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HOUSE OF REPRESENTATIVES

JUDICIARY  
COMMITTEE HEARING

STATE CAPITOL  
HARRISBURG, PA

MAIN CAPITOL BUILDING  
ROOM 140

MONDAY, JANUARY 11, 2016  
10:05 A.M.

PRESENTATION ON  
HOUSE BILL 1428  
TRANSPARENCY IN LITIGATION INVOLVING BANKRUPTCY

BEFORE:

HONORABLE RONALD MARSICO, MAJORITY CHAIRMAN  
HONORABLE SHERYL M. DELOZIER  
HONORABLE GARTH EVERETT  
HONORABLE BARRY JOZWIAK  
HONORABLE MARK KELLER  
HONORABLE KATE KLUNK  
HONORABLE TEDD NESBIT  
HONORABLE MIKE REGAN  
HONORABLE RICK SACCONI  
HONORABLE MARCY TOEPEL  
HONORABLE TARA TOOHIL  
HONORABLE MIKE VEREB  
HONORABLE MARTINA WHITE  
HONORABLE JOSEPH PETRARCA, DEMOCRATIC CHAIRMAN  
HONORABLE BRYAN BARBIN  
HONORABLE TIM BRIGGS  
HONORABLE TINA DAVIS  
HONORABLE JASON DAWKINS  
HONORABLE MADELEINE DEAN  
HONORABLE DANIEL MILLER  
HONORABLE GERALD MULLERY  
HONORABLE BRANDON NEUMAN

\* \* \* \* \*

*Pennsylvania House of Representatives  
Commonwealth of Pennsylvania*

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I N D E X

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\* \* \*

(See submitted written testimony and handouts online.)

1 P R O C E E D I N G S

2 \* \* \*

3 MAJORITY CHAIRMAN MARSICO: Welcome to the House  
4 Judiciary Committee hearing on the issue of asbestos-  
5 related litigation involving bankruptcy trust.

6 Good morning. Good to see everybody here bright  
7 and you look all ready to go. I just wanted to mention  
8 that if you can silence your cell phones, please. You can  
9 see that this hearing is being recorded as well.

10 Representative Kampf introduced the bill on this  
11 subject, which is House Bill 1498. The bill was sponsored  
12 during the last legislative session by Representative Bryan  
13 Cutler. And as many of you know, last session, this  
14 Committee had a hearing on this bill and examined this bill  
15 actually for a long time.

16 Representative Kampf's House Bill 1498 addresses  
17 a topic of litigation work involving asbestos-related  
18 bankruptcy trust, like I said. The bill would create the  
19 Fairness in Claims and Transparency Act.

20 Asbestos litigation and bankruptcy laws can be  
21 complicated topics, as we all know. They certainly can be  
22 intimidating topics for those that are unfamiliar with  
23 them. For that reason, the Committee decided to hold a  
24 second hearing on this bill.

25 Hopefully, this public hearing will help the

1 Committee, especially the new Members of the Committee, and  
2 the public to be able to understand the issues raised by  
3 asbestos litigation involving bankruptcy trust.

4 I am very pleased to say that we have a very top-  
5 notch group of testifiers with us today. We welcome all of  
6 you and look forward to your testimony.

7 With that, I'm going to turn things over to  
8 Representative Kampf, who will make introductory marks  
9 about his bill. Good morning. Good to see you.

10 REPRESENTATIVE KAMPF: Good morning. Good to see  
11 you, Mr. Chairman.

12 And thank you, Chairman Marsico, Chairman  
13 Petrarca, Members of the Committee, for having this hearing  
14 in this session on this legislation.

15 Just quickly, the legislation in my mind does two  
16 things. First off, for asbestos claims, fundamentally what  
17 it does is create, like we did in the Fair Share Act, the  
18 ability to present the whole picture to a jury in a trial  
19 court setting. As some of you may know, there are  
20 bankruptcy trusts which have been set up, dozens of them  
21 over the years, principally for the main tortfeasors, those  
22 who manufactured the asbestos insulation and other  
23 products. And claims are able to be made to those trusts  
24 to this day. I think there are about \$30 billion all told  
25 in those trusts available for claims going forward.

1           The problem is that most of that information is  
2 really never shared with the jury in a trial court case,  
3 and today's trial court cases are basically against what  
4 I'll call peripheral defendants. If you hearken back to  
5 the Fair Share Act, these are defendants who have limited  
6 liability for the injury, but when the jury is faced with a  
7 claimant who has, for example, mesothelioma, a terrible  
8 condition that was caused by asbestos, and only one or two  
9 defendants, even if they happen to be peripheral or limited  
10 in their causing of the injury, the jury feels sympathy for  
11 the claimant and desires to make an award. The problem is  
12 the jury is not really made aware of anything that's gone  
13 on in the bankruptcy trust context.

14           And so this bill essentially apportions liability  
15 between the bankruptcy setting and the trial court setting.  
16 So it really in my mind implements the Fair Share Act in  
17 this particular context.

18           And the second thing it does is it fundamentally  
19 requires that those claims that a claimant may have against  
20 the trusts, the bankruptcy trust, be filed before the trial  
21 in the court case and that the court identify claims that  
22 could be filed reasonably. And the reason for that is so  
23 that the jury and the fact-finder and the judge have all of  
24 the information in front of them during that trial of those  
25 defendants that are non-bankrupt that are before the court.

1 So, fundamentally, that's what, in my mind, the legislation  
2 does.

3 And before I conclude, Chairman, I would just  
4 commend every Member of the Committee a decision that came  
5 out after the last hearing in this Committee. It was the  
6 *Garlock* decision, Federal Bankruptcy Court, I believe, in  
7 North Carolina. And it was a bankruptcy of *Garlock*, a  
8 company. The application for bankruptcy was filed in 2010.  
9 The decision, however, was rendered by the court in 2014  
10 after an extensive investigation in both the bankruptcy  
11 context and also in the trial court context. It's got  
12 great information in it. With your indulgence, I might by  
13 email share it with all the Members of the Committee if  
14 it's not shared. And it, in my mind, is the best argument  
15 for doing 1428 as law in Pennsylvania.

16 Thank you, Mr. Chairman.

17 MAJORITY CHAIRMAN MARSICO: Well, thank you,  
18 Representative.

19 Before we go to our first panel, I'm going to ask  
20 the Members here to introduce themselves. We'll start on  
21 the far end from my right.

22 REPRESENTATIVE DAWKINS: Representative Jason  
23 Dawkins, Philadelphia County.

24 REPRESENTATIVE MULLERY: Representative Gerry  
25 Mullery, Luzerne County.

1                   REPRESENTATIVE MILLER: Representative Dan  
2 Miller, Allegheny County.

3                   REPRESENTATIVE NEUMAN: Brandon Neuman,  
4 Washington County.

5                   REPRESENTATIVE BARBIN: Representative Bryan  
6 Barbin, Cambria County.

7                   REPRESENTATIVE JOZWIAK: Representative Barry  
8 Jozwiak, Berks County.

9                   REPRESENTATIVE DAVIS: Tina Davis, Bucks County.

10                  REPRESENTATIVE KELLER: Representative Mark  
11 Keller, Perry and Cumberland County.

12                  REPRESENTATIVE SACCONI: Representative Rick  
13 Saccone, Allegheny and Washington Counties.

14                  REPRESENTATIVE EVERETT: Garth Everett, Lycoming  
15 and Union Counties.

16                  REPRESENTATIVE NESBIT: Tedd Nesbit, Mercer and  
17 Butler Counties.

18                  REPRESENTATIVE KLUNK: Kate Klunk, York County.

19                  REPRESENTATIVE TOEPEL: Marcy Toepel, Montgomery  
20 County.

21                  REPRESENTATIVE WHITE: Martina White,  
22 Philadelphia County.

23                  REPRESENTATIVE TOOHL: Good morning. Tarah  
24 Toohl, Luzerne County.

25                  MR. DYMEK: Tom Dymek, Committee Executive



1 Director.

2 MAJORITY CHAIRMAN MARSICO: Ron Marsico, Chair,  
3 Dauphin County.

4 DEMOCRATIC CHAIRMAN PETRARCA: Joe Petrarca,  
5 Democratic Chair, Westmoreland, Armstrong, and Indiana  
6 Counties.

7 MS. SPEED: Sarah Speed, Democratic Executive  
8 Director.

9 MAJORITY CHAIRMAN MARSICO: Okay. Our first  
10 panel of testifiers are Sam Marshall, Sam, President and  
11 CEO of the Insurance Federation; Sam Denisco, Vice  
12 President, Pennsylvania Chamber of Business and Industry.  
13 And do you have others coming up? Kevin Shivers, State  
14 Director, NFIB. Anyone else? Is Mark Behrens here or John  
15 Hare or --

16 MR. MARSHALL: Yes, Mr. Chairman, they are, and  
17 Sam Denisco and Kevin and I were going to be mercifully  
18 brief.

19 MAJORITY CHAIRMAN MARSICO: Okay.

20 MR. MARSHALL: You don't always --

21 MAJORITY CHAIRMAN MARSICO: That's fine.

22 MR. MARSHALL: -- expect that from me but --

23 MAJORITY CHAIRMAN MARSICO: Do what you want to  
24 do.

25 MR. MARSHALL: But we were just going to, on

1       behalf of the business and insurance communities,  
2       reiterate, as we've done in past sessions, our support of  
3       this bill as solving what we see as an unintended loophole  
4       in the Fair Share Act in bringing asbestos claims into the  
5       same construct as all other claims under the Fair Share  
6       Act.

7                       We have put together today for the Committee's  
8       consideration experts on this, people who deal with it day  
9       in, day out in the Pennsylvania courts and people who have  
10      dealt with this issue across the country. As  
11      Representative Kampf mentioned, it's been a problem in  
12      other States that other States have been addressing. So we  
13      just want to, as business and insurers, thank you for your  
14      consideration and really turn it over to the real experts,  
15      who are the people who are going to come up next.

16                      MAJORITY CHAIRMAN MARSICO: That's fine. And  
17      that would be Mark Behrens, correct --

18                      MR. MARSHALL: Mark --

19                      MAJORITY CHAIRMAN MARSICO: -- John Hare, and  
20      Peter Neeson, is that correct? You're welcome to come up.  
21      I think that they're here.

22                      MR. MARSHALL: They're the guys who you really  
23      want to hear from.

24                      MAJORITY CHAIRMAN MARSICO: Okay. Thank you very  
25      much --

1 MR. MARSHALL: Thank you.

2 MAJORITY CHAIRMAN MARSICO: -- for arranging them  
3 to be here. And we appreciate that.

4 So Mark Behrens, Esquire, Shook, Hardy & Bacon,  
5 LLP; John Hare, Esquire, Marshall Dennehey Warner Coleman &  
6 Goggin; and Peter Neeson, Esquire, Rawle & Henderson.

7 Good morning, gentlemen.

8 MR. BEHRENS: Good morning.

9 MAJORITY CHAIRMAN MARSICO: Good to see you.

10 MR. HARE: Good morning, Mr. Chairman.

11 MR. NEESON: Good morning, Mr. Chairman.

12 MR. BEHRENS: Flood you with paper. I've got a  
13 little packet that's going to explain -- can I leave it  
14 here?

15 MAJORITY CHAIRMAN MARSICO: Well, we'll have  
16 staff distribute it. Sure.

17 MR. BEHRENS: Ready to begin?

18 DEMOCRATIC CHAIRMAN PETRARCA: When you're ready  
19 to --

20 MR. BEHRENS: Mr. Chairman. Thank you very much.  
21 My name is Mark Behrens. I'm a partner in the public  
22 policy group of Shook, Hardy & Bacon. As an international  
23 law firm, I'm based in Washington, D.C. I've spent the  
24 better part of 15 years now studying asbestos litigation  
25 and writing out it probably more than anybody in the

1 country. I don't do the underlying litigation. I'm sort  
2 of like a professor, and I study trends and I write about  
3 them and I serve as an expert in the area.

4 And I'm here today on behalf of the U.S. Chamber  
5 of Commerce Institute for Legal Reform. Asbestos  
6 bankruptcy transparency is a national priority for the  
7 Chamber and all of our members nationwide and particularly  
8 here in Pennsylvania.

9 I'm going to give a framework of sort of the  
10 background on this and provide the national perspective  
11 today and hopefully make this a little bit of an  
12 interesting -- I teach torts once in a while, and so I'm  
13 going to make it a little bit of a torts class as we go  
14 along the way and help maybe make TV more interesting for  
15 you because you can't turn on TV today without seeing  
16 countless ads running every 15 minutes or so about do you  
17 have mesothelioma, which is a terrible disease. And over  
18 the past few years, you even see some ads that don't even  
19 talk about lawsuits. They talk about trust and billions of  
20 dollars, over \$30 billion available in bankruptcy trust to  
21 pay claimants.

22 And when we talk about trust claims, I'll hand  
23 out a form. I went online. Anybody can do this. And  
24 literally, this took me about less than four minutes to  
25 find a claim. I found a Pennsylvania company, Armstrong

1 World Industries, which was headquartered in Lancaster, and  
2 here's a claim form. So when we're talking about  
3 bankruptcy trust claims, I thought it would be helpful for  
4 the Committee just to see what we're talking about.

5 And, anyway, what you'll be able to see is that  
6 the claims are very simple. They ask for the claimant's  
7 name, they ask for where do you live, where did you work,  
8 what did you do, and then you sign it. So you go in and  
9 most them have work sites. You check off a box saying you  
10 worked at a particular worksite, you check off a box saying  
11 you worked at a particular occupation, you check off a box  
12 saying that you have a particular disease. If you meet  
13 those criteria, you're going to get a payment. The trust  
14 system is set up to pay claimants quickly and easily.

15 Now, how do we get here? Asbestos litigation has  
16 been going on for over 40 years, and for most of the  
17 history of the litigation, it was focused on the companies  
18 that made and sold asbestos thermal insulation. These are  
19 the shipyard workers. A lot of them come out shipyards and  
20 refineries because asbestos was used all over in shipyards  
21 to insulate ships, both to keep heat in in steam pipes and  
22 also to protect the sailors from just extreme heat that  
23 would be in the bottom of a ship. So you have asbestos all  
24 over ships, thermal insulation.

25 Those companies were the target of asbestos

1 plaintiffs' lawyers through the '70s, the '80s, and through  
2 the '90s. And what happens between 1999 and about 2002 is  
3 virtually every one of those companies is forced into  
4 bankruptcy, including Armstrong and a lot of companies like  
5 it. Owens-Corning Fiberglass, the Pink Panther insulation,  
6 you see the ads for those on TV. One hundred companies  
7 forced into bankruptcy in a very short period of time,  
8 wiping out virtually all of the manufacturers of asbestos  
9 thermal insulation.

10 Well, because of the bankruptcy system, what  
11 happens is those companies are allowed to reorganize. And  
12 when they reorganize, a trust fund is set up to pay claims  
13 for exposures to those companies' products. So the  
14 companies emerge from bankruptcy but there is a pot of  
15 money left behind to compensate people injured by those  
16 companies' products.

17 Collectively today, there are roughly 60 trusts  
18 in operation, and they hold over \$30 billion in assets. So  
19 we have one avenue for recovery in the trust system,  
20 responsible for the historical exposures that plaintiffs  
21 always allege were responsible for their injury. And over  
22 the last 15 years, plaintiffs have branched out and they've  
23 named companies that were either not named historically in  
24 the litigation or they were minor players.

25 And I'm going to tell the story of Garlock

1 because a lot of people hear about that. Garlock is an  
2 example of how the litigation evolved against companies  
3 that, before the bankruptcy wave, had been peripheral  
4 defendants. Garlock makes gaskets. You can take a gasket  
5 and bang it on a table, you're not going to get any  
6 asbestos fibers from it. Garlock had been a minor player.  
7 They had been a defendant in litigation, but they had paid  
8 very minimal sums or been dismissed from cases. Why?  
9 Because you can't get sick from the gasket. It's an  
10 encapsulated product. It's made out of a less potent type  
11 of fiber, and therefore, the plaintiffs' lawyers correctly  
12 were focused on the insulation defendants until they were  
13 gone. So then they started suing Garlock.

14           And Garlock, who's paying all these claims,  
15 Garlock starts asking plaintiffs were you exposed to any  
16 other products? Were you exposed to insulation? Time and  
17 time again in their cases the plaintiffs testimony now  
18 becomes I don't recall ever being exposed to those products  
19 or they actually said I was never exposed to those  
20 products.

21           Now, these are the products for 25 years were the  
22 principal target defendants in asbestos cases. All of a  
23 sudden, any memory of those products is gone. And Garlock  
24 starts facing cases where they are the lone defendant  
25 standing there, and they are trying to say, hey, maybe we

1 were involved but we were only a small player. It was all  
2 these other guys. But they can't do that because there's  
3 no testimony now that these other people are at fault.

4           So Garlock goes forward. After they go into  
5 bankruptcy, they are allowed, then, to go to into the trust  
6 in cases where they were told there were no other exposures  
7 or plaintiffs didn't recall any other exposures. After the  
8 fact, they go to the trust and they say let's look at what  
9 happened in these cases where we were told that plaintiffs  
10 had no other exposures. And in every single case where  
11 they were able to get discovery from the trust, they found  
12 out that after their tort case settled, and sometimes even  
13 while it was going on, while they were being told there  
14 were no other exposures, the plaintiffs were filing claims  
15 with all these trusts saying there were other exposures.  
16 In the average case, 22 average, the average case they were  
17 filing 22 trust claims and getting \$600,000 outside of the  
18 tort system.

19           So Pennsylvania cases, this is in the *Garlock*  
20 opinion, the judge, after hearing a month of testimony,  
21 cross examination from both sides, just one example, in a  
22 Philadelphia case, Garlock settled for \$250,000. The  
23 plaintiff did not identify any exposure to the bankrupt  
24 companies' asbestos products. Further, in written  
25 interrogatories, the plaintiff's lawyers said the plaintiff



1 had no personal knowledge of any such exposure. Discovery  
2 in the bankruptcy case showed, however, that six weeks  
3 earlier, six weeks before the plaintiff said I didn't have  
4 any other exposures, he filed a statement in the Owens-  
5 Corning bankruptcy swearing that he frequently, regularly,  
6 and proximately breathed asbestos from those products.

7 In total, the judge said this plaintiff's lawyer  
8 failed to disclose exposure to 20 different asbestos  
9 products for which the plaintiff filed trust claims.  
10 Fourteen of these claims were submitted by sworn statements  
11 by the plaintiff himself.

12 So this is just one example. It has got a lot of  
13 attention. In the packet there are many, many other  
14 examples from all over the country, other cases from here  
15 in Pennsylvania, cases from Delaware, cases from Maryland,  
16 cases from Texas. This is not something that's unique to  
17 any one State or any one plaintiff's lawyer. The Garlock  
18 judge found suppression of evidence in every single case he  
19 looked at, and he said, oh, it's a small sample, but  
20 because of what I've seen, I think if I look at more  
21 samples, I'd find the same thing.

22 And in fact, that analysis was done -- I don't  
23 want to step on the toes of another panel, but the Bates  
24 White folks, Pete Kelso and Mark Scarcella, did a terrific  
25 study at the end of this year where they said, well, maybe

1 Garlock -- everybody knows Garlock is not a unique  
2 experience. They're one of dozens of defendants named in  
3 cases. But let's look at another company and see what  
4 happened to them because now we know from the Garlock  
5 database what trust claims were filed by different  
6 plaintiffs.

7           So they looked at different cases, and they found  
8 over 80 percent of the time -- when Crane Co., a large  
9 defendant today, asked for information about plaintiff  
10 exposures, they didn't get it.

11           So we know that this is an epidemic of  
12 suppression of evidence. The judge didn't call it fraud  
13 because the rules of the game in many States today allow  
14 plaintiffs to game the system by bringing their tort case  
15 first and trying to tell one story of exposures to the jury  
16 to maximize their recovery from the jury, and then when the  
17 tort case is over, then they can go file the trust claims.  
18 And oftentimes, they tell a different story of the  
19 plaintiffs' exposures to maximize their recovery from the  
20 trust.

21           And so what other States are doing across the  
22 country is to try to bring transparency between these two  
23 systems to have a fully informed jury so the jury hears all  
24 the facts about all of the plaintiffs' exposures, and they  
25 can fairly allocate liability where it belongs and to

1 promote honesty in litigation so you don't have these kind  
2 of games and kind of suppression of evidence that were  
3 talked about in the Garlock and the Crane Co. studies. And  
4 that is what the Pennsylvania FACT Act would do, and that's  
5 why the U.S. chamber strongly supports the legislation.  
6 And thank you for your leadership.

7 MR. HARE: Good morning, Mr. Chairman, and  
8 Members of the Committee. My name is John Hare. I am the  
9 Chair of the Appellate Litigation Department at the  
10 Philadelphia-based law firm of Marshall Dennehey. We have  
11 16 offices in six different States, and at any given time,  
12 we handle in excess of 1,000 asbestos lawsuits. About 300  
13 of those are listed for trial every year in the various  
14 jurisdictions in which we work. And I have been involved  
15 in the trial and appellate litigation of asbestos cases for  
16 more than 15 years.

17 Mr. Behrens did, and other speakers will, outline  
18 the national scope of this problem, which was really  
19 brought to light by the Garlock case, but there are many  
20 others as well. And they highlight this problem, this very  
21 powerful incentive that plaintiffs have to conceal and  
22 delay trust filings in order to maximize recovery in the  
23 civil litigation system. That is exactly what happens.  
24 And sort of my point in talking today is to point out that  
25 this is extremely prevalent in Pennsylvania as well and to

1 briefly describe how this act addresses it and how  
2 addressing it will also close what we can describe as the  
3 asbestos loophole in the Fair Share Act, a very important  
4 statute that this body, the Legislature, generally passed  
5 in 2011, which closed off in almost all cases joint and  
6 several liability and brought Pennsylvania in line with the  
7 vast majority of other States that had done that really in  
8 the 1980s and 1990s. So this asbestos loophole does exist  
9 in the Fair Share Act, and expressly, this statute or this  
10 bill if it would become a statute, tries to close that  
11 loophole.

12           So I'd start with this question of how prevalent  
13 this problem that Mr. Behrens described is in Pennsylvania.  
14 So I took a random sample of 21 of our own files, asbestos  
15 files that we have pending. And in every one of those  
16 cases, we sent discovery to the plaintiffs asking if they  
17 had filed trust claims, simple question, did you file trust  
18 claims in these cases? In every one of those cases, the  
19 plaintiffs denied filing trust claims. Those cases were  
20 then resolved by verdict for settlement, and we then went  
21 back to the Johns Manville Trust, maybe the most prominent  
22 of the trusts, certainly not the only one, but it's one of  
23 the few that allows you to request directly from them  
24 information about filed claims. And the Johns Manville  
25 Trust responded that in 17 of those cases, not only had

1 claims been filed, but they were paid. And in one  
2 additional case, and 18th case, a claim was pending. So of  
3 the 21 original cases where the plaintiffs denied filing  
4 claims, they actually did so in 18 of those cases and  
5 recovered compensation from the Johns Manville Trust in 17  
6 of those cases.

7 And keep in mind this is only one of the dozens  
8 of trusts that litigants, claimants until they're litigants  
9 in the civil system, can file against and recover  
10 compensation from, only one of these trusts.

11 So, clearly, no one is going to credibly deny  
12 that this problem is just as rampant, if not more so, in  
13 Pennsylvania because it has long been a focus of asbestos  
14 litigation, certainly as rampant here as it is anywhere in  
15 the country.

16 And this problem of concealing and delaying trust  
17 filings is of course aimed at maximizing recoveries. If  
18 the two systems, the trust and tort systems, don't  
19 communicate, then the civil litigation system never even  
20 learns about, much less accounts for, the trust recoveries.  
21 And that is what this bill tries to do, I think, in a very  
22 straightforward and commonsensical fashion.

23 Number one, it makes the systems communicate by  
24 requiring the plaintiffs to provide information. What  
25 claims were filed? What's the status of the claims? Have

1 there been recoveries from the trust claims, number one, so  
2 the civil litigation system knows what's happened in the  
3 trust system.

4           And secondly, then, to account for the trust  
5 recoveries, and this is not a defense-driven system. The  
6 court decides if the plaintiff has a credible, reasonable  
7 basis -- to use the language of the bill -- to file claims  
8 against trusts. This is not defendant saying they could  
9 file against 60 different trusts; therefore, a portion of  
10 recovery is in the civil system. The judge decides whether  
11 a plaintiff has a reasonable basis to file a claim, and if  
12 so, and if a payment from the trust or an expected payment  
13 from the trust exceeds that trust's apportioned share of  
14 liability in a civil suit, then that is accounted for in  
15 the plaintiff's civil recovery.

16           That's all it does, this bill. It simply makes  
17 the systems communicate and it accounts for trust  
18 recoveries in the civil litigation system so we no longer  
19 have the problem that we certainly have now of redundant  
20 recoveries, two different sources recovering for the same  
21 harm. And that is exactly what happens here.

22           And so it allows the fact-finder, usually a jury  
23 in a civil litigation system, to know about what other  
24 exposures plaintiffs allege because -- Mr. Behrens touched  
25 on this, but what happens is the plaintiffs go to the trust

1 system and say I was exposed to all of your products, and  
2 they get recoveries for those, and then in a civil  
3 litigation system, they point at the defendants who are  
4 still solvent and say, no, I was exposed to your products,  
5 and the fact-finder never knows that plaintiff previously  
6 claimed exposure to all of these other products.

7 I mean, it's true that this sort of bankruptcy  
8 trust thing is nuanced, but the problem here is fairly  
9 simple. There are two sources of recovery for the same  
10 harm and the systems never communicate.

11 And as we're talking and thinking about this  
12 bill, I just want to point out three facts that are  
13 sometimes denied that really can't be. This claims system  
14 is very simple. The plaintiffs advertise how easy it is to  
15 file these claims. There are a couple or a few-page forms,  
16 they can be filed very quickly. The plaintiffs' firms use  
17 paralegals generally to do this. These claims are paid  
18 quickly.

19 In December, the general counsel of the Johns  
20 Manville Trust gave a deposition in which he said that in  
21 the case of e-filing of mesothelioma claims, those claims  
22 are generally paid within a few days. So to the extent  
23 we're talking about delay here, trust claims are paid much  
24 faster than a civil litigation can pay claims. So there's  
25 no reason to delay these claims other than to maximize

1 these redundant recoveries. So the claims are easily  
2 filed, they're quickly paid, and they are significant  
3 recoveries.

4           Mr. Behrens mentioned this because it came to  
5 light in the Garlock case. The average recovery of  
6 mesothelioma plaintiffs is many hundreds of thousands of  
7 dollars in the trust system. These are not de minimis  
8 recoveries, as is sometimes argued by our distinguished  
9 opponents. And some of them are here. They're going to  
10 say these are pennies on the dollar. These are very many,  
11 many pennies on the dollar if \$600,000 can be recovered for  
12 the trust claims, not from individual trusts obviously but  
13 en masse for average mesothelioma claimants. So these are  
14 significant recoveries.

15           And then finally, this leads us to the Fair Share  
16 Act. As its name suggests, the purpose of that act is to  
17 have all responsible entities, not just parties in civil  
18 litigation, but entities pay their fair share of liability  
19 for any harm that's caused. That's what the act tries to  
20 do. Its language specifically says that released  
21 nonparties, that is, entities other than civil defendants  
22 who have been sued and who have been discharged from  
23 further liability in exchange for the payment of claims,  
24 can be apportioned liability in a civil system.

25           That's all we're talking about here. These



1 trusts have paid money in order that plaintiffs can no  
2 longer file claims against them. That is a release. I  
3 mean, there's no other way to characterize what that is  
4 except a release from liability in exchange for paying  
5 money. That falls squarely within the terms, express  
6 terms, of the Fair Share Act, yet judges so far have been  
7 reluctant to allow trust recoveries to be offset under the  
8 Fair Share Act, which I'd submit is clearly its intent. It  
9 applies to every other civil litigation in the  
10 Commonwealth, and asbestos claims should be brought in  
11 line, we'd submit, and the bill does that.

12           So for all of these reasons, we think it makes  
13 that type of litigation consistent with all other civil  
14 litigation in the Commonwealth and prevents these redundant  
15 recoveries that have happened for so long and the  
16 incentives that the plaintiffs have to conceal and delay  
17 the trust filings to maximize these redundant recoveries.  
18 So for those reasons, we would urge you to pass this bill.  
19 Thank you very much.

20           MR. NEESON: Good morning, Mr. Chairman, Members  
21 of the Committee. Let me introduce myself. My name is  
22 Peter Neeson. I am a senior partner at the firm of Rawle &  
23 Henderson. We have offices in Philadelphia, Pittsburgh,  
24 and here in Harrisburg. I'm privileged to be Chair of our  
25 firm's Environmental, Toxic, and Mass Torts Department. We

1 handle hundreds of asbestos cases each year in all three of  
2 those cities, as well as elsewhere in this State, including  
3 several counties that are represented by Members of this  
4 Committee.

5           With the few moments that I have, since I deal  
6 with asbestos cases every day, I would like to give all of  
7 you some perspective from someone with his boots on the  
8 ground so to speak, someone who is working with these cases  
9 at the field level on a day-to-day basis.

10           First of all, there are many asbestos cases that  
11 go to trial and to verdict every year, but there are many,  
12 many more cases that are settled and resolved before trial.  
13 Asbestos trials, while numerous, are just the tip of the  
14 iceberg. Perhaps 98 out of every 100 asbestos cases are  
15 settled or resolved without seeing a courtroom. So this  
16 legislation is just as important with regard to what  
17 happens before trial as with what happens during or after  
18 trial.

19           Today, without the benefit of this legislation,  
20 trial judges, defendants, and just as importantly,  
21 settlement judges and mediators who do the laboring oar  
22 work in settling these cases, are often without any  
23 knowledge or information about these trusts, any claims  
24 being made by the plaintiffs, and any money being paid to  
25 them.

1           Well, what does this mean? How does this lack of  
2 transparency impact the pretrial process and the settlement  
3 of these cases? First, during the pretrial process,  
4 neither the trial judge, the mediators, the defendants are  
5 aware that the plaintiff is claiming that there are other  
6 products which may have caused his illness besides the  
7 defendants, who have been sued in the lawsuit. These other  
8 products are products manufactured by the companies who've  
9 been forced into bankruptcy and have filed for protection  
10 through the bankruptcy trust system.

11           Second, neither the trial judge, the settlement  
12 master, or the mediator or the defendants are aware of what  
13 claims are being made and how much money has been or will  
14 be paid by the bankruptcy trust in settlement for the  
15 plaintiff's injuries for products caused by exposure to  
16 their products.

17           So in short, during the pretrial of the case, not  
18 all of the products and not all the parties responsible to  
19 the plaintiff for his injuries are known to the court and  
20 the litigants. And not all the money paid or to be paid to  
21 the plaintiff for his injuries are known or will be  
22 considered by the court, the settlement master, or the  
23 mediator when they are trying to negotiate a settlement in  
24 this case.

25           So ask yourself this question. Let's assume that

1 you, each Member of the Committee, is a settlement master  
2 or a mediator who is charged with the responsibility of  
3 completing a settlement which is fair to all sides. Here's  
4 the question: Can I, as the mediator, make a fair, fully  
5 informed decision on what should be paid in settlement when  
6 I don't know all the parties involved, when I don't know  
7 all the products which may have caused the plaintiff's  
8 injuries, and I don't know the amount of money that has  
9 been or will be paid from parties who are presently unknown  
10 to me?

11           Since the vast majority of these cases are  
12 settled and go through the settlement process, without this  
13 legislation, this is what this litigation is like when it's  
14 time to go to work every morning. This bill addresses this  
15 problem by requiring full disclosure about the bankruptcy  
16 trust claims, including the settlement payments by the  
17 bankruptcy trusts before trial, and in time, from  
18 meaningful settlement negotiations.

19           By requiring full disclosure and completion of  
20 the bankruptcy trust claims process before trial, you are  
21 connecting the tort system with the bankruptcy trust  
22 system. And, as a result, the trial judge, the settlement  
23 master, the mediators in these cases will be able to do a  
24 far better job in accomplishing an equitable settlement in  
25 these cases.

1           Think about it for a moment. On its most basic  
2 level, the logic here is inescapable. More information,  
3 not less, will help our courts, help our settlement  
4 masters, help our mediators, help all the parties resolve  
5 these cases fairly and equitably. When all the parties  
6 know all the information, and when the court and the  
7 litigants have a uniform set of rules for both pretrial and  
8 trial of these cases, then justice will be served. This is  
9 not happening now either at the trial or at the settlement  
10 table, and that is simply not fair.

11           Thank you.

12           MAJORITY CHAIRMAN MARSICO: Thank you very much.

13           Before we go to questions, I want to recognize  
14 that Representative Vereb, Representative Briggs, and  
15 Representative Dean are present at the hearing.

16           Questions, Members?

17           Representative Saccone, I believe, has a  
18 question.

19           REPRESENTATIVE SACCONI: Thank you. Thank you,  
20 Mr. Chairman. Thank you for your testimony.

21           I'm still a little confused here about one or two  
22 points. I mean I understand there's two sources of  
23 recovery for the same harm that don't communicate, and that  
24 doesn't seem right, but how can it be in our law that you  
25 could go into the trust system and swear under oath that

1 you have been exposed to some other type of material and  
2 then go into the tort system and deny having done that and  
3 that not be against the law and not be punishable under the  
4 law? And does this bill correct that?

5 MR. BEHRENS: Mr. Chairman and Representative, a  
6 lot of times what plaintiffs say usually is that they don't  
7 recall other exposures, but time and time again -- I mean,  
8 there's a case in Pennsylvania, and this goes to really --  
9 you're pointing out the nub of what's going on here. I  
10 mean, this is widespread, these type of games being played.

11 There's a case that's in my materials,  
12 Philadelphia case, and you may hear the other side and  
13 their panel say, well, all of this information is available  
14 on normal discovery. You get a chance to depose the  
15 plaintiff. You can ask the plaintiff what he was exposed  
16 to, assuming that the plaintiff is alive. But that was  
17 done in a Philadelphia case where the plaintiff was asked:

18 "Have you ever heard of Kaylo?

19 No.

20 Any kind of pipes or pipe covering?

21 No.

22 EaglePicher, have you ever heard of that?

23 I've heard the name but I don't know what to  
24 associate it to.

25 How about Armstrong?

1 Oh, yeah.

2 You ever work with those products?

3 No.

4 Just know the name? That's tile, right?

5 Yes.

6 Did you ever work around it?

7 No.

8 How about unibestos pipe covering? You ever hear  
9 of that?

10 No.

11 Do you have any other knowledge whether you  
12 worked around any kind of sprays or spray insulation?

13 No.

14 Did you ever work around U.S. Gypsum or National  
15 Gypsum products?

16 I've heard of them, but no."

17

18 This isn't a plaintiff who said I never worked  
19 around insulation in his deposition.

20 REPRESENTATIVE SACCONI: Isn't that punishable by  
21 the law?

22 MR. BEHRENS: Less than three months after a  
23 verdict of \$4.5 million where the jury based its verdict on  
24 that information this person filed trust claims against  
25 Armstrong, Babcock & Wilcox, Fiberboard, and Owens-Corning.

1 The law firm later filed additional trust claims against  
2 several other trust claims.

3 So, yes, lying under oath is unethical and  
4 illegal, but this bill at least will help clear that up,  
5 because if you allow the jury to be fully informed, this  
6 kind of thing won't happen because it will be read to the  
7 jury, they'll see it. And if the plaintiff knows that he  
8 or she will be caught in a lie, they won't do it anymore.  
9 And that's why this bill is right because you get fully  
10 informed juries, but it also promotes honesty in litigation  
11 because this type of thing that is prevalent today will no  
12 longer happen if the plaintiff knows that they will be  
13 caught in the lie if they try to do this kind of thing.

14 REPRESENTATIVE SACCONI: Okay. And I agree with  
15 that. I'm assuming that lying under oath is against the  
16 law. Why isn't it punishable? We never did answer that.  
17 If they did what you said in that case, then there should  
18 be another case that should be brought against them for  
19 lying under oath. I'm not a lawyer but I'm just asking,  
20 and common sense tells me that.

21 MR. NEESON: Can I briefly respond to that? And  
22 this is anecdotal experience and won't answer your question  
23 generically. But a lot of times -- and I have a case in  
24 Philadelphia on this point -- where the plaintiff did lie,  
25 the case went to jury, and the jury, because he lied, found



1 against him and found in favor of the defendants.  
2 Unfortunately, at that point in time, the gentleman, the  
3 plaintiff had already died so there was obviously nothing  
4 that could be done to the individual individually.

5 So you have a lot of that going on as well. And  
6 then there's the cost of the prosecution. And oftentimes,  
7 if there's a settlement, there'll be a negotiation with  
8 regard to things like that.

9 REPRESENTATIVE SACCONI: Okay. Thank you.

10 MR. HARE: Could I add as well?

11 REPRESENTATIVE SACCONI: Go ahead. Sure. Yes,  
12 go ahead.

13 MR. HARE: What I was just going say, you know, I  
14 appreciate the point, and a lot of the things you're  
15 pointing out are what motivated Judge Hodges in his *Garlock*  
16 decision to find the way he did and sort of in the  
17 strenuous tone that he used.

18 But one of the good things about this bill is we  
19 don't need to address whether the misrepresentations were  
20 fraudulent, intentional, we don't need to call people  
21 liars, say that they engaged in fraud because the bill  
22 deals with the consequences of that conduct, not its  
23 motivation, not whether, you know, somebody was an old  
24 gentleman and mistaken or whether they simply, you know,  
25 tried to game the system and lied about prior exposures.

1 It simply says you tell the civil litigation system about  
2 what happened in the trust system. And the facts,  
3 therefore, become the facts, and the misrepresentations  
4 don't need to be fraudulent. They're accounted for  
5 regardless of their sort of motivating intent.

6 So it's critical to recognize how much of this  
7 has happened, and it's been described, but the point for  
8 purposes of the bill is it almost doesn't matter why it  
9 happens. It happens and it results in a very, very unfair  
10 situation where the systems don't communicate. And the  
11 bill tries to cure that.

12 MR. NEESON: Just one other point -- John made a  
13 very good point -- under this legislation they'll be  
14 required to file these bankruptcy trusts to disclose to  
15 everybody what products, what worksites where they got  
16 exposed to. So once that information is out in the open  
17 and transparent, it's going to be very difficult for the  
18 plaintiff, after he signs a claim form and submits it to  
19 Manville, for example, very difficult for him to deny that  
20 he did it.

21 So a lot of what you're concerned about will be  
22 eliminated because of the transparency and the obligation  
23 to disclose all this information before the trial in the  
24 case.

25 REPRESENTATIVE SACCONI: Okay. One more

1 question. So on the other side of this argument, you know,  
2 you say these claims and the trust funds are paid very  
3 quickly and shouldn't be much of a problem, but I imagine  
4 that the other side is going to get up here and say no,  
5 they're not paid very quickly and that the tort system will  
6 not be able to -- their case will not be able to be  
7 resolved until the trust fund cases are resolved, and that  
8 might delay payment until after the person is dead. So  
9 could you address that?

10 MR. HARE: Sure. And this is the point. The  
11 current system delays claims. They consciously delay the  
12 filing of the trust claims now so they don't come to light  
13 in the civil litigation system. What this bill says is  
14 file the trust claims now. And we know, and I'm simply  
15 quoting the general counsel at Johns Manville -- this is  
16 not my opinion about whether they're paid quickly. He said  
17 they're paid sometimes the same day as an electronic claim  
18 is filed but certainly within a few days. That's his  
19 testimony. So if that's true, why delay the filing of the  
20 trust claims unless you're trying to conceal them in the  
21 civil litigation system. This is why it happens.

22 So the bill actually turns this argument on its  
23 head and says the current system encourages delay to  
24 prevent the disclosure in a civil litigation system. So  
25 unless you're trying to conceal them, why not file them

1 when they can be paid quickly? And we're talking about  
2 people with mesothelioma who have very short life  
3 expectancies. Why not get them their money? Why delay the  
4 filing of these trust claims other than to conceal them?  
5 So the bill tries to correct that.

6 MR. NEESON: Well, let me just add one thing.  
7 The plaintiffs don't have an obligation to file those  
8 bankruptcy trust claims, so they're not doing anything  
9 illegal. They're taking advantage of the situation in the  
10 best interest of their clients. So I mean, from my  
11 standpoint I'm not saying to them that they're being  
12 unethical in any way. They're permitted to delay that.  
13 This bill corrects that so that they do file it in a timely  
14 fashion before the trial of the case so everybody knows the  
15 facts. So what they're doing is permitted by law. We're  
16 trying to close that loophole with this legislation.

17 MR. BEHRENS: Let me just add also from the  
18 national perspective, Ohio has had -- basically, what  
19 you're looking at today Ohio has had for several years now.  
20 And I testified in support of the Ohio legislation. And at  
21 the time, the plaintiffs' lawyers there came and said if  
22 you do this, it's going to delay justice, people are going  
23 to die before they ever see their day in court. It hasn't  
24 happened, and Ohio, in fact, just the opposite. Once  
25 plaintiffs' lawyers knew that the way get to trial quickly

1 is you filed these claim forms, which are quick and easy,  
2 there's no delays whatsoever.

3 And in Ohio what they found was before the  
4 legislation there were delays already occurring in  
5 litigation because every defendant knows that the plaintiff  
6 has these exposures, so you get these games where you send  
7 the interrogatories and they write back we didn't file any  
8 trust claims. So then you subpoena the trust, and then  
9 you've got to go litigate that. So the current system is  
10 resulting in delays through these discovery battles to get  
11 information that we all know exists at some point in time.

12 And in Ohio, once they pass this and their  
13 obligation is there to file the form and produce it, it  
14 stops all that nonsense. So the cases are getting heard  
15 more quickly in Ohio than they were before with less cost  
16 to the plaintiffs' attorneys and to the defense.

17 REPRESENTATIVE SACCONI: Okay. Thank you. Thank  
18 you. I appreciate that.

19 MAJORITY CHAIRMAN MARSICO: The Chair would like  
20 to recognize Representative Delozier, who is present with  
21 us this morning.

22 Next to ask a question is Representative Vereb.

23 REPRESENTATIVE VEREB: Thank you, Mr. Chairman.

24 These trust funds, the one thing I don't  
25 understand, are they constantly replenished or is this a

1 one-time shot in a bankruptcy of a company in which they  
2 put money into the trust fund?

3 MR. BEHRENS: The money is set up by the  
4 bankruptcy court. There's a confirmation process that  
5 requires approval by the majority of the creditors, who are  
6 the plaintiffs' attorneys. And the money is funded. And  
7 then there are mechanisms in there to prevent a run on the  
8 bank essentially that would deplete the trust in a  
9 particular year.

10 But whatever the assets are of that trust, they  
11 are set and they may grow, I guess, with investments. And  
12 maybe Mark Scarcella can tell you this. But once the  
13 company comes out of bankruptcy, the amount of the trust,  
14 the company is no longer, in most cases, continuing to fund  
15 the trust.

16 REPRESENTATIVE VEREB: Okay. And can we  
17 guarantee that the first victim in the door when the trust  
18 was established versus the 100th, 200,000th, how are the  
19 funds getting broken down so that the people that aren't  
20 there yet -- so I was hoping there would be -- gladly, I'm  
21 not a lawyer, but it seems like we have a lawyer problem  
22 frankly and we have an ethical problem and we have lawyers  
23 -- a Disciplinary Board problem. We've got a lot of  
24 problems because, really, I go back to what my friend Rick  
25 Saccone said, I don't know a court of law in Pennsylvania

1 that you can go and lie -- unless you're our Attorney  
2 General -- and get away with it.

3 So let me ask you this. Yes, it's a rough ride  
4 this morning. But seriously, my question is how can we  
5 make sure that the last plaintiff in the door, the last  
6 asbestos case ever filed is going to be treated  
7 appropriately financially like the first victim, in other  
8 words, with these trusts?

9 MR. BEHRENS: Well, the trusts have -- there are  
10 trustees that try to make sure that that happens. In fact,  
11 they do projections and then they will reduce the payments  
12 to today's plaintiffs to try to preserve those resources  
13 for future plaintiffs. So the trusts are actively being  
14 managed to try to make sure that people get comparable  
15 amounts. But they don't always.

16 And this actually goes to a point that the  
17 question the former Representative raised, which is that  
18 sometimes when the trust gets a lot of claims, they do  
19 reduce the percentage that they pay out the plaintiffs.  
20 And so delays actually -- these games that occur can  
21 actually hurt plaintiffs because if they sit on their trust  
22 claim for a long period of time and then file it a year or  
23 two later to game the tort system, it can actually result  
24 in the plaintiff getting less from the trust system. The  
25 plaintiff's incentive to get the most money from the trust

1 is to file that claim earlier.

2 REPRESENTATIVE VEREB: Well, it seems to me that  
3 -- and I go back to the lawyer problem. I mean, let's face  
4 it. I mean, my family is involved with a claim against an  
5 issue from my deceased father, which is nothing to do with  
6 asbestos, and we're only three months into it and the legal  
7 gymnastics have started. So the games are played, I think,  
8 on both of these issues, companies stall. We had a  
9 situation where a company in my district with  
10 trichloroethylene, the guy's been dead for about six years  
11 and the family is still in court just trying to get medical  
12 bills covered.

13 And I really go back to what my good friend from  
14 Allegheny said. It seems like you're asking us to fix a  
15 problem essentially of perjury and then potentially double-  
16 dipping, double-dipping meaning going after everyone after  
17 the trust fund.

18 And I would just say that if there's not money,  
19 if people are not being treated equally with the exposure  
20 that they've had -- I look at teachers, I look at people  
21 that we don't even know of yet, kids potentially in  
22 schools. So 10 years from now what are those trusts going  
23 to look like, and why should we be ratcheting down awards  
24 from that trust because we're simply running out of money?  
25 So it's just something I look forward to hearing from the



1 next panel.

2 And, Mr. Chairman, I thank you for the time.

3 MAJORITY CHAIRMAN MARSICO: Representative  
4 Barbin.

5 REPRESENTATIVE BARBIN: Thank you, Mr. Chairman,  
6 and thank you, gentlemen, for testifying today.

7 I have a couple questions today. I think I'd  
8 like to address them to you, Mr. Neeson, if you don't mind,  
9 but anybody on the panel is welcome to answer.

10 I believe from your testimony that you said that  
11 most claims are settled. I think that's a fair statement.  
12 Is it also a fair statement to say when those cases are  
13 settled or tried that it's very difficult to identify one  
14 source or person who's responsible for an asbestos claim?

15 MR. NEESON: I'm not sure I understand your  
16 question.

17 REPRESENTATIVE BARBIN: Okay. I guess what I'm  
18 trying to say is asbestosis is a particular type of fiber  
19 that causes a cancer, and so when any case is settled,  
20 whether it's before a trust or whether it's in  
21 litigation --

22 MR. NEESON: Right.

23 REPRESENTATIVE BARBIN: -- you're going to have a  
24 difficult time saying that a particular product, Owens-  
25 Corning's product or Johns Manville's product is the source

1 of the problem. Is that fair?

2 MR. NEESON: No, I don't think it's necessarily  
3 fair.

4 REPRESENTATIVE BARBIN: Okay. How would you  
5 answer it then?

6 MR. NEESON: Well --

7 REPRESENTATIVE BARBIN: Do you know when you  
8 settle a case that comes to you, are you reasonably sure  
9 that your particular product that you're defending is  
10 really the basis for this person's cancer?

11 MR. NEESON: Well, you're asking a simple  
12 question to a very complicated problem. Oftentimes in this  
13 litigation -- hopefully, I can address your question.  
14 Oftentimes, in this litigation you have 30, 40, even 50  
15 defendants that are sued, each with a different product.  
16 The case then goes to -- the way it usually goes is the  
17 plaintiff, if he's still alive, will testify, and lawyers  
18 representing those 30 or 40 defendants will ask questions  
19 to elicit the kind of information to make sure or to  
20 determine whether or not your company's product created any  
21 kind of exposure to the plaintiff to the extent that that  
22 exposure was at least a partial or probable cause of the  
23 man's illness.

24 So the pretrial discovery of these cases is  
25 designed in such a way so that both sides have an

1 opportunity to flush out that information. I'm not sure if  
2 that answers your question. But because these things are  
3 complicated and because memories are selective or flawed  
4 because we are human, oftentimes, you don't get a clear-cut  
5 answer one way or the other. But for the most part the  
6 pretrial discovery of the case accomplishes that goal.

7 REPRESENTATIVE BARBIN: Okay. Would you agree  
8 with the other side's testimony? We've received a lot of  
9 information that indicates approximately 30 percent of the  
10 people who have successful claims in this field are  
11 veterans.

12 MR. NEESON: I really couldn't answer that with  
13 any certainty. My anecdotal experience is that the older  
14 plaintiffs, ones that filed cases, lawsuits years ago in  
15 the '80s and '90s, probably you had a higher percentage  
16 then of people that were veterans. Today, less so. But  
17 you do have people that worked in a Navy yard or worked in  
18 the Navy and got their exposure there. So, yes, you're  
19 going to have a certain percentage. I wouldn't say it's 30  
20 percent but there's a certain percentage. If you look at  
21 1,000 cases every year, there's going to be a certain  
22 percentage that are veterans.

23 REPRESENTATIVE BARBIN: All right. And is it a  
24 fair statement to say that of the 60 trusts that have been  
25 set up, some of the companies who have set up these trusts

1 have gone on to continue to run profitable businesses like  
2 Owens-Corning?

3 MR. NEESON: That could be better answered by  
4 somebody else here, sir.

5 REPRESENTATIVE BARBIN: All right. Let me just  
6 finish this up then. From my perspective, if the money is  
7 put into these trusts, is there a reason why someone who  
8 has a claim that may have been created by their service in  
9 either World War II or the Korean War shouldn't be allowed  
10 to file additional claims if they find out later that their  
11 situation is worsening? You get a settlement from the  
12 trust, you get a settlement from a lawsuit for a specific  
13 injury. What if those injuries get worse or what if those  
14 settlements don't fully fund the injury? Isn't the person  
15 entitled to come back and file a tort claim for additional  
16 injuries?

17 MR. HARE: Yes. If I might, Representative, in  
18 Pennsylvania you can sue if your minor -- and will just use  
19 that phrase -- asbestos disease turns into something more  
20 significant -- and there are other people who can answer  
21 whether the trusts will compensate both of those injuries  
22 -- but the civil litigation system will if it turns into  
23 mesothelioma or something.

24 And if I could just return to your first question  
25 about this sort of burden of proof and whether it's

1 difficult --

2 REPRESENTATIVE BARBIN: Well --

3 MR. HARE: I'm sorry.

4 REPRESENTATIVE BARBIN: -- I'd like to but I've  
5 got the Chairman looking at me --

6 MR. HARE: Understood.

7 REPRESENTATIVE BARBIN: -- and I want to finish  
8 my questions --

9 MR. HARE: I apologize.

10 REPRESENTATIVE BARBIN: -- to get other Members.

11 MR. HARE: Sure.

12 REPRESENTATIVE BARBIN: But the bottom-line  
13 question for me is this: Is asbestos still legal in the  
14 United States, asbestos products? Are they?

15 MR. BEHRENS: They're very rarely used, but  
16 there's no national ban on their use at this point.

17 REPRESENTATIVE BARBIN: Okay. And aren't they in  
18 fact banned by the United Kingdom, Australia, and the  
19 European Union?

20 MR. BEHRENS: I believe many other countries have  
21 banned asbestos.

22 REPRESENTATIVE BARBIN: All right. And that's  
23 all my questions, Mr. Chairman. I'd like to make one  
24 statement.

25 MAJORITY CHAIRMAN MARSICO: Go right ahead.

1                   REPRESENTATIVE BARBIN: I understand both  
2 plaintiffs and defendants want to get to what is a fair  
3 judgment of each and every one of these claims. In this  
4 case in the United States we still allow asbestos products  
5 to be sold. So even though the people from World War II  
6 and Korean War have been exposed because that was  
7 shipbuilding practice at the time to put asbestos uncovered  
8 on boats, we did the same thing in our buildings. My  
9 sister read the blueprints for Pennsylvania and defending  
10 them. We've got asbestos in our pipe systems in this  
11 building.

12                   The problem that I see as public policy is you  
13 want to push this Fair Share Act law that we have, which  
14 denies some full recovery if you happen to be a Chinese  
15 company who's defunct. The whole injury isn't covered.  
16 You want to take that same sort of thing and put it into a  
17 situation where veterans won't know exactly who caused them  
18 the harm, and their injury isn't going to be fully  
19 compensated.

20                   I think the better answer, Mr. Chairman, isn't  
21 this act. I think the better answer is to consolidate all  
22 60 of the trust funds and make Federal legislation give you  
23 a computer database for all 60 claims. But I see this act  
24 as just pushing it a little closer to defense side to make  
25 sure the guy who really does have mesothelioma doesn't get

1 a full recovery.

2 So at this point I'm not convinced, but thank  
3 you, Mr. Chairman.

4 MAJORITY CHAIRMAN MARSICO: Thank you.

5 Representative Neuman for questions.

6 REPRESENTATIVE NEUMAN: Thank you, Mr. Chairman,  
7 and thank you all for your testimony today.

8 My first question is just generally, this  
9 legislation started to be introduced around the country  
10 around 2006, 2007? Is that accurate?

11 MR. HARE: I think that's fair.

12 MR. BEHRENS: I think that's about right. Ohio  
13 was the first. Ohio enacted in about 2012.

14 REPRESENTATIVE NEUMAN: 2012, okay. My  
15 understanding is it was around 2006, 2007, so I find it  
16 interesting that now we're calling it a loophole in the  
17 Fair Share Act even though it was introduced a long time  
18 ago by ALEC.

19 My question is generally for the openness to the  
20 jury, would you also be willing to allow the jury to hear  
21 about the profits gained and the companies' corporate  
22 structure so that the jury has the full view of the  
23 company?

24 MR. NEESON: Are you talking about the bankruptcy  
25 trust companies or are you talking about defendants who are

1 still in the litigation?

2 REPRESENTATIVE NEUMAN: This gentleman testified  
3 that he wants the jury to hear about all of the openness in  
4 the trusts, everything that's happened so that the jury has  
5 a full picture of what they're actually dealing with. My  
6 question is, besides the trusts, the companies that are the  
7 defendants before the jury, would you be willing to allow  
8 the jury to hear their corporate structure, their profits  
9 and allow the jury to decide what the company may be able  
10 to afford to give to this plaintiff?

11 MR. NEESON: I can answer that. I think what  
12 you're saying is this, that if there's a trial involving an  
13 asbestos plaintiff and several asbestos defendants, as  
14 opposed to the bankruptcy trust, can the jury hear about  
15 the assets of those asbestos defendants?

16 And the answer to that question lies in whether  
17 or not the trial judge believes that there is evidence  
18 introduced into evidence during the course of the trial  
19 that shows that those companies were reckless to the level  
20 of punitive damages. And if you get --

21 REPRESENTATIVE NEUMAN: With all due respect --

22 MR. NEESON: If you get to that level and a judge  
23 believes it is, then the jury can decide a claim on  
24 punitive damages against those companies.

25 REPRESENTATIVE NEUMAN: With all due respect, I



1 do understand how to get punitive damages. My question is  
2 in particular we want openness to allow the jury to know  
3 everything that's going on with these companies or the  
4 plaintiff and which trusts, how much money was awarded. It  
5 would only be fair to also allow the jury to understand  
6 maybe insurance coverage of the company, profits that were  
7 made from a company, the corporate structure of the  
8 companies so that the jury would actually know the full  
9 story as opposed to one side.

10 My next question generally goes to the form that  
11 was pulled up, the claim form being able to be pulled up  
12 within four minutes. Through discovery, are you able to  
13 get the work history and where these individuals worked?

14 MR. HARE: In the civil case --

15 REPRESENTATIVE NEUMAN: Yes.

16 MR. HARE: -- yes. You're allowed to take  
17 depositions to the extent that people are still alive, yes.

18 REPRESENTATIVE NEUMAN: Yes. And so if these  
19 plaintiffs are still alive, you would actually know within  
20 four minutes where the exposure happened and potentially  
21 how it happened if you pulled up the claim forms in the  
22 trusts because it gives locations I believe, companies.  
23 So, as defendants, you would actually know which trust the  
24 plaintiff would be able to file for?

25 MR. NEESON: The answer is yes, but you're

1 assuming that these bankruptcy trust forms are filed before  
2 trial, before discovery when we've told you that, by large,  
3 these bankruptcy trust claims are filed after trial so you  
4 don't have access to those claim forms during the discovery  
5 of the case.

6 REPRESENTATIVE NEUMAN: I'm not saying the  
7 plaintiff ever filled out a claim form. What I'm saying is  
8 you have the work history of those individuals and you can  
9 pull up a claim form and see which trust they would maybe  
10 qualify for?

11 MR. BEHRENS: I think Mark Scarcella is on  
12 another panel can address this --

13 REPRESENTATIVE NEUMAN: Okay.

14 MR. BEHRENS: -- but you can, knowing what  
15 worksites a plaintiff worked at and what his occupation  
16 was, be able to predict which trust claim forms, which  
17 trust claims are available to that person.

18 MR. HARE: And it also depends on, frankly, the  
19 plaintiff's willingness to disclose exposures that do not  
20 relate to the civil defendants or, frankly, his memory  
21 about those, again, taking the fraud or intent out of it.  
22 So we are reliant again solely on the plaintiff's  
23 recollection, whereas this bill would allow us to get  
24 information directly from the trust about what they told  
25 the trusts when they filed and make them file before trial

1 so we're not left to deal with this after trial.

2 MR. BEHRENS: And also just having the  
3 information that a plaintiff worked at a certain shipyard  
4 and was an electrician, for example, in a civil jury may  
5 not be enough to say that they were actually exposed to  
6 that product. If the plaintiff says I don't recall working  
7 around it, the fact that I know that he worked at a  
8 worksite and probably was exposed to it, if he's saying,  
9 like in this Philadelphia example I gave, I don't ever  
10 recall working around it, it's going to be very difficult  
11 to counter that testimony.

12 REPRESENTATIVE NEUMAN: And that's why we have  
13 juries to decipher that.

14 In the mechanism of this piece of legislation, if  
15 I'm a plaintiff and I'm suing one of your companies, a  
16 solvent company and there are no claims, trust claims  
17 filed, but you assume that some of these trust claims would  
18 apply, can you force the plaintiff to file this trust  
19 claim? So then what does this legislation do? If the  
20 plaintiff only wants to -- because the plaintiff has a  
21 right to essentially sue whoever they want. I think you  
22 would agree with that, right?

23 MR. HARE: Correct.

24 REPRESENTATIVE NEUMAN: Okay. So how would you  
25 force a plaintiff to file against the trusts before you go

1 to trial?

2 MR. BEHRENS: Yes, the system set up by this bill  
3 is not a defense-driven system. We can't force the  
4 plaintiffs to do anything. The court has to make the  
5 determination based on the record of whether plaintiff has  
6 a reasonable basis for a claim against the trust, and if he  
7 or she does, they have to file it. So it's the court that  
8 makes that determination.

9 REPRESENTATIVE NEUMAN: And the solvency of the  
10 trust, what percentage generally that the trust believes  
11 that the plaintiffs deserve versus what they get? Do you  
12 know what the percentage is generally?

13 MR. NEESON: There are other people, I think,  
14 that will testify later on that can probably answer that  
15 question for you. I certainly can't.

16 REPRESENTATIVE NEUMAN: And during trial, this  
17 legislation reads that if the case is presented before the  
18 jury before all the trust claims are finished, a maximum  
19 possible value is assumed. Is that maximum possible value  
20 what the trust thinks they should get or what they're  
21 actually going to get?

22 MR. BEHRENS: No. So if you look at -- every  
23 trust has something called a TDP, a trust distribution  
24 procedure. And in it there's a grid, and it says for what  
25 injury you're alleging what you're going to get paid. And

1 then there's also a payment percentage, which you go to.  
2 Some of the trusts like Manville, which was the first one  
3 set up, has a low payment percentage because they got  
4 raided so early on by a lot of junk cases frankly.

5           The trusts that have been created in more recent  
6 years are paying substantially more. But you can go look  
7 at that. I mean, it's publicly available. You can go on  
8 the websites of all these trusts and pull up the TDPs and  
9 they will tell you on the first page of the website in fact  
10 I saw on these what a plaintiff is entitled to and what the  
11 current payment percentage is.

12           REPRESENTATIVE NEUMAN: So if this goes to jury  
13 and there are still claims on the trust, how would you  
14 present that to the jury --

15           MR. BEHRENS: Well, I think --

16           REPRESENTATIVE NEUMAN: -- because it's the  
17 maximum possible value. I don't know what that means.

18           MR. BEHRENS: It may be a hypothetical that  
19 doesn't occur in reality because there's testimony --

20           REPRESENTATIVE NEUMAN: Well, it's in the  
21 legislation.

22           MR. BEHRENS: Well, here's the testimony from  
23 December, December 15th by the general counsel of the  
24 Manville Trust. And the question is:

25           "So it sounds like the trust has been managed

1 well enough that they have the ability now to handle claims  
2 without someone having to say I have an exigent or extreme  
3 hardship?

4 Correct.

5 And as you just indicated, payment can be made  
6 within days or an offer can be made within days of a  
7 submission?

8 Right."

9  
10 So it's a hypothetical that's not going to  
11 happen. You file a claim form, they're going to get it  
12 paid within days.

13 REPRESENTATIVE NEUMAN: And you're sure of that?

14 MR. BEHRENS: That's the testimony of the general  
15 counsel of the Manville Trust.

16 REPRESENTATIVE NEUMAN: Another attorney.

17 My last comment or question generally is I assume  
18 that your companies, they know that asbestos causes  
19 mesothelioma; there's no other medical reasoning for  
20 mesothelioma?

21 MR. NEESON: There are other causes like  
22 radiation and other things, but to answer your question  
23 fairly, the majority of individuals who get mesothelioma  
24 likely got it from asbestos exposure.

25 REPRESENTATIVE NEUMAN: And you're not claiming

1 that these individuals with mesothelioma in any way got  
2 this on their own accord? You're not claiming that the  
3 plaintiff actually is liable in any way?

4 MR. NEESON: In most cases, no. You're right.

5 REPRESENTATIVE NEUMAN: So would you want to see  
6 someone that has mesothelioma -- and for those of you who  
7 don't know is a very painful death -- would you want them  
8 to see -- do you think they deserve full recovery from  
9 their damages?

10 MR. HARE: Absolutely. And this bill does  
11 nothing to diminish the recoveries. It simply makes it  
12 fair. That's the point. No one is suggesting that people  
13 who have been exposed to asbestos manufactured into  
14 products by companies should not get compensation. The  
15 bill doesn't go there.

16 REPRESENTATIVE NEUMAN: So if a jury says that  
17 this individual deserves \$10 million and for some reason  
18 this bill would pass and it gets diminished to \$2 million,  
19 do you think that that's fair?

20 MR. HARE: Well, we have to assume that the jury  
21 knows the information. This is the point of the bill. If  
22 the jury knows --

23 REPRESENTATIVE NEUMAN: Well, I'm saying if this  
24 passes --

25 MR. HARE: Yes, right. That's right. If this

1 passes and the jury knows of all the exposures that  
2 plaintiff has previously alleged and accounts for the  
3 bankruptcy trust and the amount is \$10 million, then that  
4 is the fair compensation. That's correct.

5 REPRESENTATIVE NEUMAN: Thank you, Mr. Chairman.  
6 Thank you for your testimony.

7 MAJORITY CHAIRMAN MARSICO: It's an hour or so  
8 into the hearing and we have two more panels that -- we  
9 want to give each panel equal time and we want to give each  
10 Member the opportunity to ask questions. So if we can,  
11 Members, ask a question, be concise, and we ask the panel  
12 to be the same.

13 The next question is Representative Everett.

14 REPRESENTATIVE EVERETT: Thank you, Mr. Chairman.

15 And I just want to follow up just to make sure  
16 that I fully understand it and that everybody does, follow  
17 up with what Representative Neuman.

18 So the way this would work if this bill was law  
19 is plaintiffs would go, injured parties would go to the  
20 trust funds first, they'd file for their damages, they'd  
21 receive those, and then when they went to trial, the \$10  
22 million example, if they got 2 from the trust fund process  
23 and then the jury finds that their total damages are 10,  
24 they're going to get the 10?

25 MR. NEESON: More than likely, yes. They'd get



1 the other remaining dollars from what defendants the jury  
2 felt were responsible to the plaintiff.

3 REPRESENTATIVE EVERETT: So their total claim  
4 would in no way be diminished in your opinion?

5 MR. NEESON: Well, it depends on the  
6 circumstances, but by and large, yes.

7 REPRESENTATIVE EVERETT: Yes, but I mean they're  
8 going to get the jury award; it's just the jury award is  
9 going to be offset by what was in the trust fund process?

10 MR. NEESON: Yes.

11 REPRESENTATIVE EVERETT: Thank you.

12 MAJORITY CHAIRMAN MARSICO: Representative  
13 Toepel?

14 REPRESENTATIVE TOEPEL: Thank you. And a  
15 question along the same lines. I think your testimony,  
16 gentlemen, you spoke about the average claimant makes 22  
17 claims against the trust, and the average payout is about  
18 \$600,000. Do you have any numbers on the payout on either  
19 pretrial settlements or cases that go to trial? So that  
20 would be in addition to the average payout from the trusts.

21 MR. BEHRENS: I think that was addressed in the  
22 *Garlock* case and it was roughly an even split. I think  
23 they were getting about 500 I think -- \$500,000 from the  
24 tort system and \$600,000 from the trust system so --

25 REPRESENTATIVE TOEPEL: And that was in that

1 case, but you don't have any numbers on the average  
2 payouts?

3 MR. BEHRENS: No, that was looking at all their  
4 cases and what the settlement history had been in those  
5 cases. So it's not one case. It was looking across their  
6 aggregate portfolio of litigation. And it actually goes to  
7 a point one of the Representatives made about does the fact  
8 that there is a settlement even mean that the company  
9 believes it's at fault? And the answer is no. In *Garlock*  
10 in fact, the plaintiffs came in and said we should get --  
11 the trust should be funded with \$1.3 billion because that's  
12 how much *Garlock* had historically paid in settlements if  
13 you projected it out. And they were able to show that in  
14 most of the cases their settlement was based on avoiding  
15 legal costs to defend the case, not the merits of the case  
16 at all.

17 And the judge actually looked at that and said if  
18 we take out the fact of how much they paid for I would call  
19 it nuisance value as opposed to real liability, he said the  
20 true liability was closer to \$125 million. He knocked \$1  
21 billion off their projections. So that tells you that they  
22 would have essentially paid \$1 billion in the tort system  
23 simply to avoid litigation costs, not because they felt  
24 they were paying on the merits.

25 REPRESENTATIVE TOEPEL: So in conclusion, they're

1 basically going to double the amount of money or what the  
2 numbers are? If they're going to get \$600,000 from the  
3 trust funds, they're averaging about that same amount of  
4 money in a court case?

5 MR. BEHRENS: Today, by manipulating the filing  
6 of the trust claims, they can get a double recovery.

7 REPRESENTATIVE TOEPEL: Thank you.

8 MAJORITY CHAIRMAN MARSICO: I believe that  
9 concludes the questions. Thank you, gentlemen, for being  
10 here. I appreciate your testimony. Have a good day.  
11 Thank you.

12 MR. BEHRENS: Thank you.

13 MR. HARE: Thank you.

14 MR. NEESON: Thank you.

15 MAJORITY CHAIRMAN MARSICO: We'll now go to panel  
16 2. We have with us Larry Cohan, Esquire, with Anapol  
17 Weiss; Robert Paul, Esquire, with Reich & Myers; and Bruce  
18 Mattock, Esquire, with Persky & White. Welcome, gentlemen.  
19 Good to see you again.

20 MR. COHAN: Good morning, Chairman.

21 MAJORITY CHAIRMAN MARSICO: You may begin when  
22 you're ready.

23 MR. COHAN: One moment. Okay. My name is Larry  
24 Cohan. Thank you, Mr. Chairman Marsico and Mr. Chairman  
25 Petrarca, for the opportunity to speak here today on behalf

1 of the victims of asbestos.

2 I've just listened to the testimony of the  
3 proponents of this bill, and I am, as I was last time when  
4 we were here, shocked and somewhat appalled that there's  
5 still no actual reference to the language in the bill and  
6 what it actually does to a victim's recovery.

7 I appreciate the questions that were asked by the  
8 Representatives that raised that, but I believe that all of  
9 the responses made no reference to the bill and to what  
10 this bill actually does to the recovery that victims might  
11 obtain.

12 This bill, and if I may, I've been doing asbestos  
13 litigation, representing victims for 35 years. I'm with  
14 the firm of Anapol Weiss, which is located in Philadelphia  
15 and here in Harrisburg. And this bill that's being  
16 presented here does nothing other than two things. It  
17 guarantees -- and I will get to the detail in the language  
18 in the bill for those who asked the questions -- it  
19 guarantees that victims will recover less after the  
20 enactment of this bill than they do now. And I'll explain  
21 that and we'll look at the language together so you can all  
22 see it and get past the smokescreen.

23 And secondly, it guarantees that there will be  
24 delays -- and I'm talking about profound delays -- in the  
25 resolution of the litigation to the point that our clients,

1 the victims -- and I say the lawyers here -- will not get  
2 their day in court. Living mesothelioma victims will never  
3 see a jury based on the language in this bill.

4 This bill does not read like a piece of  
5 legislation although it looks like one. When you read it  
6 and break it down and place it into the tort system, you  
7 will see that it reads like a rule of civil procedure, and  
8 a rule of civil procedure that does nothing but benefit the  
9 asbestos manufacturers and their insurers at the direct  
10 expense of victims.

11 Our courts here in Pennsylvania have successfully  
12 presided of asbestos litigation, resolving thousands of  
13 cases, for 40 years. Our appellate courts have decided  
14 asbestos cases over and over again, Superior Court, Supreme  
15 Court of Pennsylvania have issued decision after decision  
16 defining the law, defining the basis for recovery, and in  
17 fact making it harder and harder, more difficult for  
18 victims to recover. And they've done that in an effort to  
19 be fair, balanced, to recognize the changing times. The  
20 courts that have asbestos dockets have developed procedures  
21 that address the issues in this bill outright.

22 With bankrupt asbestos companies today, they are  
23 paying pennies on the dollar. And the reference that was  
24 made, well, there are a lot of pennies. Well, in a few  
25 minutes when we look at the bill together we're going to

1 actually see together how that adds up, what it means when  
2 a bankruptcy trust pays 10 cents on the dollar in the  
3 context of this bill.

4           This bill controls the discovery process, and I'm  
5 going to look at that language as well. And it says that  
6 the asbestos manufacturers can ask for a stay, they can  
7 stop the proceedings, they can demand that the plaintiffs  
8 apply to every bankruptcy trust. It is not the court's  
9 decision. We'll look at that language together.

10           And then, most importantly, it provides for  
11 credits for the asbestos defendants in the tort system not  
12 for the amounts paid to the victims but for the amounts not  
13 paid. And I want to refer back to the questions that were  
14 just raised, and they were very pointed questions. And the  
15 question was laid out. Will victims get the same amount  
16 after this bill is in effect? If there's a \$10 million  
17 verdict and they receive \$2 million from the bankruptcy  
18 trusts, will they still get the whole \$10 million?

19           And I heard the prior speakers say yes. I was  
20 shocked because the simple answer, there is no debate,  
21 there's no dispute, we'll look at the language in a minute,  
22 is absolutely positively not. If the bankruptcy trust pays  
23 10 cents on the dollar, meaning \$10,000 out of a scheduled  
24 amount meaning the maximum allowable that counsel  
25 referenced of \$100,000, so if we take the \$10 million

1 verdict example, and let's say the bankruptcy trusts paid  
2 \$2 million, which doesn't happen -- maybe we should use the  
3 smaller numbers. But if that was the scenario since those  
4 were the questions, the \$2 million is only 20 percent of  
5 what the bankruptcy trust's maximum allowable meaning not  
6 what they actually pay because they pay a percentage of  
7 that. It would have been \$10 million, meaning if those  
8 companies weren't bankrupt.

9           The credit in this bill against that \$10 million  
10 verdict will be \$10 million. These defendants in the tort  
11 system, the ones that are here advocating today, will pay  
12 nothing. The victim will get \$2 million, not 10. And by  
13 the way, although we read about that gigantic verdict once  
14 in a blue moon, typically, the verdicts, the amounts  
15 recovered are dramatically less than that.

16           We heard in response to a question that the  
17 average recovery is \$1.1 million. That is for an  
18 individual who worked in the State of Pennsylvania, spent  
19 decades toiling in our factories and our plants and our  
20 shipyards, developed mesothelioma, and went on to a  
21 horrific death, leaving spouses, children, and that's their  
22 \$1.1 million recovery. It is not more now because there's  
23 bankruptcy trusts and non-bankrupts. It is less. You're  
24 only getting pennies on the dollar from some of those  
25 companies. And if you're lucky, if this bill doesn't go

1 through, you'll get the jury's award against the other  
2 companies. And \$1.1 million for that tragedy befalling a  
3 family is not a lot of money on average.

4           The bill is framed as using the absurdly  
5 misleading moniker of transparency. What is not  
6 transparent unless we look at this bill together and look  
7 at it carefully is that this is a money grab by these  
8 defendants. It is a way to have corporate double-dipping.  
9 The victims here are not getting double anything today.  
10 They're getting less on average than they did prior to the  
11 bankruptcy era. Under this bill, they will get  
12 substantially less.

13           And before we turn to the language in the bill, I  
14 just want to take a couple of minutes. There's been some  
15 references generally to asbestos litigation and some of the  
16 terminology and some good questions about that. And I  
17 apologize to those Members who understand the litigation  
18 and the terminology, but I want to take two or three  
19 minutes of our time and explain some of it so there's  
20 context.

21           Mesothelioma is a cancer. It is caused -- and  
22 counsel did not answer that one -- fairly straightforward.  
23 It's caused by asbestos. In these cases, they're not  
24 raising defenses that we're not at fault, our product  
25 wasn't bad, it didn't cause the problem. They're here



1 today just trying to reduce how much they have to pay to  
2 the victims.

3           Every person who's diagnosed with mesothelioma  
4 dies from mesothelioma, anywhere from months to maybe a  
5 year-and-a-half from diagnosis to death. It is a brutally  
6 painful disease. Fluid builds up in the lung, in the chest  
7 cavity. It has to be drained repeatedly. The cancer  
8 spreads. It is one of the most horrific, painful, downhill  
9 course cancers known to man for which there is no cure.

10           It leaves spouses and children behind, and the  
11 only thing we can do is get some compensation for that  
12 family. And what we try to do is to get these cases heard  
13 while that mesothelioma victim is living. That will never  
14 happen under this bill.

15           Asbestos is a mineral that's mined from the  
16 ground. These workers breathe it in. In response to the  
17 question about can we determine exactly whose product it  
18 is? No. It's a blend of all of the fibers breathed in,  
19 which is why we have to make claims against all of the  
20 companies against whom the victim may have to make the  
21 claim whose product they breathed in.

22           The exposures occurred 40 to 50 years ago, so we  
23 have to get witnesses, we have to find people that are  
24 still alive because our law in Pennsylvania, as in most  
25 States, is very stringent that requires the victim's family

1 to come forth, meet a burden of proof, and offer witness  
2 testimony about what product they were exposed to, when,  
3 and how with precision. We have the burden of proof.

4 I have with me today -- and I just want to  
5 introduce her briefly -- Valerie Wade, who's sitting here  
6 to my left. Valerie Wade is a young woman who has her own  
7 tragic story. Her mother Lisa died at the age of 51 from  
8 mesothelioma. She was a single mom. She got her exposure  
9 through Valerie's grandfather's work and bringing the dust  
10 home unknowingly on his clothing. Mom passed away leaving  
11 five children, three of whom were minors. After Mom died,  
12 Val agreed to take in her three younger siblings, minors,  
13 take care of them, and support them.

14 We filed the lawsuit. It took five years in the  
15 system as it now exists from start to finish to try to get  
16 her compensation. Her compensation was in the realm of  
17 what we've heard. If this bill was law, Val would have  
18 received literally one-half of what she received had she  
19 gone to verdict. If this bill was law, Val's case would  
20 still be pending, and it resolved almost two years ago. It  
21 would be ongoing today. She would not have any of the  
22 compensation from the non-bankrupts that she was able to  
23 get, and she'd be, as she is now, working, making a  
24 paycheck, supporting her younger siblings. She's still  
25 doing that, but thank God, with the system now in place,

1 she was able to get some compensation.

2 I invite you -- Val will be here -- to talk to  
3 her. She'd love to talk to you. She's read the bill. She  
4 knows what it would have done to her case because two years  
5 ago when we were here in 2013 she was aware of the presence  
6 of the bill.

7 The key to understanding what this bill is really  
8 doing is to look at together the language of the bill. And  
9 if you have it in front of you, look at it later, page 1,  
10 section 2, subsection 3, they want to preserve trust  
11 assets. There's nothing in this bill of any kind that's  
12 designed to preserve trust assets. To the contrary, this  
13 bill mandates every plaintiff to file against every  
14 conceivable trust where the defendant or the court deems it  
15 appropriate to file. That means there will be more  
16 filings, more expense to the trusts, and more payouts.  
17 There is no preservation of trust money of any form even  
18 addressed in this bill.

19 But most importantly, if you'll look with me,  
20 page 4 if your bill is numbered the same way mine is,  
21 subsection 4 at the top, halfway down, and it says, "If a  
22 verdict in favor of the plaintiff is entered, the court  
23 shall establish for each pending apportionment nonparty  
24 claim" -- fancy words for the bankrupt company -- "the  
25 maximum possible value as set forth in the trust governance

1 documents" -- and we'll be supplying you with these charts  
2 as well. You just heard counsel for the proponent talk  
3 about the schedule that you can get on their websites.  
4 And, yes, the schedule, as in most bankruptcy courts, talks  
5 about, well, what this might have been someday and what the  
6 maximum potential is. No plaintiff ever gets that. The  
7 plaintiff gets the pennies on the dollar. So if the  
8 maximum is \$100,000, they get \$10,000 or \$15,000 if that's  
9 the percentage, which it usually is.

10           And this says, "which value, when applicable,  
11 shall be used for purposes of establishing the settlement  
12 credit." And I'm going to stop here for just a minute  
13 because the proponents of this bill never once mentioned in  
14 their presentation or in response to the questions this  
15 language in the bill that talks about the credit against  
16 the verdict not being for what the victim actually  
17 received. They received \$10,000. That would be fair to  
18 give them a credit for that \$10,000. No. This bill says  
19 the maximum allowable, which no one ever gets because you  
20 only get your percentage. The credit under this bill would  
21 then be for \$100,000.

22           And while we're looking at this, I'm going to go  
23 back, I'll give you the same example. We'll use smaller  
24 numbers. If a victim gets \$10,000 from a bankruptcy trust  
25 with the maximum allowable, quote unquote -- that's just a

1 term of art in the bankruptcy court; no one ever gets it --  
2 is \$100,000 and then goes to verdict against one of the  
3 proponents' asbestos companies and gets a verdict for  
4 \$100,000, there will be an apportionment credit of  
5 \$100,000. And that defendant, who has proposed this bill,  
6 will pay nothing.

7           So we heard the term double-dip. I get upset  
8 when I hear that in this context because, first of all, a  
9 victim of this magnitude getting basic compensation in a  
10 tough system is not double-dipping into anything. This is  
11 a corporate double-dip. This is a way that these companies  
12 who sell their products, who made billions, and wouldn't  
13 answer the question because we can't get that evidence into  
14 a jury to hear what it is that they made on these products,  
15 will end up paying nothing or next to nothing. This is a  
16 bill that is nothing more than a simple, straightforward  
17 money grab at the expense of victims. This should be an  
18 offense to every Member of this Committee. I know it is to  
19 every victim of asbestos and mesothelioma.

20           I should say at this point also that the image  
21 painted about collecting from these bankruptcy trusts that  
22 you fill out this little form is absurd. Yes, you have to  
23 fill out a claim form just like a lawsuit complaint is a  
24 few pages long. You still have to fight with these  
25 bankruptcy trusts. You have to produce board-certified

1 pathology expert opinion about the disease and causation.  
2 You have to produce evidence of exposure. You have to  
3 produce a witness who will sign a sworn affidavit to each  
4 of these trusts, many of whom are 80 or 90 years old.  
5 They've passed away. We have to find people that worked  
6 with the deceased victim.

7           The bankruptcy trust process is not simple. It's  
8 not a bunch of paralegals filling out forms. It is hard  
9 work, it is real, and many of the trusts do not pay our  
10 claims. The thought that 22 trusts are going to hand out  
11 \$600,000 is ridiculous. It happens occasionally. In most  
12 cases, we can't find witnesses that worked with our clients  
13 back in the '50s and '40s or '60s. If we find them, they  
14 offer limited testimony about product.

15           Val's grandfather, who came in and testified, was  
16 the only witness who knew what products he was exposed to  
17 and brought home. He's turning 80 this year and he's ill.  
18 They sat him down at the table with a dozen lawyers around  
19 that table and grilled him for three straight days, each  
20 day quitting at the point of exhaustion over hundreds and  
21 hundreds of pages. And he gave everything he could. He  
22 identified a few products, could not identify a lot of the  
23 products, could not identify all the bankruptcy trusts.  
24 And for the Representative -- I don't know if he's still  
25 here -- who asked about the fraud -- you are still here --

1 of course, and I agree with you, if the witness commits  
2 fraud, there are penalties, perjury, jail, whatever it  
3 might be.

4           The *Garlock* case that they're citing to you is an  
5 exception. It's a bad case. Bad cases make bad law. Yes,  
6 if a witness testified I was never exposed to Garlock and  
7 then months later takes an affidavit and says I was, sure,  
8 but that's not how this happens. Val's grandfather  
9 testified that he was exposed to Garlock and a few other  
10 products that are in bankruptcy. The defendants had that.  
11 They had his affidavits.

12           There are procedures in place in Pennsylvania.  
13 The main dockets are in Philadelphia and Pittsburgh. There  
14 are procedures in place right now where the defendants get  
15 all the bankruptcy filings, they get the documents, they  
16 get the amount of the payment. They don't have to pay a  
17 verdict before they get that information. You don't need  
18 legislation to do what the rules of discovery now do.

19           And I want to, if I may, go to one more part of  
20 the bill, section 5(d)(3). It's on page 6, down at the  
21 bottom. It says, "A plaintiff's asbestos action shall be  
22 stayed" -- not may be, might be, shall be -- "in its  
23 entirety until the plaintiff certifies that all existing or  
24 potential claims identified in the statement provided above  
25 have been filed and identified." Now, I'm going to tell

1 you all the practical reality is that all claims cannot be  
2 filed. There are bankruptcy trusts that haven't even  
3 opened yet. There are bankruptcy trusts they don't even  
4 have their procedures lined up where you can file. The way  
5 this is written, the intention of this is to stop the  
6 litigation in its tracks because no plaintiff alive can  
7 ever make this certification.

8           And then it says, "Unless all defendants in the  
9 asbestos action consent, an asbestos action may not begin  
10 trial until at least 30 days after a statement is  
11 supplemented." I ask you, these are the defendants  
12 proposing this bill. Are they going to consent to a trial  
13 starting knowing that they have loopholes, meaning  
14 bankruptcy trusts that aren't open yet, plaintiffs that  
15 don't have witnesses that can even conceivably identify one  
16 of these trusts? This is just a mechanism to assure that  
17 there will be no trial. Please look at that language. See  
18 what its intention is, what it's really doing.

19           Those are the salient parts of the bill, that  
20 stay, that delay, and the language that actually talks  
21 about what the credit is that they're seeking. There is no  
22 need for this legislation unless it is your desire to see  
23 to it that victims like Val and her family get less, much  
24 less compensation than they're getting now, or if it's your  
25 desire to have the civil justice system shut down, the



1 right to a trial by jury eliminating, and these folks never  
2 getting their day in court.

3 This bill is nothing but a denial of victims'  
4 rights. It does nothing to improve our system, which has  
5 been working effectively here to resolve mesothelioma  
6 victims' rights for the last 40 years.

7 I now am going to turn it over to my colleagues.  
8 Thank you.

9 MR. PAUL: Good morning, Mr. Chairman Marsico,  
10 Mr. Chairman Petrarca. My name is Robert Paul. I'm a  
11 plaintiff's attorney in Philadelphia. I've been doing  
12 asbestos cases for 35 years.

13 I want to respond to a couple of things to what  
14 our opponents say, and then I want to get to what my  
15 primary job here is. First of all, with respect to the  
16 *Garlock* case, you'll be interested to know that when  
17 counsel for *Garlock* was asked, "What attorneys do what  
18 they're supposed to do?" And they said "me." So I want  
19 you to understand that I'm one of the people that *Garlock*  
20 believes is an honest person and does what they're supposed  
21 to do because in our cases, as is indeed the case in both  
22 Philadelphia and Pittsburgh, we file the claims, we let the  
23 plaintiffs answer the questions. And Larry's client did  
24 three days. One of my clients did 17 days of depositions  
25 in terms of what the asbestos exposure has.

1           It's also interesting to note that the  
2           implication from our opponents is that they want to settle.  
3           Well, my learned -- and I really mean this truly because he  
4           is -- my learned friend Mr. Hare represents the client  
5           Lincoln Electric, which sells welding rod equipment, which  
6           refuses ever, ever, ever, ever to settle. There are a  
7           number of asbestos defendants still in the court system  
8           that we had to take to verdict in which the Superior Court  
9           upheld three verdicts against Mr. Hare's client. And so  
10          what you hear is people who are simply trying to find every  
11          possible way to avoid paying.

12                 Another point that Larry made that I think is  
13          also important is the trusts are not an ATM machine. You  
14          don't just file the form and you get the money. The trusts  
15          have, for example, requirements, what they call SOE, or  
16          significant occupational exposure, where they'll refuse to  
17          pay a guy who testified that he used the product because  
18          it's the wrong occupation, and they just refuse to pay.

19                 There are trusts -- most trusts will refuse to  
20          take deposition testimony even when that's the only  
21          evidence that there is because the claimant died some years  
22          ago and there's no way to find another witness.

23                 And finally, before I get to my major points,  
24          part of the problem which my opponents neglected to tell  
25          you is that they've been doing depositions for 40 years.

1 They have the depositions from all the worksites and  
2 locations that ever plaintiffs worked from. And so when my  
3 client says I worked at the Navy yard, the defendants have  
4 a better idea of what defendants were in that location than  
5 I do. If you do go forward with this bill, it is, I think,  
6 necessary in order to achieve transparency and in order to  
7 achieve fairness that they must disclose every single  
8 deposition transcript that they have from every worksite  
9 that your plaintiff worked at.

10           The Garlock lawyer who certified to my  
11 appropriate activity in the Garlock case also testified  
12 that Garlock had every single transcript from every single  
13 worksite that every single plaintiff had, so that part of  
14 what you should do, if you pass anything in this bill, is  
15 require them to disclose every piece of information that  
16 they have because what you will find is that these  
17 defendants, when I send them discovery and say tell me  
18 every piece of evidence you have of your presence or  
19 location in a facility, they'll say no. Go to the judge  
20 and file a Motion for Sanctions to make us tell you.

21           And finally, if we have to tell them how much our  
22 folks got, then a similar requirement should be put on them  
23 to disclose what they have paid.

24           Now, let me get to what I primarily came here to  
25 talk about, and that is subrogation. Now, we did not

1 discuss this the last time but it's really very important,  
2 and that is that the clients incurred medical expenses in  
3 the treatment of their conditions. Under the Medicare  
4 Secondary Payer Act of 1980, the Medicaid statute, the  
5 provisions of ERISA and private medical plans such as Blue  
6 Cross and Aetna, this money must be repaid out of the  
7 client's share.

8           So after you get whatever recovery you get in  
9 this case, you then have to go back and repay the medical  
10 providers. Each of these payers, as enacted by law with  
11 respect to Medicare and Medicaid or insisted by contract in  
12 the case of the Blues or Aetna or the other private  
13 carriers, that they must be reimbursed any medical expenses  
14 caused by third-party tortfeasors. There are criminal  
15 penalties, including double the amount owed, if you don't  
16 repay Medicare.

17           In addition, Medicare has the right to cut you  
18 off from Medicare if you don't pay them back. A similar  
19 rule applies in Medicaid. The private carriers have in  
20 fact hired law firms, collection agencies to sue to recoup  
21 this money.

22           It's also important that you realize that under  
23 the Medicare Secondary Payer Act, there's a provision that  
24 a fund be created by the plaintiff to pay future medicals  
25 so that Medicare doesn't have to pay for future medicals

1 due to asbestos. Now, at the moment, the regulations do  
2 not exist to require how that is supposed to be done, but  
3 this so-called Medicare set aside is used today in workers'  
4 compensation claims here.

5 Thus, from the small amounts to be recovered from  
6 all of this, the plaintiff must pay out huge percentages,  
7 sometimes almost 100 percent of the recovery to repay the  
8 medical providers. And that is a matter of law and a  
9 matter of contracts, cannot be avoided, and when you  
10 consider this issue, you have to recognize how little, how  
11 little our folks are recovering from these claims.

12 Thank you.

13 MR. MATTOCK: It's almost good afternoon.

14 Chairman Marsico, Chairman Petrarca, we gladly welcome the  
15 opportunity to be able to be here, to be able to speak with  
16 you, and to be able to answer any and all questions that  
17 you need answered to be able to understand this very  
18 complex legal circumstance.

19 My name is Bruce Mattock. I'm a shareholder and  
20 the Executive Director of the law firm Goldberg, Persky &  
21 White. Our main office is in Pittsburgh. We also have an  
22 office in Greensburg, Pennsylvania, an office in Johnstown,  
23 Pennsylvania, two offices in Ohio, two in West Virginia,  
24 and two in Michigan. So I do a broad spectrum. We go to a  
25 lot of different States and handle this litigation.

1           The main reason that I come here to be able to  
2 speak and was asked to come here and speak is that I'm in a  
3 little unique position to my colleagues. I'm actually a  
4 Trust Advisory Committee representative for 17 trusts. I  
5 am involved in the governance of these trusts. I know a  
6 lot more about how they're governed, how they're run, how  
7 they're operated, where the checks and balances are.

8           And I'm here to be able to answer those questions  
9 for you and be able to tell you that every trust, every  
10 trustee of every trust, every futures representative of  
11 every trust, and every Trust Advisory Committee member, one  
12 of our biggest goals is to make sure this money lasts, make  
13 sure it's there, and make sure people into the future get  
14 paid. That's also one of the reasons why the payments are  
15 based on payment percentage.

16           The most cautious thing that is involved in this  
17 system is making sure that the assets are preserved. If  
18 they're not being properly preserved and if the Trust  
19 Advisory Committee is upset or the futures representative  
20 is upset or if the trustees get upset about the way things  
21 are going, we go back to the Federal bankruptcy judge who's  
22 in charge. So there is a Federal bankruptcy judge in  
23 charge of and overseeing and overlooking every one of these  
24 bankruptcy trusts.

25           In every one there's at least one, most of the

1 time three trustees, many of whom are former judges. Some  
2 of them are former asbestos defense lawyers. They're  
3 people involved in the governance of these trusts who know  
4 what they're doing, know what they're looking at. We have  
5 professionals who manage the money, who advise us on the  
6 money, who invest the money. This isn't just, as has been  
7 described, go to the ATM machine, file your three-page POC  
8 and boom, you get paid. It never happens that way, never  
9 happens that quickly. Maybe with Johns Manville, but most  
10 of the trusts take sometimes a year, sometimes two years,  
11 sometimes three years.

12           Many of them aren't even open yet. I'm on the  
13 committee for the Pittsburgh Corning Corporation, a  
14 Pennsylvania company that wasn't forced into bankruptcy.  
15 They chose to use 524(g) to save the company and to save  
16 the jobs of the workers and to keep the company going.  
17 Pittsburgh Corning Corporation has been in bankruptcy for  
18 13 years, and they have not paid a single penny. Not one  
19 penny has been paid to a victim because there have been  
20 appeals, there have been fights, there's been disagreements  
21 about how the process is going to go forward.

22           So that's just an example of what Mr. Cohan was  
23 pointing out to you. The way this bill is written, many  
24 people will never, ever get their day in court because  
25 everybody has to wait until the last possible defendant

1 comes out of bankruptcy. There are defendants going into  
2 bankruptcy all the time. There's no way that the way this  
3 is written this is going to work the way it was proposed to  
4 you by the first committee.

5           If the true intention is to be transparent, then  
6 transparency needs to be both ways. I don't know about  
7 Larry and Bob, but I have been doing this for as long as  
8 they have. I don't have too many defendants come to me the  
9 day I file a complaint and say we were there, we want to  
10 pay you. It's a battle, it's a fight, it's a dogfight all  
11 the way through.

12           They claim we don't tell them things. We know  
13 they don't tell us things. That's litigation. That's what  
14 discovery is for. That's what the judges do. The judges  
15 who handle these cases are sophisticated. They've been  
16 doing it for a long time. This is a mature tort. It's  
17 been around, as Larry said, for 40 years.

18           The people who are best at answering the question  
19 of whose asbestos-containing products were at each of the  
20 different jobsites are the defendants themselves, not the  
21 plaintiff. Putting this burden back on the plaintiffs is  
22 totally and completely unfair. There's no doubt about it,  
23 no way to mince words, it is totally, completely unfair.

24           Justice delayed is justice denied, and that's  
25 what this bill does. That's the sole purpose of it. They



1 can talk about fairness all they want. There's no fairness  
2 to the victims. There's only fairness one way, and that's  
3 to them.

4 A lot of people have been on soapboxes today.  
5 I've done my soapbox. I'm really here to answer your  
6 questions because I got to tell you something, there are a  
7 lot of lawyers who don't understand how asbestos bankruptcy  
8 trusts work. If you have questions about the mechanisms  
9 and the way they're developed and how they develop and what  
10 happens, I'm here to answer your questions.

11 MAJORITY CHAIRMAN MARSICO: Thank you. I'm going  
12 to turn it over to Members for questions.

13 Representative Saccone for a question.

14 REPRESENTATIVE SACCONI: Thank you, Mr. Chairman.

15 In case you haven't noticed, the people have lost  
16 faith in our judicial system, many aspects of it. Many  
17 people believe the system is rigged, many people don't  
18 trust the people involved in it all the way up to, as you  
19 see in the news today, our Supreme Court Justices.

20 We have to try to search for truth and fairness  
21 here. That's what we have to do to decipher what's going  
22 on here. From what I can see -- and I've been through I  
23 don't know how many of these hearings now and how much  
24 testimony we've heard, the two sources of recovery should  
25 communicate. There can be no doubt about that.

1           But concealing claims that have already been  
2 made, that sure doesn't help your side. Let me finish.  
3 That doesn't help your side at all. I understand your  
4 point about credits should be actual and not maximum  
5 possible, but the other side, if we had a cross examination  
6 here, they would get up and say, well, that's not actually  
7 how it goes either. We don't get the chance to hear that  
8 again, the counter to your argument.

9           I see good points on both sides. I place part of  
10 this blame on the lawyers involved in this. We're not  
11 coming together and looking for justice and fairness. I  
12 hear a lot of gaming, and we're gaming on both sides of the  
13 system. That's not what we're supposed to do here. And I  
14 know there's not a cure for that, but I think that's going  
15 to be one of the problems with the legislation in the end  
16 is there are good points on both sides and we're not  
17 getting to the core of the problem because some side is  
18 going to get an advantage and another side is going to get  
19 an advantage maybe unfairly.

20           Now, you can comment.

21           MR. MATTOCK: My first comment, Representative,  
22 would be this. I know how my law firm operates, I know how  
23 I operate, I know the way I do my claims. I file  
24 bankruptcy claims as soon as I possibly can for everybody I  
25 represent. My goal is to get compensation to the people I

1 represent from every place I can get it as fast as I can  
2 get it. I don't delay. I do not delay. And if I'm asked  
3 for the petitions, for the claim forms, for example, in  
4 West Virginia where I practice quite a bit, there's a case  
5 management order that says I have to disclose the ones that  
6 I file that are appropriate, and I do.

7 REPRESENTATIVE SACCONI: But apparently, that  
8 doesn't happen with everybody, so that's one of the  
9 problems we have. These things have to communicate. We  
10 have to solve that problem.

11 MR. MATTOCK: I agree with you, but the way this  
12 is drafted, it doesn't solve the problem. What it does is  
13 it delays justice. It closes the courthouse doors to the  
14 victims, does nothing to the defendants other than give the  
15 defendants the power to close those doors and keep them  
16 shut.

17 REPRESENTATIVE SACCONI: Thank you.

18 MR. COHAN: May I comment as well?

19 REPRESENTATIVE SACCONI: Sure.

20 MR. COHAN: Same with my law firm and I think  
21 most, we file our claims up front. We want our clients to  
22 get the money from the bankruptcy trust, and then we move  
23 forward. I believe that is the standard of Pennsylvania,  
24 nationwide. There are some firms who may wait for many  
25 reasons, because they can't file, they can't find

1 witnesses. That is the exception, not the rule.

2 The documents we file are all turned over.  
3 There's complete communication between what happens in the  
4 bankruptcy trust, what happens in the civil system. When  
5 there is a verdict and any judge orders it or asks for it,  
6 if it hasn't already been produced, these companies get the  
7 bankruptcy trustee documents.

8 And if I may, and this is really important, when  
9 you said that the credit -- that we make the point about  
10 how it's the maximum when they only get this much, but I'm  
11 sure if you cross examined them it would go back-and-forth,  
12 no. With all due respect, there's only one answer. The  
13 way this is written, it's the maximum allowable. That's a  
14 term of art in the bankruptcy trust world. That's the  
15 credit that this bill gives them. There's a panel that  
16 comes in after us. Ask them.

17 MAJORITY CHAIRMAN MARSICO: Representative  
18 Everett.

19 REPRESENTATIVE EVERETT: Thank you, Mr. Chairman.

20 I'd like to go back to just a little more detail  
21 on how the trust boards are set up because I am one of  
22 those attorneys that's totally unfamiliar with this  
23 process.

24 MR. MATTOCK: I can explain it to you hopefully  
25 quickly. Basically, what happens, when a company gets to

1 the point where they believe that their potential asbestos  
2 liabilities are so large, and their currently held assets  
3 -- insurance, real estate, whatever they have that's set  
4 aside to be able to pay those liabilities -- when they  
5 believe that those liabilities were in excess of their  
6 assets, they file for 524(g) protection. 524(g) was  
7 created by Congress to handle the asbestos problem.

8           Johns Manville was the first to file for  
9 bankruptcy without 524(g). It was a mess. Everybody was  
10 all over the place. Nobody knew what to do. It caused all  
11 kinds of problems. So they basically created 524(g) to  
12 make it a better, more streamlined system based on what  
13 they found with the problems in Manville.

14           The first thing they found out in Manville was  
15 they paid out the claims too fast. They thought they had  
16 plenty of money set aside. They thought everything was  
17 going to be okay, but they didn't set a payment percentage  
18 and the money was -- before they knew it, the trust went  
19 bankrupt. So they had to go back and they had to recreate  
20 Johns Manville, but Johns Manville is a completely unique  
21 animal.

22           So with 524(g) what you do is you have whichever  
23 court is chosen, a bankruptcy judge is assigned to that  
24 case, and then a plaintiffs' Trust Advisory Committee is  
25 formed. We all submit our applications and we all submit

1 our qualifications. And the U.S. Trustee chooses who's  
2 going to be on the Trust Advisory Committee. The U.S.  
3 Trustee and the judge and us also choose who the futures  
4 representative is going to be. The futures representative  
5 is then chosen.

6 We have our committee, you have the judge, and  
7 then the companies themselves are involved in the process  
8 as well. And we all work together to develop what's called  
9 the TDP, the trust distribution process. In most of the  
10 trusts, it's an 80-, 100-page document that lays out  
11 everything that's going to be done, everything that's going  
12 to be -- how the money's going to be managed, how the  
13 claims are going to be paid, who's going to be the  
14 processing agent, who are going to be the investment  
15 counselors, every detail that needs to be done. It's  
16 basically like setting up a corporation. But that  
17 corporation is this water bottle. It's the assets that are  
18 set aside to fund that trust.

19 There's a procedure --

20 REPRESENTATIVE EVERETT: And if I just --

21 MR. MATTOCK: No, go ahead.

22 REPRESENTATIVE EVERETT: -- I am interrupting,  
23 but the individuals that set this process up --

24 MR. MATTOCK: Correct.

25 REPRESENTATIVE EVERETT: -- I get that, they're

1 appointed by the bankruptcy judge, the trustee, and then  
2 are those individuals primarily attorneys and primary from  
3 plaintiffs' side or from defendants' side or -- what's  
4 your --

5 MR. MATTOCK: Yes, I'll --

6 REPRESENTATIVE EVERETT: -- on 17 of them, what's  
7 your feel for how that --

8 MR. MATTOCK: Our committee, the Trust Advisory  
9 Committee, is always plaintiffs' lawyers because the  
10 plaintiffs are the creditors. This is a situation where we  
11 are the creditors. But the futures representative is there  
12 to protect the trustees are there to protect the trust  
13 assets. All three are set up to be checks and balances  
14 against one another. The trustees hire investment people.  
15 They hire representatives to do the calculations on where  
16 the payment percentage should be. They hire actuaries,  
17 guys who were actuaries who take the total number of claims  
18 they see being filed, whether mesothelioma, lung cancer,  
19 asbestosis nationwide. They look at the assets that are  
20 there. They look at how many years out they feel they need  
21 to pay, and they set the payment percentage based on making  
22 sure there's money 25, 30, 35 years later to pay every  
23 conceivable victim that might come down the line.

24 REPRESENTATIVE EVERETT: I don't have a  
25 preconceived notion of this. So it's not exactly an ATM

1 machine, but on the other hand, there are plaintiffs'  
2 attorneys that are there to try to make it so that it is  
3 efficiently --

4 MR. MATTOCK: We have a hand in it and the  
5 trustees have a hand in it, and the futures representative  
6 has a hand in it, and the trust professionals. We all work  
7 together; we all talk to each other.

8 REPRESENTATIVE EVERETT: Thank you. And then I  
9 have one other question. I know we're behind and probably  
10 falling farther behind, but you mentioned West Virginia.  
11 And we were provided with a document by somebody -- I'm not  
12 even sure who provided the document -- that showed States  
13 that do have laws maybe not like this but similar to this.  
14 Do you feel that West Virginia's law is effective and is a  
15 good tool or other States, maybe Ohio that --

16 MR. MATTOCK: Our litigation in West Virginia  
17 flows just like it did before the bill passed. The  
18 provisions that are in the West Virginia bill are very  
19 similar to what was in the case management order that we  
20 were operating on before the bill was passed. It doesn't  
21 close the courthouse doors. It closes the courthouse doors  
22 to people who your colleague, the Representative who's  
23 worried about fraud. It closes the doors to those people.  
24 If you get found to not be doing what you're supposed to be  
25 doing, the defendants can bring a motion to the judge, and



1 the judge who runs the docket can take that case off the  
2 docket. You can lose your place in the trial queue until  
3 you correct and do what you're supposed to be doing.

4 But it's not written this way, and it also gives  
5 appropriate credit, not full 100 percent credit for what's  
6 the maximum value. It gives credit only for the money  
7 actually received. And it doesn't prevent you from going  
8 to trial because you haven't filed with a future trust,  
9 only those that are currently open and paying and that you  
10 have gotten money from or expect to get money from.

11 REPRESENTATIVE EVERETT: Does it somehow make an  
12 adjustment for what you might receive in the future from a  
13 trust?

14 MR. MATTOCK: No, it does not because that's too  
15 speculative. It's just too speculative.

16 REPRESENTATIVE EVERETT: I understand that. But  
17 I just want to make sure that -- I appreciate it. Thank  
18 you very much. You've helped me a lot.

19 Thank you, Mr. Chairman.

20 MAJORITY CHAIRMAN MARSICO: Representative Miller  
21 for questions.

22 REPRESENTATIVE MILLER: Thank you, Mr. Chairman.

23 I recognize we're short on time. I admit,  
24 though, it does amaze me that somewhere around 50 countries  
25 outlaw this and yet we're still making products with it. I

1 don't understand that.

2 But I want to just ask a couple quick questions  
3 about the trust. I guess in my head when I was envisioning  
4 this first was that the trust was set up to help victims in  
5 the past. Clearly, though, with more knowledge and  
6 information, we're talking about the victims who are  
7 eligible for the trust are here now, getting impacted or  
8 affected now, getting sick now, and there's more to come  
9 because of what we keep doing, right?

10 MR. MATTOCK: That is correct.

11 REPRESENTATIVE MILLER: So the percentage that is  
12 set up -- now, I had heard somebody tell me that the  
13 percentage that actually gets paid out of these trusts is  
14 somewhere between 10 and 20 percent of the award. Am I in  
15 the ballpark or am I wrong?

16 MR. MATTOCK: Representative, it changes  
17 depending upon the trust, the amount of assets in the  
18 trust, and the potential claims to be filed against that  
19 trust. There are trusts that pay as little as 1 percent.  
20 The Plibrico Trust, for example, pays 1 percent. So the  
21 scheduled value for Plibrico is \$350,000 for mesothelioma,  
22 but you get \$350.

23 REPRESENTATIVE MILLER: So, clearly, there are  
24 some trusts that the payout is incredibly low?

25 MR. MATTOCK: Correct.

1           REPRESENTATIVE MILLER: Right? Okay.

2           MR. MATTOCK: That is correct.

3           REPRESENTATIVE MILLER: I guess what sometimes  
4 comes up with aspects of the legal profession is we get  
5 caught up with awards versus what's actually making it to  
6 the families or the individual that is hurt. And I think  
7 somebody was talking about that the average person with  
8 this type of cancer is surviving no more than 18 months.  
9 So if I got it straight, you're having some trusts that pay  
10 out incredibly low amounts, and they also have to deal with  
11 the Medicare costs and attorneys' fees out of that award.  
12 Am I right with that?

13          MR. MATTOCK: That's correct.

14          REPRESENTATIVE MILLER: Okay. The thing that I  
15 guess kind of jumped out to me the most here was -- and I  
16 appreciate your effort, Mr. Cohan, on going back to the  
17 bill. And in particular, you referenced on page 6 the  
18 aspect here where it says all defendants in an asbestos  
19 action must consent in order to move on. I've got to be  
20 honest. I don't find those couple words there to be small.  
21 I find this to be a massive change. And while I have not  
22 had experience in your type of litigation, I have had  
23 experience in mine. And I guess I'm just wondering, are  
24 you guys aware of any other type of law that would mandate  
25 that in order for somebody to exercise their rights to do

1 something, they have to actually have the defendant sign  
2 off for them to get access to another type of court?

3 MR. MATTOCK: It's unheard of.

4 REPRESENTATIVE MILLER: Yeah.

5 MR. COHAN: None that I'm aware of.

6 REPRESENTATIVE MILLER: One last thing, and I  
7 appreciate in particular my friend from Allegheny and  
8 Washington County in relation to truth and confidence in  
9 the litigation system. I guess I just wanted to be clear  
10 with it here as well. And recognizing that I'm sure that  
11 every aspect of every profession will have a portion of  
12 individuals who perhaps don't practice it the way they  
13 should, I guess I just wanted to be clear because the  
14 picture that I was getting from the first panel -- and I do  
15 appreciate the Chairman's diversity in the panels today --  
16 but the picture I was getting, it seemed to be saying that  
17 your type of litigation is rampant with fraud that is  
18 seemingly perpetrated with knowledge of the attorneys who  
19 do it. That was my take-away from the testimony, and  
20 perhaps I'm exaggerating their thoughts with it. I guess I  
21 was under the impression, though, that if any attorney was  
22 to knowingly assist in presenting false information to the  
23 court that there would be some sort of ramification or  
24 ethical issue with their bar license. Am I wrong?

25 MR. MATTOCK: That's correct.

1 MR. PAUL: You're correct.

2 MR. COHAN: My understanding is that in  
3 connection with that very case there is a RICO claim  
4 against one or more lawyers who were involved in that.

5 REPRESENTATIVE MILLER: Thank you.

6 MR. PAUL: But altogether you're talking about  
7 less than 15 cases that were involved, and of the 15, they  
8 only filed five in the RICO claims. And in any event, of  
9 course there's always the provision and the ability to, on  
10 a case-by-case basis in an individual jurisdiction in  
11 Pennsylvania, file a claim with the Disciplinary Board to  
12 say that that particular attorney is committing improper  
13 conduct.

14 MR. MATTOCK: Yes, one aspect that we may not  
15 have touched on is that in every different county in  
16 Pennsylvania, the bigger ones, Allegheny County,  
17 Westmoreland County, Washington County, Philadelphia, there  
18 are case management orders in place and there are judges  
19 who are assigned to the asbestos docket. And most of the  
20 time the cases just don't go to any judge. It generally  
21 goes to one of the designated asbestos judges. And they  
22 manage their docket with case management orders. They work  
23 with the lawyers on a regular basis.

24 I'm not one of those judges, but I don't think  
25 any of the judges want to be burdened with all of this

1 either. They've got pretty big burdens already with  
2 managing their dockets.

3 REPRESENTATIVE MILLER: Thank you, gentlemen.

4 Thank you, Mr. Chairman.

5 MAJORITY CHAIRMAN MARSICO: Representative  
6 Barbin.

7 REPRESENTATIVE BARBIN: Yes, I just wanted to  
8 make sure I understood it. In all these other States --  
9 Texas, Oklahoma, Arizona, Wisconsin, Ohio, and West  
10 Virginia -- do any of them have all-defendant consent  
11 statutes? All defendants must consent to your knowledge?

12 MR. COHAN: I think --

13 MR. MATTOCK: I think they all do.

14 MR. COHAN: They're all a little different. I  
15 know Ohio does.

16 MR. PAUL: Ohio does.

17 MR. MATTOCK: Right.

18 REPRESENTATIVE BARBIN: Ohio does have an all-  
19 consent language.

20 MR. PAUL: Ohio clearly does. Ohio clearly does.

21 REPRESENTATIVE BARBIN: Do they also have a  
22 maximum possible settlement?

23 MR. MATTOCK: To be honest with you, I don't  
24 believe it's in the Ohio statute either.

25 REPRESENTATIVE BARBIN: Okay.

1           MR. MATTOCK: I think you have to put everything  
2 through. You have to make sure that you've checked off all  
3 the boxes. But the one thing that happens in Ohio -- Ohio  
4 was the first bill that passed. Ohio went through first.  
5 The versions that I've seen that have been passed in other  
6 States are greatly watered-down from what was passed in  
7 Ohio.

8           REPRESENTATIVE BARBIN: Okay. And lastly, why  
9 don't we have a ban on asbestos products if 55 other  
10 countries do?

11           MR. PAUL: In 1994 in a case called *Corrosion*  
12 *Proof Fittings v. EPA*, the various asbestos industries  
13 filed an objection to the EPA proposed ban on asbestos,  
14 which was upheld by the Fifth Circuit in Texas on the  
15 grounds that certain of the products that the EPA proposed  
16 to ban were -- that EPA had not demonstrated the ability,  
17 and therefore, they threw out the entire proposed decision  
18 to ban asbestos.

19           Since that time, the number and amount of  
20 asbestos products manufactured in this country as compared  
21 to foreign products that are imported into this country,  
22 for example, in brake linings and others things, has  
23 dropped so considerably that the desire of the Federal  
24 Government to actually ban the substance has just gone  
25 away. So that's the technical answer to your question.

1 MR. COHAN: We should.

2 REPRESENTATIVE BARBIN: We should.

3 MR. COHAN: We should.

4 MAJORITY CHAIRMAN MARSICO: Representative  
5 Petrarca for questions.

6 DEMOCRATIC CHAIRMAN PETRARCA: Just a quick  
7 follow-up, maybe Mr. Mattock. Can you tell us what the  
8 impact of the Ohio legislation has been?

9 MR. MATTOCK: Part of the problem with the Ohio  
10 legislation was that it also encompassed creating a  
11 permanent parking docket for all non-malignant cases. So  
12 if you get asbestosis in Ohio, you have no access to the  
13 courts. They also put very stringent requirements on lung  
14 cancer cases that the plaintiffs' lawyers involved and the  
15 plaintiffs themselves who get lung cancer in Ohio are  
16 virtually blocked out of the courtroom because of all  
17 different various administrative and procedural hurdles  
18 that they have to go through to be able to file a claim.  
19 Some still make it through and file claims, but very, very  
20 few.

21 So mainly, what's left is mesothelioma claims.  
22 There are still some mesothelioma claims that go forward in  
23 Ohio, but very, very few and nowhere near the volume that  
24 used to be in Ohio. And people followed the rules and  
25 people followed what they have to do. And to practice in



1 Ohio, you have to follow all the rules. And my firm still  
2 does cases in Ohio, but few and far between and nowhere  
3 near what it was before. And it has clearly affected what  
4 goes on in Ohio. And to be quite honest with you, people,  
5 if they can file their case, if they had exposes anywhere  
6 else but in Ohio that they could possibly file they case  
7 anywhere else than Ohio, that's what they do. They've gone  
8 to Illinois or they've gone to Rhode Island.

9 One of the strange aspects of this is with all  
10 the veterans' claims, there are a couple of defendants in  
11 this litigation that the first thing they do is if you're a  
12 veteran -- and we have to disclose that -- and they see  
13 that you were in the Navy or you were on a naval ship, the  
14 first thing they do is remove your case from Pennsylvania  
15 straight to Federal court. That's what goes on in these  
16 things.

17 DEMOCRATIC CHAIRMAN PETRARCA: And the question  
18 was asked about veterans earlier. Is that correct --

19 MR. MATTOCK: It's a very --

20 DEMOCRATIC CHAIRMAN PETRARCA: -- about 30  
21 percent of --

22 MR. MATTOCK: It's 30, if not higher.

23 MR. COHAN: At least.

24 MR. PAUL: It's a huge percentage.

25 MR. MATTOCK: Thirty, if not higher. And the

1 question about banning asbestos is a great question, and we  
2 definitely -- as a sophisticated nation, we should ban  
3 asbestos. But the problems we're having with asbestos, the  
4 reason asbestos litigation is still going is because of the  
5 persistent and pervasive amount of asbestos that was used.  
6 As you pointed out, Representative, it's still in our  
7 buildings, it's in our schools, it's in our workplaces.  
8 The millions and millions and millions of dollars it would  
9 take to remove it from everywhere it is, it just hasn't  
10 been done and people are continuing to be exposed. Even  
11 though most companies stop using asbestos in their products  
12 in the 1980s, people are still getting sick, people are  
13 still dying.

14 A little bit over 3,000 mesothelioma cases occur  
15 in the United States every year, and a lot of them are like  
16 her mother who got exposed through their father, their  
17 husband. It's a pervasive disease.

18 MR. PAUL: Well, the other problem also is, for  
19 example, in brake linings, there were asbestos brake  
20 linings through the year 2001. The latency period is quite  
21 long and so you still are going to have years and years in  
22 which people will develop it from exposures that occurred  
23 in the 21st century.

24 DEMOCRATIC CHAIRMAN PETRARCA: Okay. Great.  
25 And --

1 MAJORITY CHAIRMAN MARSICO: I think there's --  
2 sorry.

3 DEMOCRATIC CHAIRMAN PETRARCA: No. And just in  
4 our legislation is it more restrictive or more strict,  
5 let's say, than that Ohio legislation?

6 MR. MATTOCK: This legislation, as Mr. Cohan  
7 pointed out, it would close the courthouse doors. It would  
8 just simply shut it down. And we can't tell you how long  
9 it would be before you would ever be able to file a claim  
10 against every conceivable asbestos bankruptcy trust because  
11 they're still opening. And you have ones like Pittsburgh  
12 Corning. Thirteen years later they still have not opened  
13 and paid a penny. How can you stop someone from going  
14 forward with a case on that type of speculation?

15 DEMOCRATIC CHAIRMAN PETRARCA: Thank you.

16 MAJORITY CHAIRMAN MARSICO: I believe that  
17 Representative Toohil went to a Rules Committee meeting and  
18 Counsel Dymek has the question that she wanted to ask.

19 MR. DYMEK: Even recognizing that there's going  
20 to be a wide disparity in cases, she wanted to get a sense  
21 of the average legal fees, average medical costs, actual  
22 medical costs in any given asbestos case and the actual  
23 award that one might get from verdict in such a case.

24 MR. COHAN: Well, I'll talk about medical costs  
25 to start with. If the individual -- and most of them can't

1 get surgery, chemotherapy is not going to do them any good,  
2 so obviously the costs may be five figures,  
3 hospitalizations, palliative treatment. The ones that can  
4 get surgery, we're talking about six figures, sometimes \$1  
5 million or more of medical care, very often lienable.  
6 Val's mother received extensive treatment. She had to  
7 repay \$300,000 out of her recovery to repay the medical  
8 bills. So that's a big part of the recovery.

9           The lawyers' fees are contingency fees, and I  
10 think they range, depending on the law firm and the type of  
11 case, 20 percent to 1/3 typically, as they usually do.

12           MR. DYMEK: And she had asked if you could give a  
13 general idea on what the size of an award -- what size of a  
14 verdict might be overall in a case of this nature?

15           MR. COHAN: Well, there's something -- and I  
16 encourage the Members to look at it. There's Mealey's  
17 Asbestos Reporter that comes out and reports verdicts,  
18 Pennsylvania and around the country. Most of the verdicts  
19 are for the defense. Most of the times, the jury doesn't  
20 find against that defendant because that's the defendant  
21 that's really putting up a big fight, the product ID is  
22 difficult, the witnesses are dead and gone, they're aged,  
23 infirm, and those cases are tough. So most of the time  
24 it's a defense verdict against a lot of the asbestos  
25 manufacturers.

1           When the verdicts come in, they come in anywhere  
2 from hundreds of thousands to potentially millions. I  
3 think most significantly -- of course, juries get to hear  
4 what happened to that family, how young was the person,  
5 were they working, did they leave dependent children? So  
6 the verdicts are reflective of the circumstances. Most  
7 importantly, under the language of this bill, those  
8 verdicts would not get paid anymore. The defendants  
9 against whom the jury finds will not pay because they're  
10 going to get a credit for 100 percent of what the  
11 bankruptcy trust has as the maximum, not what the victim  
12 actually got. So the credits will often exceed the amounts  
13 of the verdicts and nothing will be paid.

14           MR. MATTOCK: There are actually two trusts that  
15 pay 100 percent: North American Refractories, which is  
16 capped at 75,000 for a mesothelioma; and Western Asbestos,  
17 which is Western MacArthur, which is a small -- for  
18 Pennsylvania victims, Pennsylvanians hardly ever are able  
19 to recover against Western Asbestos because they were based  
20 on the West Coast, they were in the shipyards, and it's  
21 extremely difficult to get through the procedures and the  
22 TDP. But when they do pay, I think they pay 200, 250,  
23 something like that. They're a pretty significant payer,  
24 but they pay a very, very small number of people.

25           MR. PAUL: I think the other answer to your

1 question, Mr. Dymek, is that because every case is  
2 different that you can create an average number, you can  
3 create a modal number, you can create a 50 percent number,  
4 but that is very difficult to project on a case-by-case  
5 basis or any way to say, well, an average case is worth  
6 this or that because every case is specific. And remember  
7 also that in Pennsylvania the lawyers can't say to a jury  
8 this is how much I think you should award. It's up to the  
9 individual jurors. And so it depends on the 8 or 12 that  
10 you have that show up what those values are. And so there  
11 are low ranges and there are high ranges. It's not a  
12 specific answer, which I wish we could give you but we  
13 can't.

14 MR. DYMEK: Thank you.

15 MAJORITY CHAIRMAN MARSICO: Well, thank you very  
16 much --

17 MR. COHAN: Thank you.

18 MAJORITY CHAIRMAN MARSICO: -- Mr. Cohan --

19 MR. PAUL: Thank you.

20 MR. MATTOCK: Thank you.

21 MAJORITY CHAIRMAN MARSICO: -- Mr. Paul, and  
22 Mr. Mattock --

23 MR. COHAN: Thank you.

24 MR. PAUL: Thank you.

25 MR. MATTOCK: Thank you, Mr. Chairman.

1 MAJORITY CHAIRMAN MARSICO: -- and your  
2 testimony. And we want to say to Val, thank you for being  
3 here. On behalf of the Committee, we're sorry for your  
4 loss and our thoughts are with you and your family.

5 MR. PAUL: Thank you.

6 MAJORITY CHAIRMAN MARSICO: Next, panel 3, we  
7 have until 1:00, everyone, because we have session at 1:00.  
8 Panel 3 has come before us. The Honorable Peggy Ableman  
9 with McCarter & English, Delaware Superior Court, retired;  
10 Marc Scarcella, Bates White Economic Consulting; and Peter  
11 Kelso, Bates White Economic Consulting. Welcome. And you  
12 may begin when you're ready.

13 MS. ABLEMAN: Good afternoon, Representative  
14 Marsico and Members of the House of Representatives. My  
15 name is Peggy Ableman, and I have to give you a little  
16 disclosure here that I'm not and have never been a  
17 Pennsylvania attorney. I am from the neighboring State of  
18 little Delaware, and I've been, for the past six years or  
19 so, a staunch advocate for greater transparency between the  
20 two compensation systems available for plaintiffs who have  
21 been injured as a result of asbestos exposure.

22 And having said that, I do have some expertise in  
23 these matters because until December of 2012 I was a trial  
24 judge in the State of Delaware for almost 30 years. For  
25 the last few years of my tenure on the Superior Court, I

1 was solely responsible for the asbestos docket, which then  
2 consisted of approximately 600 to 700 cases. So I'm going  
3 today to switch gears a little bit and give you something  
4 of the judicial perspective.

5 In that capacity, I had an experience in a  
6 particular case that deeply troubled me and opened my eyes  
7 to the need for mandatory disclosure and transparency  
8 between the two compensation systems. And it's led me to  
9 believe in the critical importance of State and Federal  
10 legislation to eliminate the deceptive practices that the  
11 current arrangement fosters and to close the loopholes that  
12 exist in States like Pennsylvania.

13 I've seen the unfairness of this lack of  
14 transparency played out in my own courtroom where I  
15 personally believed that I possessed all the power  
16 necessary to ensure a fair and just result in every case  
17 over which I presided. I was wrong. Even with standing  
18 orders that were discussed today and rules requiring  
19 disclosure, the problem persists.

20 The case that I will briefly describe  
21 precipitated my post-retirement interest in advocating for  
22 reform of the current system. And it was not an isolated  
23 or unique situation. It is a national problem that is so  
24 widespread that it has been addressed by an increasing  
25 number of State Legislatures, is the subject of pending



1 Federal legislation, and has been a topic of dozens of  
2 scholarly legal articles and reviews.

3 Absent legislation or court rules, defendants in  
4 tort cases simply have no way of knowing all of the sources  
5 of an individual's total exposure to asbestos. And as I  
6 unwittingly learned, even in the face of court rules or  
7 orders requiring disclosure, there is no foolproof  
8 mechanism to eliminate fraud.

9 The irony of my encountering this problem in  
10 Delaware is that we have and have always had a statewide  
11 standing order requiring plaintiffs to provide to  
12 defendants copies of all bankruptcy trust claim forms that  
13 have been filed. But even in a State where an express  
14 requirement of full disclosure exists, deception and  
15 withholding of vital information still occurs, often  
16 resulting in irreversible prejudice to one or more  
17 defendants.

18 The case was called *Montgomery v. A.W.*  
19 *Chesterton*, but by the time of trial, all but one  
20 defendant, Foster Wheeler, had settled. The original  
21 plaintiff in the case, June Montgomery, was diagnosed in  
22 April of 2009 with pleural mesothelioma. Her son Brian  
23 first retained Texas counsel to assist his parents in  
24 finding Florida counsel, where they resided at the time.  
25 Florida counsel ultimately filed the case in the Superior

1 Court in New Castle County, Delaware, in November of 2000.

2 And I was assigned to it.

3           The suit named 22 defendants and alleged that  
4 June's mesothelioma was caused by her exposure to the  
5 products of those 22 defendants. As I stated, asbestos-  
6 related lawsuits in Delaware are governed by a standing  
7 order, which sets forth mandatory disclosure obligations  
8 related to bankruptcy trust claims. But even in spite of  
9 this mandatory order and specific interrogatories directed  
10 to plaintiffs requesting this information from the outset,  
11 up until the weekend before trial was to commence on a  
12 Monday, at no time did plaintiffs ever identify the  
13 products of any of the 20 entities to whom trust claims had  
14 been submitted. Instead, they consistently asserted that  
15 Mrs. Montgomery was exposed to asbestos solely through her  
16 laundering of her husband's work clothes as opposed to any  
17 work she personally performed with or around products  
18 outside the home.

19           Now, although Mr. Montgomery, her husband, was an  
20 electrician who had worked with and around a variety of  
21 products and materials at multiple locations in Florida  
22 throughout his entire career, the distinct impression from  
23 the complaint, the discovery responses, and his sworn  
24 deposition testimony was that the bulk of his work around  
25 asbestos occurred only during a short period of time at the

1 Everglades power plant where, coincidentally, Foster  
2 Wheeler boilers were located.

3           Because Foster Wheeler was aware of other cases  
4 where lawyers representing asbestos claimants had submitted  
5 conflicting work histories to multiple trusts, it had  
6 actually filed a motion in advance of trial requesting that  
7 the court order disclosure of all pretrial settlements of  
8 any monies received from bankruptcy trusts. Plaintiff's  
9 counsel reported to me unequivocally that no trust  
10 submissions had been made and no monies received.

11           But two days before trial was to begin on a  
12 Saturday night, defense counsel first learned from  
13 plaintiff's counsel that plaintiff had received two  
14 bankruptcy settlements of which he was previously unaware.  
15 The disclosure was directly inconsistent with counsel's  
16 representations to the court, and by the following day, it  
17 was revealed that a total of 20 bankruptcy trust claims had  
18 been submitted.

19           Although the defendant had been led to believe  
20 that Mrs. Montgomery's exposure was solely the result of  
21 take-home fibers on her husband's clothing, at this late  
22 point in the litigation, it was revealed that one or more  
23 of plaintiff's attorneys had been claiming exposure through  
24 Mrs. Montgomery's own employment, as she had worked in and  
25 around the products herself. In essence, the

1 representations to the bankruptcy trusts painted a much  
2 broader picture of exposure to asbestos than plaintiff or  
3 her attorneys had acknowledged during the entire course of  
4 the litigation in Delaware.

5 Under Florida law, which was applicable to that  
6 case, jurors are permitted to allocate fault to parties not  
7 present at trial, including bankrupt entities. But  
8 plaintiff's failure to disclose and produce the trust  
9 claims precluded Foster Wheeler from investigating  
10 Mrs. Montgomery's exposure to asbestos from these  
11 additional bankrupt companies, and it precluded them from  
12 identifying additional exposures from products that were  
13 not developed in the Delaware litigation. That, of course,  
14 was severely prejudicial to defendant Foster Wheeler.

15 And equally disconcerting was the fact that all  
16 the other defendants in the Montgomery case had already  
17 settled with plaintiffs but did so without full knowledge  
18 of the truth.

19 Plaintiff had been poised to try the case before  
20 a jury as though Foster Wheeler had sole or at least  
21 predominant responsibility for Mrs. Montgomery's exposure  
22 and disease. This is important because the crux of the  
23 Montgomery case, as in all asbestos litigation today, is a  
24 determination of who is responsible for a claimant's  
25 exposure and to what extent. When 20 manufacturers of

1 asbestos or asbestos-containing products are removed from  
2 the equation, a true and fair allocation of fault simply  
3 cannot occur.

4           When I first began advocating for greater  
5 transparency, I was often led to believe that there was no  
6 such thing as widespread fraud in this dual-compensation  
7 system and that my case was simply an aberration, but that  
8 was not true. We now have additional proof that this is  
9 not an isolated problem.

10           The findings of Judge Hodges in his opinion in  
11 the *Garlock* bankruptcy case and the research and analysis  
12 of my colleagues from Bates White involving solvent  
13 defendant Crane Company, as reported in their recent  
14 Mealey's article, the number of States that have passed  
15 specific legislation to increase transparency, as well as  
16 the number of jurisdictions that have standing orders  
17 requiring disclosure speaks to the magnitude of the problem  
18 of inconsistent claiming patterns and fraudulent practices.

19           It's not necessary here to play the blame game or  
20 point fingers at any particular member of the plaintiffs'  
21 bar. I'm proud of our fellow plaintiffs' bar members here  
22 who have been cited for being so honest. The system as it  
23 is now structured encourages attorneys to wait until the  
24 litigation is concluded before they file their trust  
25 claims.

1           In my case, the lawyers were clearly not  
2 forthright because they concealed the trust filings in  
3 violation of the case management order, and when they  
4 failed to disclose the claims specifically required in  
5 discovery. But the plaintiff in that case could just as  
6 easily have waited to file claims with the trust, and in  
7 that case, there would be nothing to disclose, and  
8 therefore, no fraud.

9           Attorneys continue to take advantage of this  
10 loophole because they can justify their strategy by  
11 asserting that they have a duty to receive maximum recovery  
12 for their clients. But when these claim filings are  
13 delayed and evidence of exposure to other products is  
14 deliberately concealed, the outcome is unfair to the  
15 remaining solvent defendants in the case and to the  
16 defendants who have already settled. It also depletes the  
17 resources available to those claimants who honestly seek  
18 compensation and do not play games with the system.

19           And finally, I want to emphasize the role of the  
20 courts in achieving greater transparency. And this was  
21 addressed by Representative Saccone.

22           MAJORITY CHAIRMAN MARSICO: Saccone.

23           MS. ABLEMAN: Saccone, sorry. The *Montgomery*  
24 case is a quintessential example of how difficult it is for  
25 the courts to control this deliberate withholding of

1 exposure evidence either through case management orders or  
2 even through disciplinary proceedings. Delaware had a  
3 standing order requiring disclosure but I had no way to  
4 enforce it.

5           Even after plaintiff's scheme was exposed to me,  
6 the real culpable lawyer turned out to be a Texas attorney  
7 who had never entered his appearance in Delaware and who  
8 had filed trust claims on plaintiff's behalf without  
9 advising litigation counsel. He was therefore beyond the  
10 reach of our court's disciplinary powers. And that's an  
11 example of the types of games that are played. I'm quite  
12 sure that those practices continue to this day.

13           And even if a judge has the disciplinary  
14 jurisdiction to sanction counsel, it is often too late  
15 because the damage to the integrity of the judicial process  
16 has already occurred. Thank you.

17           MR. KELSO: Good afternoon, Chairman, Members of  
18 the Committee. My name is Peter Kelso. I'm with Bates  
19 White Economic Consulting studying litigation and asbestos  
20 trends for the better part of 15 years. A lot of what I  
21 was going to say has been covered today, so I don't want to  
22 be redundant. We have lunch and I know you guys have a  
23 busy schedule. I'm going to cover mainly two major points.

24           The first has to do with *Garlock*, which we've  
25 heard a little bit about today. It's a bankruptcy case in

1 which I think there's a lot of myths and misconceptions  
2 about it. A lot of people believe that the judge's finding  
3 in which he found that the asbestos litigation was  
4 manipulated and infected by the game that Judge Ableman  
5 talks about was based on 15 cases. Not true. Garlock put  
6 forth 15 exemplar cases, high-value cases which they  
7 settled and the data later showed that some major  
8 contradictory allegations between the tort and trust  
9 systems in which the 15 cases, I believe, on average, only  
10 two trust claims or exposures were divulged in the tort  
11 system. The Garlock data showed that there was 19 trust  
12 claims later filed.

13           So let's first explain what is the Garlock case  
14 because I believe the last time you guys had a committee  
15 hearing the Garlock ruling was out, earlier this year, the  
16 Garlock data. So all the information based upon Judge  
17 Hodges' ruling was made publicly available to any party  
18 that wanted to examine it. And that's what we essentially  
19 did.

20           So what is the Garlock data? The Garlock data is  
21 4,000 personal injury questionnaires that were court-  
22 ordered to the plaintiff law firms. Those plaintiff law  
23 firms then disclosed what documentation they've made to the  
24 trust, as well as documentation that they've made regarding  
25 solvent settlements in the tort system. Eight hundred and



1 forty-five of those claimants out of the 4,000 provided  
2 total recovery data. So for the first time -- and the  
3 discovery process in Garlock was unprecedented. They got  
4 more discovery on the trust system than had ever been given  
5 before. And in terms of the total recovery data, for the  
6 first time, somebody could see other than the trust what a  
7 claimant had filed and collected in the tort system and  
8 what they had subsequently filed in the trust system.

9           The Garlock data also included DCPF, Delaware  
10 Claims Processing Facility data, which houses 11 of  
11 probably the largest bankruptcy trusts that are out there.  
12 It also included voting ballots on over 30 bankruptcy  
13 reorganizations, and all this information was put into an  
14 analytical database, which was used in the bankruptcy case  
15 to prove that Garlock's legal liability was \$125 million,  
16 due in part because they were paying nuisance or settlement  
17 costs or transaction costs based upon the concealment of  
18 trust-related disclosures.

19           So what we've done, since this information became  
20 public, we took a step back. Okay, we know what the judge  
21 found in Garlock. Let's see how it examined Garlock's  
22 codefendant, Crane Company, another company that's been a  
23 solvent tort defendant, a peripheral defendant until the  
24 bankruptcy wave. And what did it show? Well, in Crane's  
25 case, it showed that 80 percent of the time trust claims

1 and disclosures weren't disclosed to Crane in the tort  
2 system. Fifty percent of the time the trust claims were  
3 made after Crane had already settled or resolved the case.

4           So I think from our perspective and what we found  
5 especially in the Crane paper, it validated to us what  
6 Judge Hodges found, that if you look at the complex and  
7 aggregate data that's involved in these cases, you're going  
8 to find that the problem is pervasive. It's not every  
9 firm. Some firms are playing by the rules. And there's  
10 four RICO suits alleging fraud filed by Garlock against  
11 four very prominent plaintiff firms. So in terms of the  
12 question of whether there's not a recourse to perjury,  
13 there may be. Those suits are pending.

14           The 15 cases Garlock highlighted, we found  
15 additional exemplar cases in the two papers we did. I'll  
16 give you brief examples. I think they've been touched on  
17 before. One was a New York case involving a plaintiff  
18 Ginter in which the plaintiff claims he was a chemist, and  
19 he claimed that he had very limited -- in fact, his  
20 plaintiff attorneys took a long time and downplayed his  
21 exposure to any thermal insulation products. And yet the  
22 Garlock data shows less than three months after the trial,  
23 plaintiff attorneys filed seven claim trusts with thermal  
24 insulation trusts.

25           So I think all these exemplar cases, especially

1 the ones we've highlighted, kind of crystallize what's  
2 happening in these cases. And I think it's very similar to  
3 what Judge Ableman found in the *Montgomery* case where you  
4 have extreme contradictory statements being made to a  
5 judge, to a jury in the tort system and then a very  
6 different set of allegations being made against the  
7 bankruptcy trust. And because there's no transparency or  
8 recourse, the tort system doesn't know what happens in the  
9 trust system, the trust system doesn't know or even care  
10 what happens in the tort system.

11 We also did a study in Philadelphia. We examined  
12 the disappearance of tort allegations against bankrupt  
13 parties. So as you have companies go bankrupt like Garlock  
14 -- I wouldn't be surprised if this happened today -- their  
15 name disappears from exposure allegations once they file  
16 for bankruptcy. The plaintiff no longer remembers. It  
17 happens with GM. When GM filed for bankruptcy, it's now  
18 Chevy and Ford country all of a sudden. They don't  
19 remember those exposures. Now, whether those are a bad  
20 memory or not, it's pervasive enough.

21 And what we found in Philadelphia, it was  
22 pervasive to the tune that 75 percent of claimants today --  
23 this was back, I guess, as of 2011; I don't think it's  
24 changed. In fact, given the industrial State of  
25 Pennsylvania with the naval shipyards and refineries and

1 steel plants, that 75 percent of claimants have some type  
2 of occupational exposure to thermal insulation products.  
3 So to say that a plaintiff today goes into a courtroom and  
4 obviously can't name those bankrupt products but that he  
5 doesn't remember being exposed or that plaintiff attorneys  
6 don't say they're going to file claims against those I  
7 think is a little bit disingenuous based upon what we found  
8 from the Garlock data.

9           The second point I'd like to make, and I'll make  
10 it very briefly, I think this bill is all about discretion.  
11 Right now, the discretion has been with the plaintiff  
12 attorneys and their willingness to divulge and not  
13 intentionally delay the trust claims. That hasn't worked.  
14 Under the honor rule and their discretion, we even had like  
15 three different plaintiff attorneys in the Garlock  
16 bankruptcy proceedings very forthright under deposition say  
17 we intentionally delay. They admitted it.

18           So I think giving the discretion in this instance  
19 to the judge to determine what non-apportionment parties  
20 can be on the verdict sheet and ultimately to a jury to  
21 evaluate the full complement of evidence, exposures from  
22 solvent defendants and exposures from the bankruptcy trust,  
23 will be really the only way you're going to get to an  
24 equitable outcome, and allocation only then will be able to  
25 be allocated responsibly amongst both solvent and bankrupt

1 parties.

2 MR. SCARCELLA: Well, thank you, everyone. Thank  
3 you, Mr. Chairman, Representatives, and everybody else  
4 who's spoken today. I'll keep it even more brief since I'm  
5 the last person and everybody's done a wonderful job on  
6 these panels, including the opponents of the bill.

7 My name is Marc Scarcella. I got to testify on  
8 the last iteration of these hearings a few years ago. I've  
9 testified at a number of State hearings in Ohio, Texas,  
10 Wisconsin, et cetera, as well as at the Federal level. I  
11 used to advise to bankruptcy trusts. I actually used to be  
12 a statistician of the Johns Manville Trust about 15 years  
13 ago now. I was one of the professionals that Mr. Mattock  
14 referenced when talking about the professionals of the  
15 trust hired to advise them on things like their actuarial  
16 forecasts.

17 I sadly have set reduced payment percentages more  
18 times than I would have liked to when I was with my former  
19 firm, which I left in 2009, but I have an intimate  
20 knowledge of how the trust system works. I advised the  
21 trustee boards of some of the trusts. And for the last six  
22 or seven years I've been working more closely with the  
23 defendants and the insurers, so I've seen things from both  
24 sides of the litigation, the trust world, the tort world,  
25 on behalf of plaintiff representatives, as well as

1 defendants and insurers.

2           So I'm basically here to try and answer any  
3 questions anybody still has about how the trust system  
4 works. I think everybody else has covered some of the  
5 issues very well. And I'm actually rather encouraged  
6 because one noticeable difference I have heard today than I  
7 think it was three years ago when we had a similar hearing  
8 is I don't see anybody disagreeing -- and I don't want to  
9 put words in anybody's mouth, especially, the opponents of  
10 the bill. But I don't seem to hear people disagreeing  
11 about the problem that's out there.

12           When I used to do this three, four, five years  
13 ago in some other States, there would still be some  
14 contention about whether or not a problem even existed. I  
15 think *Garlock* helped shed a lot of light on that, that  
16 there are bad actors and there's a lot of States that have  
17 procedural loopholes that allow bad actors to, well, act  
18 badly. And, unfortunately, like with most litigations, the  
19 few bad actors, I think, make it more difficult for the  
20 good actors like the panel we had previously to operate  
21 without further scrutiny about their practices.

22           So what I'd like to see happen is a bill pass  
23 that addresses the problem, that makes sure that the people  
24 who are acting in good faith still get to act the same way,  
25 and those that would act badly are disincentivized to do

1 so. Now, I'm not an attorney, I'm not a legislator so I'm  
2 not going to get into the nuance of the bill and whether or  
3 not the bill answers the problem. I'm just happy to see  
4 that more people on both sides of the panels, on both sides  
5 of the issues are recognizing the problem.

6 Just to touch on a couple things before I stand  
7 down that I think could be misleading or needed a little  
8 bit further explanation, the bankruptcy trust system is the  
9 most efficient way to get paid for legitimate claimants  
10 hands down. It's far faster than the tort system. It's  
11 just not Manville. We just happen to have a deposition for  
12 the general counsel of the Manville Trust. When you're  
13 talking about mesothelioma victims and you're talking about  
14 large industrial defendants, predecessor companies like  
15 Owens-Corning, like Armstrong, like Babcock, mesothelioma  
16 victims more times than not get paid by these trust and  
17 they get paid very quickly. The information they require  
18 to be paid is oftentimes minimal.

19 We talk about medical diagnoses. Yes, it's the  
20 same medical diagnosis of mesothelioma that's being  
21 presented in the tort case to prove that the individual has  
22 mesothelioma. You take that same document you've produced  
23 for the tort case, attach it to your trust claim form,  
24 which is, as we've already noted, pretty easy to fill out.  
25 You don't need to track down coworkers to testify on your

1 behalf even if the person has passed away. You can have  
2 family members do that. Or you can just get paid based on  
3 the approved site in which you were working.

4           We had this conversation come out about how some  
5 of the most knowledgeable groups, entities, parties,  
6 however you want to define them in this litigation are  
7 those defendants. Well, these former defendants, Owens-  
8 Corning, Armstrong, so on and so forth, 60 of them are so,  
9 they do know a lot. They were in this litigation for quite  
10 some time. And about 30 of their successor trusts use  
11 things called approved site lists where they know their  
12 products were. Philadelphia Naval Shipyard, Bethlehem  
13 Steel facility up in Allentown, there was a number of  
14 trusts that know that their products were at these sites.  
15 So a lot of times plaintiffs can get paid just by being  
16 able to prove through sworn statement, again, of the  
17 individual, of a family member, of a coworker that they  
18 worked at that site and they are willing to allege  
19 exposure.

20           So it's not a really long process. It's not an  
21 arduous process. It's far less arduous than a lawsuit.  
22 And that's the fastest way to get people paid. So I just  
23 wanted to make that clear, not that anybody was suggesting  
24 otherwise, but just keep everything relative. Compared to  
25 the tort system, it's far easier to get paid by the trust



1 system, and the burdens are sometimes far less than trying  
2 to get settlement from the tort system.

3           The other thing you need to understand, when we  
4 talk about defense verdicts in the tort system, that is not  
5 to imply that the plaintiff gets no money when there's a  
6 defense verdict. It was correctly pointed out on the  
7 previous panel, but I just wanted to make sure it was  
8 clear. You get a defense verdict against that particular  
9 defendant or group of defendants who took the case all the  
10 way through trial. That individual has likely settled with  
11 a number of defendants prior to trial, prior to verdict.  
12 So it's no to say that defendants who get verdicts that  
13 those plaintiffs on the other side are getting no money,  
14 certainly not the case for mesothelioma, certainly not what  
15 we found across thousands of cases in Garlock.

16           So, again, given my background, I'm happy to  
17 answer any questions anybody has about the trust system,  
18 the bankruptcy reorganization process, though I think  
19 Mr. Mattock covered a lot of it already. And I thank you  
20 for your time and your willingness to have this hearing.

21           MAJORITY CHAIRMAN MARSICO: Okay. Representative  
22 Barbin for questions.

23           REPRESENTATIVE BARBIN: I just have a quick  
24 question.

25           One of the things that was pointed out in the

1 prior panel was the unfairness of the language of the  
2 specific bill. Has there been in any State any effort or  
3 on the Federal level to take the information from the  
4 people who are getting the benefit of the bankruptcy  
5 protection by being able to put the money in trust and then  
6 go on with their business a requirement for the information  
7 that the defendants have to be put into a national database  
8 similar to the information they're requesting from the  
9 plaintiffs' counsel?

10 MR. SCARCELLA: I'm sorry, are you asking about  
11 solvent defendants or the predecessor companies that have  
12 since filed for bankruptcy?

13 REPRESENTATIVE BARBIN: No, what I'm asking is is  
14 there any information that's currently available to  
15 plaintiffs about the information that maybe Armstrong has  
16 kept for 30 years or, you know, any of these companies that  
17 have received the benefit of the bankruptcy protection.  
18 They got a trust set up. They're out there making money in  
19 the same sort of business. Has any of that information  
20 ever been suggested to be put into a database so that the  
21 plaintiffs have it, the same access?

22 MR. SCARCELLA: I can't say whether or not  
23 plaintiffs have utilized this, but my example of the  
24 approved site lists I think is similar to what you're  
25 asking about. These approved site lists -- and Armstrong

1 happens to be one that has one -- they'll range from as  
2 many as, let's say, north of 40,000 site records for the  
3 Babcock & Wilcox Trust to as many as a few hundred for some  
4 of your small regional trusts. These site lists are made  
5 up of decades of plaintiff testimony, product ID witness  
6 expert testimony, corporate records that were all taken  
7 post-bankruptcy when the trust was set up and actually  
8 established and used to create these site lists.

9 We have all of this information saying that  
10 bankrupt company XYZ's products were at the Philadelphia  
11 Naval Shipyard. So as a trust, we're willing to presume  
12 that if somebody is alleging exposures to our products at  
13 that site, we're willing to presume that their existence at  
14 that site is supported by the approved site list. So in a  
15 way that information is publicly available to everyone.

16 REPRESENTATIVE BARBIN: But only if you raise a  
17 specific claim on a specific site?

18 MR. SCARCELLA: No. But again, this is Armstrong  
19 making available to the public what they have developed as  
20 sites where they're going to presume exposure. Whether or  
21 not there's other ones out there, these site lists can be  
22 amended from time to time. If plaintiff attorneys come  
23 across more evidence that suggests that another site that  
24 isn't currently on the Armstrong site list should be added,  
25 they can petition the trust to add that new site to the

1 list and it'll be amended. They're amended periodically,  
2 some as often as every year.

3 REPRESENTATIVE BARBIN: And do you believe that  
4 the maximum possible settlement should be the definition  
5 for a credit under the current law 1428, and do you believe  
6 that all defendants should be required to give their  
7 consent before a case can actually go to a tort, you know,  
8 a jury trial?

9 MR. SCARCELLA: I mean, I would have to defer to  
10 some of the practicing attorneys in Pennsylvania.

11 REPRESENTATIVE BARBIN: How about you, Judge?  
12 Can you tell us?

13 MS. ABLEMAN: I think the bill only talks about  
14 the maximum amount in certain instances where there's been  
15 some established deception. I don't think it was meant to  
16 say -- I think it was meant to be almost like a sanction in  
17 the event that it wasn't disclosed as it should have been.  
18 And I'm not sure what the provision was but --

19 REPRESENTATIVE BARBIN: What about the all  
20 consenting? All defendants must consent before you can go  
21 to trial.

22 MS. ABLEMAN: I don't know of any other State  
23 that has that, but usually, the defendants that are left  
24 that are going to go to trial -- there's usually one or  
25 two. It's really not very many. I mean if there's --

1           REPRESENTATIVE BARBIN: Do you suggest that be  
2 deleted from our legislation?

3           MS. ABLEMAN: I don't think it's necessary, but,  
4 again, I'm not an expert in legislative matters.

5           MAJORITY CHAIRMAN MARSICO: Do you want to go  
6 ahead?

7           MR. HARE: Yes. May I just briefly address that?  
8 The bill doesn't say that all defendants have to consent  
9 for a case to go to trial. It says if the claim forms  
10 haven't been filed as required, only in that instance must  
11 the defendants consent.

12           REPRESENTATIVE BARBIN: And it also says in a  
13 previous -- in the definitions section that you're not only  
14 required to do the settlements or the trust documents that  
15 you're submitting. It also says you're required to have  
16 any potential claims as well. How do you meet that burden?

17           MR. HARE: Well, in fairness, it's not potential.  
18 It's a reasonable basis to file a claim as determined by  
19 the judge. So this example we heard earlier that some  
20 trusts don't even exist, this is what judges do. They  
21 determine what language in statutes mean. No judge is  
22 going to say, oh, a trust doesn't even exist so I'm going  
23 to say a plaintiff has a reasonable basis to file that  
24 claim, and therefore, the trial will be continued until  
25 that trust is created at some point in the future. The

1 statute is very clear. It doesn't say potential claims.  
2 It says a reasonable basis as determined by the court. So  
3 the court gets to make that determination.

4 REPRESENTATIVE BARBIN: So then you get the judge  
5 shopping, and the person who loses out on that are  
6 Ms. Wade's mother or a veteran because they can't get  
7 before the right judge with whatever general language there  
8 is in this legislation that allows them to get put out of  
9 court. That's the problem with this legislation. There's  
10 no standard that says one judge is going to do something  
11 different than another. It's --

12 MR. HARE: Representative, that's always true.

13 MS. ABLEMAN: Yes.

14 MR. HARE: And --

15 REPRESENTATIVE BARBIN: It's not always true in  
16 asbestos litigation. There's only six States that have  
17 gone this far. And you're asking us to become the seventh.

18 MR. HARE: We're asking you to address a problem  
19 that no one on this panel has denied and no one on the  
20 plaintiffs' panel denied, which, as Mr. Scarcella said, is  
21 a significant issue. Thank you.

22 MAJORITY CHAIRMAN MARSICO: Thank you,  
23 Mr. Barbin.

24 Representative Dean, I think, has the last  
25 question.

1           REPRESENTATIVE DEAN: I'll try to be brief. I  
2 thank all the testifiers. Thank you, Ms. Wade, for sharing  
3 your story with us, and our sympathies go to you.

4           Your Honor, as to the *Montgomery* case that you  
5 were talking about, did I understand correctly that  
6 Delaware does already have -- and under the case that you  
7 presided over had a requirement of disclosure of claims?

8           MS. ABLEMAN: Yes.

9           REPRESENTATIVE DEAN: Okay.

10          MS. ABLEMAN: It has a standing case management  
11 order that requires it.

12          REPRESENTATIVE DEAN: So apparently --

13          MS. ABLEMAN: But whether I can enforce it, I  
14 think that case is an example. And I can't follow the  
15 plaintiffs' attorneys around and know whether they're being  
16 honest. That case, they got caught, just happened to get  
17 caught. In my mind, I don't think that behavior was  
18 limited to that case.

19          REPRESENTATIVE DEAN: But the problem is that you  
20 had that in existence.

21          MS. ABLEMAN: Yes.

22          REPRESENTATIVE DEAN: In our State, we don't have  
23 that. So it doesn't follow to me that Delaware having had  
24 that and a couple of bad actors, servants of the court,  
25 defrauded you and defrauded the entire court says anything

1 about us passing this kind of legislation. So that's my  
2 thought. It doesn't follow for me.

3 But I really want to say that it's really  
4 important that we read this stuff because while some broad  
5 strokes are being said about what the intention of and the  
6 actual application if this were to become law would be,  
7 you've got to read it. And so it is not a discretionary  
8 matter. It says on page 6, paragraph 3 -- and notice the  
9 imbalance here. Every time the duty is imposed, the duty  
10 is imposed upon the plaintiff. There's no balancing here  
11 where the defendants have to do some disclosing, none of  
12 that. That always worries me in legislation.

13 I will say I also worry whenever legislation  
14 names itself that way, Fairness in Claims and Transparency  
15 Act. That's a red flag for me.

16 But let's take a look at the actual language. It  
17 isn't as has been discussed here by some of the folks  
18 talking. "A plaintiff's asbestos action shall be stayed in  
19 its entirety until the plaintiff certifies that all  
20 existing or potential claims identified in the statement  
21 provided under subsection A as supplemented have been filed  
22 and identified." That's not discretionary. They shall be  
23 stayed. That bar is so high I don't know how the plaintiff  
24 ever gets over it.

25 And so the other critical underlying problem here



1 is this isn't an ordinary tort action. This is a fatal  
2 tort. This is something we know that within 18 months that  
3 person is going to die -- I've seen people die of this --  
4 in a very painful, uncomfortable way, burdened by the worry  
5 of their litigation. So the plaintiff here is treating and  
6 has to certify that all existing or potential claims  
7 identified in the statement provided have been filed, all  
8 of them.

9 MS. ABLEMAN: It's their lawyers.

10 REPRESENTATIVE DEAN: It's too high a bar. It's  
11 way too high a bar. And then it says after that, "unless  
12 the defendants in the asbestos action consent." And that's  
13 an absurdity. Why would we need the defendants to consent  
14 for a plaintiff to actually come to court? We don't do  
15 that in any other kind of action.

16 So to me, while I get that some people have  
17 identified a problem and there are sometimes bad actors,  
18 this is bad law. This is law that will not get at those  
19 bad actors because in Delaware the bad actors still go on.

20 I'm glad we had this hearing, and I'm glad we  
21 exposed what this legislation would do.

22 MAJORITY CHAIRMAN MARSICO: Thank you,  
23 Representative.

24 And thanks to Judge Ableman and Mr. Scarcella and  
25 Mr. Kelso for your testimony, for being here. I appreciate

1 your time.

2 Know that the Committee will keep the record open  
3 for this hearing in order to receive additional comments.  
4 And at this time I want to thank the Members as well for  
5 being here. And this hearing is adjourned. Thank you.

6

7 (The hearing concluded at 12:20 p.m.)

1                   I hereby certify that the foregoing proceedings  
2 are a true and accurate transcription produced from audio  
3 on the said proceedings and that this is a correct  
4 transcript of the same.

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