Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation

S. TODD BROWN†

INTRODUCTION

Drawing upon the tragedy of the commons, Francis McGovern observed in 2002 that asbestos plaintiffs were “arguably ‘overgrazing’ the accessible financial assets [recoveries from asbestos defendants] to the detriment of the total value of those assets.” 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. Judges, too, were arguably “challenging the legitimacy of the public justice system” by allowing asbestos claims to dominate their dockets. He observed that the solution to the commons problem is typically coercion, and that the parties that cooperate first to orche-

† Associate Professor, SUNY Buffalo Law School. The author wishes to thank the Widener Law Journal, Widener University School of Law and Christopher J. Robinette for the opportunity to discuss these issues at the Perspectives on Mass Tort Litigation Symposium earlier this year. The author also wishes to thank his fellow panelists, Bruce Mattock and William Shelley, for their insightful comments and observations, many of which are addressed in this article, in connection with the symposium.

1 Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968).
3 Id.
4 Id.
trate it would be the ones most likely to achieve their objectives.⁵

As judges and legislatures considered measures to reduce the prevalence of the asymptomatic claims that dominated asbestos litigation for more than a decade,⁶ many prominent defendants entered bankruptcy and, with the assistance of key members of the plaintiffs’ bar, subsequently emerged free of their long-term asbestos liabilities during the last decade. These bankruptcy cases, in turn, resulted in a sharp increase in the number of bankruptcy trusts established to pay current and future asbestos victims.⁷ 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.⁸

Yet most of the trusts established to date have ultimately suffered from the commons problem as well. In adopting settlement standards and payment practices that both expand the pool of compensable claims and front-load payments to current plaintiffs,⁹ trusts are arguably polluting their own environment by encouraging law firms to

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⁵ Id. at 1722-23.
⁸ Id.
⁹ S. Todd Brown, How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts, 61 BUFFALO L. REV. 537, 550-51 (2013)(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)[hereinafter Brown, FOREVER].
amass and file more claims against them. Plaintiffs’ firms rationally pursue all ethically and legally appropriate means to increase the potential recoveries for their clients, but in doing so they are arguably overgrazing the trusts and solvent defendants. Defendants continue to establish bankruptcy trusts on terms that are favorable to them, but in so doing, they shift the risks that these trusts are underfunded to future victims and solvent defendants in the tort system. And 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.\footnote{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., \textit{Pre-Packaged Asbestos Bankruptcies: A Flawed Solution}, 44 S. TEX. L. REV. 883 (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., \textit{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., \textit{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 \textit{Judicial Education Program Transcript}, supra note 6, at 498 (plaintiffs’ attorney Charles Siegel noting that Halliburton “is not, and has never 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 plaintiffs concerning its trust contribution requirements. See S. Todd Brown, \textit{Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox}, 2008 COLUM. BUS. L. REV. 841, 921 n.209 (2008)(noting the company’s strategy of challenging individual claims)[hereinafter, Brown, \textit{WITHOUT COMPROMISE}]; Lester Brickman, \textit{The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?}, 61 SMU L. REV. 1221, 1339-40 (2008)(discussing expert report in Grace bankruptcy suggesting that the number of asbestos claims filed “fourteen times greater than the number of medically plausible cases of asbestosis”).}

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.

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.

I. BACKGROUND: ASBESTOS LITIGATION, TRUSTS AND LINKAGES

The prevailing narrative concerning the origins of the asbestos personal injury crisis remains largely as it has been for the last three decades. Asbestos was prized for its resistance to heat, acid, alkalis and electricity throughout much of the last century. It was designated a “critical war material” during World War II and was integrated into

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12 Although this narrative has gained the most traction, it has been challenged as plagued by hindsight bias and “retroactive inculpation for acts committed decades earlier that were not wrongful at the time.” Lester Brickman, LAWYER BARONS 153 (2011); see also Rachel Maines, The Asbestos Litigation Master Narrative: Building Codes, Engineering Standards, and Retroactive Inculpation,’ 13 ENTERPRISE & SOCIETY 862, 864-65 (2012)(agreeing with Brickman and further suggesting that asbestos was required in many products in which there was no “equivalent-performance substitute”).

13 Id. at 865.
thousands of products.\textsuperscript{14} 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 pneumococcus and certain forms of cancer, including mesothelioma.\textsuperscript{15} And though the industry successfully manipulated public opinion concerning these risks until the 1960s, the industry was flooded with personal injury claims once these risks became common knowledge and plaintiffs increasingly obtained favorable verdicts at trial.\textsuperscript{16}

As asbestos claims mounted during the late 1970’s and early 1980’s, a relatively small group of defendants shouldered the largest liability shares. 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, and the extensive work performed by plaintiffs’ firms to establish exposure to these defendants’ products, and, for some, their perceived ability to satisfy judgments at trial.\textsuperscript{17} By contrast, other defendants were named less frequently because plaintiffs 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.

The bankruptcies of these early lead defendants triggered,\textsuperscript{18} and each successive wave of bankruptcies contin-

\textsuperscript{14} Andrew Schneider & David McCumber, \textit{A N AIR THAT KILLS} 81-2 (2004).

\textsuperscript{15} Brown, \textit{WITHOUT COMPROMISE}, supra note 10, at 844-46.

\textsuperscript{16} Id. at 846.

\textsuperscript{17} 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)

\textsuperscript{18} 557 U.S. at 140 (noting that “the prospect of overwhelming liability led Manville to file for bankruptcy protection”).
ued, an “endless search for a solvent bystander” that continues today. After some of these first tier defendants commenced bankruptcy, plaintiffs could still seek full recovery from other defendants. 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. 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. And as Jus-

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19 Commentary, ‘Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz, MEaley’s Litig. Rep.: Asbestos, Mar. 1, 2002, at 33, 37 (quoting Richard Scruggs). 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 Product Liability Trust, 424 F.3d 488 (6th Cir. 2005)(no duty to warn of potential exposure to asbestos in others’ products); O’Neil v. Crane Co., 53 Cal. 4th 335 (Cal. 2012)(rejecting appeal to extend strict liability to include such claims); Simonetta v. Viad Corp., 197 P.3d 127 (Wash. 2008) (in a case asserting that a manufacturer of an evaporator “sans asbestos insulation,” finding “little to no 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 Matter of New York City Asbestos Litig., 36 Misc. 3d 1234(A) (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).

20 Brown, FOREVER, supra note 9, at 545-46 (discussing the profile of companies that have recently filed bankruptcy); see also Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 791, 793 (E.D. Pa. 2012)(“Indeed, as asbestos 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.”); Philip Bentley & David Blabey Jr., Asbestos Estimation in Today’s Bankruptcies: The Central Importance of the New Trusts, 26 MEaley’s Litig. Rep. Asb. 28 (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
tice Kennedy observed in 2003, “With each bankruptcy the remaining defendants come under greater financial strain, and the funds available for compensation become closer to exhaustion.”

Although the profile of asbestos claims changed in the last decade, we remain in the midst of a slow-motion cascade failure that continues to stretch deeper into the pool of potential defendants. Some of this strain may be the lingering effect of the asymptomatic claims that dominated asbestos litigation for more than a decade, but solvent defendants also point to lingering distortions in the system that, they claim, continue to impose irrationally elevated liability shares upon them. 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.

A. Linkages that Increase Solvent Defendant Liability Shares

At the heart of the bankruptcy cycle lie the linkages\textsuperscript{23} that make the transfer of liability shares from bankrupt defend-
fendants to solvent defendants possible. 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 asbestos and the number of companies that have played a role in the production, distribution and use of asbestos-containing products.24

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.25 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.

For any one plaintiff, the universe of potentially responsible defendants is limited by the plaintiff’s exposure history.26 Insulation workers, for example, may have worked with a range of products manufactured and sold by dozens of defendants over several decades. Someone who

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26 Id., at 3.
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 manufacturers of these other products. 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. Moreover, some victims may assert “take-home” or “do-it-yourself” exposure instead of or in addition to workplace exposure.

Given the limits of our scientific knowledge in this area, 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. 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. Similarly, in some states, this evidence may be sufficient to allow some co-defendants to prove alternative causation. 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.

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 with a natural check on the

28 Id. at 1029.
expansion of their own liabilities. 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. 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.

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. While a defendant may point to objective evidence suggesting that bankrupt defendants’ products were present in a given workplace, they must still demonstrate that the plaintiff worked with or was otherwise exposed to these products. The witnesses 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. 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. Moreover, witnesses who once testi-

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30 Accord Threadgill v. Manville Corp. Asbestos Disease Compensation Fund, 1990 U.S. Dist. LEXIS 19083, at *8 (D. Del. July 27, 1990)(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).

31 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, 137-166 (2003). Although the discussion of these practices have 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.
fied 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.32

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. Whereas exposure linkages shift liability by the omission of exposures to bankrupt defendants’ products, compensation linkages arise in joint liability jurisdictions merely as a matter of policy. 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. 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.33 In either case, solvent defend-

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32 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).

ants 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.  

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, this is not the case in modern asbestos bankruptcies. 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. These trusts, most of which have been established under section 524(g) of the Bankruptcy Code, will pay claims only after determining that the plaintiff has produced evidence sufficient to demonstrate exposure to the applicable trust’s predecessor’s products. 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.

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) because juries may reduce fault allocations to some defendants below the state threshold for joint liability).

34 Judicial Education Program Transcript, supra note 6, at 496 (Mark Behrens).


36 See Part II.B.2, infra.
was enacted to address the debtor’s and its 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 claims\(^{37}\) - not the impact of the proceedings on non-parties, including co-defendants. 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. 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;\(^{38}\) (2) assurances that the trust will value and pay current and future victims in substantially the same manner;\(^{39}\) (3) a judicial finding that the channeling injunction is fair and equitable in light of the contributions to the trust;\(^{40}\) and (4) the approval of the plan by no less than seventy-five percent of known asbestos plaintiffs with current claims against the estate.\(^{41}\)

In the typical chapter 11, the right to participate as a creditor involves a series of factual admissions and disclosures. Most creditors are required to file a proof of claim, which outlines the factual and legal basis for the claim.\(^{42}\) If a claim was liquidated pre-petition, the amount of this settlement may also be disclosed on the debtor’s official sched-

\(^{37}\) In re Plant Insulation Co., 469 B.R. 843, 859 (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.”).


ules of assets and liabilities. 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.\footnote{43}{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”).}

Transparency may be the norm in most chapter 11
cases, but these rules rarely apply in asbestos cases. If a
plaintiff’s claim is referenced in public documents, it is like-
ly to be indirect; the only information disclosed will be the
name, address and type of claims asserted by law firm with-
out any specific reference to the identity of the plaintiff.\footnote{44}{Brown, WITHOUT COMPROMISE, supra note 10, at 866-67.}
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 discl
osure of the identities of asbestos claimants participating in
a case.\footnote{45}{Id.} 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.\footnote{46}{See generally In re Motions for Access of Garlock Sealing Techs. LLC, 488
B.R. 281 (D. Del. 2013); T.K. Kim, Federal judge closes portion of Garlock
bankruptcy trial, Legal Newline, July 26, 2013 (discussing the bankruptcy
court’s decision to seal estimation hearing testimony concerning asbestos claim
fraud allegations) available online at: http://legalnewsline.com/issues/asbestos/243134-federal-judge-closes-portion-of-garlock-bankruptcy-trial.}

In sum, a plaintiff may assert a ri
ght to
payment against the bankruptcy estate, vote on any pr
osed 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.

The most obvious explanation for the distinct treat-
ment of asbestos claims in bankruptcy is that transparency
is intended to enable parties in interest to protect their interests in the bankruptcy case. Bankruptcy law does not seek to provide co-defendants with information they may use to defend themselves in tort litigation. 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.47

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. 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 at multiple trusts.48 Thus, the procedures governing their operations remain similar across most trusts.49

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. Each component is discussed in turn below.

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47 See discussion at Part I.B.2.c, infra.
48 Brown, FOREVER, supra note 9, at 552.
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. 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. These procedures also provide: (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.\(^50\)

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 applicable state court. 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.\(^51\) Moreover, exposure may be established by demonstrating that the claimant worked at an approved worksite and 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 qualify-

\(^{50}\) Brown, \textit{FOREVER}, supra note 9, at 554.

\(^{51}\) Id. at 567-68.
ing product.\textsuperscript{52} Limitations periods are likewise more generous in the bankruptcy trust system than in the tort system.\textsuperscript{53} Moreover, claims based on fiber migration theories may be compensable at the trusts\textsuperscript{54} even though state courts have consistently rejected such claims.\textsuperscript{55} 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.

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 whether the claimant is seeking expedited or individual review.\textsuperscript{56} 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. At this stage, the submitting firm will either attempt to correct the deficiencies until the claim is approved or may ultimately withdraw the claim. Once a claim reviewer approves and assigns a settlement value to a claim, the trust will make an offer to the claimant.

\begin{footnotes}
\item 52 Id. at 560-66.
\item 53 Bruszewski v. Motley Rice, LLC, 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).
\item 54 Brown, \textit{F\o\r\e\v\n\u\r\n\e\r\y}, \textit{supra} note 9, at 561-62.
\item 55 Transcript, Task Force on Asbestos Litigation and the Bankruptcy Trusts, American Bar Assoc., June 6, 2013, at 131 [hereinafter \textit{ABA JUNE 6 TRANS\textsc{script}}]; available online 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.
\item 56 Brown, \textit{F\o\r\e\v\n\u\r\n\e\r\y}, \textit{supra} note 9, at 552-55.
\end{footnotes}
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. 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%.  

Thus, a claim with a settlement value of $100,000 at a trust with a 10% payment percentage will result in a payment of just $10,000 ($100,000 x .1). 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 payments made.

Notwithstanding the payment percentage reductions, active trusts paid $15 billion to claimants from 2006 through 2012. 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 asbesto-

57 Id. at 576.
58 For example, the Combustion Engineering 524(g) Asbestos PI Trust employs a 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 Payment, Claims Payment Ratio notice, available online at: http://www.cetrust.org/docs/CE_2013_MAP_Notice.pdf. 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. Combustion Engineering 524(g) Asbestos PI Trust Annual Report for the Fiscal Year Ended December 31, 2011, at 4.
sis claimants went to mesothelioma victims.\textsuperscript{60} 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.\textsuperscript{61} And given the relatively small number of active mesothelioma claims during this time frame, 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.

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?\textsuperscript{62}

First, the figures used to identify payments that may be received from the trusts typically assume scheduled values,\textsuperscript{63} not the substantially higher payments available if plaintiffs pursue individual review. For example, under the Lummus TDP, the scheduled value for a mesothelioma claim is $25,000,\textsuperscript{64} so the actual payment received under expedited review (after application of the 10\% payment percentage)\textsuperscript{65} would be only $2,500. Yet the maximum value

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\item Id., at 53.
\item JUDICIAL EDUCATION PROGRAM TRANSCRIPT, supra note 6, at 511-12 (attorney walking through the amounts his 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).
\item Id.
\item Lummus 524(g) Asbestos PI Trust Distribution Procedures, § 5.2(b)(3)[hereinafter Lummus TDP]; available online at: x http://www.abblummustrust.org/Files/lummus_tdp.pdf.
\item 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, dated
\end{enumerate}
\end{footnotesize}
available under individual review is $400,000, 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, respectively, which results in a difference in actual payments received of $225,000 after accounting for the trust’s 30% payment percentage (($900,000-$150,000) x .3=$225,000). Claimants typically pursue claims against between two and three dozen trusts, and electing individual review at even a small number of these trusts may have a dramatic impact on any given plaintiff’s aggregate trust recoveries.

The obvious response to this explanation is that, according to a recent GAO report, only 2-3% of claimants actually avail themselves of individual review. The basis for this estimate is unclear, but it is dramatically lower than the individual review rates reported by the few trusts that include this information in their annual reports. 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.

June 13, 2011, at 1


Lummus TDP, § 5.2(b)(3).

TH Agriculture & Nutrition, L.L.C. First Amended Asbestos Personal Injury Trust Distribution Procedures, § 5.3(b)(3)[hereinafter THAN TDP]; available online at: http://www.thanasbestostrust.com/Files/20110401_THAN_TDP.PDF.


GAO REPORT, supra note 7, at 20.

The report does not specify how this figure was reached or cite to any other sources in support of this figure.
claims.\textsuperscript{71} 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.\textsuperscript{72} Similarly, individual review claims comprised 61.6\% of the cancer and asbestosis claims that were paid by the Lummus Trust in 2011.\textsuperscript{73} The discrepancy may simply capture the difference in claiming approaches across trusts or between severe injury claims and asymptomatic claims. In any case, the 2-3\% figure does not appear to be accurate with respect to all specific 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. The Lummus TDP began with a 100\% payment percentage,\textsuperscript{74} making the difference between the post-petition scheduled value payment ($25,000 \times .1$) and the maximum value payment ($400,000 \times 1$) 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,\textsuperscript{75} we see a difference between post-payment percentage reduction scheduled value ($150,000 \times .3$) and original payment percentage maximum value ($900,000 \times 1$) of $855,000. Moreover, even if we use only scheduled values, the difference between the pre-

\textsuperscript{71} Annual Report, Financial Statements and Results of Operations of the Combustion Engineering 524(g) Asbestos PI Trust for Fiscal Year Ended December 31, 2011, at 4-5.
\textsuperscript{72} Annual Report, Financial Statements and Results of Operations of the Combustion Engineering 524(g) Asbestos PI Trust for Fiscal Year Ended December 31, 2010, at 5.
\textsuperscript{73} 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, at 5-6.
\textsuperscript{74} Lummus TDP, § 4.2.
\textsuperscript{75} THAN TDP, § 4.2.
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 paid through the bankruptcy trust, actual bankruptcy payments to some claimants may exceed even the maximum value payment level in some cases.

c. Trust Confidentiality and Sole-Benefit Provisions

Although some trusts previously sold or licensed their claim information freely,\textsuperscript{76} most bankruptcy trusts currently treat claim submissions and payments as confidential.\textsuperscript{77} 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.\textsuperscript{78} 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.\textsuperscript{79} Accordingly, co-defendants are unlikely to find most trusts cooperative when they attempt to investigate plaintiffs’ trust submissions and payments.

Nonetheless, these provisions do not present an insurmountable bar to disclosure. 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 disclo-


\textsuperscript{79} Id. at 10.
sure of information that is material and necessary to the
litigation pending before it.”80 Likewise, the only bankrup-
tcy 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.81 This conclusion is not only a
reflection of the reality of the trust confidentiality provi-
sions at issue – namely, that plan proponents have inserted
them to advance their own private interests and may be al-
tered at the sole discretion of trust officials82 – but also the
fact that the Bankruptcy Code does not in any way purport
to alter another forum’s control over its own discovery pro-
cess. And, as the Third Circuit recently noted, trusts, un-
like typical administrative schemes, “place the authority to
adjudicate claims in private rather than public hands, a dif-
erence that has at times given us and other observers
pause, since it endows potentially interested parties with
considerable authority.”83

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

Although federal law does not bar discovery of trust
information, efforts to obtain this information in state court
may still fail where: (1) courts deem it immaterial or unnec-

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80 In re: New York City Asbestos Litig., No. 40000/88, at 8 (S.Ct. N.Y. Nov. 15,
2012); available online at:
81 In re ACandS, Inc. v. Hartford Accident Indem. Co., 2011 Bankr. LEXIS 2962,
at *17-18 (Bankr. D. Del. Aug. 8, 2011)(also noting that even if the court had
subject matter jurisdiction, it would abstain from doing so in deference to the
court in which the discovery dispute was pending).
ecessary or (2) the mechanisms available in discovery are insufficient to ensure that it is, in fact, disclosed.

1. Are Trust Submissions and Payments Discoverable?

The assessment of whether trust materials are subject to discovery begins with the question of relevance. 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. And given that 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. As New York Justice Helen Friedman observed:

[While 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.]


Although trust forms may be discoverable, plaintiffs argue that trusts are akin to settling defendants, so all communications should be subject to settlement privilege. 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 promote “free and frank” settlement discussions. 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.

Most courts to consider the question have concluded that trust forms are nonetheless discoverable. 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. Even if the privilege applies to discovery in the state, most courts have concluded that claim forms are more akin to filing a complaint – which, of course, is not privileged – than the

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87 Inselbuch, supra note 33, at 6; Lorenzo Mendizabal, Asbestos and Secrecy: The Confidentiality Battle, 31 AM. BANKR. INST. J. 38, 89 (May 2012).
“free and frank discussions” contemplated by the privilege. 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. Moreover, the case management orders for New York City92 and West Virginia93 – which were adopted after negotiation among leading plaintiffs and defense firms practicing in those jurisdictions – expressly require disclosure of trust claim forms, and there is no evidence that this requirement has impaired free and frank discussion with bankruptcy trusts or otherwise interfered with trust claim settlement.

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.”94 Defendants may ask plaintiffs, through interrogatories and any depositions, searching questions concerning their exposure and work histories.95 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.96

Notwithstanding the trend toward requiring plaintiffs to disclose trust submissions, defendants contend that

94 FACT ACT REPORT, supra note 76, at 36 (dissenting views).
95 Inselbuch, supra note 33, at 8.
96 Id. at 8-9.
plaintiffs do not, in fact, provide these materials in discovery. 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.\footnote{JUDICIAL EDUCATION PROGRAM TRANSCRIPT, supra note 6, at 508, 515.} 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.

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.\footnote{ABA JUNE 6 TRANSCRIPT, supra note 55, at 114-15.} 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.\footnote{Id. at 114-15.}

The potential for such manipulation is well-established, but participants disagree concerning the extent to which it is being exploited by plaintiffs. RAND’s Institute for Civil Justice\footnote{2011 RAND REPORT, supra note 23, at 29-30.} and the GAO,\footnote{GAO REPORT, supra note 7, at 23.} 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. 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. 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.

The question that has not been answered, and cannot be answered definitively given the limited available public information, is how frequently this potential is exploited. In support of their assertions that such manipulation is pervasive, 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. Plaintiffs’ lawyers and trust officials counter that these cases are anecdotal and comprise only a miniscule portion of the asbestos cases and trust claims filed. 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; 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, and the discovery that is allowed will be subject

\[\text{\footnotesize 102} \quad \text{2011 RAND REPORT, supra note 23, at 19.}\]

\[\text{\footnotesize 103} \quad \text{See Part I.B.2.c., supra.}\]

to protective orders precluding public disclosure of that information.\textsuperscript{105}

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. Given the sheer volume of claims controlled by the lawyers interviewed for the 2011 RAND Report, 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.

II. STATE-LEVEL INITIATIVES

At the state level, some legislatures have considered proposals designed to fully incorporate both representations to bankruptcy trusts (addressing the exposure linkage) and the payments made by the trusts (addressing the compensation linkage) into the asbestos personal injury litigation within their respective state courts. 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 – Ohio and Oklahoma – have adopted legislation that addresses plaintiffs’ obligations with respect to bankruptcy trust disclosures in the tort system. Other states have considered or are in the process of considering similar legislation. Moreover, as noted previously, the general case management orders for asbestos cas-

\textsuperscript{105} In re Motions for Access of Garlock Sealing Techs. LLC, 488 B.R. 281 (D. Del. 2013); see also Brown, WITHOUT COMPROMISE, supra note 10, at 867.
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. 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.

1. Ohio

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

First, the Ohio Act imposes certain disclosure obligations concerning trust claims that are filed before or during the proceedings. 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 claim materials that pertain to each trust claim. This disclosure obligation is ongoing; any new trust claims filed after this initial disclosure and all claim materials must be produced within 30 days of their submissions to the

106 See notes 95-96, supra.
trusts.\textsuperscript{107} 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.\textsuperscript{108}

Second, the Ohio Act includes a provision requiring asbestos plaintiffs to file trust claims if certain conditions are satisfied. 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 75 days prior to trial.\textsuperscript{109} The plaintiff then has 14 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.\textsuperscript{110} 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.\textsuperscript{111} If the court determines that the fees and expenses associated with filing a trust claim, 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.

Third, the Ohio Act expressly addresses the potential uses of bankruptcy trust information at trial. Under Section 2307.954(B), trust claim information is “presumed to be authentic, relevant to, and discoverable in asbestos tort action.” This section further provides that claim materials

\textsuperscript{107} Ohio Act, § 2307.952(A)(2).
\textsuperscript{108} Ohio Act, § 2307.952(B).
\textsuperscript{109} Ohio Act, § 2307.953(A). 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. Ohio Act, § 2307.953(B).
\textsuperscript{110} Ohio Act, § 2307.953(C)(1).
\textsuperscript{111} Ohio Act, § 2307.953(E).
“are presumed to not be privileged” notwithstanding any private agreement or TDP confidentiality provisions to the contrary. Moreover, this section expressly provides that this information may be introduced at trial “to 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.”

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. 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. 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.”

2. Oklahoma

The Oklahoma legislation, Senate Bill 404, was introduced on February 4, 2013. The bill passed the Oklahoma Senate with 33 votes in favor and 11 votes against on February 26, 2013. As amended, it passed the Oklahoma House with 82 votes in favor and 10 votes against on April 24, 2013, and the governor signed the bill on May 7, 2013. The new law, entitled the “Personal Injury Trust Fund Transparency Act,” will be codified in the Oklahoma Statutes at Sections 81-89 of Title 76 (hereinafter, the Oklaho-

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112 Id.
113 Ohio Act, § 2307.954(D).
114 Ohio Act, § 2307.954(E).
ma Act). 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.

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. Where the Ohio Act required the initial disclosure within 30 days of the commencement of discovery,\(^\text{115}\) the Oklahoma Act requires the disclosure of claim forms and materials within 90 days of the commencement of the case.\(^\text{116}\) 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.”\(^\text{117}\) 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.\(^\text{118}\) Moreover, a trial date may not be scheduled earlier than 180 days after this disclosure obligation is satisfied.\(^\text{119}\)

Second, the Oklahoma Act also includes a provision requiring asbestos plaintiffs to file trust claims. 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 90 days prior to trial.\(^\text{120}\) The plaintiff then has 10 days to submit

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\(^{115}\) Ohio Act, § 2307.852(A)(1)(a).

\(^{116}\) Oklahoma Act, § 83.A-B.

\(^{117}\) Oklahoma Act, § 83.C.

\(^{118}\) Oklahoma Act, § 89.

\(^{119}\) Oklahoma Act § 85.A.

\(^{120}\) Oklahoma Act, § 86.A 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. Oklahoma Act, § 86.B.
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.\textsuperscript{121} If disputed, the court shall determine whether there is a good faith basis for submitting a claim.\textsuperscript{122} 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.\textsuperscript{123} 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.”\textsuperscript{124}

Third, Section 84 largely mirrors the Ohio Act in addressing the potential uses of bankruptcy trust information at trial. Trust claim materials and governance documents are discoverable\textsuperscript{125} and “presumed to be relevant and authentic, subject to the Rules of Evidence governing admissibility,” and no claims of privilege may apply to these materials and documents.\textsuperscript{126} In addition, any party may present these materials to prove alternative causation or for the purposes of allocating liability for the plaintiff’s injury.\textsuperscript{127}

\textsuperscript{121} Oklahoma Act, § 86.B.  
\textsuperscript{122} Oklahoma Act, § 86.C.  
\textsuperscript{123} Oklahoma Act, § 86.E.1.  
\textsuperscript{124} Oklahoma Act, § 86.E.2.  
\textsuperscript{125} Oklahoma Act, § 84.B.  
\textsuperscript{126} Oklahoma Act, § 84.A.  
\textsuperscript{127} Id.
Unlike the Ohio Act, 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 set-offs of judgments against one or more solvent defendants. 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. 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.

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. The Oklahoma Act is not yet effective, and the Ohio Act became effective in March 2013. By June 2013, more than 80 motions to compel compliance with the Ohio Act had been filed, and none of the motions had been argued. At least one case was settled, several plaintiffs’ 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. These early results tell us little about the

128 Apportionment of liability for asbestos claims in Ohio is covered by Section 2307.22 of the Ohio Revised Code.
129 The effective date for the Oklahoma Act is November 1, 2013. Oklahoma Senate Bill No. 404, § 20.
130 Transcript, Task Force on Asbestos Litigation and the Bankruptcy Trusts, American Bar Assoc., June 5, 2013, at 111 [hereinafter, ABA JUNE 5 TRANSCRIPT].
131 Id., at 111-12.
law’s application and impact; so much of the discussion remains centered on the purpose of the acts and their express terms.

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. 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. 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.

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 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.”132 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, defendants and state courts typically are not. 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.

The structure of both acts not only works to encourage the disclosure of trust forms but also that the information is shared in a timely manner. 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.

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. 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 witnesses concerning these exposures. Defense lawyers, like plaintiffs’ lawyers, are repeat players, and they or their firms typically track plaintiffs’ alleged exposures to other defendants’ products across cases. 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.

This characterization of the acts, however appealing as a rhetorical matter, is not entirely accurate. Defendants

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133 ABA JUNE 5 TRANSCRIPT, supra note 130, at 99-100.
134 See Part I.C.2., supra.
135 Inselbuch, supra note 33, at 9.
136 Id.
must still use the information available to them to demonstrate that “good cause” exists to file any suggested trust claim.\textsuperscript{137} The plaintiff remains free to demonstrate that the defendant has not demonstrated good cause for submitting a trust claim, but the statutes likewise attempt to foreclose the option of changing course and filing trust claims once the litigation concludes. 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.

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 treating them as presumptively “relevant and authentic.” Thus, critics argue that the legislation unfairly requires plaintiffs to create evidence that will be introduced against them at trial.\textsuperscript{138} And this, in turn, could undermine plaintiffs’ position should the evidence be misconstrued by the jury.\textsuperscript{139}

The concern that juries provided with trust information “may well assign fault to the insolvent defendants”\textsuperscript{140} is reasonable. 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. 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 –

\textsuperscript{137} Ohio Act, § 2307.953(A); Oklahoma Act, § 86.A.
\textsuperscript{138} Inselbuch, supra note 33, at 8.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
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.

Moreover, this risk may be particularly high where a plaintiff’s exposure to a solvent defendant’s product is modest. 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 factors to a plaintiff’s injury.141 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. 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.

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. Judges remain free to ensure that any evidentiary value of trust forms and materials will be “consistent with the Rules of Evidence,”142 through jury instructions and otherwise. Trust governance and procedure documents, which are admissible under the acts passed to date,143 may be referenced to limit the potential confusion between exposure standards under tort law and those at the different trusts. Thus, one’s assessment of the potential for tilting the scales in favor of

141 For examples of such testimony, see Freeman v. AMF, Inc. (In re Asbestos Prods. Liab. Litig.), 2012 U.S. Dist. LEXIS 31650 (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”).
142 Ohio Act, § 2307.953(A); Oklahoma Act, § 86.A.
143 Id.
defendants may hinge upon his or her perception of the capacity and willingness of judges to use the tools available to assist the jury in reaching a fair and equitable verdict.

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. Conventional wisdom is that delay serves defendants’ interests, so plaintiffs’ objections to the addition of an express statutory mechanism that may allow defendants to postpone trial are understandable. This concern is magnified in asbestos litigation because trial dates are already delayed by case volumes that strain judicial resources. And though the vast majority of cases settle, having an imminent trial date can be an important tool in getting to the finish line in settlement negotiations.

144 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, CALIF. L. REV. 1243, 1293 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.”).

145 Paul D. Carrington, Asbestos Lessons: The Consequences of Asbestos Litigation, 26 REV. LITIG. 583, 593 (2007); Steven L. Schulz, Note, 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 BROOKLYN L. REV. 553, 562 (1992)(“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.”). Accord Richard A. Nagareda, Autonomy, Peace, and Put Options in the Mass Tort Class Action, 115 HARV. L. REV. 747, 764 (2002)(“In the face of defendants’ intransigence during the mature
This risk is moderated by the limitations imposed on the right to obtain a stay, which have received little attention in public discussion concerning the state legislation to date. 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. In addition, the statutory limitations period concerning the timing of any stay request (75 days before trial in Ohio and 90 days in Oklahoma) were included to reduce the prospects that any such request would be a mere ploy to postpone trial. And nothing in these statutes strips courts of their inherent powers to sanction those who might otherwise seek to abuse the process, and the court has the final say as to whether the plaintiff will be required to submit any additional claims with bankruptcy trusts. Again, how one views the impact of the legislation in this respect depends largely on their perspective of state judges’ willingness to utilize the tools available to them to prevent abuse.

III. THE FACT ACT OF 2013

At the federal level, legislation that would require claim-level transparency at the trusts was introduced in 2012 and again in 2013. Where the state-level initiatives imposed obligations on plaintiffs and their counsel in state court, the federal bills would impose public and private reporting obligations on the trusts. 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, legislation to amend the Bankruptcy Code to require these disclosures was introduced in 2012. This legislation, the Furthering Asbestos Claims Transparency (FACT) Act of 2012, would have amended Section 524(g) of the Bankruptcy Code to require 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. Confidential medical records and the claimant’s full social security number were expressly excluded from these public reports. 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. 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. The Furthering Asbestos Claims Transparency (FACT) Act of 2013 was identical in all material respects to the final version of the 2012 act.

147 FACT ACT REPORT, supra note 76, at 13-14 (noting that this failure was due to the perception that such requirements were more appropriately left to Congress).
148 Id.
149 Id.
150 Id. This tracks Bankruptcy Rule 9037(a), which allows parties to include only the last four digits of their social security number where the number is required.
151 See id.
152 See id.
BANKRUPTCY TRUSTS

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. 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. 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.\footnote{See note 90, supra.}

From a governance perspective, however, it may be more instructive to view the trusts as extensions of the bankruptcy estate.\footnote{Accord Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869 (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”).} Like their debtor-in-possession predecessors, bankruptcy trusts manage a limited fund. They also assume a role most often left to the court: post-confirmation claim review and approval. 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. 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 suggest a need for greater oversight and transparency than private settlements in the tort system.155

In this context, transparency serves two basic objectives. 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.156 Second, the absence of transparency lends itself to questions about the integrity and legitimacy of the process, especially where the system consistently generates poor outcomes for stakeholders. And given the trust system’s recent performance,157 legislation that demands greater transparency or some other form of oversight was, perhaps, inevitable.

2. Addressing Fraud and Abuse

“Fraud,” as many advocates of trust transparency use the term speaks more to social norms than criminal con-

155 There are, of course, other ways in which trusts vary from solvent defendants in the tort system. Solvent defendants are free to adapt their settlement strategies to reflect their experiences, changes in underlying law and procedure and so on. 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 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. 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.

156 See Brown, WITHOUT COMPROMISE, supra note 10, 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).

157 Id., at 919-25.

158 Brown, FOREVER, supra note 9, at 574-78 (demonstrating that trust assets are declining at a rapid rate); Scarcella & Kelso, supra note 59, at 51 (discussing the impact of these reductions on payments to victims).
duct. 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 current gaps between the trust and tort system allow claimants to shape misleading “realities” in one or both to maximize recovery. 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 norm concerning meritorious claims. 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. And given that every such payment to parties asserting dubious claims represents a reduction in payments 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.

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 discussing the issue. Even this narrow argument, however, appears inconsistent with the experience of compensation funds generally,159 some bankruptcy trust representatives’ concerning the claims submit-

ted to the trusts,\textsuperscript{160} and the fact that similar conduct has been found fraudulent elsewhere.\textsuperscript{161}

When these representations are viewed in light of what is known about trust reviews and audits, however, the suggestion that fraud has not been uncovered is understandable. 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\textsuperscript{162} – but legal fraud is rarely so cut-and-dry, especially when there is little available information.\textsuperscript{163} In other cases, the review may simply conclude if the claim is approved or the claimant does not respond to a deficiency notice. If the claim is audited, the risk of discovery depends upon the nature and extent of the audit; not all “audits” are the same.\textsuperscript{164} Indeed, although some trusts may have aggressive audit plans that attempt to identify and deter abusive

\textsuperscript{160} Transcript of Hearing on H.R. 982, Furthering Asbestos Claim Transparency (FACT) Act of 2013, March 13, 2013, at 49 (testimony of Elihu Inselbuch)(arguing that some trusts have found “far more interesting discrepancies” than reported by others); Complaint for Declaratory Judgment at 2, W. Asbestos Settlement Trust v. Mandelbrot, No. 12-04190 (N.D. Cal. Sept. 19, 2012)(in the first suit of its kind, asserting, among other things, that a law firm employed dubious patterns and practices in submitting claims and seeking declaratory relief in response to litigation threats from the firm).


\textsuperscript{162} S. Todd Brown, Specious Claims and Global Settlement, 42 U. MEM. L. Rev. 559, 609-10 (2012).

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 619-26.
patterns and practices, some report that they do not track the claim-level data necessary to conduct stratified, target-
ed audits when questionable practices or patterns may war-
rant such an approach.\textsuperscript{165}

Not surprisingly, these discussions most often have a
two-ships-passing-in-the-night quality, which the competing
voices appear largely satisfied to perpetuate. For defen-
dants, “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. For plaintiffs, this focus on
“fraud” shifts the debate away from the policy justifications
for those tools to a narrow category of conduct whose impact
cannot be ascertained empirically. Thus, the remainder of
this discussion focuses on the policy arguments on their own
terms rather than further unpacking the confusing and un-
duly inflammatory “fraud” characterization.

a. The Bankruptcy Policy Argument

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

First, the intrinsic merit question appears simple at
first glance, but its answer ultimately relies upon a complex

\textsuperscript{165} See Supplemental Letter from Douglas A. Campbell to House Subcommittee,
dated March 20, 2013 (acknowledging that the four trusts represented by
counsel do not currently track and compile the information required under the
FACT Act). As I 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 for S. Todd Brown, SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL
AND ANTITRUST LAW HEARING ON H.R. 982, THE “FURTHERING ASBESTOS CLAIM
normative assessment of what makes a claim meritorious. 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 or the other approach, 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.166 This process strongly favors current claimants above future victims notwithstanding statutory language to the contrary.167 Barring extensive changes to the process, and regular oversight to ensure that these changes are achieving the desired ends, it is likely to favor current claimants in the future.

Accordingly, to obtain confirmation, the resulting trust distribution procedures must appeal both to those advancing 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).168 Thus, we should not be surprised when trust criteria and payment levels that are satisfactory to current claimants at confirmation prove unsustainable and,

166 Courts, in turn, have suggested that resolving such policy questions should be left to Congress. In re Federal-Mogul Global, 684 F.3d 355, 362 (3d Cir. 2012).

167 684 F.3d 355 at 360.

168 See note 9, supra.
ultimately, require reductions in payments to future victims. 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.

I have suggested elsewhere that transparency should promote internal trust reforms that better protect future victims’ interests; and though I have remain confident in this assessment, its immediate value lies in the extent to which these policy questions can be addressed empirically. 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. Likewise, the extent to which other cost-effective mechanisms may be employed that better capture these norms may be informed by a better understanding of how differences across the trusts have impacted claim submissions and payments.

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 and materials and, ultimately, payment information. 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.

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. Of course, defense counsel must remain vigilant and ultimately use this information to investigate

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169 Brown, FOREVER, supra note 9, at 584-85.
and develop admissible evidence; the FACT Act does not purport to alter state rules concerning relevance or admissibility at trial.

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

For those who view settlement as the preferred or only endgame in civil litigation, however, the FACT Act may be undesirable in some circumstances. This is because the plaintiff’s the ability to conceal trust payments may encourage plaintiffs and defendants to settle. Plaintiffs, for example, knowing that they have received substantial trust payments may want to settle because the potential upside at trial is low. 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 accounting for judgment molding to account for these settlements. Yet in states that require plaintiffs to file all trust claims 75 or 90 days before trial, it is possible that one or more claims will be paid and reported publicly while pre-trial negotiations are ongoing. Even in states without such requirements, defendants can develop information about specific plaintiffs’ firms’ settlement histories that reflect their trust claiming and payment patterns that are more accurate than relying upon assumptions about these practices as they largely must do today.
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 the range of likely additional recovery at trial would be between zero 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 we 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 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 their 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 the defendant will prevail on one of 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.

If both sides are aware of the actual existing settlement values, however, the plaintiff may be willing to settle the claim at $400,000, but the defendant may view the risk at trial as acceptable. Now the potential downside, exclusive of defense costs, is not $800,000; it is only $100,000. Depending on the defendants’ assessment of the strength and weaknesses of any available defenses, the defense may
accept only a much lower settlement or prefer to roll the
dice at trial rather than set a precedent for future settle-
ments. Thus, by precluding the plaintiff from enjoying the
benefit of information asymmetries concerning her extraor-
dinary trust settlement, the FACT Act may, in this case,
dermine settlement talks.

This scenario assumes several facts that, of course,
are unlikely to be true across cases. Information asymm-
etries concerning trust claim payments will not always be
sufficient to alter the parties’ respective settlement pos-
tures, especially where a plaintiff’s trust exposures are al-
ready known to the defendant and the claims are all paid at
the trusts’ respective scheduled values. Unknown defend-
ant settlement amounts may also far exceed any payments
from the trusts. 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; thus, 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. And, of course,
some defendants may continue to insist upon going to trial
even in cases where settlement appears rational.

3. The Privacy Question

Another common critique of the FACT Act is that it
“would require the trusts to publicly disclose extensive, in-
dividual and personal claim information.” A similar criti-
cism suggests that the act “could further victimize unsus-
ppecting asbestos victims by requiring information about
their illness to be made publically available to anyone who
has access to the Internet” and, accordingly, this infor-
mation could “be used by data collectors and other entities

170 Andrew Cochran, Why Would We Dishonor Veterans’ Injury Claims and
Invade Their Privacy, MADISON COUNTY RECORD, May 23, 2013.
171 FACT Act Report, supra note 76, at 31 (dissenting views).
for purposes that have absolutely nothing to do with compensation for asbestos exposure."\textsuperscript{172}

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. 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 schedules.\textsuperscript{173} The personal information to be disclosed under the act – name and nature of the injury asserted\textsuperscript{174} – is far from “extensive;” rather, it is the sort of information that is already available concerning litigants on public dockets in state court and, at times, available on the Internet. This information has been disclosed in the past in bankruptcy cases,\textsuperscript{175} 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.\textsuperscript{176}

Second, although it is true that the legislation would require trusts to file quarterly reports on the public docket in the bankruptcy case, this does not create any serious risk of intrusion. Contrary to the suggestion above, the dockets for these closed cases are not typically available on the Internet.\textsuperscript{177} Moreover, courts frequently modify or limit access to files that contain personal information through protective

\textsuperscript{172} Id.

\textsuperscript{173} Brown, FOREVER, supra note 9, at 588-89.

\textsuperscript{174} Consistent with the limitations on identifying information found in Bankruptcy Rule 9037(a), the FACT Act expressly precludes the disclosure of social security numbers. \textit{Furthering Asbestos Claim Transparency (FACT) Act of 2012}, H.R. 4369, 112th Cong., at § 2 (2d Sess. 2012).

\textsuperscript{175} Brown, FOREVER, supra note 9, at 589.

\textsuperscript{176} Id.

\textsuperscript{177} Brown, FOREVER, supra note 9, at 589 (noting that documents on the dockets in closed cases, including asbestos bankruptcy cases, are no longer available on PACER).
orders and screening those seeking access, and nothing in the FACT Act forecloses this option with respect to the trusts’ reports.

IV. 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 at a given defendant or trust. From a systemic standpoint, it 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. This section discusses the commons problem as a matter of local (individual defendants) and systemic (across defendants and trusts) depletion and 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. Initially, the automatic stay in bankruptcy erects an absolute barrier to access; suspending all ability to proceed against the debtor for recovery. 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 rational self-interests made litigation and settlement in the tort system unsustainable. 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.\(^\text{180}\)

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. Trusts pay claims faster, employ weaker compensation standards than the tort system and frequently lack robust, comprehensive quality controls.\(^\text{181}\) Current plaintiffs with weaker claims may thus benefit: obtaining compensation from a trust where their claims would not have been viable in the tort system. 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. 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.

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.\(^\text{182}\) Others may suspend payments for extended periods to preserve assets.\(^\text{183}\) Trusts may not be intended to carry only a fraction of the liability

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\(^\text{180}\) Accord 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”).

\(^\text{181}\) Brown, FOREVER, supra note 9, at 559-73 (discussing quality controls at bankruptcy trusts).

\(^\text{182}\) Id., at Appendix A (listing payment percentages across trusts).

\(^\text{183}\) See Part I.B.2.b., supra.
share that their predecessors carried in the tort system, but they most often do so within a few years.\footnote{Brown, FOREVER, \textit{supra} note 9, at 574-78.} 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.

\textit{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. 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. It also demonstrates that the past and future transformation of claims against solvent lead defendants into claims against underfunded trusts has broader, global implications. Due to the linkages among them, the rapid depletion of one commons will create still more pressure on others. And given the projected duration of asbestos litigation in the United States, this suggests that we will not only see more defendant bankruptcies but also a period of expanded and accelerating scarcity for plaintiffs seeking compensation.

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 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.
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.\textsuperscript{185} 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.\textsuperscript{186} 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.\textsuperscript{187}

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.\textsuperscript{188} Thus, asbestos litigation will likely remain a pervasive presence in the civil justice system as long as most of today’s judges remain on the bench.\textsuperscript{189}

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

\textsuperscript{186} ROBERT L. VIRTA, U.S. GEOLOGICAL SURVEY, MINERAL COMMODITY SUMMARIES, at 22 (2013).
\textsuperscript{187} VIRTA, supra note 189, at 31.
\textsuperscript{188} JUDICIAL EDUCATION PROGRAM TRANSCRIPT, supra note 6, at 492 (Mark Behrens).
\textsuperscript{189} Id.
entered bankruptcy by 1993.\textsuperscript{190} As noted previously, that number has grown to roughly 100 companies today; “the major producers of asbestos have virtually all been forced into bankruptcy.”\textsuperscript{191} 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.

Of course, the tort system accounts for the potential bankruptcy of one or more co-defendants. In some states, that risk is borne by the plaintiff; in others, defendants must make up any deficiency. Still others transfer unpaid bankrupt liability shares only to those defendants who are at fault above a certain threshold. 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 opaque nature of the current system may surreptitiously alter their effect across cases.

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. 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- and long-term liability exposure considerably. 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.

\textsuperscript{190} Ronald L. Motley & Joseph F. Rice, The Carlough Settlement -- Blueprint for a Sane Resolution to the Asbestos Problem, Mealey’s Litig. Rep.: Asbestos, July 2, 1993, at 4 (“All in all, seventeen (17) former asbestos defendants – representing one-half to three-quarters of the original liability share – have gone into bankruptcy.”).

\textsuperscript{191} Id., at 493.
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. In that case, compensation rights are limited not because the available resources are overrun but because the civil justice system effectively closes its doors. 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.

The various transparency proposals advanced to date, 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. 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. Future legislation that goes beyond the reach of the Ohio and Oklahoma acts, 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 and other solvent defendants will be able to fill the compensation void.

As an initial matter, it may be assumed that the sheer volume of asbestos defendants may provide the ultimate check on global compensation scarcity. After all, of the roughly 10,000 entities that have been named as de-
fendants during the first four decades of this litigation, only 100 have entered bankruptcy. These numbers, combined with the plaintiffs’ bar’s historical success in adapting to the changes within asbestos litigation generally, 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. 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 corporate defendants, will diminish over time. As new lead defendants become increasingly removed from the industry, 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. 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.

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. The two are, of course, interrelated. If plaintiffs’ evidence against solvent defendants is insuffi-

cient to warrant a pattern of favorable judgments at trial or demand high-value settlements, these defendants are unlikely to pursue bankruptcy to address their asbestos liabilities. 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.

Given that some appear to have compensable claims only against established trusts today, the risk of global scarcity is not academic; it is, for some, already a reality. Whether they worked in professions that have already been depleted or past reforms present insurmountable barriers to compensation for their legitimate non-malignant injuries, scarcity played a role in shaping how their claims are compensated today. 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. Comparisons to 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. 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 neces-

193 ABA JUNE 5 TRANSCRIPT, supra note 130, at 63.
sarily shifts any risk of unsustainability to future generations.

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. 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. To that end, some form of enhanced oversight at 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.

Conversely, although plaintiffs’ firms and groups present a disturbing picture of the potential recoveries for some plaintiffs today, the desire to maximize their recoveries conflicts with the interests of similar future victims in ensuring that sufficient assets remain available to compensate them. This conflict is perhaps best demonstrated by the degree to which choices that favored victims in the past have impacted today’s victims. Early trusts made the ill-fated decision to adopt exceedingly low qualification standards that led to their early depletion. 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. 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

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194 In re Amatex 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 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, 626 (1997).

195 ABA JUNE 6 TRANSCRIPT, supra note 55, at 7.
costs\textsuperscript{196} – this advantage appears to have been more than offset by the resulting surge in claims received and paid.\textsuperscript{197} And just as delay may serve defendants’ interests at trial, 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.

**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. 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 caused – largely as rhetorical distractions in a broader,

\textsuperscript{196} 684 F.3d 355 at 360.

\textsuperscript{197} See note 158, supra.
more significant policy discussion. Some of the arguments, including the suggestion that the proposals would lead to the public release of "extensive" and "sensitive" information, are demonstrably false. Other arguments, including the suggestion that fraud is rampant across trusts and the tort system, cannot be verified empirically. The privacy and fraud arguments, however, advance their respective groups' interests by stirring public outrage and, with respect to victims, fear that may drive them to action; but they ultimately do more to confuse the policy discussion than advance it.

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. Shaping policy to address these complex questions, however, demands more careful and searching reflection than the talking points suggest.