimony in favor of the FACT Act (and elsewhere), defendants typically cite a series of cases as proof that claimants to

²¹⁶ The Plevin article, for example, cites *In re: Combustion Eng'g, Inc.*, 391 F.3d 190, 238 (3d Cir. 2004), for the assertion that a truly independent FCR might challenge a bankruptcy plan leading to a trust on the grounds that the future claimants might prefer to recover against a future solvent company than a trust. Plevin et. al, *supra* note 207, at 292. However, the *Combustion Engineering* appellate court had no issue with the FCR in that case, rather, the plan brought in two solvent related companies in order to give them section 524(g) protection; the future claimants of those companies had no representatives. *In re: Combustion Eng'g, Inc.*, 391 F.3d at 233-37. Professor Brickman attacks the compensation of the FCR in the Halliburton bankruptcy and implies that the FCR therein was corrupt. Brickman, *supra* note 207, at 868 n.144. Professor Brown relies on Plevin's article, Brickman's article, and the Nagareda book (which itself relies on Plevin). S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 899 n.151 (2008).

²¹⁷ See Brickman, *supra* note 207, at 878-80; NAGAREDA, *supra* note 215, at 177.

²¹⁸ See Green et al., *supra* note 207, at 771, for a strong response to the prepack criticism.

²¹⁹ *Id.* at 751.

asbestos personal injury trusts are committing fraud.²²⁰ Describing these cases as "the mere tip of the iceberg,"²²¹ they argue that "transparency" is the solution.²²²

There are major problems with this evidence of an epidemic of fraud.²²³ The "evidence" consists of a few cases²²⁴ in a system in which there are thousands of lawsuits filed yearly, and tens of thousands of trust claims processed, and the "evidence" is anecdotal, not statistical.²²⁵

During hearings on the FACT Act in March 2013, the then-chairman of the subcommittee, Bob Goodlatte (R-VA), referred to an article in the *Wall Street Journal*²²⁶ as if the newspaper had found thousands of problems.²²⁷ In fact, the *WSJ* found very

²²⁰ *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy and the Legal System: Hearing Before the Subcomm. on the Constitution of Comm. on the Judiciary*, 112th Cong. 51 (2011) (written statement of James L. Stengel, Esq.) [hereinafter Stengel Statement].

²²¹ *Id.* at 86.

²²² *Id.*; see, e.g., Brickman, *supra* note 24, at 7.

²²³ See *infra* note 225 (explicating these problems).

²²⁴ See, e.g., Stengel Statement, *supra* note 220, at 101-05 (examining *Kanianian*, *Warfield*, and *Edwards*). A year later defendants had dredged up a fourth case. See Schell Statement, *supra* note 23, at 18, 20-21 (describing *Kanianian*, *Warfield*, *Edwards*, and *Dunford*.) By June 2013, Mark Behrens, testifying before the Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association's Tort Trial and Insurance Practice Section, had added a few others, as well as repeating (virtually word-for-word) Ms. Schell's citation of *Kanianian*, *Warfield*, *Edwards*, and *Dunford*. See Mark Behrens, Esq., Testimony Before the Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association's Tort Trial and Insurance Practice Section, at 7-10, 14 (June 6, 2013), available at http://www.americanbar.org/groups/tort_trial_insurance_practice/asbestos_task_force.html.

²²⁵ Almost all the cases are discovery disputes—there is perhaps one case in which improper trust claims were made, *Kanianian v. Lorillard Tobacco Co.* Schell Statement, *supra* note 23, at 101-02. The remainder do not indicate problems with the trusts, but disputes over when information should be turned over during the discovery process. *Id.*

²²⁶ Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J. (Mar. 11, 2013), <http://online.wsj.com/news/articles/SB10001424127887323864304578318611662911912>.

²²⁷ *Id.* (showing that there were suggestions of fraud and abuse).

little.²²⁸ It noted a claim already under investigation and some possible data entry errors from a partial database of the Manville Trust's records.²²⁹

There has been no evidence cited that fraudulent claims are widespread. In fact, most asbestos personal injury trusts have a provision in the TDP allowing the trust to create audit programs. Indeed, ninety-eight percent of the trusts studied by the GAO had audit programs in place.²³⁰ These audit programs include both random and targeted audits.²³¹ These audits have not revealed widespread fraud.²³²

iii. The FACT ACT Advantages Asbestos Defendants

Another argument put forward for transparency legislation is that it will more "proper[ly]" allocate the liability for asbestos injuries, that is, away from the defendants pushing the legislation.²³³ This is the other line of thinking that originated in the 2006 Bates and Mullins article – that solvent defendants are paying funds to plaintiffs that should be paid by the trusts instead.²³⁴ As previously discussed,²³⁵ this expectation is purely theoretical, and runs counter to the historical experience of defendants with both the return of the Manville Trust to the tort system in 1988 and the payments from new asbestos personal injury trusts in 2006-2008.²³⁶

The legislation would purportedly benefit defendants in several specific ways.²³⁷ Mark Behrens, a lobbyist for asbestos

²²⁸ *Id.* (stating that the trust's general counsel does audit, and has not found fraud).

²²⁹ *Id.*

²³⁰ GAO REPORT, *supra* note 3, at 22.

²³¹ *Id.* at 22-23.

²³² The GAO Report notes that trust counsel reported finding no evidence of fraud. *Id.*

²³³ *Furthering Asbestos Claim Transparency (FACT) Act of 2012: Hearing on H.R. 4369 Before the Subcomm. On Courts, Commercial and Admin. Law of the Comm. on the Judiciary*, 112th Cong. 120, at 65 (2012).

²³⁴ See Bates & Mullin, *supra* note 22, at 1-2.

²³⁵ See *supra* notes 31-34 and accompanying text.

²³⁶ See *id.*

²³⁷ See Behrens, *supra* note 224, at 28.

defendants,²³⁸ spoke before the ABA Task Force on Asbestos Litigation and Bankruptcy Trusts.²³⁹ He explained that

"Sunshine" requirements that improve bankruptcy trust transparency provide tort defendants a tool to (1) identify fraudulent or exaggerated exposure claims; (2) establish that a debtor company was partly or entirely responsible for the plaintiff's harm; and (3) allow judgment defendants to obtain set-off credits for trust claim payments received by the plaintiff.²⁴⁰

We previously discussed the first justification (that fraud will be exposed), and the third justification has been waived aside by a prominent defense attorney:

And I should address a red herring which is raised, and some defense lawyers take a different view than I do. I will say the amount a trust pays a claimant is irrelevant to me. I don't really care. Now, if we get a verdict and we have to mold the verdict and calculate credits and setoffs, then we will need that information. But unless and until we get to that point, the dollar amounts are not a matter of concern to me. What is a matter of concern to me is the exposure allegations or assertions made against the trusts, because those are relevant to almost every jurisdiction where we have cases, whether it's a case-jurisdiction where we can allocate fault, we want to argue

²³⁸ Behrens noted that he has testified:

before state legislatures in support of legislation to bring about greater transparency between the asbestos bankruptcy trust and civil tort systems[,] . . . worked on behalf of the U.S. Chamber's Institute for Legal Reform and serve as counsel to the Coalition for Litigation Justice, Inc., a nonprofit association formed by insurers in 2000 to address and improve the asbestos litigation environment[,] and counsel[ed] companies that have been named as defendants in asbestos cases.

Id. at 1.

²³⁹ *Id.*

²⁴⁰ *Id.* at 28.

supervening or intervening cause. Those are really the gold standard.²⁴¹

What remains is the idea that trust claim information can establish that another entity was responsible for the plaintiff's injury.²⁴² The problem with this argument – that exposure allegations are relevant to arguing that another defendant was responsible – is that the exposure information in possession of asbestos personal injury trusts is generally not sufficient to prove liability in court.²⁴³ The trusts require "meaningful and credible [evidence of] exposure,"²⁴⁴ but, as noted above, many also pay on the basis of a site list—that is, the trust, based on the records of its predecessor, knows that products for which it bears responsibility were in use at that site in a given period, and presumes exposure at that place and time—a procedure designed to reduce transaction costs and delay.²⁴⁵ This is insufficient to prove a case or allocate fault.²⁴⁶

Arguments for legislation like the FACT Act that stress the benefits to defendants are less focused on creating a narrative of supporting the legislation as a public good and more toward a statement of self-interest.²⁴⁷ Even there, however, the explanations of how the FACT Act would benefit asbestos defendants are not

²⁴¹ James L. Stengel, Testimony Before the Task Force on Asbestos Litigation and the Bankruptcy Trusts of the American Bar Association's Tort Trial and Insurance Practice Section, at 16 (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.authcheckdam.pdf.

²⁴² *Id.* at 16-17.

²⁴³ *Id.* (explaining that the defendant can attempt to show another cause, but that it is not the end all to proving liability).

²⁴⁴ See, e.g., *Asbestos PI Settlement Trust Distribution Procedures*, *supra* note 128, at § 5.7(b)(3); *Asbestos Personal Injury Settlement Trust Distribution Procedures*, *supra* note 130, at § 5.7(b)(3).

²⁴⁵ Davidson et al., *supra* note 1, at 155.

²⁴⁶ *Id.*

²⁴⁷ Inselbuch et al., *supra* note 1, at 9.

always clear.²⁴⁸ It appears, though, that they center around the argument that defendants should not have to pay.²⁴⁹

The Chamber of Commerce, in an open letter to the members of the House, claimed that "[t]he FACT Act would also ensure that the thousands of small, medium, and large businesses currently embroiled in asbestos litigation are not unfairly victimized by plaintiffs' attorneys who, it appears, exploit the trusts' lack of transparency to prevent important information from entering court cases."²⁵⁰

Given that in discovery this information can enter tort cases,²⁵¹ the rationale for the FACT Act fails. And other organizations supporting the legislation are generally unable to connect the dots.²⁵² If it is not really to benefit future claimants, then the question is how the FACT Act will benefit defendants.²⁵³ The National Association of Manufacturers does not explain how the bill will protect manufacturers, but explains instead that "[c]utting down on fraud will ensure that more money is available for the intended recipients" and expresses concern that "[w]ithout proper oversight and checks on the system, increasing fraud and abuse will harm the truly needy and diminish asbestos trust fund

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Letter from R. Bruce Josten, Executive Vice President, Gov't Affairs, Chamber of Commerce of the U.S. of America, to the Members of the U.S. House of Representatives (Nov. 12, 2013), *available at* http://images.politico.com/global/2013/11/12/131112_kv_hr982_furtheringasbestosclaimtransparencyact2013_house.html.

²⁵¹ *See infra* Part V.C.

²⁵² Letter from Aric Newhouse, Senior Vice President, Policy and Gov't Relations, Nat'l Ass'n of Mfrs., to the U.S. House of Representatives (Nov. 13, 2013), *available at* http://www.nam.org/~media/C60A37D2706741BBBAE429C6C16E0FA4/KV_Letter_FACT_HR982_11_12_13.pdf; *see also* Schell Statement, *supra* note 23, at 2, 13-14 (illustrating examples of organizations in support of the FACT Act).

²⁵³ *Dissenting Views on H.R. 982, "Furthering the Asbestos Claim Transparency Act of 2013," The House Comm. on the Judiciary: Democrats*, at 1, 5-6, 8-10, 14-16 (Nov. 17, 2013), *available at* <http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/HR982Dissent.pdf> [hereinafter *Dissenting Views on H.R. 982*] (showing opposition to the FACT Act and explaining how asbestos defendants will be benefitted).

resources."²⁵⁴ It also criticizes a system that allows "opportunistic individuals . . . to file claims for the same claimant with numerous trusts, seeking multiple payouts."²⁵⁵ This is misguided since any claimant has the right to recover from all tortfeasors that caused his or her injury.²⁵⁶

C. *The FACT Act Is Unfair*

Rather than protecting future claimants or filling a need in the tort system, the FACT Act appears simply to hinder the operation of asbestos personal injury trusts.²⁵⁷ By forcing the disclosure of trust claims—which are settlements with co-defendants—it also creates an imbalance in the tort system in that a defendant knows what a plaintiff has already recovered.²⁵⁸ The plaintiff does not know, however, what that defendant typically pays to settle a case against it.²⁵⁹ The absurdity of the FACT Act's distortion of the tort system can be demonstrated by imagining the implausible situation in which an active defendant were to be ordered by law to produce all of its settlement agreements with plaintiffs—an occurrence that is unforeseeable.²⁶⁰

²⁵⁴ Letter from Rosario Plamieri, Vice President, Infrastructure, Legal and Regulatory Policy, to Lamar Smith & John Conyers, Jr., Committee on the Judiciary (June 5, 2012), *available at* http://www.nam.org/~media/EC5DA46101BD492A9D6B234E9C059E13/NAMHouseJudiciaryFACTAct_06_05_12.pdf.

²⁵⁵ *Id.*

²⁵⁶ See Inselbuch et al., *supra* note 1, at 1.

²⁵⁷ See *Dissenting Views on H.R. 982*, *supra* note 253, at 1-2.

²⁵⁸ See Charles E. Bates & Charles H. Mullin, *Show Me the Money*, 22:21 MEALEY'S LITIG. REP.: ASBESTOS 1 (Dec. 3, 2007) (illustrating that normally the average total recovery for claims is not readily available, that plaintiff law firms only know what their claimants receive, and that defendant companies only know what they pay each claimant, not what other defendants paid that same plaintiff).

²⁵⁹ *Id.*

²⁶⁰ Such an order, or one like that which appeared in the suggested amendment to the FACT Act requiring defendants to disclose the location at which all its products were used, sold, or purchased, can be justified by defendants' long record of hiding the effects of asbestos exposure and other misconduct, which did not end with the disclosure of their wrongdoing in the early 1980s, but continues to this day. See, e.g., Testimony of Brian Weinstein,

VI. STATE TRUST TRANSPARENCY LEGISLATION IS "TORT REFORM"
RELABELED AND DESIGNED TO IMPOSE NEW BURDENS ON
PLAINTIFFS

A. Structure of the State Legislation

The Asbestos Claims Transparency Act is not about transparency at all.²⁶¹ It is legislation designed to increase the burdens on plaintiffs in asbestos litigation and lower settlement values.²⁶² Ohio House Bill 380 is an example of this proposed legislation that was signed into law on December 20, 2012.²⁶³ Ohio House Bill 380 has several key provisions.

It requires disclosure of all asbestos personal injury trust claims filed before or during the pendency of an asbestos tort action.²⁶⁴ The plaintiff must identify all existing asbestos personal injury trust claims and all material pertaining to them.²⁶⁵ This is an ongoing obligation—that is, the plaintiff must update the filing as the case continues.²⁶⁶ The law differs from existing CMOs, however, in that until seventy-five days before trial any defendant may move for a stay if it believes that the plaintiff can file

Transcript of the Proceedings ABA TIPS Asbestos Task Force, Los Angeles Hearing (Oct. 2, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/tips/asbestos_tf/1013/asbestos_task_force%2010_02_2013_mini_2.authcheckdam.pdf; *see also Dissenting Views on H.R. 982, supra* note 253, at 1-2, 9 (illustrating that the FACT Act mandates disclosure by trusts); GAO REPORT, *supra* note 3, at 26, 29 (noting that typically "information disclosed in the course of settlement negotiations is recognized as not discoverable").

²⁶¹ Letter from Nan Aron, Alliance for Justice, Joanne Doroshow, Ctr. for Justice & Democracy, & Robert Weissman, Pub. Citizen, to Bob Goodlatte, Chairman, & John Conyers, Jr., Ranking Member, U.S. House Judiciary Comm., (May 20, 2013), *available at* <http://www.afj.org/wp-content/uploads/2013/09/asbestoscoalitionlettermay.pdf>.

²⁶² *See Dissenting Views on H.R. 982, supra* note 253, at 1-2 (illustrating the new burdens that are placed on plaintiffs in asbestos litigation).

²⁶³ H.R. 380, 129th Gen. Assemb., Reg. Sess. (Ohio 2013).

²⁶⁴ *Id.* § 2307.952(A)(1)(a).

²⁶⁵ *Id.* See discussion of the West Virginia CMO, *supra* notes 163-69 and accompanying text.

²⁶⁶ H.R. 380, § 2307.952(A)(2), 129th Gen. Assemb., Reg. Sess. (Ohio 2013).

additional trust claims.²⁶⁷ The defendant is required to identify the trusts and describe the information supporting its belief.²⁶⁸ The plaintiff must, within fourteen days of the defendant's motion, file the trust claims or file a response seeking a determination by the court that the claim or claims should not be filed or that the cost of filing the claim or claims would exceed the recovery.²⁶⁹

The plaintiff has the burden of proving that he or she should not file the claims.²⁷⁰ If the court finds in favor of the defendant, the action will remain stayed until the plaintiff files the claim or claims.²⁷¹

The state transparency laws also have evidentiary implications.²⁷² Trust claim information is presumed to be "authentic, relevant to, and discoverable" in asbestos tort actions, and presumed not to be privileged.²⁷³ It can be introduced to prove alternative causation and to allocate responsibility, unless exclusion is required by the rules of evidence.²⁷⁴

Furthermore, the state transparency laws provide for sanctions for failure to comply with the disclosure requirements, including vacation of a judgment rendered in an asbestos personal injury action.²⁷⁵

Oklahoma Senate Bill 404, which was signed into law on May 7, 2013,²⁷⁶ is similar to the Ohio law, although it applies to other personal injury trusts (rather than just asbestos bankruptcy trusts) and the timing provisions differ.²⁷⁷ More importantly, however, the legislation provides for the calculation of the value of trust claims

²⁶⁷ *Id.* § 2307.953(A).

²⁶⁸ *Id.* § 2307.953(A)(2).

²⁶⁹ *Id.* § 2307.953(C)(1)(b).

²⁷⁰ *Id.* § 2307.953(D)(1).

²⁷¹ *Id.* § 2307.953(E).

²⁷² H.R. 380, § 2307.954(B), 129th Gen. Assemb., Reg. Sess. (Ohio 2013) (illustrating an example of a state transparency law that has evidentiary implications).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* § 2307.954(E)(1).

²⁷⁶ *See* S. 404, 2013 Leg., 54th Sess. (Okla. 2013).

²⁷⁷ *See, e.g., id.* § 3(A).

prior to resolution, using scheduled value and payment percentage, with dollar-for-dollar setoffs to reduce damage awards.²⁷⁸

B. The Effects of the State Legislation Are Anti-Plaintiff

These laws, unlike the FACT Act, are justified by their proponents primarily on the grounds that asbestos personal injury trusts should be paying more than they are.²⁷⁹ The law's supporters allege that "businesses in this state [may be] being unfairly penalized and deprived of their rights"²⁸⁰ – a statement drawn verbatim from ALEC's model legislation.²⁸¹ Concerned not with the rights of future claimants, the legislation is blatantly pro-defendant, with the goal of ensuring that "solvent companies do not unnecessarily absorb the liabilities of bankrupt entities that are not subject to tort actions."²⁸²

Far from being about simple transparency to ensure the "responsible parties are allocated an equitable share of any liability,"²⁸³ however, the effects of the legislation based on the Asbestos Claims Transparency Act are actively anti-plaintiff.²⁸⁴

The laws force plaintiffs to do defendants' work for them.²⁸⁵ Once a plaintiff has provided evidence of exposure to a defendant's asbestos products, one of the primary ways a defendant can deflect liability is to prove that the plaintiff was exposed to the asbestos for which another entity is responsible.²⁸⁶ By forcing the plaintiffs to work up trust claims and then statutorily bringing those claims into court, the laws make plaintiffs assist defendants in proving their case.²⁸⁷ That is, they have to create new "evidence" which will be used against them at trial.²⁸⁸ And, even though the standard

²⁷⁸ *Id.* § 8.

²⁷⁹ DIXON ET AL., *supra* note 93, at 34-35.

²⁸⁰ H.R. 380, 129th Gen. Assemb., Reg. Sess. (Ohio 2013).

²⁸¹ *Asbestos Claims Transparency Act*, *supra* note 37, at § 2(A)(8).

²⁸² H.R. 380, 129th Gen. Assemb., Reg. Sess. (Ohio 2013).

²⁸³ *Id.*

²⁸⁴ Inselbuch et al., *supra* note 1, at 8.

²⁸⁵ *Id.* at 9.

²⁸⁶ *See, e.g.*, OHIO REV. CODE ANN. § 2307.23 (West 2005).

²⁸⁷ Inselbuch et al., *supra* note 1, at 9.

²⁸⁸ *Id.* at 8.

of proof is different for trust claims, which are meant to be reviewed based on the quantum of evidence necessary to beat summary judgment, juries may still use the trust claims to assign fault.²⁸⁹

There is another way in which the state laws force plaintiffs to create so-called "evidence" that can harm them.²⁹⁰ In certain jurisdictions, including Ohio, joint and several liability for non-economic damages only attaches if a defendant is found to be more than a certain percentage at fault.²⁹¹ Each additional party on the verdict form therefore increases the possibility that the plaintiff, not the defendant, will bear the shortfall of the trusts' reduced payments.²⁹²

In addition, the laws allow defendants to create delays.²⁹³ Delays are beneficial to defendants for a number of reasons. The time value of money is different for a dying plaintiff, who will heavily discount the value of his or her claim.²⁹⁴ And, whether a plaintiff is alive or dead is one of the strongest criteria for the value of a case.²⁹⁵ Juries tend to award live plaintiffs much higher verdicts.²⁹⁶

²⁸⁹ Laura Kingsley Hong & Robert E. Haffke, *Apportioning Liability in Asbestos Litigation: A Review of the Law in Key Jurisdictions*, T.M. COOLEY L. REV. 682, 685 (2009).

²⁹⁰ Inselbuch et al., *supra* note 1, at 8.

²⁹¹ § 2307.23.

²⁹² Inselbuch et al., *supra* note 1, at 8.

²⁹³ *Id.*

²⁹⁴ *Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the Comm. on the Judiciary*, 113th Cong. 39 (2013) (statement of Elihu Inselbuch).

²⁹⁵ Julia Marsh, *Cancer Victims Win \$190 Million in Asbestos Case — the 'Largest Ever' Judgment of its Kind in New York City*, N.Y. POST (July 24, 2013, 9:12 PM), <http://nypost.com/2013/07/24/cancer-victims-win-190-million-in-asbestos-case-the-largest-ever-judgment-of-its-kind-in-new-york-city/> (illustrating that live plaintiffs receive more compensation than deceased plaintiffs).

²⁹⁶ For example, in a consolidated trial in July 2013, each of the two living mesothelioma victims in the trial was awarded a verdict twice that of each of the deceased. *See, e.g., id.*

VII. CONCLUSION: THE STATE AND FEDERAL "TRANSPARENCY"
LEGISLATION IS DESIGNED TO WORK TOGETHER TO CREATE AN
ENVIRONMENT WHERE TRUSTS PAY AND SOLVENT DEFENDANTS
DO NOT

The purpose of the state and federal "transparency" legislation appears to be the creation of a system in which all (or almost all) of asbestos claimants' compensation comes not from solvent defendants, but from the asbestos personal injury trusts.²⁹⁷ The FACT Act requires the publication of vast amounts of private information about plaintiffs' trust claims.²⁹⁸ Meanwhile, the state laws allow defendants to take this data and use it to force plaintiffs to file additional claims, thus slowing down the tort system and increasing victims' willingness to settle.²⁹⁹

Defendants had hoped that the presence of asbestos personal injury trusts in the place of their predecessors would "cause the solvent defendants' asbestos liabilities to return much, if not all of the way back to their pre-2000 levels."³⁰⁰ When this did not happen, unwilling to face a situation in which defendants could be jointly liable for the acts of all the entities that caused a plaintiff's asbestos disease, defendants developed legislative campaigns leading to the FACT Act and the Asbestos Claims Transparency Act.³⁰¹ They are attempting to use federal legislation in conjunction with state laws, not to root out fraud, but to shift losses to innocent plaintiffs and away from culpable entities that profited from the use of asbestos, while pretending that both sets of laws are for the common good.³⁰²

²⁹⁷ As one witness in favor of the FACT Act argued, "[w]ith such a staggering amount of money available to asbestos claimants in the trust system, it makes no sense to require the solvent peripheral defendants to bear full tort liability." Schell Statement, *supra* note 23, at 13.

²⁹⁸ Inselbuch et al., *supra* note 1, at 8.

²⁹⁹ *Id.*

³⁰⁰ Philip Bentley & David Blabey, Jr., *Asbestos Estimation in Today's Bankruptcies: The Central Importance of the New Trusts*, 26:24 MEALEY'S LITIG. REP.: ASBESTOS 1 & n.1 (Jan. 2012).

³⁰¹ Inselbuch et al., *supra* note 1, at 7.

³⁰² *Id.* at 9.