

BANKRUPTCY TRUSTS, TRANSPARENCY AND THE
FUTURE OF ASBESTOS COMPENSATION

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I. INTRODUCTION

Drawing upon the tragedy of the commons,¹ Francis McGovern observed in 2002 that asbestos plaintiffs were "arguably 'overgrazing' the accessible financial assets [recovery from asbestos defendants] to the detriment of the total value of those assets."² He warned defendants that they were "arguably polluting their own economic environment" by litigating and settling claims in a manner that encouraged plaintiffs' firms to recruit more clients, which might ultimately overrun their resources and the resources of their co-defendants.³ Judges, too,

¹ Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

² Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1722 (2002).

³ *Id.* at 1722 & n.6, 1732.

were "arguably challenging the legitimacy of the public justice system by allowing" asbestos claims to dominate their dockets.⁴ He observed that the solution to the commons problem is typically coercion,⁵ and that the "parties who cooperate first to orchestrate [the] coercion [would be] the ones most likely to achieve their [objectives]."⁶

As judges and legislatures considered measures to reduce the prevalence of the asymptomatic claims that dominated asbestos litigation for more than a decade,⁷ many prominent defendants (with the assistance of key members of the asbestos plaintiffs' bar) entered bankruptcy and subsequently emerged free of their long-term asbestos liabilities during the last decade.⁸ These bankruptcy cases,⁹ in turn, resulted in a sharp increase in the number of bankruptcy trusts established to pay current and future asbestos victims.¹⁰ As of today, roughly 100 companies have entered bankruptcy to address their asbestos liabilities, and approximately 60 asbestos bankruptcy trusts have been established or are in the process of being established.¹¹

⁴ *Id.* at 1722.

⁵ *Id.* at 1723.

⁶ *Id.*

⁷ See, e.g., Joseph W. Belluck et al., 7th Annual Judicial Symposium on Civil Justice Issues: George Mason Judicial Education Program Transcript, *The Asbestos Litigation Tsunami—Will It Ever End?*, 9 J. L. ECON. & POL'Y 489, 493-95 (2013) [hereinafter Judicial Education Program Transcript]; Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 505 (2009); Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 513, 515 (2008).

⁸ Lee Blanton Ziffer, *Bankruptcy Trusts and Asbestos Litigation*, A.B.A. (June 11, 2012), <http://apps.americanbar.org/litigation/committees/products/articles/spring2012-bankruptcy-trusts-asbestos-litigation.html#top>; see also *Resolving Corporate Asbestos Liability*, SHARON MERRILL, <http://www.investorrelations.com/casestudies/13-asbestos-liability.html> (last visited Oct. 8, 2013) (discussing how a small industrial manufacturer negotiated with "key members of the plaintiffs bar" in an attempt "to permanently resolve its asbestos liability").

⁹ See Judicial Education Program Transcript, *supra* note 7, at 493.

¹⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3, 14 (Sept. 2011) [hereinafter GAO REPORT].

¹¹ *Id.* at 2-3.

Yet, most of the trusts established to date have ultimately suffered from the commons problem as well.¹² In adopting settlement standards and payment practices that both "expand the pool of compensable claims" and "front-load[] payments" to current plaintiffs,¹³ trusts are "arguably polluting their own economic environment" by encouraging law firms to amass and file more claims against them.¹⁴ Plaintiffs' firms rationally pursue all ethically and legally appropriate means to increase the potential recoveries for their clients,¹⁵ but, in doing so, they are arguably overgrazing the trusts and solvent defendants.¹⁶ Defendants continue to establish bankruptcy trusts on terms that are favorable to them,¹⁷ but, in so doing, they shift the risks that these trusts are

¹² McGovern, *supra* note 2, at 1747-50.

¹³ S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 539 n.12, 550-51, 559 (2013) [hereinafter Brown, *Forever*] (explaining that the negotiations that lead to the establishment of bankruptcy trusts and the voting requirements under section 524(g) of the Bankruptcy Code result in standards that both expand the number of compensable claims and maximize the settlement values for strong claims).

¹⁴ See McGovern, *supra* note 2, at 1722.

¹⁵ See generally Freedman, *supra* note 7, at 519-21 (discussing ethics in asbestos settlements).

¹⁶ McGovern, *supra* note 2, at 1722.

¹⁷ This occurs in both consensual and contested bankruptcy cases. In consensual cases, the debtor and leading members of the plaintiffs' bar reach mutually agreeable terms prior to the commencement of the case, and these settlements typically allow the debtor to retain considerable assets and equity to retain some or all of its interest in the debtor. Mark D. Plevin et al., *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. TEX. L. REV. 883, 884, 888, 891 (2003). Under this model, Halliburton, which was not expected to be at any serious risk of insolvency, used the bankruptcy process to cap its long-term asbestos liabilities and effectively transfer any risk of trust underfunding to future victims. See 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, 297 n.116 (2006); Ronald Barliant et al., *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441, 451-52 (2004); see also Judicial Education Program Transcript, *supra* note 7, at 498 (noting that plaintiffs' attorney Charles Siegel stated that Halliburton "is not, and never has been . . . bankrupt in any sense that is familiar," but nonetheless was able to "deal with its asbestos liabilities" in bankruptcy). Conversely, in challenging plaintiffs' claims extensively in its bankruptcy case, W.R. Grace ultimately attained a favorable settlement with

underfunded to future victims and solvent defendants in the tort system.¹⁸ Additionally, the courts overseeing these cases are arguably challenging the legitimacy of the bankruptcy process by confirming reorganization plans that perpetuate long recognized weaknesses in each successive trust.¹⁹ Instead of moving asbestos compensation toward a sustainable equilibrium, bankruptcy trusts have arguably both accelerated their own demise and fueled the broader commons problem in the tort system.²⁰

This article examines the bankruptcy trust system as part of the overall framework for asbestos personal injury compensation. Part I provides a basic background concerning the linkages across solvent and bankrupt defendants, how bankruptcy trusts are established and operate, and the growing significance of trust operations and payments in the tort system. Parts II and III compile the most common arguments concerning proposed transparency legislation addressing the trusts at the state and federal level, respectively, and analyze their relative strengths and weaknesses. Part IV breaks away from these traditional arguments, suggesting that they largely miss the broader long-term implications of the current system for victim compensation.

plaintiffs concerning its trust contribution requirements. *Some Asbestos Grace*, WALL ST. J. (Mar. 8, 2008), <http://online.wsj.com/article/SB120494308054321521.html#printMode> (discussing the W.R. Grace bankruptcy settlement); see S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 921 & n.209 (2008) [hereinafter Brown, *Without Compromise*] (noting the company's strategy of challenging individual claims); Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1339-40 n.636 (2008) (discussing the expert report in the Grace bankruptcy, and suggesting that the number of asbestos claims filed is "fourteen times greater than the number of medically plausible cases of asbestosis").

¹⁸ Brown, *Forever*, *supra* note 13, at 538-39.

¹⁹ See *id.* at 582-83 (arguing that the experience of the trusts to date suggests that the continued approval of similar trusts without demanding substantial changes is inconsistent with the Bankruptcy Code and its underlying policies).

²⁰ *Id.* at 538-39.

II. BACKGROUND: ASBESTOS LITIGATION, TRUSTS, AND LINKAGES

The prevailing narrative²¹ concerning the origins of the asbestos personal injury crisis remains largely as it has been for the last three decades.²² Asbestos was prized for its resistance to heat, acid, alkalis, and electricity throughout much of the last century.²³ It was designated a "critical war material" during World War II and was integrated into thousands of products.²⁴ For much of this time, key members of the asbestos industry, medical establishment, government, and others were aware of a growing body of evidence suggesting a correlation between exposure to airborne asbestos and pneumoconiosis and certain forms of cancer, including malignant mesothelioma.²⁵ Although the industry successfully manipulated public opinion concerning these risks until the 1960s,²⁶ the industry was flooded with personal injury claims once these risks became common knowledge and plaintiffs increasingly obtained favorable verdicts at trial.²⁷

As asbestos claims mounted during the late 1970s and early 1980s, a relatively small group of defendants shouldered the

²¹ Although this narrative has gained the most traction, it has been challenged as plagued by hindsight bias and "retroactive inculcation for acts committed decades earlier that were not wrongful at the time." LESTER BRICKMAN, *LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA* 153 (2011); see also Rachel Maines, *The Asbestos Litigation Master Narrative: Building Codes, Engineering Standards, and "Retroactive Inculcation"*, 13 *ENTERPRISE & SOC'Y* 862, 864 (2012) (agreeing with Brickman and further suggesting that asbestos was required in many products in which there was no "equivalent-performance substitute").

²² Maines, *supra* note 21, at 862-63.

²³ *Id.* at 864.

²⁴ ANDREW SCHNEIDER & DAVID MCCUMBER, *AN AIR THAT KILLS: HOW THE ASBESTOS POISONING OF LIBBY, MONTANA, UNCOVERED A NATIONAL SCANDAL* 81-82 (2004).

²⁵ See Brown, *Without Compromise*, *supra* note 17, at 844-45; see also *Pneumoconiosis*, HARV. HEALTH PUBLICATIONS, <http://www.drugs.com/health-guide/pneumoconiosis.html> (last visited Oct. 8, 2013).

²⁶ Elihu Inselbuch et al., *The Effrontery of the Asbestos Trust Transparency Legislation Efforts*, 28:2 *MEALEY'S LITIG. REP. ASBESTOS* 3 (Feb. 20, 2013), available at www.capdale.com/files/8122_ASB022013cm.pdf.

²⁷ Brown, *Without Compromise*, *supra* note 17, at 846.

largest liability shares.²⁸ The defendants in this first tier were most often targeted because of their central roles in the asbestos industry, the growing availability of evidence tying them to intentional concealment of the dangers of asbestos, the extensive work performed by plaintiffs' firms to establish exposure to these defendants' products, and, for some, the perceived ability to satisfy judgments at trial.²⁹ By contrast, other defendants were named less frequently because plaintiffs' attorneys had not yet developed the evidence linking them to their clients' injuries or to actual knowledge of the dangers of asbestos, which tended to make for less compelling narratives at trial and in settlement discussions.³⁰

The bankruptcies of these early lead defendants triggered,³¹ and each successive wave of bankruptcies continued, an "endless search for a solvent bystander" that continues today.³² After some

²⁸ *Id.* at 852; see also Jeff Dirksen, *Gordian Knot: How the Senate's Asbestos "Reform" Bill Entangles Taxpayers*, NTU Policy Paper No. 118, NAT'L TAXPAYERS UNION (Dec. 8, 2005), <http://www.ntu.org/news-and-issues/economy/how-senate-asbestos-reform-bill-entangles-taxpayers.html>.

²⁹ See generally H.R. REP. NO. 112-687, at 3-5, 34-35 (2012), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt687/html/CRPT-112hrpt687.htm> [hereinafter FACT ACT REPORT] (discussing asbestos litigation, fraud, and the need for legislation). For example, Johns-Manville, which was the second asbestos defendant to enter bankruptcy in 1982, "was, by most accounts, the largest supplier of raw asbestos and manufacturer of asbestos-containing products in the United States." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 140 (2009).

³⁰ See generally FACT ACT REPORT, *supra* note 29, at 4, 7 (discussing "the mass filing of lawsuits by plaintiffs . . . without reliable proof of causation").

³¹ 'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz, 17:1 MEALEY'S LITIG. REP.: ASBESTOS 1, 5 (Mar. 1, 2002) [hereinafter MEALEY'S LITIG. REP.: ASBESTOS]; *Travelers Indem. Co.*, 557 U.S. at 140 (noting that "the prospect of overwhelming liability led Manville to file for bankruptcy protection").

³² See MEALEY'S LITIG. REP.: ASBESTOS, *supra* note 31, at 5. Most recently, this "endless search" has extended beyond products manufactured with asbestos parts to products that were merely compatible with asbestos-containing components produced by others. Compare *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 497-98 (6th Cir. 2005) (no duty to warn of potential exposure to asbestos in others' products), and *O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012) (rejecting appeal to extend strict liability to include such claims), and *Simonetta v. Viad Corp.*, 197 P.3d 127, 133, 138 (Wash. 2008) (asserting that a manufacturer of an evaporator "sans asbestos insulation," finding "little to no

of these first-tier defendants commenced bankruptcy, plaintiffs could still seek full recovery from other defendants.³³ Unable to shoulder the additional burden, many of these second-tier defendants also commenced bankruptcy; thereby, shifting the liability shares they carried to still other defendants.³⁴ Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.³⁵ And, as Justice Kennedy observed in 2003, "[w]ith each bankruptcy the remaining defendants come under greater financial strain, . . . and the funds available for compensation become closer to exhaustion."³⁶

support under our case law for extending the duty to warn to another manufacturer's product" and, accordingly, concluding that the defendant "cannot be held responsible for the asbestos contained in another manufacturer's product"), *with In re N.Y.C. Asbestos Litig.*, 36 Misc. 3d 1234(A), 4, 6, 16 (N.Y. Sup. Ct. 2012) (concluding that a manufacturer has a duty to warn where it had or should have had knowledge of the use of asbestos-containing components produced by others in connection with its product).

³³ Brown, *Forever*, *supra* note 13, at 545-46.

³⁴ 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 2, 6 (2012).

In the first four years of the 21st century, at least 36 companies filed for bankruptcy to address their asbestos liabilities. These companies—mostly construction companies and their suppliers—included such major asbestos defendants as Armstrong World Industries, Federal-Mogul Corporation, Kaiser Aluminum, Owens Corning, U.S. Gypsum Company, and W.R. Grace. This bankruptcy wave had a profound effect on the asbestos defendants that remained in the tort system, which had, to this point, been only peripheral defendants.

Id.

³⁵ Brown, *Forever*, *supra* note 13, at 545-46 (discussing the profile of companies that have recently filed for bankruptcy); *see also* Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 791, 793 n.2 (E.D. Pa. 2012) ("[A]sbestos litigation has evolved, and the major manufacturing defendants have declared bankruptcy, the litigation has moved away from the manufacturers of asbestos, and defendants in the cases now pending before this Court are typically those that manufactured so-called 'bare-metal' products that contained or were later encapsulated in asbestos."); *supra* note 34 and accompanying text.

³⁶ *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 169 (2003) (Kennedy, J., dissenting); *see also* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) ("[E]xhaustion of assets threatens and distorts the process; and future claimants

Although the profile of asbestos claims changed in the last decade,³⁷ we remain in the midst of a slow-motion, cascading failure that continues to stretch deeper into the pool of potential defendants.³⁸ Some of this strain may be the lingering effect of the asymptomatic claims that dominated asbestos litigation for more than a decade,³⁹ but solvent defendants also point to lingering distortions in the system that, they claim, continue to impose irrationally elevated liability shares upon them.⁴⁰ In order to more fully evaluate these claims and the proposals that have been advanced to address them, this section outlines how exposure and compensation linkages in the tort system may fuel this pattern, examines the manner in which bankruptcy trusts replace tort defendants in the compensation scheme, and discusses the degree to which trust claim and payment information may offset linkages across bankrupt and solvent defendants in the tort system.⁴¹

A. Linkages that Increase Solvent Defendant Liability Shares

The linkages⁴² that make the transfer of liability shares from bankrupt defendants to solvent defendants possible are at the heart of the asbestos bankruptcy cycle.⁴³ These linkages are not unique to asbestos litigation, but the extent to which they have extended liability is unprecedented due to the number of victims exposed to

may lose altogether.' ") (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3 (Mar. 1991)).

³⁷ Behrens, *supra* note 7, at 523-24.

³⁸ *See id.* at 527, 556-57.

³⁹ *See supra* note 7.

⁴⁰ *See* Laura Kingsley Hong & Robert E. Haffke, *Apportioning Liability in Asbestos Litigation: A Review of the Law in Key Jurisdictions*, 26 T.M. COOLEY L. REV. 681, 682, 684, 690 (2009).

⁴¹ *See infra* Part I.A-C.

⁴² The linkages concept has been used to capture the various connections across defendants and between the bankruptcy trust and tort systems previously. *See* LLOYD DIXON & GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION xii (2011), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1104.sum.pdf. Although I have adopted a slightly different approach and labels, the underlying reference to these connections and their cross-forum and cross-party consequences captures largely the same principles.

⁴³ *Id.*

asbestos and the number of companies that have played a role in the production, distribution, and use of asbestos-containing products.⁴⁴

1. Exposure Linkages: Overlapping Exposures, Causation, and Liability

Exposure linkages shift liability where plaintiffs were exposed to bankrupt and solvent defendants' products, but only exposures to solvent defendants' products are considered in determining causation and allocation of liability.⁴⁵ These linkages may drive the cycle because: (1) workers and customers may have been exposed to a wide variety of asbestos products; (2) it is not possible to state with certainty that any specific exposure or combination of exposures caused a specific injury; and (3) the narratives that influence alternative causation defenses and probabilistic allocations of several liability in the tort system undergo fundamental shifts once former lead defendants exit the tort system.⁴⁶

For any one plaintiff, the universe of potentially responsible defendants is limited by the plaintiff's exposure history.⁴⁷ Insulation workers, for example, may have worked with a range of products manufactured and sold by dozens of defendants over several decades.⁴⁸ Someone who replaced gaskets in industrial products may have been exposed to asbestos gaskets produced by multiple companies over time, but given that many of the products that used these gaskets also contained asbestos insulation or other products, this same worker may also assert claims against the

⁴⁴ See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1827, 1831-34 (1995) (discussing the high elasticity among plaintiffs and defendants in asbestos litigation).

⁴⁵ See DIXON & MCGOVERN, *supra* note 42, at xii, xv.

⁴⁶ See FACT ACT REPORT, *supra* note 29, at 3-5, 7; see also Hong & Haffke, *supra* note 40, at 717-20 (discussing various defenses used by defendants).

⁴⁷ See DIXON & MCGOVERN, *supra* note 42, at xvi.

⁴⁸ *Asbestos Insulation*, ASBESTOS.COM, <http://www.asbestos.com/products/construction/insulation.php> (last visited Oct. 22, 2013).

manufacturers of these other products.⁴⁹ Some plaintiffs worked at multiple job sites and in different jobs over the course of their careers, so they may claim workplace exposures to asbestos products that may be tied to each worksite or job type.⁵⁰ Moreover, some victims may assert "take-home" or "do-it-yourself" exposure instead of, or in addition to, workplace exposure.⁵¹

Given the limits of our scientific knowledge in this area,⁵² and the likelihood that any given plaintiff was exposed to asbestos produced, sold, or used by numerous defendants, allocation of fault is ultimately a probabilistic inquiry.⁵³ Fault is allocated across defendants based on a variety of factors that are known to increase the risk of developing the applicable cancer or other disease: extent and duration of exposure, type of asbestos used in the product, the extent to which the asbestos was friable, and so on.⁵⁴ Similarly, in some states, this evidence may be sufficient to allow some co-defendants to prove alternative causation.⁵⁵ To that end, known defendants are listed on verdict forms with juries left to allocate responsibility to them based on rough assessments of these and other factors.⁵⁶

Thus, in advancing the evidence necessary to establish specific causation with respect to lead defendants—acknowledging exposure to their products and putting forward witnesses who attested to personal knowledge of the plaintiff's presence when those products were used—plaintiffs also provide other defendants

⁴⁹ DIXON & MCGOVERN, *supra* note 42, at 3; *see also In re Garlock Sealing Techs., Inc.*, Case No. 10-31607, at 14-16 (Bankr. W.D.N.C. Jan. 10, 2014) (describing asbestos gaskets, their use, and the process for replacing them and noting that “[v]irtually all of the pipes, flanges and valves where Garlock’s gaskets were used were wrapped in a thick covering of thermal insulation produced by other manufacturers”).

⁵⁰ DIXON & MCGOVERN, *supra* note 42, at 3.

⁵¹ *Mesothelioma Prevention*, ASBESTOS.COM, www.asbestos.com/mesothelioma/prevention.php (last visited Sept. 21, 2013).

⁵² Jane Stapleton, *The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims*, 74 BROOK. L. REV. 1011, 1025 (2009).

⁵³ *See id.* at 1029.

⁵⁴ DIXON & MCGOVERN, *supra* note 42, at 16, 73-74.

⁵⁵ *Id.* at 14, 17.

⁵⁶ *Id.* at 14.

with a natural check on the expansion of their own liabilities.⁵⁷ These tertiary defendants can point to testimony that emphasizes use of the lead defendants' products to obtain only marginal fault allocations at trial or, depending on the state law at issue, prevail on causation or other issues altogether.⁵⁸ Thus, it is perhaps unsurprising that many of today's lead defendants enjoyed years or decades of success in the tort system, having the cases against them dismissed or settled at amounts well below their projected transaction costs in all but a handful of cases.⁵⁹

Solvent defendants contend that this process is distorted today because plaintiffs, directly or through their witnesses, deny exposure to bankrupt defendants' products solely to preclude their consideration at trial or in settlement.⁶⁰ Although the available evidence may suggest that bankrupt defendants' products were present in a given workplace, solvent defendants must still demonstrate that the plaintiff worked with or was otherwise exposed to airborne asbestos from these products.⁶¹ The witnesses

⁵⁷ *Id.* at 16.

⁵⁸ Hong & Haffke, *supra* note 40, at 688-91.

⁵⁹ THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION 25 (Federal Judicial Center 1987), available at [www.fjc.gov/public/pdf.nsf/lookup/asbststr.pdf/\\$file/asbststr.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/asbststr.pdf/$file/asbststr.pdf); see also Michelle J. White, *Is Asbestos the Future of Mass Torts?*, DEPARTMENT ECON., U. CAL., SAN DIEGO, Nov. 2003, at 17, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.9079&rep=rep1&type=pdf>.

⁶⁰ DIXON & MCGOVERN, *supra* note 42, at 16-17. As Judge Hodges recently observed:

Most significant to Garlock, though, was the fact that often the evidence of exposure to those [bankrupt] insulation companies' products also "disappeared." This occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants).

In re Garlock Sealing Techs., Inc., Case No. 10-31607, at 30 (Bankr. W.D.N.C. Jan. 10, 2014).

⁶¹ See, e.g., *Threadgill v. Manville Corp. Asbestos Disease Comp. Fund*, 1990 U.S. Dist. LEXIS 19083, at *8-9 (D. Del. July 27, 1990) (holding that purely circumstantial evidence of product nexus was insufficient; the evidence must show that the plaintiff was in proximity to the product when it was being used to establish causation).

who are most likely to present admissible testimony concerning such exposures will be the plaintiff, former co-workers, or relatives, though most will have little recollection of which products were used decades ago prior to meeting with counsel.⁶² To overcome these gaps in memory, defendants contend that witnesses may be coached to recall solvent defendants' products and disavow any recollection of the plaintiff's exposure to bankrupt defendants' products.⁶³ Moreover, witnesses who once testified to the prevalence of bankrupt defendants' products in the relevant workplace may no longer be available, and it is perhaps unsurprising if these witnesses qualify those recollections by denying that this plaintiff was exposed to those products where they perceive that doing so will help their co-workers, friends, and family members.⁶⁴

2. Compensation Linkages: The Role of Joint Liability

Compensation linkages arise where joint liability rules transfer the unpaid liability shares of bankrupt defendants to one or more solvent co-defendants.⁶⁵ Whereas exposure linkages shift liability by the omission of exposures to bankrupt defendants' products, compensation linkages arise in joint liability jurisdictions merely

⁶² See, e.g., Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 139-41 (2003).

⁶³ See, e.g., *id.* at 139-40, 142-45. Although the discussion of these practices has centered on professionalism questions, see, e.g., W. William Hodes, *The Professional Duty to Horseshed Witnesses-Zealously, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343, 1362-63 (1999) ("Given the fragility of human perception, memory, and communication, a wide range of discrepant statements about the same event can all be true, or at least not false. Thus, there may be considerable ethical leeway to coach witnesses to adopt one, rather than another, version of events."), they also raise considerable policy concerns about the ultimate truth-seeking capacity of civil litigation.

⁶⁴ See generally Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 TEX. TECH L. REV. 1383, 1384-86 (1999) (discussing the role of laypersons coaching witnesses generally, and in the asbestos context specifically, and suggesting that it is ultimately far more prevalent than witness coaching by lawyers).

⁶⁵ DIXON & MCGOVERN, *supra* note 42, at xv.

as a matter of policy.⁶⁶ In pure joint liability jurisdictions, even defendants who have modest several liabilities due to their limited roles in contributing to a plaintiff's injury may be required to carry all unsatisfied bankrupt defendants' liability shares.⁶⁷ In jurisdictions where only defendants who have contributed more than a certain amount to the plaintiff's injury will be held jointly liable, exposure linkages may unduly elevate the defendant's perceived contribution above this threshold, ensuring that even peripheral defendants may be held jointly liable.⁶⁸ In either case, solvent defendants contend that the sheer number of co-defendant bankruptcies to date and their respective roles in the asbestos industry have the potential to increase solvent defendants' liability shares dramatically.⁶⁹

B. The Potential Offsetting Effect of Bankruptcy Materials and Payments

Although a defendant's bankruptcy may have once ensured that any tort plaintiff would receive little or no recovery,⁷⁰ this is not the case in modern asbestos bankruptcies.⁷¹ As noted previously, several formerly prominent defendants in asbestos litigation have established bankruptcy trusts, which control several billion dollars in assets for the benefit of current and future victims.⁷² These trusts, most of which have been established under section 524(g) of the Bankruptcy Code,⁷³ will pay claims only after determining that the plaintiff has produced evidence sufficient to demonstrate exposure to the applicable trust's predecessor's

⁶⁶ *Id.* at 65-66.

⁶⁷ Steven B. Hantler et al., *Moving Toward the Fully Informed Jury*, 3 GEO. J.L. & PUB. POL'Y 21, 41 (2005).

⁶⁸ *See, e.g.*, Inselbuch et al., *supra* note 26, at 8.

⁶⁹ Behrens, *supra* note 7, at 542.

⁷⁰ S. Todd Brown, *Constitutional Gaps in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 179, 187 n.37 (2012) (discussing historical treatment of tort claims in bankruptcy proceedings).

⁷¹ *See* Brown, *Without Compromise*, *supra* note 17, at 852.

⁷² *See supra* notes 7-11 and accompanying text; *see also* DIXON & MCGOVERN, *supra* note 42, at 2-3.

⁷³ *See* DIXON & MCGOVERN, *supra* note 42, at 2.

products.⁷⁴ Thus, solvent defendants believe that mandatory disclosure of these representations will offset the impact of exposure linkages in the tort system, and disclosure of the amounts received from trusts will likewise offset the impact of compensation linkages by demonstrating that at least some of the bankruptcy shares have been paid.⁷⁵

1. Information Advanced During an Asbestos Bankruptcy

Consistent with chapter 11's focus on the direct relationships among the debtor and its creditors, section 524(g) was enacted to address the debtor's, creditors', and future victims' interests—ensuring equal protection of present and future claimants' rights against the debtor, preservation of the going-concern value of the debtor for the benefit of all creditors and future victims, and providing prompt payment of meritorious claims⁷⁶—not the impact of the proceedings on non-parties, including co-defendants.⁷⁷ Thus, section 524(g) provides the debtor with a means of channeling all of its current and future asbestos liability to a trust established to pay current and future claims.⁷⁸ To protect asbestos victims, current and future, this provision outlines several conditions that must be satisfied prior to the entry of the injunction including: (1) the appointment of a representative to speak for future victims in the proceedings;⁷⁹ (2) assurances that the trust will value and pay current and future victims in substantially the same manner;⁸⁰ (3) a judicial finding that the channeling injunction is fair and equitable in light of the protected parties' contributions to the trust;⁸¹ and (4)

⁷⁴ See *infra* Part II.B.2.

⁷⁵ DIXON & MCGOVERN, *supra* note 42, at xii, xv, 19, 35-36 (explaining the link between trusts and bankruptcies).

⁷⁶ *In re Plant Insulation Co.*, 469 B.R. 843, 859-61 (Bankr. N.D. Cal. 2012) ("Congress had three purposes in enacting section 524(g): equal treatment of present and future asbestos claimants; preservation of going-concern value; and prompt payment of meritorious asbestos claims.").

⁷⁷ *Id.* at 859.

⁷⁸ *Id.* at 860.

⁷⁹ 11 U.S.C. § 524(g)(4)(B)(i) (2013).

⁸⁰ § 524(g)(2)(B)(ii)(V).

⁸¹ § 524(g)(4)(B)(ii).

the approval of the plan by no less than seventy-five percent of known asbestos plaintiffs with current claims against the estate.⁸²

In the typical chapter 11, the right to participate as a creditor involves a series of factual admissions and disclosures.⁸³ Most creditors are required to file a proof of claim, which outlines the factual and legal basis for the claim.⁸⁴ If a claim was liquidated pre-petition, the amount of this settlement may also be disclosed on the debtor's official schedules of assets and liabilities.⁸⁵ If a claim is settled during the course of a case, the debtor will most often be required to file a motion seeking approval of the settlement, which will include the legal and factual basis of the claim and the amount of the settlement.⁸⁶

Transparency may be the norm in most chapter 11 cases, but these rules rarely apply in asbestos cases.⁸⁷ If a plaintiff's claim is referenced in public documents, it is likely to be indirect; the only information disclosed will be the name, address, and type of claims asserted by the law firm, without any specific reference to the identity of the plaintiff.⁸⁸ Asbestos claimants are not required to file a proof of claim, and other mandatory disclosures under the bankruptcy rules have been modified by courts to preclude public disclosure of the identities of asbestos claimants participating in a case.⁸⁹ Rather, such submissions, discovery, and any other pleadings or materials that include identifying information will be shielded by protective orders during and after the bankruptcy case.⁹⁰ In sum, a plaintiff may assert a right to payment against the

⁸² § 524(g)(2)(B)(ii)(IV)(bb).

⁸³ § 501.

⁸⁴ § 501(a).

⁸⁵ § 521(a)(6); Norman L. Tolle, *Bankrupt Claimants May Be Barred From Pursuing Disability Benefits*, RIVKIN RADLER (April 2005), <http://www.rivkinradler.com/publications.cfm?id=547>.

⁸⁶ *In re Blake*, 452 B.R. 1, 11 (Bankr. D. Mass. 2011) (noting that "settlements generally are subject to disclosure and bankruptcy court approval procedures under both the federal and local bankruptcy rules").

⁸⁷ Brown, *Without Compromise*, *supra* note 17, at 920-21.

⁸⁸ *Id.* at 866-67.

⁸⁹ *Id.*

⁹⁰ See generally *In re Motions for Access of Garlock Sealing Techs., L.L.C.*, 488 B.R. 281, 302 (D. Del. 2013) (discussing Garlock's limitations to access certain exhibits); T.K. Kim, *Federal Judge Closes Portion of Garlock*

bankruptcy estate, vote on any proposed plan, and otherwise enjoy the full array of protections enjoyed by any other creditor in the case without the public disclosure of her identity or the factual basis for her claim.⁹¹

The most obvious explanation for the distinct treatment of asbestos claims in bankruptcy is that transparency is intended to enable parties in interest to protect their interests in the bankruptcy case.⁹² Bankruptcy law does not seek to provide co-defendants with information they may use to defend themselves in tort litigation.⁹³ Rather, to the extent courts consider co-defendant access at all, they understandably assume that these rights are governed by state discovery rules, and any right to obtain the information that forms the basis of the plaintiffs' claims or concerning payments they receive from a bankrupt defendant or trust will be addressed in state court.⁹⁴

2. Bankruptcy Trust Submissions and Payments

Much like a debtor-in-possession in bankruptcy, the trusts have independent management, seek to preserve and grow the limited funds under their control for the benefit of creditors, and file financial reports with the bankruptcy court.⁹⁵ Trust management—one or more trustees, a legal representative for future victims (FCR or future claimants' representative), a trust advisory committee (TAC) comprised of leading plaintiffs' lawyers, and private claim reviewers—varies from one trust to the next, but most of these parties are repeat players with appointments

Bankruptcy Trial, LEGAL NEWSLINE (July 26, 2013), <http://legalnewsline.com/issues/asbestos/243134-federal-judge-closes-portion-of-garlock-bankruptcy-trial> (discussing the bankruptcy court's decision to seal estimation hearing testimony concerning asbestos claim fraud allegations).

⁹¹ Brown, *Without Compromise*, *supra* note 17, at 856-57.

⁹² *Id.* at 919-20; Kim, *supra* note 90.

⁹³ See DIXON & MCGOVERN, *supra* note 42, at 29-30.

⁹⁴ See *infra* Part I.B.2.c.

⁹⁵ *How Bankruptcy and Settlement Trusts Affect Asbestos Lawsuits*, ASBESTOS NETWORK, www.asbestosnetwork.com/tools/tl_bankruptcy.htm (last visited Oct. 14, 2013).

at multiple trusts.⁹⁶ Likewise, the procedures governing their operations remain similar across most trusts.⁹⁷

For the purposes of this discussion, the key components of these operations are the manner in which they review claims, how claims are valued and paid once approved, and the public and private avenues for obtaining access to this information.⁹⁸ Each component is discussed in turn below.

a. Claim Review

Unlike debtors in possession, private claim reviewers hired by the trusts process and review claims to determine whether claimants ultimately qualify to become trust beneficiaries, and bankruptcy courts do not supervise this process.⁹⁹ Rather, this component of trust administration is governed by trust distribution procedures (TDPs), which outline the process for filing claims, how the claims will be reviewed, and mechanisms for contesting unfavorable claim determinations.¹⁰⁰ These procedures also outline: (1) distinct categories of claims according to the injury asserted; (2) the criteria for obtaining compensation for each category of claim; (3) the scheduled value for each category of injury; and (4) one or more mechanisms for plaintiffs to obtain more than the scheduled value for their claims following a more extensive individual review.¹⁰¹

The criteria employed to evaluate claims for payment ostensibly mirror those used in the tort system—focusing on whether the plaintiff has the asserted injury and has established evidence sufficient to demonstrate exposure to the trust predecessors' conduct—and vary according to the asserted injury, but the actual standards may be far lower than required in the

⁹⁶ Brown, *Forever*, *supra* note 13, at 552.

⁹⁷ See *In re Fed.-Mogul Global Inc.*, 684 F.3d 355, 360 (3d Cir. 2012).

⁹⁸ Brown, *Forever*, *supra* note 13, at 552-53; DIXON & MCGOVERN, *supra* note 42, at 13.

⁹⁹ Brown, *Forever*, *supra* note 13, at 552; GAO REPORT, *supra* note 10, at 13.

¹⁰⁰ See Brown, *Forever*, *supra* note 13, at 552-53 (discussing how individual claims are reviewed).

¹⁰¹ See *id.* at 554-55.

applicable state court.¹⁰² The veracity of some medical reports advanced by the plaintiffs' expert may not be challenged by claim reviewers, and other potential causes for a plaintiffs' asserted injuries (smoking, for example) may not be considered if the claimant is not forthcoming with such information.¹⁰³ Moreover, exposure may be established by demonstrating that the claimant worked at an approved worksite and by providing an affidavit from the claimant, a co-worker, or a family member attesting to exposure to a qualifying product or someone who worked with a qualifying product.¹⁰⁴ Limitations periods are likewise more generous in the bankruptcy trust system than in the tort system.¹⁰⁵ Moreover, claims based on fiber migration theories may be compensable by the trusts¹⁰⁶ even though state courts have consistently rejected such claims.¹⁰⁷ Thus, it is possible that some claims may be approved even if the evidence supporting exposure may not survive early dispositive motions in the relevant state court.¹⁰⁸

In practice, a claimant seeking compensation from a trust must file a claim form, which, among other things, requires a statement of injury; information sufficient to establish asbestos exposure attributable to the trust's predecessor under the TDP under penalty of perjury; and a determination as to whether the claimant is

¹⁰² *Id.* at 554, 565.

¹⁰³ *Id.* at 567; see also Marc C. Scarcella et al., *Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts: The Economic Incentives Behind the New Recruitment of Lung Cancer Claims*, 13:4 MEALEY'S ASBESTOS BANKR. REP. 7 (Nov. 2013) (arguing that trusts do not require disclosure of smoking history for lung cancer claims).

¹⁰⁴ Brown, *Forever*, *supra* note 13, at 562-63, 570.

¹⁰⁵ See, e.g., *Bruszewski v. Motley Rice, L.L.C.*, 2012 U.S. Dist. LEXIS 181187, at *17 (E.D. Ky. Dec. 21, 2012) (defending malpractice action against law firm for failing to file before state limitations period ran by arguing, among other things, that the damages periods do not preclude submitting claims to bankruptcy trusts).

¹⁰⁶ See Brown, *Forever*, *supra* note 13, at 561-62.

¹⁰⁷ American Bar Ass'n, *Transcript, Task Force on Asbestos Litigation and the Bankruptcy Trusts*, at 131 (June 6, 2013), available at 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 [hereinafter ABA June 6 *Transcript*].

¹⁰⁸ Brown, *Forever*, *supra* note 13, at 566.

seeking expedited or individual review.¹⁰⁹ If the file is incomplete or the evidence is otherwise deemed insufficient, the trust will notify the submitting law firm of the deficiencies and provide the firm one or more opportunities to correct them.¹¹⁰ At this stage, the submitting firm will either attempt to correct the deficiencies until the claim is approved or may ultimately withdraw the claim.¹¹¹ Once a claim reviewer approves and assigns a settlement value to a claim, the trust will make an offer to the claimant.¹¹²

b. Payments From Bankruptcy Trusts

Although the "settlement value" reflects the value assigned to a claim, any payment to the claimant may be reduced or suspended due to one or more other provisions of the TDP.¹¹³ First, bankruptcy trusts adopt payment percentages where their projected current and future payments exceed their projected assets in an effort to preserve assets for future victims, and substantially all of the active and proposed trusts have payment percentages of less than 100%.¹¹⁴ Thus, a claim that is settled for \$100,000 by a trust with a 10% payment percentage will result in a payment of just \$10,000 ($\$100,000 \times 0.1$).¹¹⁵ Several trusts further control costs by adopting annual payment caps, beyond which all new approved claims must wait for payment until the subsequent year, and a claims payment ratio, which limits payments to certain categories of claims in a given year to a certain percentage of the aggregate payments made during the year.¹¹⁶

¹⁰⁹ *Id.* at 552-55.

¹¹⁰ GAO REPORT, *supra* note 10, at 19, 21.

¹¹¹ *Id.*

¹¹² Brown, *Forever*, *supra* note 13, at 555.

¹¹³ 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); Brown, *Forever*, *supra* note 13, at 555.

¹¹⁴ Brown, *Forever*, *supra* note 13, at 574-76.

¹¹⁵ *See generally id.* at 576 (demonstrating the mathematical determinations involved in settlement payment percentages).

¹¹⁶ For example, the Combustion Engineering 524(g) Asbestos PI Trust employs a Maximum Annual Payment (or MAP, currently set at \$75 million) and a Claims Payment Ratio, which allocates 87% (\$65,250,000) of the MAP to malignancy claims and 13% (\$9,750,000) to non-malignant claims. *See Combustion Engineering 524(g) Asbestos PI Trust 2013 Maximum Annual*

Notwithstanding the payment percentage reductions, active trusts paid \$15 billion to claimants from 2006 through 2012.¹¹⁷ Of this amount, between \$2.6 and \$3.5 billion was paid to settle non-malignant claims, and roughly 80% of the amount paid to malignancy and severe asbestosis claimants went to mesothelioma victims.¹¹⁸ Given the size of these payments, some projections previously suggested that the trust system would soon provide victims with all or substantially all of their compensation.¹¹⁹ And given the relatively small number of active mesothelioma claims during this time frame,¹²⁰ solvent defendants may have reasonably believed that their liability shares for such claims would decline dramatically once the trusts established in the last decade started paying claims.¹²¹

What, then, explains the disconnect between the aggregate payment patterns at established trusts and plaintiffs' firms' arguments that they receive, on average, only a small fraction of the value of their claims from bankruptcy trusts?¹²²

Payment, Claims Payment Ratio, COMBUSTION ENGINEERING 524(g) ASBESTOS PI TRUST, http://www.cetrust.org/docs/CE_2013_MAP_Notice.pdf. (last visited Oct. 19, 2013). The trust's non-malignancy MAP for 2013 was exhausted in January of this year. *Id.* The trust paid all approved malignancy claims in 2012—\$89,282,678, an amount that exceeds the malignancy portion of the MAP by more than \$34 million (or 36.8%)—due to a "carryover" from years earlier. *Annual Report, Financial Statements and Results of Operations of the Combustion Engineering 524(g) Asbestos PI Trust for the Fiscal Year Ended December 31, 2011*, COMBUSTION ENGINEERING 524(g) ASBESTOS PI TRUST at 4 (Apr. 30, 2012), http://www.cetrust.org/docs/CE_Annual_Report_2011.pdf [hereinafter *Combustion Annual Report 2011*].

¹¹⁷ Scarcella & Kelso, *supra* note 113, at 3.

¹¹⁸ *Id.* at 7.

¹¹⁹ See Charles E. Bates et al., *The Naming Game*, 24:15 MEALEY'S LITIG. REP. ASBESTOS 6 (Sept. 2, 2009).

¹²⁰ ABA June 6 *Transcript*, *supra* note 107, at 139.

¹²¹ See DIXON & MCGOVERN, *supra* note 42, at 13-14 (discussing how defendants look to liability standards when planning trial strategy).

¹²² Judicial Education Program Transcript, *supra* note 7, at 511-12 (walking through the amounts an attorney's clients stand to receive from bankruptcy trusts according to scheduled values and payment percentages, and stating that they average roughly \$300,000 in total trust payments). By contrast, the court overseeing the Garlock bankruptcy recently observed that actual trust recoveries for a representative sample of plaintiffs who responded to information questionnaires averaged "about \$600,000 from 22 Trusts." *In*

First, the figures used to identify payments that may be received from the trusts typically assume scheduled values,¹²³ not the substantially higher payments available if plaintiffs pursue individual review.¹²⁴ For example, under the Lummus TDP, the scheduled value for a mesothelioma claim is \$25,000,¹²⁵ so the actual payment received under expedited review (after application of the 10% payment percentage)¹²⁶ would be only \$2,500. Yet the maximum value available under individual review is \$400,000,¹²⁷ which would result in an actual payment of sixteen times the scheduled value payment (\$40,000). The scheduled and maximum values at the THAN trust are likewise \$150,000 and \$900,000,¹²⁸ respectively, which results in a difference in actual payments received of \$225,000 after accounting for the trust's 30% payment percentage¹²⁹ ($(\$900,000 - \$150,000) \times 0.3 = \$225,000$). Claimants typically pursue claims against between two and three dozen trusts,¹³⁰ and electing individual review at even a small number of

re Garlock Sealing Techs., Inc., Case No. 10-31607, at 61-62 (Bankr. W.D.N.C. Jan. 10, 2014).

¹²³ Judicial Education Program Transcript, *supra* note 7, at 505.

¹²⁴ Scarcella & Kelso, *supra* note 113, at 3.

¹²⁵ *Lummus 524(g) Asbestos PI Trust Distribution Procedures*, LUMMUS 524(G) ASBESTOS PI TRUST, at § 5.2(b)(3), http://www.abblumustrust.org/Files/lummus_tdp.pdf (last visited Oct. 19, 2013) [hereinafter *Lummus TDP*].

¹²⁶ This reduction was attributed to the fact that "more cancer claims have been filed with the Trust in its first three years of operations than were forecast during the bankruptcy case to be filed over the 40 year life of the Trust." *See Letter to Holders of TDP Determined Lummus Asbestos PI Trust Claims*, LUMMUS 524(g) ASBESTOS PI TRUST, at 1 (June 13, 2011), http://www.abblumustrust.org/Files/20110616_Lummus_Letter_To_TDP_Claim_Holders.pdf.

¹²⁷ *Lummus TDP*, *supra* note 125, at § 5.2(b)(3).

¹²⁸ *T H Agriculture & Nutrition, L.L.C. First Amended Asbestos Personal Injury Trust Distribution Procedures*, THAN ASBESTOS PERSONAL INJURY TRUST, at § 5.3(b)(3), http://www.thanasbestostrust.com/Files/20110401_THAN_TDP.PDF (last visited Oct. 19, 2013) [hereinafter *THAN TDP*].

¹²⁹ *See id.*; *T H Agriculture & Nutrition, L.L.C. Asbestos Personal Injury Trust Payment Percentage Notice*, THAN ASBESTOS PERSONAL INJURY TRUST, http://www.thanasbestostrust.com/Files/20110321_THAN_Payment_Percentage_Notice.PDF (last visited Oct. 19, 2013).

¹³⁰ *See ABA June 6 Transcript*, *supra* note 107, at 12.

these trusts may have a dramatic impact on any given plaintiff's aggregate trust recoveries.¹³¹

The obvious response to this explanation is that, according to a recent Government Accountability Office (GAO) report, only 2-3% of claimants actually avail themselves of individual review.¹³² The basis for this estimate is unclear,¹³³ but it is dramatically lower than the individual review rates reported by the few trusts that include this information in their annual reports.¹³⁴ For example, 31.4% of the cancer and severe asbestosis claims submitted to the Combustion Engineering Trust in 2011 requested individual review, and 30.4% of cancer and severe asbestosis claims paid that year were individual review claims.¹³⁵ In 2010, 25.3% of the cancer and severe asbestos claims submitted and 44.1% of the claims in these categories that were paid were individual review claims.¹³⁶ Similarly, individual review claims comprised 61.6% of the cancer and asbestosis claims that were paid by the Lummus Trust in 2011.¹³⁷ The discrepancy may simply capture the difference in claiming approaches across trusts or between severe injury claims and asymptomatic claims.¹³⁸ In any case, the 2-3%

¹³¹ Brown, *Forever*, *supra* note 13, at 553-55.

¹³² GAO REPORT, *supra* note 10, at 20.

¹³³ The report does not specify how this figure was reached or cite to any other sources in support of this figure. *Id.* at 20.

¹³⁴ *Annual Report, Financial Statements and Results of Operations of the ABB Lummus Global Inc. 524(g) Asbestos PI Trust for Fiscal Year Ended December 31, 2011*, LUMMUS 524(G) ASBESTOS PI TRUST, at 5-6, http://www.abblummustrust.org/Files/ABBLummus_Annual_Report_2011.pdf (last visited Oct. 19, 2013) [hereinafter *Lummus Annual Report 2011*] (demonstrating that 12% of claimants opted for individual review with the Lummus Trust in 2011); *Amended Annual Report, Financial Statements and Results of Operations of the Combustion Engineering 524(g) Asbestos PI Trust for Fiscal Year Ended December 31, 2010*, COMBUSTION ENGINEERING 524(G) ASBESTOS PI TRUST, at 5, www.cetrust.org/docs/20110809_CE_Annual_Report_2010.pdf (last visited Oct. 19, 2013) [hereinafter *Combustion Annual Report 2010*] (demonstrating that 10% of claimants opted for individual review with the CE Trust in 2010).

¹³⁵ See *Combustion Annual Report 2011*, *supra* note 116, at 4-5.

¹³⁶ See *Combustion Annual Report 2010*, *supra* note 134, at 5.

¹³⁷ See *Lummus Annual Report 2011*, *supra* note 134, at 5-6.

¹³⁸ See *id.* at 5-6 (demonstrating that 24% of Category A claimants opted for individual review with the Lummus Trust in 2011); *Combustion Annual*

figure does not appear to be accurate with respect to all claim categories across trusts, especially higher value claims.

Second, these accounts assume that plaintiffs receive payments at post-bankruptcy payment percentage levels, which are frequently far lower than initial levels, especially for high-value mesothelioma claims.¹³⁹ The Lummus TDP began with a 100% payment percentage,¹⁴⁰ making the difference between the post-petition scheduled value payment (\$25,000 x 0.1) and the maximum value payment (\$400,000 x 1) for those who filed claims in the bankruptcy case of \$397,500. Applying the same approach to the THAN Trust, which also applied a 100% payment percentage to claims filed in the bankruptcy case,¹⁴¹ we see a difference between post-payment percentage reduction scheduled value (\$150,000 x 0.3) and original payment percentage maximum value (\$900,000 x 1) of \$855,000. Moreover, even if we use only scheduled values, the difference between the pre-payment percentage and post-payment percentage figures for mesothelioma claims against the Lummus and THAN trusts are \$22,500 and \$105,000, respectively. Finally, given that maximum payment caps may not apply to claims that are settled pre-petition but are nonetheless paid through the bankruptcy trust, actual bankruptcy payments to some claimants may exceed even the maximum value payment level in some cases.¹⁴²

c. Trust Confidentiality and Sole-Benefit Provisions

Although some trusts previously sold or licensed their claim information freely,¹⁴³ most bankruptcy trusts currently treat claim

Report 2010, supra note 134, at 5 (demonstrating that 25% of Category A claimants opted for individual review with the CE Trust in 2010).

¹³⁹ Brown, *Forever*, *supra* note 13, at 555-56.

¹⁴⁰ *Lummus TDP*, *supra* note 125, at § 4.2.

¹⁴¹ *THAN TDP*, *supra* note 128, at § 4.3.

¹⁴² See *Plant Insulation Company Asbestos Personal Injury Settlement Trust Distribution Procedures*, PLANT ASBESTOS SETTLEMENT TRUST, at § 2.4 (Nov. 2012), <http://pastrust.com/drupal/sites/default/files/documents/Plant%20Trust%20Distribution%20Procedures.pdf>.

¹⁴³ See, FACT ACT REPORT, *supra* note 29, at 11.

submissions and payments as confidential.¹⁴⁴ Beginning in 2006, new trusts included TDP language requiring the trusts to treat claim submissions, discussions, and payments as confidential "settlement negotiations," and several older trusts amended their TDPs to include similar provisions.¹⁴⁵ These provisions obligate trustees to "take all necessary and appropriate steps" to resist disclosure of this information unless authorized by the claimant or required under applicable law.¹⁴⁶ Accordingly, co-defendants are unlikely to find most trusts cooperative when they attempt to investigate plaintiffs' trust submissions and payments.¹⁴⁷

Nonetheless, these provisions do not present an insurmountable bar to disclosure.¹⁴⁸ As Justice Heitler of New York recently observed, the mere fact that the bankruptcy trusts were established under federal law does not preclude a state court from requiring plaintiffs "to make full disclosure of information that is material and necessary to the litigation pending before it."¹⁴⁹ Likewise, the only bankruptcy court to consider the question of its role in third party discovery of trust information—in that case, discovery sought *directly* from the trusts—concluded that the court overseeing the discovery, not the bankruptcy court that approved the creation of the trust, had exclusive jurisdiction over any discovery disputes.¹⁵⁰ This conclusion is not only a reflection of the reality of the trust confidentiality provisions at issue—namely,

¹⁴⁴ See LLOYD DIXON ET AL., *ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS* xvii (2010).

¹⁴⁵ Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, 11:11 MEALEY'S ASBESTOS BANKR. REP. 9 (June 2012).

¹⁴⁶ *Id.* at 10.

¹⁴⁷ See Scarcella & Kelso, *supra* note 113, at 11-12.

¹⁴⁸ See, e.g., *Volkswagon of Am., Inc. v. Superior Court*, 43 Cal. Rptr. 3d 723, 733 (Cal. Ct. App. 2006).

¹⁴⁹ *In re N.Y.C. Asbestos Litig.*, No. 40000/88, at 8 (N.Y. Sup. Ct. Nov. 15, 2012), available at http://www.nycal.net/PDFs/orders/Heitler_Poc_Decision_111512.pdf.

¹⁵⁰ *In re AC&S, Inc. v. Hartford Accident Indem. Co.*, 2011 Bankr. LEXIS 2962, at *17-18 (Bankr. D. Del. Aug. 8, 2011) (noting that even if the court had subject matter jurisdiction, it would abstain from exercising jurisdiction in deference to the court in which the discovery dispute was pending).

that plan proponents have inserted them to advance their own private interests and may be altered at the sole discretion of trust officials¹⁵¹—but also the fact that the Bankruptcy Code does not in any way purport to alter another forum's control over its own discovery process.¹⁵² And, as the Court of Appeals of the Third Circuit recently noted, trusts, unlike typical administrative schemes, "place the authority to adjudicate claims in private rather than public hands, a difference that has at times given us and other observers pause, since it endows potentially interested parties with considerable authority."¹⁵³

C. Discovery and Introduction of Trust Information as Evidence in the Tort System

Although federal law does not bar discovery of trust information,¹⁵⁴ efforts to obtain this information in state court may still fail where: (1) courts deem it immaterial or unnecessary; or (2) the mechanisms available in discovery are insufficient to ensure that it is, in fact, disclosed.¹⁵⁵

1. Are Trust Submissions and Payments Discoverable?

The assessment of whether trust materials are subject to discovery begins with the question of relevance.¹⁵⁶ Information is generally discoverable so long as it "appears reasonably calculated to lead to the discovery of admissible evidence," even if that information is ultimately inadmissible at trial.¹⁵⁷ And given that

¹⁵¹ See *AC&S Asbestos Settlement Trust v. Hartford Accident Indem. Co.*, 2011 Bankr. LEXIS 609, at *38-40 n.11 (Bankr. D. Del. Feb. 22, 2011).

¹⁵² *Id.* at *43-44.

¹⁵³ *In re Fed.-Mogul Global Inc.*, 684 F.3d 355, 362 (3d Cir. 2012).

¹⁵⁴ *DIXON & MCGOVERN*, *supra* note 42, at 63.

¹⁵⁵ See *In re Motions for Access of Garlock Sealing Techs., L.L.C.*, 488 B.R. 281, 290 (D. Del. 2013).

¹⁵⁶ See *Volkswagen of Am., Inc. v. Superior Court*, 43 Cal. Rptr. 3d 723, 726-27 (Cal. Ct. App. 2006) (showing that trust materials may be relevant if they contain medical history related to exposure).

¹⁵⁷ FED. R. CIV. P. 26(b)(1). As observed elsewhere, "[m]any states codified their standard of discovery in exactly the language of Federal Rule 26(b)" and generally embrace the broad discovery model. Jeffrey W. Stempel, *Politics and*

trust documents include information about a plaintiff's asserted exposures, work history, and medical condition—all of which are directly at issue in such cases—most courts have had little difficulty in concluding that trust forms are discoverable.¹⁵⁸ As New York Justice Helen Friedman observed:

[W]hile the proofs of claim are partially settlement documents, they are also presumably accurate statements of the facts concerning asbestos exposure of the plaintiffs. While they may be filed by the attorneys, the attorneys do stand in the shoes of the plaintiffs and an attorney's statement is an admission under New York law. Therefore, any factual statements made in the proofs of claim about alleged asbestos exposure of the plaintiff to one of the bankrupt's products should be made available to the defendants who are still in the cases.¹⁵⁹

Although trust forms may be discoverable, plaintiffs argue that trusts are akin to settling defendants,¹⁶⁰ so all communications should be subject to settlement privilege.¹⁶¹ Although non-settling co-defendants might enjoy considerable benefits from using a plaintiff's statements made in connection with negotiating settlements with settling co-defendants, the settlement privilege exists to prevent such statements from being used at trial to

Sociology in Federal Civil Rulemaking: Errors of Scope, 52 ALA. L. REV. 529, 601 (2001).

¹⁵⁸ *Shepherd v. Pneumo-Abex, L.L.C.*, MDL 875, No. 09-91428, 2010 U.S. Dist. LEXIS 90122, at *2-5 (E.D. Pa. Aug. 30, 2010); *In re Asbestos Prods. Liab. Litig.*, 2009 WL 6869437, at *1-2 (E.D. Pa. Sept. 18, 2009) (citing several unreported orders); *In re N.Y.C. Asbestos Litig.*, 36 Misc. 3d 1234(A), at *7 (N.Y. Sup. Ct. 2012); *Volkswagen*, 43 Cal. Rptr. 3d at 729.

¹⁵⁹ *Negrepoint v. A.C. & S., Inc.*, Index No. 120894/01 (N.Y. Sup. Ct. Dec. 11, 2003).

¹⁶⁰ *Inselbuch et al.*, *supra* note 26, at 6; Lorenzo Mendizabal, *Asbestos and Secrecy: The Confidentiality Battle*, 31 AM. BANKR. INST. J. 38, 38 (2012).

¹⁶¹ *See In re N.Y.C. Asbestos Litig.*, No. 40000/88, at 6 (N.Y. Sup. Ct. Nov. 15, 2012).

promote "free and frank" settlement discussions.¹⁶² Thus, plaintiffs' ostensible concern is that disclosure of trust materials will interfere with their free and frank discussions with trusts and, ultimately, their ability to settle trust claims.¹⁶³

Most courts to consider the question have concluded that trust forms are, nonetheless, discoverable.¹⁶⁴ As an initial matter, few jurisdictions have extended the settlement privilege to *discovery*; rather, the question for discovery remains whether the material sought is relevant.¹⁶⁵ Even if the privilege applies to discovery in the state, most courts have concluded that claim forms are more akin to filing a complaint¹⁶⁶—which, of course, is not privileged—than the free and frank discussions contemplated by the privilege.¹⁶⁷ Although trusts and claimants may subsequently engage in such discussions, the disclosure of claims forms should not interfere with them any more than submitting a complaint interferes with settlement in the tort system.¹⁶⁸ Moreover, the case

¹⁶² *United States v. Reserve Mining Co.*, 412 F. Supp. 705, 712 (D. Minn. 1976); *Goodyear Tire and Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003).

¹⁶³ See generally GAO REPORT, *supra* note 10, at 31-32 (discussing confidentiality of trusts).

¹⁶⁴ See *Nat'l Union Fire Ins. Co. v. Porter Hayden Co.*, 2012 U.S. Dist. LEXIS 23716, at *16-17 (D. Md. Feb. 24, 2012); *Shepherd v. Pneumo-Abex, L.L.C.*, MDL 875, No. 09-91428, 2010 U.S. Dist. LEXIS 90122, at *1-2 (E.D. Pa. Aug. 30, 2010); *In re Asbestos Prods. Liab. Litig.* (No. VI), 2009 WL 6869437, at *1-2 (E.D. Pa. Sept. 18, 2009); *Volkswagen of Am., Inc. v. Superior Court*, 43 Cal. Rptr. 3d 723, 724 (Cal. Ct. App. 2006). *But see Sweredoski v. Alfa Laval, Inc.*, 2013 R.I. Super. LEXIS 128, at *27 (R.I. Super. Ct. June 15, 2013) (finding that trust information was "not relevant to the Plaintiff's burden of causation" under Rhode Island law and, accordingly, denying discovery of trust claim forms); *revised on reconsideration at Sweredoski v. Alfa Laval, Inc.*, C.A. No. PC-2011-1544, at 7 (R.I. Super. Ct. Nov. 18, 2013) (ordering in camera review of the requested documents to determine if they suggest that the plaintiff "did not frequently at regularly work in proximity to asbestos contained in Crane products").

¹⁶⁵ See *Nat'l Union Fire Ins. Co.*, 2012 U.S. Dist. LEXIS 23716, at *10-11.

¹⁶⁶ *Ferguson v. Lorillard Tobacco Co.*, 2011 U.S. Dist. LEXIS 135183, at *3 (E.D. Pa. Nov. 22, 2011); *Volkswagon*, 43 Cal. Rptr. 3d at 730; *Seariver Mar., Inc. v. Superior Court*, 2006 Cal. App. Unpub. LEXIS 6596, at *5-6 (Cal. Ct. App. July 28, 2006).

¹⁶⁷ *Reserve Mining Co.*, 412 F. Supp. at 712.

¹⁶⁸ GAO REPORT, *supra* note 10, at 29.

management orders for New York City¹⁶⁹ and West Virginia¹⁷⁰— which were adopted after negotiation among leading plaintiffs and defense firms practicing in those jurisdictions—expressly require disclosure of trust claim forms.¹⁷¹ There is no evidence that this requirement has impaired free and frank discussion with bankruptcy trusts or otherwise interfered with trust claim settlement.¹⁷²

2. The Sufficiency of Existing Discovery and Public Materials

Given the foregoing, the mounting calls for state and federal transparency legislation may appear to be little more than "solution[s] in search of a problem."¹⁷³ Defendants may ask plaintiffs, through interrogatories and any depositions, searching questions concerning their exposure and work histories.¹⁷⁴ Moreover, the information linking some trust defendants to products at several worksites is public knowledge—many trusts even list approved worksites on their respective websites—so defendants already have access to this information.¹⁷⁵

¹⁶⁹ Amended Case Management Order, *In re* N.Y.C. Asbestos Litig., No. 40000/88 (N.Y. Sup. Ct. May 26, 2011).

¹⁷⁰ 2012 Asbestos Case Management Order With Attached Exhibits, *In re* Asbestos Pers. Injury Litig., No. 03-C-9600 (Cir. Ct. W. Va. Jan. 6, 2012).

¹⁷¹ See Amended Case Management Order, *In re* N.Y.C. Asbestos Litig., No. 40000/88, at 21 (showing that documents previously produced for trust claims are discoverable); 2012 Asbestos Case Management Order with Attached Exhibits, *In re* Asbestos Pers. Injury Litig., No. 03-C-9600, at 28 (enumerating the required disclosures).

¹⁷² See generally Lee Blanton Ziffer, *Bankruptcy Trusts and Asbestos Litigation*, AM. BAR ASS'N (June 11, 2012), <http://apps.americanbar.org/litigation/committees/products/articles/spring2012-bankruptcy-trusts-asbestos-litigation.html> (explaining that, although no specific settlement information is available due to confidentiality, total trust payments and settlements have steadily increased).

¹⁷³ Fact ACT REPORT, *supra* note 29, at 36 (dissenting views).

¹⁷⁴ See GAO REPORT, *supra* note 10, at 29 (noting that "all potentially relevant information about an individual's exposure to asbestos, work history, or other evidence submitted to the trusts may be available through the pretrial discovery process").

¹⁷⁵ Inselbuch et al., *supra* note 26, at 9; see Brown, *Forever*, *supra* note 13, at 560-61 (making note of the use of "approved job site lists" when evaluating claims).

Notwithstanding the trend toward requiring plaintiffs to disclose trust submissions,¹⁷⁶ defendants contend that plaintiffs do not, in fact, provide these materials in discovery.¹⁷⁷ Setting aside the possibility that some lawyers simply choose to violate applicable discovery orders, professionals who are not involved in the state court litigation may be responsible for submitting claims to bankruptcy trusts, and the lawyers overseeing the litigation may neglect to verify that no such submissions have been made.¹⁷⁸ Whatever the reason, the cases in which plaintiffs have failed to disclose trust claims submitted before or during trial may be characterized as inadvertent; the product of sloppiness or innocent mistakes rather than fraud.¹⁷⁹

Moreover, competent counsel should be able to avoid disclosure without the risk of becoming embroiled in any such scandals; largely the same result can be achieved with far less likelihood of discovery and potential sanctions by simply deferring trust submissions until after the state court proceedings conclude.¹⁸⁰ Indeed, some of these lawyers may not even investigate trust-related disclosures to any significant degree until this point, and, in the absence of such investigation, may not have an enforceable obligation to disclose these potential trust submissions.¹⁸¹

The potential for such manipulation is well-established, but participants disagree concerning the extent to which it is being exploited by plaintiffs.¹⁸² RAND's Institute for Civil Justice¹⁸³ and

¹⁷⁶ *Shepherd v. Pneumo-Abex, L.L.C.*, MDL 875, No. 09-91428, 2010 U.S. Dist. LEXIS 90122, at *1-2 (E.D. Pa. Aug. 30, 2010) (finding trust materials discoverable and discussing other cases that have found likewise); *In re Asbestos Prods. Liab. Litig.* (No. VI), 2009 WL 6869437, at *1 (E.D. Pa. Sept. 18, 2009) (ordering the plaintiff to turn over trust documents to the defendant); *Volkswagon of Am., Inc. v. Superior Court*, 43 Cal. Rptr. 3d 723, 730-31 (Cal. Ct. App. 2006) (illustrating that the court did not treat claim forms as settlement documents and, therefore, deeming them discoverable).

¹⁷⁷ DIXON & MCGOVERN, *supra* note 42, at 18.

¹⁷⁸ Judicial Education Program Transcript, *supra* note 7, at 508, 515.

¹⁷⁹ *See id.* at 508 (describing circumstances that lead to failure to disclose trust claims).

¹⁸⁰ ABA June 6 Transcript, *supra* note 107, at 114-15.

¹⁸¹ *Id.*

¹⁸² DIXON & MCGOVERN, *supra* note 42, at 19.

the GAO,¹⁸⁴ for example, have acknowledged this potential where trusts, among other things, treat such submissions as confidential, allow claimants to defer submissions until after parallel state court litigation concludes, and refuse to consider plaintiffs' failure to identify the trusts' predecessors' products in state court proceedings.¹⁸⁵ Moreover, although some plaintiffs' lawyers interviewed for the 2011 RAND study objected to the suggestion that such gamesmanship occurs, others confirmed that they do, in fact, defer trust filings where they believe it will benefit their clients.¹⁸⁶ The question, then, is not whether the trust system creates the potential for imbalanced linkages or some plaintiffs' lawyers exploit this potential; neither question is seriously in dispute.¹⁸⁷

The question that has not been answered, and cannot be answered definitively, given the limited available public information,¹⁸⁸ is how frequently this potential is exploited. In support of their assertions that such manipulation is pervasive,¹⁸⁹ trust reform advocates frequently point to a half-dozen or so cases where plaintiffs failed to disclose known trust exposures notwithstanding applicable law or case management orders requiring them to do so.¹⁹⁰ Plaintiffs' lawyers and trust officials counter that these cases are anecdotal and comprise only a

¹⁸³ *Id.* at 29-30.

¹⁸⁴ GAO REPORT, *supra* note 10, at 29.

¹⁸⁵ DIXON & MCGOVERN, *supra* note 42, at 29-30 (showing that it is beneficial for plaintiffs to defer making trust claims until after their tort claims are resolved); GAO REPORT, *supra* note 10, at 28.

¹⁸⁶ DIXON & MCGOVERN, *supra* note 42, at 19.

¹⁸⁷ *See id.*

¹⁸⁸ *Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Judiciary Comm.'s Subcomm. on Regulatory Reform, Commercial, and Antitrust Law 11* (2013) (statement of Marc Scarcella) [hereinafter *FACT Act Testimony*] (illustrating why there is a lack of public information).

¹⁸⁹ ABA June 6 *Transcript*, *supra* note 107, at 58-59.

¹⁹⁰ DIXON & MCGOVERN, *supra* note 42, at 69; 2012 Asbestos Case Management Order With Attached Exhibits, *In re Asbestos Pers. Injury Litig.*, No. 03-C-9600, at 45 (Cir. Ct. W. Va. Jan. 6, 2012) (illustrating a CMO requiring disclosure).

miniscule portion of the asbestos cases and trust claims filed.¹⁹¹ Yet, defendants do not commonly have the power to subpoena bankruptcy submissions or trust claim forms *after* their cases settle, and trusts do not disclose claim-level information in their reports;¹⁹² so, it is unclear how these defendants would discover undisclosed and deferred trust claim submissions. Even where some of these defendants have subsequently commenced bankruptcy and sought this information, courts frequently reject these requests,¹⁹³ and the discovery that is allowed will be subject to protective orders precluding public disclosure of that information.¹⁹⁴

In sum, it remains unclear precisely how much of the billions of dollars in trust recoveries paid each year, and the exposures supporting those recoveries, are not accounted for in the tort system.¹⁹⁵ Given the sheer volume of claims controlled by the lawyers interviewed for the 2011 RAND Report,¹⁹⁶ however, the fact that some freely acknowledge deferring submissions to evade discovery may suggest that the linkage imbalance is more substantial than bankruptcy trusts and plaintiffs' advocates acknowledge.¹⁹⁷

¹⁹¹ ABA June 6 *Transcript*, *supra* note 107, at 147.

¹⁹² *See supra* Part I.B.2.c.

¹⁹³ *See, e.g., In re* Motions for Access of Garlock Sealing Techs. L.L.C., 488 B.R. 281, 290, 294 (D. Del. 2013) (discussing the history of Garlock's efforts to obtain discovery concerning Bankruptcy Rule 2019 statements); *In re* Specialty Prods. Holdings Corp., 2011 Bankr. LEXIS 3759, at *1, *14 (Bankr. D. Del. Oct. 7, 2011) (denying a motion seeking information from law firms who have represented claimants in asbestos cases).

¹⁹⁴ Brown, *Without Compromise*, *supra* note 17, at 867.

¹⁹⁵ *FACT Act Testimony*, *supra* note 188, at 2-3.

¹⁹⁶ *See* DIXON & MCGOVERN, *supra* note 42, at xiii.

¹⁹⁷ *Id.* at xvi. In the Garlock bankruptcy, the court allowed the debtor discovery into fifteen cases the debtor previously settled “for large sums” and found that “exposure evidence was withheld in *each and every one* of them.” *In re* Garlock Sealing Techs., Inc., Case No. 10-31607, at 31 (Bankr. W.D.N.C. Jan. 10, 2014) (emphasis in original). The number of disclosed trust exposures ranged from zero to seven (with a mean of one), while the number of undisclosed trust exposures ranged from four to twenty-six (with a mean of twenty-two). *Id.* at 34. Although the court recognized that this was not “purported to be a random or representative sample,” it nonetheless reasoned that “the fact that *each and every one of them* contains such demonstrable

III. STATE-LEVEL INITIATIVES

At the state level, some legislatures have considered proposals designed to incorporate both representations to bankruptcy trusts (addressing the exposure linkage) and the payments made by the trusts (addressing the compensation linkage) fully into the asbestos personal injury litigation within their respective state courts.¹⁹⁸ This section outlines the common features of this legislation, its potential for correcting any imbalances in the linkages between the tort and trust systems, and the arguments advanced in opposition to these initiatives.

A. Key Features of Recent Legislation

To date, two states—Ohio¹⁹⁹ and Oklahoma²⁰⁰—have adopted legislation that addresses plaintiffs' obligations with respect to bankruptcy trust disclosures in the tort system.²⁰¹ Other states have considered, or are in the process of considering, similar legislation.²⁰² Moreover, as noted previously, the general case management orders for asbestos cases in some jurisdictions contain

misrepresentation is surprising and persuasive” and “[i]t appears certain that more extensive discovery would show more extensive abuse.” *Id.* at 35 (emphasis in original). Thus, the court concluded, “[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock from 2000 through 2010.” *Id.* at 37.

¹⁹⁸ See Brown, *Without Compromise*, *supra* note 17, at 845-46, 866-67; DIXON & MCGOVERN, *supra* note 42, at xvi.

¹⁹⁹ OHIO REV. CODE ANN. §§ 2307.951-2307.954 (LexisNexis 2013).

²⁰⁰ The new law, entitled the "Personal Injury Trust Fund Transparency Act," was codified in the Oklahoma Statutes at sections 81-89 of title 76. OKLA. STAT. tit. 76, §§ 81-89 (2013).

²⁰¹ See *id.*; §§ 2307.951-2307.954.

²⁰² Eric Gardner, *Product Liability Trends and Developments: Multiple States Considering Changes to Asbestos Transparency Laws*, ALSTON & BIRD LLP, <http://www.alston.com/productsliabilityblog/blog.aspx?entry=4858> (last visited Sept. 22, 2013); Kirk Hartley, *Asbestos Bankruptcies Back in the News*, GLOBALTORT, <http://www.globaltort.com/2013/03/asbestos-bankruptcies-back-in-the-news/> (last visited Sept. 22, 2013).

provisions that mirror some of the key elements of this legislation.²⁰³

This discussion will center on the legislation passed in Ohio and Oklahoma for two reasons. First, although the various proposals across the states have varied at the margins, these laws are representative of the proposals advanced in other states to date in all material respects.²⁰⁴ Second, these laws appear likely to serve as models for future legislation, or at least as starting points for developing such legislation; so, a thorough discussion of their terms and implications may be useful in suggesting modifications or improvements to address the specific circumstances present in these other states.²⁰⁵

1. Ohio

Ohio House Bill 380 was introduced in November 2011 after earlier attempts to pass similar legislation failed.²⁰⁶ The bill passed the Ohio House of Representatives in January 2012, passed the Ohio Senate in December 2012, and was signed into law on December 20, 2012.²⁰⁷ The Law may be found in the Ohio Revised Code at sections 2307.951-2307.954 (hereinafter, the Ohio Act).²⁰⁸ The Ohio Act has four main features,²⁰⁹ which are discussed in turn below.

First, the Ohio Act imposes certain disclosure obligations concerning trust claims that are filed before or during the

²⁰³ Compare *supra* notes 169-71 and accompanying text, with § 2307.952(A)(1)(a), and tit. 76 § 84(B).

²⁰⁴ See Gardner, *supra* note 202 (stating that the Ohio legislation has influenced measures for reform in other states); Hartley, *supra* note 202 (noting that states that have not passed statutes are considering similar legislation to that which has been passed).

²⁰⁵ See Rachel Reynolds, *Following in Ohio's Footsteps: The Expansion of Asbestos Transparency Legislation*, SEDGWICK LAW, <http://www.sdma.com/following-in-ohios-footsteps-the-expansion-of-asbestos-transparency-legislation-05-13-2013/> (last visited Sept. 22, 2013) (explaining that after Ohio's legislation was passed, "other states and the federal government have followed suit").

²⁰⁶ H.B. 230, 129th Gen. Assemb. (as introduced, Ohio 2011-2012).

²⁰⁷ H.B. 230, 129th Gen. Assemb. (as signed, Ohio 2011-2012).

²⁰⁸ See §§ 2307.951-2307.954.

²⁰⁹ See §§ 2307.952(A)(1)(a), 2307.953(A)(1), 2307.954(B), (D)-(F).

proceedings.²¹⁰ "Within thirty days after the commencement of discovery," section 2307.952(A)(1)(a) requires the plaintiff to provide all parties in the case with a sworn statement identifying all existing trust claims and all claims material that pertain to each trust claim.²¹¹ This disclosure obligation is ongoing; any new trust claims filed after this initial disclosure and all claim materials must be produced within thirty days of their submissions to the trusts.²¹² If a plaintiff fails to satisfy these requirements the court may refuse to assign an initial trial date or extend the date set for trial.²¹³

Second, the Ohio Act includes a provision requiring asbestos plaintiffs to file trust claims if certain conditions are satisfied.²¹⁴ If a defendant presents evidence that the plaintiff may make a good faith claim against trusts other than those that the plaintiff has previously disclosed, the defendant may request a stay of the proceedings no less than seventy-five days prior to trial.²¹⁵ The plaintiff then has fourteen days to either submit the claim, object on the basis that there is insufficient information to submit the claim, or request a determination from the court that the costs of submitting the claim exceed the plaintiff's reasonably anticipated recovery from the trust.²¹⁶ If disputed and the court concludes by a preponderance of the evidence that a trust claim could be filed in good faith, the court "shall stay the proceedings" until the claimant files the claim.²¹⁷ If the court determines that the fees and expenses associated with filing a trust claim exceed the plaintiff's reasonably anticipated recovery from the trust, the court will order the plaintiff to file a verified statement of his or her exposure history to the asbestos products covered by the trust.²¹⁸

²¹⁰ See § 2307.952(A)(1)(a).

²¹¹ *Id.*

²¹² § 2307.952(A)(2).

²¹³ § 2307.952(B).

²¹⁴ See § 2307.953(A)(1).

²¹⁵ See *id.* If the plaintiff produces evidence that supports the filing of an additional trust claim after this deadline, however, any defendant may request a stay pending the submission of a claim with this trust within seven days of receiving the information. See § 2307.953(B).

²¹⁶ § 2307.953(C)(1).

²¹⁷ § 2307.953(E).

²¹⁸ § 2307.953(D)(2).

Third, the Ohio Act expressly addresses the potential uses of bankruptcy trust information at trial.²¹⁹ Under section 2307.954(B), trust claim information is "presumed to be authentic, relevant to, and discoverable in an asbestos tort action."²²⁰ This section further provides that claim materials "are presumed to not be privileged" notwithstanding any private agreement or TDP confidentiality provisions to the contrary.²²¹ Moreover, this section expressly provides that this information may be introduced at trial:

[T]o prove alternative causation for the exposed person's claimed injury, death, or loss to person, to prove a basis to allocate responsibility for the claimant's claimed injury, death, or loss to person, and to prove issues relevant to an adjudication of the asbestos claim, unless the exclusion of the trust claims material is otherwise required by the rules of evidence.²²²

Finally, the Ohio Act includes several potential sanctions for non-compliance, even if the abuse is discovered up to one year after judgment is entered.²²³ In the event that a defendant discovers that a plaintiff has not complied with disclosure requirements of sections 2307.952 and 2307.953, the court is expressly authorized to order sanctions, including, but not limited to, vacating any judgment in the plaintiff's favor.²²⁴ The court may also order a reduction in the judgment in the amount of any post-judgment trust payments obtained by the plaintiff or order any other relief "that the court considers just and proper."²²⁵

2. Oklahoma

The Oklahoma legislation, Senate Bill 404, was introduced on February 4, 2013.²²⁶ The bill passed the Oklahoma Senate with

²¹⁹ § 2307.954(B).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ §§ 2307.954(E)(1)(a)-(b), (F).

²²⁴ § 2307.954(D).

²²⁵ § 2307.954(E).

²²⁶ S.B. 404, 2013-14 Reg. Sess. (as introduced, Okla. 2013).

thirty-three votes in favor and eleven votes against on February 26, 2013.²²⁷ As amended, it passed the Oklahoma House with eighty-two votes in favor and ten votes against on April 24, 2013, and the governor signed the bill on May 7, 2013.²²⁸ The new law, entitled the "Personal Injury Trust Fund Transparency Act," was codified in the Oklahoma Statutes at sections 81-89 of Title 76 (hereinafter, the Oklahoma Act).²²⁹ The Oklahoma Act is substantially similar to the Ohio Act, but it extends to all personal injury trusts, not just asbestos bankruptcy trusts, and the timing of some of its features varies from the Ohio Act.²³⁰

Like the Ohio Act, section 83 the Oklahoma Act imposes disclosure obligations on plaintiffs concerning the trust claims they file before and during the state court proceedings.²³¹ Where the Ohio Act required the initial disclosure within thirty days of the commencement of discovery,²³² the Oklahoma Act requires the disclosure of claim forms and materials within ninety days of the commencement of the case.²³³ Moreover, the plaintiff is required to "supplement the information and materials he or she provided under this section within thirty (30) days after the plaintiff files an additional claim, supplements an existing claim or receives additional information or materials."²³⁴ Courts are expressly authorized to address violations of this section under Oklahoma's version of Rule 11 and the state's laws concerning sanctions for discovery violations.²³⁵ Moreover, a trial date may not be scheduled earlier than 180 days after this disclosure obligation is satisfied.²³⁶

²²⁷ S.B. 404, 2013-14 Reg. Sess. (as amended, Okla. 2013).

²²⁸ S.B. 404, 2013-14 Reg. Sess. (as enrolled, Okla. 2013).

²²⁹ OKLA. STAT. tit. 76 §§ 81-89 (2013).

²³⁰ *See id.*

²³¹ *Compare* OHIO REV. CODE ANN. § 2307.952 (LexisNexis 2013), *with* tit. 76 § 83.

²³² § 2307.852(A)(1)(a).

²³³ *See* tit. 76, §§ 83(A)-(B).

²³⁴ *See* tit. 76, § 83(C).

²³⁵ *See* tit. 76, § 89; OKLA. STAT. tit. 12 §§ 2011, 3237 (2013).

²³⁶ *See* tit. 76, § 85(A).

Second, the Oklahoma Act also includes a provision requiring asbestos plaintiffs to file trust claims.²³⁷ If a defendant has a good faith belief that the plaintiff may make a successful claim against additional trusts, the defendant may request a stay of the proceedings no less than ninety days prior to trial.²³⁸ The plaintiff then has ten days to either submit the claim, object on the basis that there is insufficient information to submit the claim, or request a determination from the court that the costs of submitting the claim exceed the plaintiff's reasonably anticipated recovery from the trust.²³⁹ If disputed, the court shall determine whether there is a good faith basis for submitting a claim.²⁴⁰ If so, the court shall order the plaintiff to file the claim and stay the proceedings until the claim is filed and all relevant trust forms and materials are disclosed to other parties in the case.²⁴¹ If the court concludes that the costs of submitting a claim exceed the plaintiff's reasonably anticipated recovery, the court shall stay the proceedings "until the plaintiff files with the court and produces to all parties a verified statement of the plaintiff's history of exposure, usage, or other connection, as relevant, to the products, services, or events covered by the personal injury trust."²⁴²

Third, section 84 largely mirrors the Ohio Act in addressing the potential uses of bankruptcy trust information at trial.²⁴³ Trust claim materials and governance documents are discoverable²⁴⁴ and "presumed to be relevant and authentic, subject to the Rules of Evidence governing admissibility," and no claims of privilege may

²³⁷ See tit. 76, § 86. While not mentioned specifically as "asbestos plaintiffs," this law extends to all personal injury claims, thus, not prohibiting asbestos plaintiffs.

²³⁷ *Id.*

²³⁸ See tit. 76, § 86(A)(1). If the plaintiff produces evidence that supports the filing of an additional trust claim after this deadline, however, any defendant may request a stay pending the submission of a claim with this trust within seven days of receiving the information. See tit. 76, § 86(A)(2).

²³⁹ See tit. 76, § 86(B).

²⁴⁰ See tit. 76, § 86(C).

²⁴¹ See tit. 76, § 86(E)(1).

²⁴² See tit. 76, § 86(E)(2).

²⁴³ Compare tit. 76, § 84, with OHIO REV. CODE ANN. § 2307.954(B) (LexisNexis 2013).

²⁴⁴ tit. 76, § 84(B).

apply to these materials and documents.²⁴⁵ In addition, "any party may present [these] materials to prove alternative causation" or for the purposes "of allocating liability for the plaintiff's injury."²⁴⁶

Unlike the Ohio Act,²⁴⁷ the Oklahoma Act expressly provides for the calculation of the value of trust claims prior to their resolution with the trusts and dollar for dollar setoffs of judgments against one or more solvent defendants.²⁴⁸ Under section 87, the court may take judicial notice of a given trust's scheduled value for the plaintiff's disease and any payment percentage to be applied where the trust claim remains unliquidated, and there is a rebuttable presumption that this estimated amount is what the plaintiff will receive from the trust.²⁴⁹ Under section 88, any damages awarded against solvent defendants will be reduced by any such estimated amounts and, with respect to trusts that have awarded payments to the plaintiff, the actual amounts received.²⁵⁰

B. Arguments For and Against the State Legislation

At this point, it is too early to tell whether the Ohio Act and the Oklahoma Act will have the effects suggested by plaintiffs and defendants.²⁵¹ The Oklahoma Act became effective on November 1, 2013, and the Ohio Act became effective in March 2013.²⁵² By June 2013, more than eighty motions to compel compliance with the Ohio Act had been filed, and none of the motions had been argued.²⁵³ At least one case was settled; several plaintiffs

²⁴⁵ tit. 76, § 84(A).

²⁴⁶ *Id.*

²⁴⁷ Apportionment of liability for asbestos claims in Ohio is covered by section 2307.22 of the Ohio Revised Code. § 2307.22.

²⁴⁸ tit. 76, §§ 87-88.

²⁴⁹ tit. 76, § 87.

²⁵⁰ tit. 76, § 88.

²⁵¹ *See* §§ 2307.951-2307.954 (demonstrating that the Ohio Bill has been effective since March 2013 and establishing that the legislation is too new for the effects of it to be determined yet); S.B. 404, 2013-14 Reg. Sess. (Okla. 2013) (establishing that the Oklahoma Act did not become effective until November 1, 2013, thus there is no way to determine its effectiveness yet).

²⁵² *See* §§ 2307.951-2307.954; S.B. 404, 2013-14 Reg. Sess. (Okla. 2013).

²⁵³ American Bar Ass'n, *Transcript, Task Force on Asbestos Litigation and the Bankruptcy Trusts*, at 111 (June 5, 2013), available at <http://www.american>

submitted certifications that they were in compliance and also provided defendants with additional trust materials; two others filed constitutional challenges to the law; and several others requested additional time to respond.²⁵⁴ These early results tell us little about the law's application and impact; so, much of the discussion remains centered on the purpose of the acts and their express terms.²⁵⁵

1. Prompt Disclosure of Trust Materials

The primary argument in favor of state-level legislation is that it corrects gaps in the current system that deny defendants access to the information that they are entitled to in discovery.²⁵⁶ If the information necessary to build a complete picture of a plaintiff's exposure is within the sole possession of the plaintiff and there is no cost to concealing this information at trial, defendants and juries alike are left to consider only a narrow, manufactured reality concerning the plaintiff's exposure history that may have little relationship to the underlying truth.²⁵⁷ Defendants, then, complain that they must either accommodate inflated settlement demands or run the risk of ruinous verdicts at trial that are premised upon a distorted vision of the plaintiff's exposure history.²⁵⁸

The question from this perspective is relatively straightforward: should the civil justice system condone a process where litigants may advance one set of facts under penalty of perjury in one forum and a contradictory set of facts under penalty of perjury in another? The civil justice system typically frowns upon litigants obtaining relief in one forum based on one set of facts and pursuing relief in another based on a contradictory set of

bar.org/content/dam/aba/administrative/tips/asbestos_tf/Asbestos_Transcript_06-05-2013.authcheckdam.pdf [hereinafter *ABA June 5 Transcript*].

²⁵⁴ *Id.* at 111-12.

²⁵⁵ *See generally id.* at 99, 101, 103-05, 110-12 (focusing the discussion on the purpose and language of the bill, since the early results have proved to be too varied to draw relevant conclusions).

²⁵⁶ *See ABA June 6 Transcript, supra* note 107, at 15-16.

²⁵⁷ *See id.* at 30-31.

²⁵⁸ *See generally id.* at 47-49 (discussing the adverse consequences suffered by defendants when information pertaining to plaintiffs' exposure is limited).

facts for a simple reason: it creates the impression "that either the first or the second . . . was misled" by one or more parties "deliberately changing positions according to the exigencies of the moment."²⁵⁹ And even if the trusts—which are largely designed and remain subject to oversight by leading plaintiffs' lawyers—are ultimately content to overlook any inconsistencies,²⁶⁰ defendants and state courts typically are not.²⁶¹ To that end, legislation that closes any loopholes that allow litigants to take such an approach in asbestos litigation may be seen as merely respecting the truth-seeking function of civil litigation.²⁶²

The structure of both acts not only works to encourage the disclosure of trust forms, but also to ensure that the information is shared in a timely manner.²⁶³ Some defendants have complained that even when plaintiffs share trust materials, they do so on the eve of trial, long after it can be reviewed and any additional discovery can be conducted and reasonably incorporated into the trial plan.²⁶⁴

Regardless of whether discovery of trust forms and materials is allowed in the applicable state court, plaintiffs frequently note that defendants already have sufficient access to the information contained in these documents to prepare a defense.²⁶⁵ Defendants are free to use many of the same public databases and other materials that plaintiffs' lawyers use to identify possible sources of exposure, and they also have the right to depose potential

²⁵⁹ *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)). As the Garlock bankruptcy court recently observed, "while it is not suppression of evidence for a plaintiff to be unable to identify exposures, it is suppression of evidence for a plaintiff to be unable to identify exposure in the tort case, but then later (and in some cases previously) to be able to identify it in Trust claims." *In re Garlock Sealing Techs., Inc.*, Case No. 10-31607, at 36-37 (Bankr. W.D.N.C. Jan. 10, 2014).

²⁶⁰ See ABA June 6 *Transcript*, *supra* note 107, at 18-21, 23 (demonstrating the pro-plaintiff policies in trusts and including an example of a trust that turned a blind-eye to clear inconsistent filings).

²⁶¹ See *id.* at 32-33.

²⁶² See *id.* at 51-52.

²⁶³ See *id.* at 50.

²⁶⁴ See ABA June 5 *Transcript*, *supra* note 253, at 99-100.

²⁶⁵ See *supra* Part I.C.2.

witnesses concerning these exposures.²⁶⁶ Defense lawyers, like plaintiffs' lawyers, are repeat players, and they or their firms typically track plaintiffs' alleged exposures to other defendants' products across cases.²⁶⁷ To that end, plaintiffs' lawyers contend that this requirement does little more than require them to do the defendants' work for them: identifying and building the case against the "empty chair" that solvent defendants will then attempt to try in order to avoid responsibility for their own roles in causing a plaintiff's injuries.²⁶⁸

This characterization of the acts, however appealing as a rhetorical matter, is not entirely accurate.²⁶⁹ Defendants must still use the information available to them to demonstrate that "good faith" exists to file any suggested trust claim.²⁷⁰ The plaintiff remains free to demonstrate that the defendant has not demonstrated good cause for submitting a trust claim,²⁷¹ but the statutes likewise attempt to foreclose the option of changing course and filing trust claims once the litigation concludes.²⁷² If, on the other hand, the plaintiff intended to pursue trust claims at a later date, this component of the legislation requires—and enables defendants to demand—that such claims be advanced prior to trial.²⁷³

²⁶⁶ Inselbuch et al., *supra* note 26, at 9.

²⁶⁷ *Id.*

²⁶⁸ *Id.*; *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 70 (Ky. 2010) (showing that the defendants can avoid liability by assigning liability to "empty-chair" defendants).

²⁶⁹ *See generally* OKLA. STAT. tit. 76 § 86(A) (2013) (dispelling the characterization that this statute unfairly benefits defendants by illustrating that the defendant will have the burden of showing why the plaintiff should make claims against other trusts and that the plaintiff has the ability to rebut any such showing).

²⁷⁰ *See* OHIO REV. CODE ANN. § 2307.953(A) (LexisNexis 2013); tit. 76, § 86.

²⁷¹ tit. 76, § 86.

²⁷² § 2307.954(E) (showing that courts can adjust an award amount after trial if the plaintiff makes and prevails on any subsequent claims).

²⁷³ *See* Inselbuch et al., *supra* note 26, at 8 (showing that defendants can force plaintiffs to make trust claims prior to trial).

2. The Use of Trust Materials at Trial

Both the Ohio Act and Oklahoma Act, however, go beyond merely affording defendants with access to relevant information: they mandate the submission of trust claim forms and treat them as presumptively "relevant and authentic."²⁷⁴ Thus, critics argue that the legislation unfairly requires plaintiffs to create evidence that will be introduced against them at trial.²⁷⁵ And this, in turn, could undermine plaintiffs' position should the evidence be misconstrued by the jury.²⁷⁶

The concern that juries provided with trust information "may well assign fault to the insolvent defendants" is reasonable.²⁷⁷ Neither act dictates what weight juries must give to trust forms and materials in assigning fault and liability, and plaintiffs are free to demonstrate the distinctions in trust and tort exposure criteria.²⁷⁸ Nonetheless, the knowledge that a plaintiff acknowledged at least some level of exposure under penalty of perjury—regardless of whether it was voluntary or mandated upon the court's conclusion that such a claim could be made in good faith—may be far more compelling in shaping juries' assessments than whatever other evidence the defendants may be able to advance, particularly in light of the inherent limitations of demonstrating direct exposure outlined in Part I.A.1.²⁷⁹

Moreover, this risk may be particularly high where a plaintiff's exposure to a solvent defendant's product is modest.²⁸⁰ Across cases, plaintiffs frequently rely upon expert testimony that any exposure, however remote or minor it may be, is sufficient to conclude that a defendant's actions were substantial contributing

²⁷⁴ § 2307.952(A); tit. 76, § 83.

²⁷⁵ Inselbuch et al., *supra* note 26, at 8.

²⁷⁶ *See id.*

²⁷⁷ *Id.*

²⁷⁸ *See* §§ 2307.952-2307.954 (showing that nothing directs how juries must weigh the evidence and that nothing precludes plaintiffs from making distinctions as to exposure).

²⁷⁹ Inselbuch et al., *supra* note 26, at 8 (showing that juries may allocate fault to multiple defendants if there is evidence of multiple exposures); *see supra* Part I.A.1.

²⁸⁰ *See* DIXON & MCGOVERN, *supra* note 42, at 65 (showing that even one percent fault can establish liability).

factors to a plaintiff's injury.²⁸¹ And, in these cases, it is easy to see how juries may take this expert testimony to heart not only with respect to solvent defendants but also bankrupt defendants when allocating fault.²⁸² Of course, this is precisely the point from the defense perspective: if plaintiffs advance such inclusive theories of exposure to establish causation, they should not complain if defendants point to those same theories to prove alternative causation or support lower several liability allocations.²⁸³

In states where such provisions are adopted, judges will play a critical role in balancing the parties' interests, just as they do with other evidentiary questions.²⁸⁴ Judges remain free to ensure that any evidentiary value of trust forms and materials will be "subject to the Rules of Evidence,"²⁸⁵ through jury instructions and otherwise.²⁸⁶ Trust governance and procedure documents, which are admissible under the acts passed to date,²⁸⁷ may be referenced to limit the potential confusion between exposure standards under tort law and those at the different trusts.²⁸⁸ Thus, one's assessment of the potential for tilting the scales in favor of defendants may hinge upon his or her perception of the capacity and willingness of

²⁸¹ For examples of such testimony, see *In re Asbestos Prods. Liab. Litig.* (No. VI), 2012 WL 760739 (E.D. Pa. Feb. 17, 2012) (noting expert testimony that "all of Mr. Freeman's non-trivial exposures to asbestos above background levels were substantial factors in causing the development of his malignant mesothelioma"); ABA June 6 *Transcript*, *supra* note 107, at 179-80.

²⁸² See Inselbuch et al., *supra* note 26, at 8 (illustrating that juries will rely on the evidence to assign fault to the various defendants).

²⁸³ ABA June 6 *Transcript*, *supra* note 107, at 15-17 (showing that defense attorneys feel that they should be entitled to make the same claims that plaintiffs are making against other defendants in order to prove percentage of liability).

²⁸⁴ See Inselbuch et al., *supra* note 26, at 8 (noting that judges make decisions as to what claim information juries will be shown); DIXON & MCGOVERN, *supra* note 42, at 63 (showing that judges weigh the value against the harm in determining admissibility).

²⁸⁵ OKLA. STAT. tit. 76, § 86(A) (2013); DIXON & MCGOVERN, *supra* note 42, at 63.

²⁸⁶ ABA June 6 *Transcript*, *supra* note 107, at 120 (showing that judges give jury instructions); DIXON & MCGOVERN, *supra* note 42, at 63 (showing that a judge can otherwise enforce the rules of evidence by denying the admission of evidence).

²⁸⁷ tit. 76, § 84(A).

²⁸⁸ See *id.*

judges to use the tools available to assist the jury in reaching a fair and equitable verdict.²⁸⁹

3. The Potential for Delay and Abuse

The state-level legislative initiatives advanced to date invite criticism that they will delay trial because, as noted, they allow defendants to demand that plaintiffs submit trust claims and provide for a stay of trial if this obligation is not satisfied.²⁹⁰ Conventional wisdom is that delay serves defendants' interests,²⁹¹ so plaintiffs' objections to the addition of an express statutory mechanism that may allow defendants to postpone trial are understandable.²⁹² This concern is magnified in asbestos litigation because trial dates are already delayed by case volumes that strain judicial resources.²⁹³ And, though the vast majority of cases settle,²⁹⁴ having an imminent trial date can be an important tool in getting to the finish line in settlement negotiations.²⁹⁵

²⁸⁹ See ABA June 6 *Transcript*, *supra* note 107, at 51-52.

²⁹⁰ See Inselbuch et al., *supra* note 26, at 8.

²⁹¹ Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1858 (1997) (characterizing delay as the defendants' "nirvana"); Tung Yin, Comment, *Nailing Jello to a Wall: A Uniform Approach for Adjudicating Insurance Coverage Disputes in Products Liability Cases with Delayed Manifestation Injuries and Damages*, 83 CALIF. L. REV. 1243, 1292 n.321 (1995).

Delay produces several benefits: (1) any damages they must pay as a result of future determinations of liability are discounted to present value; (2) some plaintiffs will die before reaching trial, reducing the damages in those instances; and (3) by forcing each plaintiff to litigate every issue, the defendants can drive the cost of litigation high enough to dissuade some plaintiffs with smaller claims from pursuing them.

Id.

²⁹² See Inselbuch et al., *supra* note 26, at 9.

²⁹³ See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 764 (2002).

²⁹⁴ Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 590 (2007).

²⁹⁵ *Id.* at 593; Steven L. Schulz, *In re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged – A Proposal for the Use of Federal Common Law in Mass Tort Class Action*, 58 BROOK. L. REV. 553, 562 (1992).

This risk is moderated by the limitations imposed on the right to obtain a stay,²⁹⁶ which have received little attention in public discussion concerning the state legislation to date.²⁹⁷ In addition to the good faith requirement, both statutes contain avenues for avoiding any stay by submitting the suggested claim, objecting to the request, or demonstrating that the costs of filing exceed likely recoveries.²⁹⁸ In addition, the statutory limitations period concerning the timing of any stay request (seventy-five days before trial in Ohio²⁹⁹ and ninety days in Oklahoma³⁰⁰) were included to reduce the prospects that any such request would be a mere ploy to postpone trial.³⁰¹ Nothing in these statutes strips courts of their inherent powers to sanction those who might otherwise seek to abuse the process,³⁰² and the court has the final say as to whether the plaintiff will be required to submit any additional claims with bankruptcy trusts.³⁰³ Again, how one views the impact of the legislation in this respect depends largely on their perspective of

In addition, plaintiffs frequently face incredibly long delays in receiving their just compensation. While the majority of cases settle before trial, most defendants will not even enter settlement negotiations until a plaintiff possesses a trial date. Because courts are so backlogged with asbestos cases, the fact is that many asbestos victims will die before receiving any compensation at all.

Id. Accord Nagareda, *supra* note 293, at 764.

In the face of defendants' intransigence during the mature litigation stage, mass tort plaintiffs' attorneys have only one real bargaining chip, but it is a big one: their power to take cases to trial. Trial dates are a scarce resource, limited by the capacity of the judicial system. But when they do approach, trial dates create conditions ripe for aggregate settlements.

Id.

²⁹⁶ OHIO REV. CODE ANN. § 2307.953(A) (LexisNexis 2013).

²⁹⁷ *See* ABA June 5 *Transcript*, *supra* note 253, at 101 (explaining that state legislation has been slow to start due to confusion over federal or state regulation).

²⁹⁸ §§ 2307.953(A)(1), (C); ABA June 5 *Transcript*, *supra* note 253, at 104.

²⁹⁹ § 2307.953(A).

³⁰⁰ OKLA. STAT. tit. 76, § 83(A) (2013).

³⁰¹ ABA June 5 *Transcript*, *supra* note 253, at 104.

³⁰² *Id.* at 106-07, 109-10.

³⁰³ *See id.* at 106-07, 124-25.

state judges' willingness to utilize the tools available to them to prevent abuse.³⁰⁴

IV. THE FACT ACT OF 2013

At the federal level, legislation that would require claim-level transparency by the trusts was introduced in 2012 and again in 2013.³⁰⁵ Where the state-level initiatives imposed obligations on plaintiffs and their counsel in state court,³⁰⁶ the federal bills would impose public and private reporting obligations on the trusts.³⁰⁷ This section analyzes the basic terms of the federal legislation, the degree to which it may address any imbalanced linkages in the tort system, and its potential impact on trust governance and administration.

A. Key Features of the FACT Act

After a push to amend the Federal Rules of Bankruptcy Procedure to require mandatory disclosure of trust submissions and payments stalled,³⁰⁸ legislation to amend the Bankruptcy Code to require these disclosures was introduced in 2012.³⁰⁹ This legislation, the Furthering Asbestos Claims Transparency (FACT) Act of 2012,³¹⁰ would have amended "section 524(g) of the Bankruptcy Code to require asbestos trusts to file quarterly reports" to the bankruptcy court concerning each claim received, including the name and asserted exposure history of the claimant, and the basis for any payments made during the quarter.³¹¹

³⁰⁴ See ABA June 6 *Transcript*, *supra* note 107, at 9-10 (explaining how there are two viewpoints of the prevention of abuse, which depends on how the court system, including discovery is viewed).

³⁰⁵ Scarcella & Kelso, *supra* note 113, at 13.

³⁰⁶ See *generally id.* at 12 (showing how the new law requires a timeline for filing a tort complaint, and how the court can take away the trial date).

³⁰⁷ *Id.* at 13.

³⁰⁸ FACT ACT REPORT, *supra* note 29, at 13-14 (noting that this failure was due to the perception that such requirements were more appropriately left to Congress).

³⁰⁹ *Id.*

³¹⁰ H.R. REP. NO. 112-687, at 2-3 (2012) [hereinafter FACT ACT OF 2012]; see also FACT ACT REPORT, *supra* note 29, at 14.

³¹¹ FACT ACT REPORT, *supra* note 29, at 14.

Confidential medical records and the claimant's full social security number were expressly excluded from these public reports.³¹² In addition, the legislation sought to require trusts to disclose trust claim forms and supporting materials to defendants in related state tort litigation upon request.³¹³ The final version of the bill that was reported to the House of Representatives also included a provision that expressly authorized the trusts to charge the defendants a fee to cover the reasonable costs of complying with any such requests.³¹⁴ The Furthering Asbestos Claims Transparency (FACT) Act of 2013 was identical in all material respects to the final version of the 2012 act.³¹⁵

B. Arguments Advanced in Favor of the FACT Act

1. Trust Governance and Oversight

Bankruptcy trusts are novel creations in both bankruptcy and the tort system, so developing rules concerning their governance and disclosure takes us into uncharted territory.³¹⁶ When confronted with a novel question, advocates commonly draw upon the rules and practices applicable elsewhere, and this has been true with respect to discussions concerning the FACT Act.³¹⁷ As noted previously, for example, trust officials and plaintiffs' lawyers routinely characterize the trusts as little more than private entities that assumed the liabilities of one or more defendants and, accordingly, suggest that any disclosure obligations should merely track those applicable to settling defendants in the tort system.³¹⁸

³¹² *Id.*; FED. R. BANKR. P. 9037(a)(1).

³¹³ See FACT ACT REPORT, *supra* note 29, at 14.

³¹⁴ See H.R. 982, 113th Cong. (2013) [hereinafter FACT ACT OF 2013]; see also FACT ACT REPORT, *supra* note 29, at 31.

³¹⁵ See FACT ACT OF 2013, *supra* note 314; FACT ACT OF 2012, *supra* note 310, at 1-4.

³¹⁶ See generally FACT ACT REPORT, *supra* note 29, at 3-4, 8-13, 29-30, 32-35, 37, 39 (discussing the novel nature of bankruptcy trusts).

³¹⁷ See FACT ACT REPORT, *supra* note 29, at 32, 37; see also Brown, *Without Compromise*, *supra* note 17, at 896.

³¹⁸ See *supra* note 90. See generally Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations From 1991-2010*, 27:17 MEALEY'S LITIG. REP.: ASBESTOS 1-2, 9, 12 (Oct. 10, 2012) (discussing that "plaintiff attorneys refocused their

From a governance perspective, however, it may be more instructive to view the trusts as extensions of the bankruptcy estate.³¹⁹ Like their debtor-in-possession predecessors, bankruptcy trusts manage a limited fund.³²⁰ They also assume a role most often left to the court: post-confirmation claim review and approval.³²¹ Their diligence, or lack thereof, in settling these competing claims to the limited fund will have a clear impact on all others with rightful claims to the fund.³²² The purposes underlying the establishment of each trust—including equality of distribution across creditors—and the risks of manipulation of the process by the private actors who control them will undermine these purposes; thus, suggesting a need for greater oversight and transparency than private settlements in the tort system.³²³

litigation strategy on defendants who previously had only been peripheral sources of plaintiff compensation" and stating that "[t]hese trusts assume the legal responsibility of the Reorganized Defendant's asbestos-related liability and, in turn, are funded with assets intended to pay compensable claims"); Inselbuch et al., *supra* note 26, at 4, 7, 9 (discussing the Mansville Trust and how it "assumed the debtors' present and future liabilities," the interplay between the tort system and bankruptcy trusts, and how defendants have access to information by discovery, just as plaintiffs do in the tort system).

³¹⁹ See, e.g., *In re Thorpe Insulation Co.*, 677 F.3d 869, 878, 889-90 (9th Cir. 2012) (noting that a debtor's rights to insurance may be transferred to bankruptcy trusts because section 541(c) of the Bankruptcy Code invalidates contractual restrictions on assignment to the estate, and, in the asbestos bankruptcy context, the debtor is merely transferring "its rights and property to the trust, part of the estate").

³²⁰ See Inselbuch et al., *supra* note 26, at 4; FACT ACT REPORT, *supra* note 29, at 32. See generally 11 U.S.C. § 1107 (2012) (discussing the duties of a debtor-in-possession).

³²¹ See Inselbuch et al., *supra* note 26, at 4.

³²² See *id.* (explaining how the trusts' diligence in settling the claims from present and future claimants allows for these present and future claimants to have recourse to the assets of the trust).

³²³ See GAO REPORT, *supra* note 10, at 14; see also Brown, *Without Compromise*, *supra* note 17, at 896-97, 900-01. There are, of course, other ways in which trusts vary from solvent defendants in the tort system. See DIXON & MCGOVERN, *supra* note 42, at xv. Solvent defendants are free to adapt their settlement strategies to reflect their experiences, changes in underlying law and procedure, and so on. See GAO REPORT, *supra* note 10, at 3, 27. Trusts, by contrast, tend to follow largely the same model of claim review as their predecessors, without regard for variations in state law, and they must obtain the

In this context, transparency serves two basic objectives.³²⁴ First, it provides a means of holding fiduciaries accountable; if there is no risk of discovery or accountability, the risk is always present that the fiduciary will become more beholden to other interests than those he or she represents.³²⁵ Second, the absence of transparency lends itself to questions about the integrity and legitimacy of the process,³²⁶ especially where the system consistently generates poor outcomes for stakeholders.³²⁷ And, given the trust system's recent performance,³²⁸ legislation that demands greater transparency or some other form of oversight was, perhaps, inevitable.³²⁹

2. Addressing Fraud and Abuse

"Fraud," as many advocates of trust transparency use the term, speaks more to social norms than criminal conduct.³³⁰ While this does not preclude the possibility that some claims are fraudulent in the narrow legal sense, it captures a broader policy concern that the

approval of some of their ostensible adversaries—the lawyers that comprise the TAC—before changing their criteria for paying claims, the values they assign to claims, and their process for deciding which claims warrant more extensive review. *See id.* at 15-16, 22-23. And, of course, the TDPs at several trusts contemplate the payment of claims advanced after applicable state law limitations periods have run or trials have concluded with a determination that the trust has no liability to a plaintiff, whereas these considerations would obviously argue against settlement in the tort system. *See id.* at 17-18, 20-22.

³²⁴ *See infra* text accompanying notes 325-29.

³²⁵ *See Brown, Without Compromise, supra* note 17, at 897-902 (noting that the process for appointing key fiduciaries in asbestos bankruptcies unnecessarily creates conflicts of interest between their constituencies and the repeat players who select these fiduciaries for these roles).

³²⁶ *Id.* at 919-21.

³²⁷ *See McGovern, supra* note 2, at 1725.

³²⁸ *See Brown, Forever, supra* note 13, at 575 fig.1 (demonstrating that trust assets are declining at a rapid rate); Scarcella & Kelso, *supra* note 113, at 3 (discussing the impact of these reductions on payments to victims).

³²⁹ *See generally* Brown, *Forever, supra* note 13, at 584 (discussing the need for transparency in order to allow more oversight of the trust system and thereby prevent abuse).

³³⁰ *See generally* Lisa J. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L. J. 123, 124 (discussing bankruptcy law and its connection to society and its norms).

current gaps between the trust and tort systems allow claimants to shape misleading "realities" in one or both to maximize recovery.³³¹ It raises questions about the legitimacy of a system that accepts and pays claims based on zealous characterizations of the underlying facts that, upon reflection, do not mirror some broader social norms concerning meritorious claims.³³² This includes the potential that the omission of critical facts in one or both systems, regardless of whether these omissions are intentional or merely beneficial mistakes, will enable claimants to obtain recoveries that would otherwise be unwarranted.³³³ And, given that every such payment to parties asserting dubious claims represents a reduction in assets that would otherwise go to victims whose claims do not suffer from such deficiencies, the fraud argument ultimately hinges on the inequity of paying specious claims today at the expense of future victims.³³⁴

By contrast, trust officials and plaintiffs' lawyers tend to focus on fraud from a purely legal standpoint—whether they have uncovered conduct that qualifies as civil or criminal fraud—when

³³¹ See DIXON & MCGOVERN, *supra* note 42, at 3 (explaining that it is common for claimants to try and recover from more than one source).

³³² See generally William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. OF BANKR. L. & PRACTICE 257, 258 (2008), available at http://www.cozen.com/admin/files/publications/JBLP_v17n2_ShelleyCohnArnold_sent%20040208.pdf (discussing how claimants have been using joint and several liability in a way which holds defendants "liable for their entire reward," when their shares of liability are only comparatively minor).

³³³ See *id.* (discussing defendants' inability to obtain information about other claims being filed by plaintiffs, thereby "hampering their ability . . . to obtain judgment reductions, credits, and/or offsets that they should in all fairness receive").

³³⁴ *Questions for the Record Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the H. Comm. on the Judiciary and the Subcomm. on Regulatory Reform, Commercial & Antitrust Law*, 113th Cong. 6 (2013) (statement of S. Todd Brown) [hereinafter *Questions for the Record by Brown*] (stating that "past policy failures have impacted current victims' prospects for recovery" and that "the ongoing rapid depletion of trusts today suggests that the recovery prospects for future victims will be worse").

discussing the issue.³³⁵ However, even this narrow argument appears inconsistent with the experience of compensation funds generally,³³⁶ some bankruptcy trust representatives' concerns regarding the claims submitted to the trusts,³³⁷ and the fact that similar conduct has been found fraudulent elsewhere.³³⁸

When these representations are viewed in light of what is known about trust reviews and audits, however, the suggestion that

³³⁵ See generally Daniel Fisher, *Law Firm Hit With \$429,000 Verdict Over Faked Asbestos Suits*, FORBES (Dec. 12, 2012), <http://www.forbes.com/sites/danielfisher/2012/12/21/law-firm-hit-with-429000-verdict-over-faked-asbestos-suits/> (suggesting that lawyers for asbestos plaintiffs do not find claims fraudulent when they believe there is a "reasonable basis" for the claim).

³³⁶ Jay Weaver, *Fraud Pollutes BP Oil-Spill Compensation Fund for Gulf Coast Victims from Florida to Louisiana*, MIAMI HERALD (Aug. 19, 2012), <http://www.miamiherald.com/2012/08/19/2959468/fraud-pollutes-bp-oil-spill-compensation.html> (stating that "anytime you establish a very generous public compensation program, it will trigger a certain amount of fraudulent activity"); see also DISASTER FRAUD TASK FORCE, REP. TO ATT'Y GEN. FOR FISCAL YEAR 2011 1 (2012) (stating that "in any disaster, there are always individuals who are not entitled to that assistance, but who falsely claim those benefits for their personal gain, often at the expense of the true victims of disasters"); Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 734 (1989) (discussing fraud in the black lung program).

³³⁷ *Questions for the Record Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the H. Comm. on the Judiciary and the Subcomm. on Regulatory Reform, Commercial & Antitrust Law*, 113th Cong. 6 (2013) (statement of Elihu Inselbuch) (explaining that not all claims are accepted and some are rejected in order to prevent the payment of fraudulent claims); 3 *Asbestos Trusts Accuse Attorney of Submitting Fraudulent Claim Information*, 12:3 MEALEY'S ASBESTOS BANKR. REP. (Oct. 2012) (asserting, in the first suit of its kind, that a law firm employed dubious patterns and practices in submitting claims and seeking declaratory relief in response to litigation threats from the firm).

³³⁸ See Fisher, *supra* note 335 (discussing a jury verdict against two lawyers for fraud); John O'Brien, *Federal Jury Finds Fraud on Part of Asbestos Lawyers*, LEGAL NEWSLINE LEGAL J. (Mar. 10, 2010), <http://legalnewsline.com/news/226046-federal-jury-finds-fraud-on-part-of-asbestos-lawyers> (discussing a jury verdict finding Mississippi lawyers guilty of fraud for failing to disclose plaintiffs' receipt of compensation in a previous settlement administered by the lawyers).

fraud has not been uncovered is understandable.³³⁹ Discovering fraud through individual claim review may be possible where the submitter is careless or foolish, advancing claims that are obviously fraudulent and lacking any colorable argument that it is the product of a mistake.³⁴⁰ But, legal fraud is rarely so cut-and-dry, especially when there is little available information.³⁴¹ In other cases, the review process may simply conclude if the claim is approved or the claimant does not respond to a deficiency notice.³⁴² If the claim is audited, the risk of discovery depends upon the nature and extent of the audit; not all "audits" are the same.³⁴³ Indeed, although some trusts may have aggressive audit plans that attempt to identify and deter abusive patterns and practices, some report that they do not track the claim-level data necessary to conduct stratified, targeted audits when questionable practices or patterns may warrant such an approach.³⁴⁴

Not surprisingly, these discussions most often have a "two ships passing in the night" quality, which the competing voices

³³⁹ See S. Todd Brown, *Specious Claims and Global Settlement*, 42 U. MEM. L. REV. 559, 608-09 (2012).

³⁴⁰ See generally *id.* (explaining that only obviously fraudulent claims are likely to be discovered).

³⁴¹ See generally *id.* at 609-10 (explaining that it is often hard to determine whether the specious claims are inadvertent or by design, thus they are likely to go uninvestigated and undetected).

³⁴² See generally *id.* at 613 n.194 (quoting *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1225 (9th Cir. 2006)) (explaining the process through which a deficiency notice is sent, and how it can result in a claim dismissal).

³⁴³ *Id.* at 619-20 (explaining that while auditing should be mandatory, there is no "uniform model," and it will depend on things such as the likelihood of future claim submissions).

³⁴⁴ See Supplemental Letter from Douglas A. Campbell to House Subcommittee (Mar. 20, 2013) (acknowledging that the four trusts represented by counsel do not currently track and compile the information required under the FACT Act). As noted in connection with the 2013 hearings on the FACT Act, these representations raise serious questions as to how the trusts could identify abusive or fraudulent claiming patterns and practices. See *Questions for the Record by Brown, supra* note 334, at 2.

appear largely satisfied to perpetuate.³⁴⁵ For defendants, fraud continues a broader narrative that paints plaintiffs' lawyers in a negative light, even where they are arguably doing no more than utilizing the tools available to advance their clients' interests.³⁴⁶ For plaintiffs, this focus on fraud shifts the debate away from the policy justifications for those tools to a narrow category of conduct, of which the impact cannot be ascertained empirically.³⁴⁷ Thus, the remainder of this discussion focuses on the policy arguments on their own terms, rather than further unpacking the confusing and unduly inflammatory fraud characterization.³⁴⁸

a. The Bankruptcy Policy Argument

From the bankruptcy perspective, the question is twofold: (1) whether claims that lack intrinsic merit are being unduly paid, and (2) the extent to which claims that have merit are nonetheless receiving more than is equitable vis-à-vis similar current and future claims.³⁴⁹ Both points require further discussion than space allows in this article, but the main points can be readily identified.

³⁴⁵ See *infra* notes 346-47 and accompanying text (discussing plaintiffs' and defendants' 'competing voices' on the issue of "fraud" as it relates to plaintiffs seeking damages from trusts as well as companies in court).

³⁴⁶ See generally Tiffany Kary, *Bogus Asbestos Claims Cheat Companies, Lawyer Testifies*, BLOOMBERG (Mar. 13, 2013, 5:37 PM), <http://www.bloomber.com/news/2013-03-13/bodgus-asbestos-claims-cheat-companies-lawyer-testifies.html> (explaining defendants' concerns that "under the current system, people claiming money from asbestos can seek damages from trusts . . . and simultaneously sue non-bankrupt companies," allowing plaintiffs' lawyers to use this system to maximize their clients' returns); Shelley et al., *supra* note 332, at 258 (explaining how claimants are using joint and several liability to recover from multiple defendants); DIXON & MCGOVERN, *supra* note 42, at 3 (explaining that it is common for claimants to try and recover from more than one source).

³⁴⁷ See *infra* note 358 and accompanying text (noting that policy questions will be solved with the use of empirical data).

³⁴⁸ See generally Brown, *Forever*, *supra* note 13, at 588, 592 (discussing policy considerations of equal treatment for creditors, transparency, and plaintiff privacy and explaining that public knowledge of fraud in the system leads to "doubts about the trusts' credibility and quality controls").

³⁴⁹ See generally Daniel Fisher, *Double-Dippers*, FORBES (Aug. 19, 2006, 4:40 AM), <http://www.forbes.com/forbes/2006/0904/136.html> (noting that a

The intrinsic merit question appears simple at first glance, but its answer ultimately relies upon a complex normative assessment of what makes a claim meritorious.³⁵⁰ Is the tort system the gold standard, and if so, at what point? Should claims be deemed compensable merely because they might survive summary judgment, or should the inquiry focus on whether they would prevail at trial? Even if we accept one approach over the other, what about claims where the outcome in the tort system would likely vary from one state to the next? Do we consistently go with the lowest standard, the highest, or somewhere in between; or should compensability in the trust system vary according to the standard applicable to a specific claim? What role should the high likelihood of settlement and the need to control administrative costs play in shaping the standards?

In a perfect world, these and other policy questions would be explored in detail as part of the political process, but, of course, their resolution has been left largely to the bankruptcy process.³⁵¹ This process strongly favors current claimants above future victims, notwithstanding statutory language to the contrary.³⁵² Barring extensive changes to the process, and regular oversight to ensure that these changes are achieving the desired ends, this process is likely to favor current claimants in the future.³⁵³

Accordingly, to obtain confirmation, the resulting trust distribution procedures must appeal both to those advancing

common problem in this context is that trusts are paying money "based on inflated or downright false" claims).

³⁵⁰ See Brown, *Forever*, *supra* note 13, at 548 (explaining that claims are assessed based on aggregate liability and seldom based on the merit of individual claims); GAO REPORT, *supra* note 10, at 19 fig.5 (showing the process and analysis of an asbestos trust claim and demonstrating that it is a complicated one with many intermediary steps).

³⁵¹ See generally *In re Fed.-Mogul Global Inc.*, 684 F.3d 355, 362 (3d Cir. 2012) (showing that the trust system places authority in private rather than public hands and suggesting that resolving these policy questions should be left to Congress).

³⁵² See generally *id.* at 361 (noting current asbestos claims are given preferential treatment over future claims).

³⁵³ See generally GAO REPORT, *supra* note 10, at 18 (explaining that "claims are paid according to a first-in, first-out (FIFO) rule, processing each claim based on the date the claim was filed").

weaker claims (who will prefer more inclusive standards) and stronger, higher value claims (who will demand that the process match or exceed their expectations in the tort system).³⁵⁴ Thus, we should not be surprised when trust criteria and payment levels that are satisfactory to current claimants at confirmation prove unsustainable and ultimately require reductions in payments to future victims.³⁵⁵ In sum, each trust so established suffers from the commons problem precisely because the process ultimately empowers current claimants' to elevate their own individual self-interests ahead of future victims.³⁵⁶

I have suggested elsewhere that transparency should promote internal trust reforms that better protect future victims' interests;³⁵⁷ and, although I remain confident in this assessment, its immediate value lies in the extent to which these policy questions can be addressed empirically.³⁵⁸ Understanding not only how trust procedures are designed, but also how they are applied in practice, is a necessary step in identifying where they are inconsistent with broader norms about merit.³⁵⁹ Likewise, developing a better understanding of how differences across the trusts have impacted claim submissions and payments should improve future claim projections and inform the development of cost-effective mechanisms that better capture these norms.³⁶⁰

³⁵⁴ See generally *supra* note 13 and accompanying text (explaining requirements for confirmation of a bankruptcy trust under section 524(g) of the Bankruptcy Code).

³⁵⁵ See generally *Busting the Trust Fraud: Ohio Cleans up the Bar's Asbestos Bankruptcy Scam*, WALL ST. J., (Dec. 11, 2012), <http://online.wsj.com/news/articles/SB10001424127887324640104578161472087716126> (explaining how reform will protect bankruptcy trusts' funds for legitimate future claims).

³⁵⁶ See *supra* notes 12-16 and accompanying text; McGovern, *supra* note 2, at 1722.

³⁵⁷ See Brown, *Forever*, *supra* note 13, at 584 (noting that preventing abuse is a critical component of the reforms).

³⁵⁸ See *id.* (noting that there is limited empirical data available to evaluate the policy questions implicated in bankruptcy trusts).

³⁵⁹ See generally *id.* at 560, 566, 568 (discussing the comparative analysis of trust criteria, comparing exposure standards, medical criteria, audits and adaptability of bankruptcy trusts).

³⁶⁰ See *id.* at 584 (noting that "no one person or organization currently has access to sufficient information across trusts to provide any meaningful

b. The Tort Compensation Policy Argument

As with the state level legislation, the FACT Act arguably would balance exposure and compensation linkages by providing defendants with access to trust claim forms, materials, and ultimately payment information.³⁶¹ Rather than revisit the impact of this information on such linkages, the following focuses on the manner in which this information may discourage strategic nondisclosure and trust submission timing.³⁶²

First, in making this information available in the aggregate and removing some of the hurdles erected by the trusts to access to this information, the FACT Act should remove any perceived option for hiding the ball concerning trust exposures.³⁶³ Of course, defense counsel must remain vigilant and ultimately use this information to investigate and develop admissible evidence; the FACT Act does not purport to alter state rules concerning relevance or admissibility at trial.³⁶⁴

Although the FACT Act does not require claimants to advance trust claims prior to trial,³⁶⁵ it may nonetheless discourage strategic timing of trust submissions.³⁶⁶ Regardless of when trust submissions and payments occur, the risk that vigilant defendants

empirical assessment of the extent to which fraudulent claims are, or are not, prevalent in the bankruptcy trust system").

³⁶¹ H.R. 4369, 112th Cong. (2012).

³⁶² Brown, *Forever, supra* note 13, at 586-87 (noting that the FACT Act requires information regarding plaintiff's claim be exposed, but also noting that there is some limitation as to confidential information, including medical records and social security numbers).

³⁶³ See Andrew Silverman, *Furthering Asbestos Claims Transparency Act: Discovery of Bankruptcy Claim Information to Avoid Double Compensation*, DEF. LITIG. INSIDER (July 9, 2013), <http://www.defenselitigationinsider.com/2013/07/09/furthering-asbestos-claims-transparency-act-discovery-of-bankruptcy-claim-information-to-avoid-double-compensation/> (discussing that it is important to have access to this information, because defendants often conceal these claims to get a second recovery).

³⁶⁴ *Id.* See generally H.R. 4369 § 1 (showing that there is no language in the Act indicating a change in state rules in evidence relevance or admissibility).

³⁶⁵ See generally H.R. 4369 § 2(8)(A)(i) (noting that under the Act, one must disclose claims filed and amount paid out).

³⁶⁶ See *supra* note 363 and accompanying text (arguing that the FACT Act should discourage strategically planned claim filings).

may learn of after-the-fact filings suggests that those who play fast and loose with trust exposures and payments in litigation and settlement will face long-term credibility problems with defendants and judges going forward.³⁶⁷ Conversely, these disclosures should reward those who are already diligent in communicating with co-counsel, who submit trust claims and freely share this information with defendants today by providing a ready means of verifying that they are, in fact, transparent in these discussions.³⁶⁸

However, for those who view settlement as the preferred or only endgame in civil litigation, the FACT Act may be undesirable in some circumstances.³⁶⁹ This is because the plaintiff's ability to conceal trust payments may encourage plaintiffs and defendants to settle.³⁷⁰ Plaintiffs, for example, knowing that they have received substantial trust payments, may want to settle because the potential upside at trial is low.³⁷¹ At the same time, defendants, who are unaware that these payments have been substantial, may perceive the risk at trial as considerably higher than it would be after verdict molding to account for these settlements.³⁷² Yet, in states that require plaintiffs to file all trust claims seventy-five or ninety days before trial, it is possible that one or more claims will be paid and reported publicly while pretrial negotiations are ongoing.³⁷³ Even

³⁶⁷ See generally H.R. 982, 113th Cong. § 2(8)(A)(i) (2013) (requiring quarterly public reporting of certain information related to trust claims). Because this information would become public, defendants and judges involved in asbestos litigation will be able to learn of trust claims settlements and payments. See *id.*

³⁶⁸ See *id.* § 2(8)(A)-(B) (stating that reporting under the FACT Act is mandatory which would, in turn, verify any disclosure freely provided).

³⁶⁹ See generally Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 262 (noting that some judges focus on settlement because, "[f]rom a judicial perspective, . . . settlements [have] the virtue of clearing hundreds of thousands of cases from the court calendar in one fell swoop").

³⁷⁰ ABA June 6 *Transcript*, *supra* note 107, at 61 (noting that a defendant's lack of knowledge could lead to settlement).

³⁷¹ See generally *id.* at 142 (noting that not all claims have a high value).

³⁷² See Mendizabal, *supra* note 160, at 38 (noting that a lack of claim transparency increases the financial burden on asbestos defendants).

³⁷³ Compare OHIO REV. CODE ANN. § 2307.953(A)(1) (LexisNexis 2013) (requiring that trust claims be filed seventy-five days before trial), with OKLA. STAT. tit. 76, § 83 (2013) (requiring that trust claims be filed ninety days before

in states without such requirements,³⁷⁴ defendants can develop information about specific plaintiffs' firms' settlement histories that reflect their trust claim submission and payment patterns, which are more accurate than relying upon assumptions about these practices, as they largely must do today.³⁷⁵

Assume, for example, that a plaintiff has received \$1 million from the trust system (including an \$800,000 payment after individual review at a newly-established trust) and another \$500,000 from solvent defendants in a case that is factually similar to other cases, where the plaintiffs' injuries were valued at between \$900,000 and \$2 million. The plaintiff's lawyer may thus view that the range of likely additional recovery at trial would be between \$0 and \$500,000, after any offset for these payments, and that any verdicts that fall within the larger portion of this range (\$900,000 to \$1.5 million) will lead to no additional recovery after the time and expense of trial. Thus, the plaintiff's likely maximum recovery after trial would be \$500,000 minus the anticipated costs of trial, and one would expect a compensation-maximizing plaintiff to accept settlements that approach or exceed that amount.

At the same time, the defendant does not know that trust payments have been higher than the \$300,000 that the plaintiff's lawyer normally receives for similar claims in the trust system and correctly estimates, given what is known about the settling co-defendants' settlement patterns, that his or her settlements are roughly \$500,000. Thus, the defendant may reasonably estimate that the potential downside at trial ranges from \$100,000 to \$1.2 million with, of course, the potential that it will prevail on one of

trial). One can see from these statutes that because each requires early disclosure of trust claims, there is a potential for overlap between disclosure and pretrial negotiations.

³⁷⁴ See ABA June 6 *Transcript*, *supra* note 107, at 34 ("[Plaintiffs] sit on the trust forms until after the civil case has settled or gone to verdict. And they are permitted to do so under the rules in most jurisdictions."). See generally Brown, *Forever*, *supra* note 13, at 586 (noting that other states are considering similar disclosure legislation).

³⁷⁵ Compare GAO REPORT, *supra* note 10, at 28 (noting that trusts may exclude payment information, even when subpoenaed), with H.R. 982, 113th Cong. § 2(8)(B) (2013) (requiring trusts to produce payment information upon a defendant's request).

its other defenses, bringing the upside to zero additional liability. If the plaintiff suggests a willingness to accept a \$400,000 settlement, then the defendant may view this offer as economically reasonable, especially if the costs of defending the case further are perceived as high.³⁷⁶

However, if both sides are aware of the actual existing settlement values, the plaintiff may be willing to settle the claim at \$400,000, but the defendant may view the risk at trial as acceptable.³⁷⁷ Now, the potential downside, exclusive of defense costs, is not \$800,000, it is only \$100,000. Depending on the defendants' assessment of the strengths and weaknesses of any available defenses, it may only accept a much lower settlement or prefer to roll the dice at trial, rather than set a precedent for future settlements. Thus, by precluding the plaintiff from enjoying the benefit of information asymmetries concerning his or her extraordinary trust settlement, the FACT Act may, in this case, undermine settlement talks.³⁷⁸

This scenario assumes several facts that, of course, are unlikely to be true across cases. Information asymmetries concerning trust claim payments will not always be sufficient to alter the parties' respective settlement postures, especially where a plaintiff's trust exposures are already known to the defendant, and the claims are all paid at the trusts' respective scheduled values.³⁷⁹ Unknown co-defendant settlement amounts may also far exceed

³⁷⁶ See generally ABA June 6 *Transcript*, *supra* note 107, at 61 (noting that a defendant's lack of knowledge regarding its trial risk can be used as leverage to force a defendant to settle).

³⁷⁷ See generally *id.* (noting that if a plaintiff's trust claim settlement information is made available to the defendant, the defendant can better decide whether to settle or bring the case to trial).

³⁷⁸ *Id.* (noting that a defendant with access to a plaintiff's trust claim information may think that its potential for loss is low, and, therefore, go to trial).

³⁷⁹ See generally Karen Marshall, *3 Things Mesothelioma Plaintiffs Should Know about Defendant*, ASBESTOS.COM (June 1, 2012), <http://www.asbestos.com/blog/2012/06/01/3-things-mesothelioma-plaintiffs-should-know/> (listing other factors considered by defendants when deciding whether to settle, such as admissions of liability, jury outcomes, and the possibility of additional lawsuits).

any payments from the trusts.³⁸⁰ Moreover, it may work the other way as a defendant may not believe that a plaintiff's likely trust payments are as low as they ultimately prove to be; in this scenario, the defendant incorrectly *underestimates* the risk at trial and proceeds to litigate a claim that it would have settled in a world of perfect knowledge.³⁸¹ And, of course, some defendants may continue to insist upon going to trial, even in cases where settlement appears rational.³⁸²

3. The Privacy Question

Another common critique of the FACT Act is that it "would require the trusts to publicly disclose extensive, individual and personal claim information."³⁸³ A similar criticism suggests that the act "could further victimize unsuspecting asbestos victims by requiring information about their illness to be made publically available to anyone who has access to the Internet"³⁸⁴ and, accordingly, this information could "be used by data collectors and other entities for purposes that have absolutely nothing to do with compensation for asbestos exposure."³⁸⁵

These characterizations of the federal legislation, however forceful, do not present accurate portrayals of its terms or the manner in which it would operate within the bankruptcy system.³⁸⁶

³⁸⁰ See generally H.R. 982 § 2(8)(A)(i) (showing that the reporting requirements of the FACT Act only apply to trust settlements; thus, information relating to a plaintiff's settlement with another defendant may be unknown to the defendant in the current litigation).

³⁸¹ See generally Brown, *Forever*, *supra* note 13, at 548 (noting that settlement history "may over or understate the debtor's legal liability to asbestos personal injury claimants").

³⁸² See generally *id.* at 549 (noting that defendants may elect to litigate a case even where settlement appears to be the economically rational course).

³⁸³ Andrew Cochran, *Why Would We Dishonor Veterans' Injury Claims and Invade Their Privacy*, MADISON COUNTY REC. (May 23, 2013), <http://7thamendmentadvocate.org/blog/2013/05/why-would-we-dishonor-veterans-injury-claims-invade-their-privacy/>.

³⁸⁴ FACT ACT REPORT, *supra* note 29, at 31 (dissenting views).

³⁸⁵ *Id.* at 32.

³⁸⁶ See *infra* note 438 and accompanying text (explaining that it is too early to determine the effect of this legislation and how it addresses the perceived abuses in the bankruptcy context).

First, the information required in such reports is no more than is already required with respect to creditors, including tort creditors, in a proof of claim or on a debtor's schedule.³⁸⁷ The personal information to be disclosed under the act—name and nature of the injury asserted—is far from "extensive;"³⁸⁸ rather, it is the sort of information that is already available concerning litigants on public dockets in state court and, at times, on the Internet.³⁸⁹ This information has been disclosed in the past in bankruptcy cases,³⁹⁰ and there have been no reports of such abuse, with respect to the trust that already discloses all of the information required under the FACT Act.³⁹¹

Second, although it is true that the legislation would require trusts to file quarterly reports on the public docket in bankruptcy cases, this does not create any serious risk of intrusion.³⁹² Contrary to the suggestion above, the dockets for these closed cases are not typically available on the Internet.³⁹³ Moreover, courts frequently modify or limit access to files that contain personal information by issuing protective orders and screening those seeking access,³⁹⁴

³⁸⁷ Brown, *Forever*, *supra* note 13, at 588-89.

³⁸⁸ FACT ACT REPORT, *supra* note 29, at 32 (dissenting views) (acknowledging that what would be released would include names and exposure histories). Consistent with the limitations on identifying information found in Bankruptcy Rule 9037(a), the FACT Act expressly precludes the disclosure of social security numbers. *Id.* at 14.

³⁸⁹ See Brown, *Forever*, *supra* note 13, at 588 (discussing how under the FACT Act, information about asbestos victims is made publically available to those who access the Internet).

³⁹⁰ *Id.* at 589.

³⁹¹ *Id.*

³⁹² See *id.* at 588 (stating that it is possible to protect claimant's information on the Internet without completely shielding information concerning the claim).

³⁹³ *Id.* at 589 (noting that documents on the dockets in closed cases, including asbestos bankruptcy cases, are no longer available on the Internet and that courts can modify access in order to avoid misuse).

³⁹⁴ See, e.g., *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 560 (Bankr. D. Del. 2005) (holding that the bankruptcy court acted appropriately in limiting electronic access to Bankruptcy Rule 2019 disclosures).

and nothing in the FACT Act forecloses this option with respect to the trusts' reports.³⁹⁵

V. THE COMMONS PROBLEM REVISITED: A GLOBAL PERSPECTIVE ON THE TRUST AND TORT SYSTEMS

In asbestos personal injury litigation, the commons problem captures the potential that the parties' private self-interests will generate unsustainable compensation burdens on a given defendant or trust.³⁹⁶ From a systemic standpoint, the commons problem also reflects the long-term risk that asbestos litigation will be unsustainable across defendants, leading to the establishment of more underfunded trusts and leaving only less viable sources of compensation in the tort system.³⁹⁷ This section discusses the commons problem as a matter of local (individual defendants), and systemic (across defendants and trusts) asset depletion and compensation scarcity.

A. *The Local Impact of Bankruptcy Trusts*

If we view each defendant company as a distinct commons, its bankruptcy is a form of coercion that alters each plaintiff's access to the shared resource.³⁹⁸ Initially, the automatic stay in bankruptcy erects an absolute barrier to access, suspending the plaintiff's

³⁹⁵ See Brown, *Forever*, *supra* note 13, at 588-89 (explaining that there are ways to protect a claimant by limiting access to other information, even if details about claimant's illness are exposed by the FACT Act).

³⁹⁶ See *supra* notes 355-56 and accompanying text (noting that the commons problem encourages current claimants to pursue their own individual self-interest and file claims which, in turn, results in reductions in compensation to future victims).

³⁹⁷ See *supra* notes 15-18 and accompanying text (discussing how increasing the potential recovery for clients in turn overgrazes trusts, which are severely underfunded for future victims, making their only remedy the tort system).

³⁹⁸ See *generally infra* notes 425, 434 and accompanying text (discussing how limited compensation from trusts has led to a decline in shared resources for each plaintiff).

ability to proceed against the debtor for recovery.³⁹⁹ Yet, section 524(g) ensures that the power to design post-bankruptcy rules governing access to the resource will be placed largely at the discretion of the same plaintiffs and defendants whose perceived self-interests made litigation and settlement in the tort system unsustainable.⁴⁰⁰ These bankruptcy negotiations involve promises of future trust payments that most often accelerate overexploitation and ensure that the combined effect of individual demands against the trust will generate greater, rather than less, strain on its resources and accelerate its depletion.⁴⁰¹

With respect to claim qualification and valuation, the trusts established under section 524(g) encourage the advancement of individual self-interests ahead of collective, long-term interests.⁴⁰² Trusts pay claims faster, employ weaker compensation standards than the tort system, and frequently lack robust, comprehensive quality controls.⁴⁰³ Current plaintiffs with weaker claims may thus

³⁹⁹ 11 U.S.C. § 362(a) (2012). The automatic stay does not, of course, extend to related cases against co-defendants. *Arnold v. Garlock, Inc.*, 278 F.3d 426, 436 (5th Cir. 2001).

⁴⁰⁰ See tit. 11, § 524(g)(2)(B) (showing that under section 524(g), trust criteria are proposed by those same defendants and must be approved "by at least 75 percent of those [victims]" in every given case). Asbestos litigation, for example, has proved so onerous on the tort system that "[j]udges, lawyers, and legislators all share a belief that asbestos litigation is a national tragedy—a tragedy for victims and defendants alike—which deserves a national statutory solution." Francis E. McGovern, *Asbestos Legislation II: Section 524(g) Without Bankruptcy*, 31 PEPP. L. REV. 233, 233 (2003) (footnotes omitted); see *supra* note 355 and accompanying text (discussing how claimants driven by self-interest have depleted the compensation and resulted in payment reductions for future victims, making it unsustainable).

⁴⁰¹ See, e.g., *In re Global Indus. Techs.*, 645 F.3d 201, 214 (3d Cir. 2011) (noting that the establishment of a silica bankruptcy trust triggered an "explosion of new claims" where the trust recognized "4,600 silica-related claims, as opposed to a pre-Plan world that recognized only 169").

⁴⁰² See generally Plevin, et al., *supra* note 17, at 914-15 (citing tit. 11, § 524(g)(2)(B)(ii)(IV)(bb)) (noting that some present claimants "enjoy the benefit of a far less stringent evaluation to determine entitlement to compensation . . . [in order] to induce them to vote in favor of the pre-packaged plan in large enough numbers to meet the 75% 'supermajority' requirement in section 524(g)").

⁴⁰³ See Brown, *Forever*, *supra* note 13, at 559-73 (discussing quality controls of bankruptcy trusts).

benefit by obtaining compensation from a trust, where their claims would not have been viable in the tort system.⁴⁰⁴ Plaintiffs with asymptomatic injuries may benefit as well, particularly where their claims are on suspended dockets or are otherwise not likely to result in compensation in the tort system.⁴⁰⁵ In the short term, even victims with strong claims may benefit by submitting claims for individual review and receiving prompt payments that meet or exceed the amounts they would have received from the trust's predecessor in the tort system.⁴⁰⁶

Over time, however, trusts overrun by high claim volumes and aggregate payments most often pay smaller and smaller portions of the reorganized debtors' former liability shares, with some trusts paying less than one percent of the agreed value of settled claims.⁴⁰⁷ Others may suspend payments for extended periods to preserve assets.⁴⁰⁸ Trusts may not be intended to carry only a fraction of the liability share that their predecessors carried in the tort system, but they most often do so within a few years.⁴⁰⁹ Today's plaintiffs are thus able to enjoy the full benefit of each claim they file across trusts and in the tort system, with the impact of any overgrazing shifted to future victims.⁴¹⁰

⁴⁰⁴ See *id.* at 559 (explaining that the negotiated "trust criteria expand the pool of compensable claims beyond comparable standards in the tort system").

⁴⁰⁵ See Fisher, *supra* note 349 ("Even as states crack down on frivolous [tort] lawsuits by people with no symptoms at all, trusts established by bankrupt asbestos manufacturers are paying tens of thousands of claims each year based on inflated or downright false stories of how people were exposed to their products.").

⁴⁰⁶ One reason for this increased compensation in trust cases is that parties avoid the high transaction costs associated with traditional tort litigation. See *supra* Part IV.B.2.b. "In addition, some claimants who qualify for expedited review may nonetheless request individual review in hopes of obtaining more compensation for their injuries than provided by the scheduled value for their respective injuries." Brown, *Forever*, *supra* note 13, at 554.

⁴⁰⁷ See Brown, *Forever*, *supra* note 13, at app.A (listing payment percentages across trusts).

⁴⁰⁸ See *supra* text accompanying notes 113-16.

⁴⁰⁹ See Brown, *Forever*, *supra* note 13, at 574-78 (discussing trust assets and payment percentages).

⁴¹⁰ See *id.* at 539-40.

B. From Local to Systemic Depletion

The commons framework is useful for understanding the implications of both the current state of affairs in asbestos litigation and the potential impact of different tort and trust reforms.⁴¹¹ The rapid depletion of several trusts has clear and disturbing implications for those for whom the trusts will be the best, if not only, practical means of compensation in the future.⁴¹² It also demonstrates that the past and future transformation of claims against solvent defendants into claims against underfunded trusts has broader, global implications.⁴¹³ Due to the linkages among them, the rapid depletion of one commons will create still more pressure on others.⁴¹⁴ And, given the projected duration of asbestos litigation in the United States,⁴¹⁵ this suggests that we will not only see more defendant bankruptcies, but also a period of expanded and accelerated scarcity for plaintiffs seeking compensation.⁴¹⁶

The prospects for compensation when these defendants and trusts prove unsustainable hinge, then, upon three factors: (1) whether demand for compensation will decline to match their resources; (2) the extent to which existing linkages will effectively

⁴¹¹ See generally McGovern, *supra* note 2, at 1721-24 (stressing the importance of understanding the forces behind the "commons" problem in order to address the "tragedy" that is asbestos litigation).

⁴¹² See Brown, *Forever*, *supra* note 13, at 593.

⁴¹³ One effect is companies that are usually "reluctant to file for bankruptcy . . . until their assets have been [greatly] diminished" will do so sooner because "it is possible to pre-negotiate a plan of reorganization . . . knowing in advance what the [more speedy] outcome will be" under section 524(g). See McGovern, *supra* note 400, at 246.

⁴¹⁴ See *supra* text accompanying notes 42-44.

⁴¹⁵ One study estimates that 600,000 asbestos claimants have come forward through 2000, and another 1 to 3 million will do so in the future. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 77-78 (2002), available at http://www.rand.org/content/dam/rand/pubs/documented_briefings/2005/DB397.pdf. Although this study was conducted prior to the mid-2000s decline in nonmalignant filings, this impact of this decline appears to have been largely offset by an increase in lung cancer cases and other client recruiting practices. See Scarcella et al., *supra* note 103, at 15-17.

⁴¹⁶ See *supra* text and accompanying notes 407-10.

allow those experiencing scarcity to pursue offsetting compensation elsewhere; and (3) the extent to which victims are ultimately able to obtain this offsetting compensation from these other sources.⁴¹⁷

1. Current and Future Demands for Compensation

Asbestos use in the United States peaked at over 136,000 metric tons in 1973 and declined gradually over the next two decades.⁴¹⁸ This consumption has fluctuated between 869 and 1,180 metric tons since 2009, with roughly 98% of this use in the chlor-alkali industry (where a cost-effective alternative to asbestos remains elusive) and the roofing industry, and is expected to remain in the 1,000 metric ton range going forward.⁴¹⁹ Some of the industries most associated with asbestos litigation historically—including the insulation, cement, and flooring products industries—effectively transitioned away from asbestos in the 1980s or early 1990s; while other industries, including the friction products and packing and gaskets industries, saw at least marginal asbestos use through the early 2000s.⁴²⁰

The most recent projections, however, indicate that asbestos injuries in the United States will remain above background levels for another four decades, with most of these occurring in the next decade.⁴²¹ Thus, asbestos litigation will likely remain a pervasive

⁴¹⁷ See generally McGovern, *supra* note 2, at 1721-26 (viewing the entire universe of asbestos litigation as a commons problem epitomized by an ever-increasing number of plaintiffs scrambling for their share of a limited resource, whereby each plaintiff's effort to recover from all possible defendants results in a further depletion of the "common" pool of assets). "In the context of asbestos, if there is a limited fund of money for asbestos plaintiffs and no restriction on their access to that fund, it will become dissipated before all the asbestos plaintiffs are paid. [T]he latecomers will suffer." *Id.* at 1722 n.5.

⁴¹⁸ ROBERT L. VIRTA, WORLDWIDE ASBESTOS SUPPLY AND CONSUMPTION TRENDS FROM 1900 THROUGH 2003 29-30 (2006), available at <http://pubs.usgs.gov/circ/2006/1298/>.

⁴¹⁹ U.S. GEOLOGICAL SURVEY, MINERAL COMMODITY SUMMARIES 2013 22 (2013), available at <http://minerals.usgs.gov/minerals/pubs/mcs/2013/mcs2013.pdf>.

⁴²⁰ See VIRTA, *supra* note 418, at 31 tbl.3.

⁴²¹ Judicial Education Program Transcript, *supra* note 7, at 492 (providing the remarks of Mark Behrens).

presence in the civil justice system, as long as most of today's judges remain on the bench.⁴²²

2. Imbalanced Linkages, Reform, and the Acceleration of Scarcity

Seventeen companies, representing as much as two-thirds of the original liability share in asbestos litigation, entered bankruptcy by 1993.⁴²³ As noted previously, that number has grown to roughly 100 companies today, and "the major producers of asbestos have virtually all been forced into bankruptcy."⁴²⁴ These departures from the tort system, and the poor prospects of recovery from the resulting trusts, represent a substantial decline in the resources available for compensation for current and future victims.⁴²⁵

Of course, the tort system accounts for the potential bankruptcy of one or more co-defendants.⁴²⁶ In some states, that risk is borne by the plaintiff; in others, defendants must make up any deficiency.⁴²⁷ Still, others transfer unpaid bankrupt liability shares only to those defendants who are at fault above a certain threshold.⁴²⁸ And, though we may expect the wisdom of these policies will be called into question and debated elsewhere, they are only at issue in the transparency debates to the extent that the

⁴²² *Id.*

⁴²³ Ronald L. Motley & Joseph F. Rice, *The Carlough Settlement—Blueprint for a Sane Resolution to the Asbestos Problem*, 8:11 MEALEY'S LITIG. REP.: ASBESTOS 4 (July 2, 1993) ("All in all, seventeen (17) former asbestos defendants—representing one-half to three-quarters of the original liability share—have gone into bankruptcy.").

⁴²⁴ Judicial Education Program Transcript, *supra* note 7, at 493 (providing the remarks of Mark Behrens).

⁴²⁵ See generally Behrens, *supra* note 7, at 503 n.7 (discussing attorneys seeking out new defendants to compensate clients since traditional asbestos makers and users have been depleted due to bankruptcy litigations). See also *id.* at 505 n.14 (discussing lack of money available to those harmed because of the reduction in "traditional defendants").

⁴²⁶ See DIXON & MCGOVERN, *supra* note 42, at xi.

⁴²⁷ See *id.* at xii-xiii (discussing different degrees of defendant liability used in various states).

⁴²⁸ See Shelley et al., *supra* note 332, at 265-66 (discussing states barring joint and several liability and having defendants only pay liability assigned to them or barring defendants under fifty percent liable from joint and several liability).

opaque nature of the current system may surreptitiously alter their effect across cases.⁴²⁹

Although plaintiffs may be able to enhance their individual recoveries where the linkages are imbalanced, they also accelerate the depletion of the applicable trusts and the sustainability of solvent defendants.⁴³⁰ Collectively, the potential impact on juries' assessments of causation and allocation of liability, and, accordingly, the defendant's risk assessments in settlement discussions, may transform a defendant's short-term and long-term liability exposure considerably.⁴³¹ For some, the additional burden may be unsustainable, leaving them with far more demands for compensation than they can satisfy and, ultimately, driving them into bankruptcy.⁴³²

By that same token, however, there is always the danger that efforts to reform the system will deny plaintiffs any reasonable prospect of recovery from solvent defendants who, upon full consideration of the relevant facts, should be held accountable under applicable substantive law.⁴³³ In that case, compensation rights are limited, not because the available resources are overrun,

⁴²⁹ *Id.* at 264-65, 272-73 (discussing lack of transparency and the ability to correctly decide the appropriate percentage of liability to assign to a defendant).

⁴³⁰ See DIXON & MCGOVERN, *supra* note 42, at xi.

⁴³¹ See generally Brown, *Forever*, *supra* note 13, at 579-81 (discussing the trend of defendants refusing to enter into large global settlements unless future claims are included into the trust).

⁴³² See generally Shelley et al., *supra* note 332, at 265 (discussing the fact that most original asbestos defendants have been driven into bankruptcy because of the unjust results from joint and several liability in asbestos litigation); *The Public Policy Solution To Runaway Asbestos Litigation*, 12:1 ISSUE BACKGROUND 1-2 (Jan. 2004), available at http://www.paint.org/component/docman/cat_view/53-background.html (discussing the asbestos litigation epidemic and its enormous transactional costs to asbestos companies which are driven into bankruptcy).

⁴³³ ABA June 5 *Transcript*, *supra* note 253, at 119-20 (discussing results of tort reform and the dismissal of ninety percent of pending cases, as well as the shift in liability it creates). See generally ABA June 6 *Transcript*, *supra* note 107, at 89-90 (discussing the shift in liability allowing asbestos companies to avoid liability while others must pay the bill).

but because the civil justice system effectively closes its doors.⁴³⁴ As noted previously, this is arguably the fate of asymptomatic claims in some jurisdictions; including claims that, but for deferred docket and similar mechanisms, would be compensable in the tort system.⁴³⁵

The various transparency proposals advanced to date,⁴³⁶ however, do not appear likely to have such a dramatic effect on tort claimants' rights. The federal legislation is narrow and should have, at best, an indirect effect on litigation by unwinding some existing information asymmetries.⁴³⁷ And, though it remains too early to assess the precise effect of the state legislation passed to date, it appears that judges enjoy considerable discretion in interpreting the legislation and addressing perceived abuses otherwise.⁴³⁸ Future legislation that goes beyond the reach of the Ohio and Oklahoma Acts,⁴³⁹ however, may have far more profound effects.

3. The Capacity for Compensation Going Forward

The third question for the purposes of understanding the implications for plaintiff compensation is necessarily related to the second: whether the additional liability carried by lead defendants is sustainable and, if not, the extent to which the resulting trusts

⁴³⁴ See ABA June 5 *Transcript*, *supra* note 253, at 120 (discussing that the way the law is written in some states (i.e. Ohio) plaintiffs with asbestos related diseases are unable to file claims).

⁴³⁵ See *supra* notes 403-05 and accompanying text.

⁴³⁶ See *supra* notes 87-89, 173-75, 305-15 and accompanying text.

⁴³⁷ See generally Brown, *Forever*, *supra* note 13, at 584 (discussing how transparency may allow the United States, courts and other parties to identify and address some shortcomings).

⁴³⁸ See generally *United States v. Owens Contracting Servs., Inc.*, 884 F.Supp. 1095, 1101 (E.D. Mich. 1994) (showing the court's interpretation of the law contrary to the government's interpretation); *Elsemore v. Grenell*, No. 58267-4-1, 2007 Wash. App. LEXIS 2655, at *42-43 (Wash. Ct. App. Sept. 17, 2007) (showing that the court has discretion in interpreting the law); *Man v. Raymark Indus.*, 728 F.Supp. 1461, 1464 (D. Haw. 1989) (showing the court interpreting federal law in opposition to the parties' interpretation).

⁴³⁹ See *supra* notes 206-09, 226-30 and accompanying text.

and other solvent defendants will be able to fill the compensation void.⁴⁴⁰

As an initial matter, it may be assumed that the sheer volume of asbestos defendants may provide the ultimate check on global compensation scarcity.⁴⁴¹ After all, of the roughly 10,000 entities that have been named as defendants⁴⁴² during the first four decades of this litigation, only 100 have entered bankruptcy.⁴⁴³ These numbers, combined with the plaintiffs' bar's historical success in adapting to the changes within asbestos litigation generally,⁴⁴⁴ may thus suggest that any risk of future compensation scarcity is remote.

The raw numbers, however, may be misleading. Relatively few defendants have been prominent repeat players over time, and fewer still may be viable lead defendants across comparable cases.⁴⁴⁵ And, if we assume that plaintiffs have been rational in selecting defendants—naming those against whom they believe they have the strongest potential of obtaining recovery—the demise of so many former lead defendants suggests that the potential for obtaining full recovery, at least in industries with few viable

⁴⁴⁰ See *supra* notes 431-32 and accompanying text.

⁴⁴¹ Compare JENNI BIGGS ET AL., A SYNTHESIS OF ASBESTOS DISCLOSURES: FROM FORM 10-KS 1 (2010), available at <http://www.towerswatson.com/en-US/Insights/IC-Types/Survey-Research-Results/2010/04/A-Synthesis-of-Asbestos-Disclosures-From-Form-10-Ks-2010>, with *supra* note 424 and accompanying text. Considering only 100 companies in asbestos litigation entered bankruptcy, this equates to 1% of the 10,000 companies in asbestos litigation. Accordingly, since only 1% of the named defendants have filed for bankruptcy, it suggests that the other 99% should be able to provide any answers to the global compensation scarcity issue.

⁴⁴² See BIGGS ET AL., *supra* note 441, at 1.

⁴⁴³ See *supra* note 424 and accompanying text.

⁴⁴⁴ See generally Bates, et al., *Show Me The Money*, 22:21 MEALEY'S LITIG. REP.: ASBESTOS 1 (Dec. 3, 2007) (discussing the dramatic increase in the average recovery from 2000 to 2007, thus, suggesting the plaintiffs' bar's historical success in adapting to the changes within asbestos litigation).

⁴⁴⁵ See generally DIXON & MCGOVERN, *supra* note 42, at 2 (discussing defendants' filing of bankruptcy and the formation of a bankruptcy trust that allows plaintiffs to pursue multiple claims with what seems to be mediocre results due to the defendants' lack of viability).

corporate defendants, will diminish over time.⁴⁴⁶ As new lead defendants become increasingly removed from the industry,⁴⁴⁷ we may expect the prospects of obtaining high several liability allocations and, in states with limited joint liability, satisfying the necessary thresholds for requiring them to fill the compensation void left by bankrupt defendants, to weaken even in the absence of the proposed federal or state legislation.⁴⁴⁸ The remaining lead defendants in some industries may lack sufficient resources to carry increased liability shares over an extended period of time, and others may rationally pursue bankruptcy early in the process to reduce their estimated aggregate liability.⁴⁴⁹

For this system to sustain plaintiffs' compensation demands, then, plaintiffs must be able to obtain offsetting compensation from other defendants in the tort system, or new trusts must consistently come into the pipeline and follow the same model.⁴⁵⁰ The two are, of course, interrelated.⁴⁵¹ If plaintiffs' evidence against solvent defendants is insufficient to warrant a pattern of favorable judgments at trial or demand high-value settlements, these defendants are unlikely to pursue bankruptcy to address their

⁴⁴⁶ See generally McGovern, *supra* note 2, at 1722-23 (explaining the inevitable diminishing recovery dollar value due to the "commons" problem in asbestos litigation, even when the plaintiff acts rationally).

⁴⁴⁷ See generally STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION XXI (2005), available at http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf (discussing the changing defendants in asbestos litigation).

⁴⁴⁸ See generally ABA June 5 Transcript, *supra* note 253, at 42-43, 131-33 (explaining the compensation void left by bankrupt defendants and how legislation in Ohio will affect the plaintiff).

⁴⁴⁹ See *id.* at 44-45 (explaining how plaintiffs will be paid from a bankruptcy trust in joint liability states).

⁴⁵⁰ See generally DIXON & MCGOVERN, *supra* note 42, at 30-31 (discussing the provisions that will prevent plaintiffs from recovering more than their full value of injuries and also explaining how trusts are now on the lookout for plaintiffs attempting to do this, which, in turn, should allow for more plaintiffs in the future to receive compensation).

⁴⁵¹ See generally ABA June 5 Transcript, *supra* note 253, at 46-47 (explaining how the trust and tort claim system is interrelated for a plaintiff).

asbestos liabilities.⁴⁵² If the linkages between the trusts and the tort system are balanced only after numerous trusts have been depleted and the remaining solvent defendants are far removed from the asbestos industry, the compensation levels for future plaintiffs will likewise equalize at a level that is far lower than if such steps are taken sooner.⁴⁵³

Given that some appear to have compensable claims only against established trusts today,⁴⁵⁴ the risk of global scarcity is not academic; it is, for some, already a reality.⁴⁵⁵ Whether they worked in professions that have already been depleted or past reforms present insurmountable barriers to compensation for their legitimate non-malignant injuries,⁴⁵⁶ scarcity played a role in shaping how their claims are compensated today.⁴⁵⁷ And, the manner in which we address ongoing questions about the bankruptcy trust and tort systems today will likewise play a substantial role in determining how future victims are compensated.

C. Implications for Policy Discussion

If we view asbestos compensation from a global perspective, many of the arguments that drive the political debate today have very little to tell us in shaping long-term policy.⁴⁵⁸ Comparisons to

⁴⁵² See generally DIXON & MCGOVERN, *supra* note 42, at 2 (discussing the fact that as expected future payments increase, many asbestos defendants filed for bankruptcy).

⁴⁵³ See generally *id.* at xi (discussing that if the linkages problem is not addressed, compensation levels for future plaintiffs will decrease based on higher trust payments now).

⁴⁵⁴ See generally ABA June 5 *Transcript*, *supra* note 253, at 63 (explaining that in Wisconsin, a lawyer had a number of claims that were only compensable through the bankruptcy trust system).

⁴⁵⁵ See generally *id.* at 63 (providing a specific example of a Wisconsin lawyer).

⁴⁵⁶ See generally *id.* at 70-71, 76-77 (discussing the availability of funds for claims for non-malignant injuries and for different professions).

⁴⁵⁷ See *In re Amatex Corp.*, 755 F.2d 1034, 1042-43 (3d Cir. 1985) (explaining how future claimants are considered in compensation claims today).

⁴⁵⁸ See generally ABA June 6 *Transcript*, *supra* note 107, at 195-97 (explaining the significance of a long-term policy and how ensuing policy recommendations have all failed).

how the tort system manages litigant rights in cases with a discrete universe of plaintiffs and little risk of compensation scarcity do not, of course, capture the full array of competing interests when scarcity is a concern.⁴⁵⁹ And, though it may be tempting to disregard the potential for scarcity here, resources are often viewed as inexhaustible until it is too late, and the preference for advancing the wants and needs of today's population necessarily shifts any risk of unsustainability to future generations.⁴⁶⁰

Defendants are clearly advancing their own interests with the proposed legislation, but their points concerning plaintiff exploitation of the gaps in the trust and tort systems have broader implications.⁴⁶¹ As bankruptcies continue to mount and trust payouts continue to exceed projections, the impact will be felt not only by corporate stakeholders, but also future victims.⁴⁶² To that end, some form of enhanced oversight of the bankruptcy trusts and enhanced measures at the state level to reduce gamesmanship may serve the collective good even though it limits individual options for maximizing compensation.⁴⁶³

Conversely, although plaintiffs' firms and groups present a disturbing picture of the potential recoveries for some plaintiffs today,⁴⁶⁴ the desire to maximize their recoveries conflicts with the interests of similar future victims in ensuring that sufficient assets

⁴⁵⁹ See generally *In re Amatec Corp.*, 755 F.2d at 1042-43 (explaining the unique situation that asbestos plaintiffs face); ABA June 5 *Transcript*, *supra* note 253, at 86-87 (explaining scarcity's role in the decision making of the asbestos plaintiff).

⁴⁶⁰ See generally DIXON & MCGOVERN, *supra* note 42, at xi (discussing "whether a lack of coordination between trusts and the tort system advantages today's plaintiffs relative to future plaintiffs").

⁴⁶¹ See *id.* (discussing a "lack of coordination between the trusts and the tort system" which allows plaintiffs to recover under both the tort systems and trusts).

⁴⁶² See generally *id.* (discussing the rise in asbestos litigation compensation payouts resulting in corporate bankruptcies).

⁴⁶³ See generally DIXON ET AL., *supra* note 144, at 2-3 (discussing state level reforms implemented to manage mass tort asbestos claims).

⁴⁶⁴ See generally Ziffer, *supra* note 8 (discussing plaintiffs' substantial recoveries for asbestos mass tort injuries).

remain available to compensate them.⁴⁶⁵ This conflict is perhaps best demonstrated by the degree to which choices that favored victims in the past have impacted today's victims.⁴⁶⁶ In designing the early bankruptcy trusts, litigants made the ill-fated decision to adopt exceedingly low qualification standards that led to their rapid depletion.⁴⁶⁷ The power imbalance between current and future victims became even more exaggerated under section 524(g), preserving this approach and encouraging more aggressive front-loading in subsequent trusts.⁴⁶⁸ Thus, notwithstanding the inherent transaction cost advantage that trusts have over defendants in the tort system—namely, replacing the high defense costs associated with tort litigation with the low trust administration costs⁴⁶⁹—this advantage appears to have been more than offset by the resulting surge in claims received and paid.⁴⁷⁰ And just as delay may serve defendants' interests at trial,⁴⁷¹ delay in addressing weaknesses in the trust system and its relationship with the tort system favors current claimants and repeat players at the expense of future victims.⁴⁷²

⁴⁶⁵ *In re Amatec Corp.*, 755 F.2d 1034, 1042-43 (3d Cir. 1985) (explaining the conflict between current and future claimants). Similar concerns were also expressed by the Supreme Court of the United States in its rejection of asbestos class action settlements. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997).

⁴⁶⁶ See generally ABA June 6 *Transcript*, *supra* note 107, at 7 (discussing the choice to follow a schedule to pay out claims to plaintiffs that, in retrospect, should not have been paid out).

⁴⁶⁷ See generally *supra* Part IV.A (discussing the impact of trusts on present and future asbestos claim litigants).

⁴⁶⁸ See *In Re Fed.-Mogul Global Inc.*, 684 F.3d 355, 361 (3d Cir. 2012).

⁴⁶⁹ See *id.* at 362.

⁴⁷⁰ See Brown, *Forever*, *supra* note 13, at 574-75 (discussing the rise of bankruptcy trust payments).

⁴⁷¹ See *supra* Part II.B.3 (stating that "[c]onventional wisdom is that delay serves defendants' interests").

⁴⁷² See Brown, *Forever*, *supra* note 13, at 569-70 (explaining how "repeat players will adopt patterns and practices that exploit weaknesses in comprehensive settlement[s]").

VI. CONCLUSION

However understandable it may be for advocates and participants to stress their individual interests when addressing the proposed modifications to the trust and tort system discussed in this article, the policy questions are ultimately global and straightforward.⁴⁷³ From a procedural standpoint, is the process fair and equitable to litigants, or does it merely promote gamesmanship that distorts the truth-seeking function of litigation? As a matter of compensation, does the proposal unduly limit victims' avenues for recovery through delay and corruption of the tort process, or does it merely capture the underlying principles of tort compensation? As a matter of bankruptcy policy, will any federal legislation promote accountability and equitable compensation for those asserting similar claims, or will it merely advance the private self-interests of solvent defendants? And, over time, are the practices and rules in place today sufficient to protect the interests of future victims?

To that end, this article has addressed the most common allegations in these debates—complaints that fraud dominates asbestos trust submissions and tort litigation, that trust officials are part of some conspiracy to cheat solvent defendants of access to the information they are entitled to receive under state law, and that defendants are merely trying to avoid responsibility for the injuries they caused⁴⁷⁴—largely as rhetorical distractions in a broader, more significant policy discussion.⁴⁷⁵ Some of the arguments, including the suggestion that the proposals would lead to the public release of extensive and sensitive information,⁴⁷⁶ are demonstrably overblown. Other arguments, including the suggestion that fraud is rampant across trusts and the tort system, cannot be verified empirically.⁴⁷⁷ The privacy and fraud arguments, however, advance their respective groups' interests by stirring public outrage and, with respect to victims, fear that may

⁴⁷³ See *supra* Parts IV.A-B (discussing the global policy implications of asbestos personal injury litigation).

⁴⁷⁴ See *supra* Parts II.B.1, III.B.2.

⁴⁷⁵ See *supra* Parts III.B.2.a-b (discussing policy arguments).

⁴⁷⁶ See Cochran, *supra* note 383.

⁴⁷⁷ See Brown, *Forever*, *supra* note 13, at 584.

drive them to action; but, they ultimately do more to confuse the policy discussion than advance it.⁴⁷⁸

My purpose in laying bare the superficial nature of the talking points that dominate this debate, however, is not to impugn the integrity or motives of those advancing them. Such zealous rhetoric is to be expected where passions built over more than four decades of contentious litigation spill over into policy debates, and both sides in these discussions advance broader, underlying policy concerns that are reasonable.⁴⁷⁹ Shaping policy to address these complex questions, however, demands more careful and searching reflection than the talking points suggest.

⁴⁷⁸ *See supra* Part III.B.2 (discussing fraud and abuse policy arguments).

⁴⁷⁹ *See supra* Part IV.C (discussing policy arguments).