IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: MOTIONS SEEKING ACCESS TO 2019 STATEMENTS	CASE NO. 16-1078 (LPS)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS/CROSS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

Page(s)

OTHER SOURCES

Page(s)

Page(s)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS/CROSS-APPELLEES

INTERESTS OF *AMICUS CURIAE*

Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 states, including Delaware. WLF devotes a large part of its resources to promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF has often appeared in federal and state courts in cases addressing asbestos liability issues. *See, e.g., In re Kensington Int'l Ltd.*, 368 F.3d 289 (3d Cir. 2004); *Owens Corning v. Credit Suisse First Boston*, No. 04-cv-905 (D. Del. Mar. 21, 2005); *In re New York City Asbestos Litig.*, 27 N.Y.3d 765 (2016).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles analyzing various legal and policy issues related to tort liability in asbestos cases. *See, e.g.*, Thomas J. LoSavio, *California Appeals Court Breaks with Ninth Circuit, Accepts Government-Contractor Defense in Asbestos Liability Suit*, WLF Legal Opinion Letter (February 10, 2017); Hon. Dick Thornburgh & Hon. Peggy L. Ableman, *Why Transparency Is Imperative When Litigating Asbestos Liability Claims*, WLF Conversations With (Autumn 2014); Eric G. Lasker & Richard O. Faulk, *Texas Supreme Court Rejects "Any Exposure" Causation in Asbestos Litigation*, WLF Legal Opinion Letter (August 1, 2014).

WLF supports efforts to ensure that those injured from exposure to asbestos are adequately and promptly compensated for their injuries. WLF is alarmed, however, by mounting evidence that much of the money awarded—either as damages in asbestos liability litigation or as claim settlements from privately funded asbestos bankruptcy trusts—has been at the behest of lawyers who knew full well that their clients suffered no asbestos-related injuries. WLF fears that attorneys will continue to deluge courts and bankruptcy trusts with unmeritorious asbestos liability claims until the companies victimized by such claims receive full access to all available historical data on asbestos claims and claimants.

INTRODUCTION

Plaintiffs' lawyers today have two entirely separate avenues by which to obtain compensation for clients alleging asbestos-related injuries. In addition to lucrative recoveries under tort in the civil-justice system, billions of dollars are available in the asbestos bankruptcy trust system to compensate claimants for harms caused by exposure to asbestos. Although these trusts were established to help ensure recovery for past, present, and future claimants, the trusts' assets increasingly are being depleted by plaintiffs' counsel who, in some documented instances, file questionable claims with multiple trusts while pursuing civil litigation against solvent defendants who are kept ignorant of the claims made against the trusts.

For years, plaintiffs' lawyers in tort litigation have resisted disclosure of claims and settlements with bankruptcy trusts. They have resisted disclosure even though (1) the claims often contain useful evidence of exposure to the bankrupt parties' products and (2) the details of trust settlements might be used as credits or offsets against a solvent defendants' liability. Without any meaningful way to offset insolvent companies' settlements, defendants face a Hobson's choice: they can accept inflated settlement values—or risk judgments inflated by their inability to obtain offsets.

This lack of transparency between the asbestos trust and tort recovery systems is deeply unfair. Among other things, the ability to share detailed information from asbestos trust claims is crucial for asbestos tort defendants to accurately value a case in light of potential offsets or credits for monies that have been—or are expected to be—recovered by the same claimants (and their attorneys) from asbestos bankruptcy trusts. At the same time, denying asbestos liability stakeholders the ability to exchange available information on a given claimant's purported asbestos exposures also incentivizes the submission of inconsistent and unethical trust claims and undermines the integrity of asbestos civil litigation.

Yet the Bankruptcy Court's November 8, 2016 order and opinion below, by (among other things) prohibiting Appellants from sharing individualized data from

the Rule 2019 exhibits with any third party, thwarts the goal of greater transparency between the bankruptcy trust and asbestos tort regimes. If allowed to stand, the Bankruptcy Court's unduly restrictive ruling will make it easier for attorneys advancing fraudulent asbestos claims to avoid being detected.

Such secrecy deprives Appellants of the opportunity to present every available defense, including showing alternative sources and causes for a plaintiff's alleged asbestos-related injuries. It also prevents Appellants from exposing potential inconsistencies between claims (and supporting documents) filed with bankruptcy trusts on the one hand and testimony and other evidence submitted in asbestos civil litigation on the other. The consequence of these irregularities is not insignificant. Given the finite amount of available resources, such manipulation has the unintended consequence of reducing the amount of compensation available for those claimants (both tort and trust) who are fully entitled to recovery.

ARGUMENT

I. LIMITING ACCESS TO BANKRUPTCY TRUST MATERIALS UNFAIRLY PREJUDICES DEFENDANTS AND COMPROMISES THE INTEGRITY OF THE CIVIL-JUSTICE SYSTEM

A. There Are Two, Independent Asbestos-Recovery Regimes

The asbestos-litigation crisis—routinely described as an "elephantine mass," *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 821 (1999), or an "avalanche," *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005)—continues unabated. Now well into its fourth decade, asbestos litigation is the nation's "longest running mass tort" and shows no signs of slowing down. *See* Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008). Recent actuarial studies project that asbestos claims will persist for the next 50 years, suggesting that the crisis has not yet reached the half-way mark. *See*, *e.g.*, Joseph W. Belluck, *et al.*, *The Asbestos Litigation Tsunami—Will It Ever End?*, 9 J.L. Econ. & Pol'y 489, 492 (2013).

To date, more than 115 companies with asbestos-related liability have filed for bankruptcy. *See* Mark D. Plevin, *et al.*, *Where Are They Now, Part Eight: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 16 Mealey's Asbestos Bankr. Rep. 1, Chart 1 (Sept. 2016). Many companies that filed for bankruptcy protection in the wake of the asbestos-litigation explosion "have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts

funded with tens of billions in assets to pay claims." Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 Mealey's Asbestos Bankr. Rep. 33, 33-34 (June 2013).

These trusts "answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades." William P. Shelley, *et al*., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 675-76 (2014). According to a 2011 report by the U.S. Government Accountability Office, "the number of asbestos personal injury trusts increased from 16 trusts with a combined total of $4.2 billion in assets in 2000 to 60 with a combined total of over $36.8 billion in assets in 2011." U.S. Government Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, at 3 (Sept. 2011).

Thus, plaintiffs' lawyers today have two completely separate but parallel paths by which to obtain compensation for clients alleging asbestos-related injuries. In addition to lucrative recoveries under tort in the civil-justice system, billions of dollars are available in the asbestos bankruptcy trust system to

compensate claimants for harms caused by exposure to asbestos. Trusts' recovery criteria are far less rigorous than satisfying the elements for negligence in a civil tort action. "Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories, and sign forms declaring their truthfulness." Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1. Moreover, the payout "is far quicker than a court proceeding and the process is less expensive for attorneys." *Id.*

Control of trusts' governance and relaxed payment criteria generally rests with trustees. Because trusts often have hundreds of thousands of beneficiaries who cannot directly control the trustees, committees are set up to represent the interests of current and future claimants. Trustees are generally required to obtain the consent of the trust advisory committee before major actions can be taken by the trust (such as revising trust distribution procedures). A 2010 study conducted by the RAND Institute for Civil Justice revealed that members of a select group of plaintiffs' firms serve as trustees for many of the trusts. *See* Lloyd Dixon, *et al*., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010) ("The involvement of all of these firms at a sizable share of the selected trusts reflects the leading role these firms play in asbestos litigation or in the bankruptcy process and the creation

of asbestos trusts."); *see also* Daniel Fisher, *Plaintiff Lawyer Offers Inside Look at 'Institutionalized Fraud' at Asbestos Trusts*, Forbes, May 8, 2014.

B. The Inability to Access and Share Trust Claims Data Harms Civil Defendants and Incentivizes Fraud

A lack of transparency between the tort and trust systems enables plaintiffs' counsel to take inconsistent or conflicting positions across multiple asbestos trust filings and between their trust filings and in allegations made in asbestos tort claims. In several well-documented cases, plaintiffs' counsel have withheld evidence of trust-related exposures or delayed trust-claim filings to deny defendants access to such information. As a result, "claimants have alleged exposure to the products of bankrupt entities in their trust filings, but then ignore or flatly deny those exposures when they target solvent defendants in tort litigation." Daniel J. Ryan & John J. Hare, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock's Bankruptcy*, 15:1 Mealey's Asbestos Bankr. Rep. 1, 2 (Aug. 2015).

This lack of transparency also facilitates "double-dipping," by which plaintiffs' attorneys strategically time the filing of their clients' trust claims to maximize their tort recoveries and then receive additional asbestos trust payments for the same alleged injury. *See, e.g.*, William P. Shelley, *supra*, at 676; Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 25, 2014, at A12 (describing "'double-dipping'—in which lawyers sue a company and claim its products caused

their clients' disease, even as they file claims with asbestos trusts blaming other products for the harm. This lets them get double or multiple payouts for a single illness, with a huge cut for the lawyers each time.").

Because each trust operates independently, and plaintiffs' counsel can claim exposure to many different asbestos products over each client's lifetime, it is not uncommon for a single person to receive multiple trust payments. In one recent case, the typical total recovery for a single claimant's asbestos-related injuries was estimated to be between $1 and $1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71, 96 (Bankr. W.D.N.C. 2014).

In 2013, the *Wall Street Journal* painstakingly reviewed trust claims and court cases of roughly 850,000 persons who filed claims against the Manville Trust since the late 1980s until as recently as 2012. *See* Dionne Searcey, *supra*, at A1, A14. That analysis found "numerous apparent anomalies." *Id*. at A14. For example, "[m]ore than 2,000 applicants to the Manville Trust said they were exposed to asbestos working in industrial jobs before they were 12 years old." *Id.* "Hundreds of others claimed to have the most-severe form of asbestos-related cancer in paperwork filed to Manville but said they had lesser cancers to other trusts or in court cases." *Id.*

Solvent targets of asbestos litigation such as Appellants have a legitimate interest in obtaining reliable information about all of a plaintiff's asbestos exposures during his or her lifetime. The ability to obtain and share trust claims data is essential to accurately value a case in light of potential offsets or credits for monies that have been, or are expected to be, recovered from asbestos bankruptcy trusts. Such information helps to "ensure that defendants are held responsible only for their fair share of the liability, whether through proper allocation of fault at trial or by proving that the now bankrupt entity was the sole proximate cause of the harm." Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. Trial Advoc. 1, 17 (2012).

Disclosing trust claim submissions also provides practical benefits. By the time an asbestos tort action is filed and discovery begins, plaintiffs may be deceased or unable to recall with precision all past exposures to asbestos-containing products, particularly if those exposures took place decades earlier. Obtaining materials submitted in support of bankruptcy trust claims can allow defendants to verify information that may not otherwise be verifiable. At the same time, access to information submitted to an asbestos bankruptcy trust can also help to correct any errors or omissions provided to a defendant or to the court, such as during deposition testimony. Sharing trust claims information also reduces the

burden and expense of subpoenaing third parties, including the trusts themselves, for information relevant to a claimant's work and exposure history or medical condition.

Although Congress authorized the creation of asbestos bankruptcy trusts to provide present and future asbestos victims with compensation, the opacity of the dual-recovery system has resulted in widespread abuse to the detriment of everyone except the asbestos plaintiffs' bar. Given finite resources, such abuse has had the unintended consequence of reducing the amount of compensation available for those claimants (both tort and trust) who are fully entitled to recovery. And even for an evergreen trust with funding obligations in perpetuity, such as the trust at issue in this case, deserving claimants may die before being able to benefit personally from any recovery: if the trust's annual cap is reached for payouts in one year, the trust is unable to distribute funds until the following year.

II. THE LACK OF TRANSPARENCY BETWEEN THE ASBESTOS TRUST AND TORT SYSTEMS HAS FOSTERED WIDESPREAD ABUSE

The important legal questions presented in this appeal do not arise in a vacuum. Rather, the need for greater transparency in asbestos bankruptcy trusts has soared in the wake of a disturbing nationwide trend in which plaintiffs' attorneys—either through errors of omission or otherwise—have manipulated the civil-justice system to gain an unfair advantage. The following case studies—from Delaware, North Carolina, Ohio, and Maryland—exemplify the many asbestos-related

litigation abuses that will continue indefinitely if affected stakeholders are denied reasonable access to claimants' detailed submissions in asbestos bankruptcy trust claims.

A. Delaware: *Montgomery v. Foster Wheeler*

Montgomery v. Foster Wheeler, C.A. No.: 09C-11-127-ASB (Del. Super. Ct. 2011), a Delaware state-court case that gained national attention, epitomizes how a lack of transparency can give plaintiffs an unfair advantage in asbestos litigation. In that case, despite a standing order requiring full disclosure of all previous bankruptcy trust claims and filings, plaintiff's counsel failed to disclose (in direct response to interrogatories requesting them) his client's prior claims to 20 bankruptcy trusts. *See* Asbestos Claims Transparency, Hearing Before the Subcommittee on Regulatory Reform, Commercial, & Antitrust Law of the Committee on the Judiciary, House of Representatives, 113th Cong., at 2013 WLNR 7440143 (Mar. 13, 2013) (statement of Hon. Peggy L. Ableman).

Although the plaintiff spent his entire career as an electrician exposed to varied asbestos products and materials throughout Florida, his own deposition testimony and his attorney's discovery responses unequivocally stated that the bulk of the plaintiff's asbestos exposure occurred during his short stint working at the Everglades Power Plant where—not coincidentally—Foster Wheeler's boilers were located. Even as late as the pretrial conference, plaintiff's counsel assured the

trial judge that the plaintiff had neither submitted any bankruptcy trust claims nor received any monies for asbestos-related injuries. Two days before trial, however, plaintiff's counsel e-mailed defense counsel to disclose that his client had in fact received two bankruptcy trust settlements—a disclosure that was "directly inconsistent with the unequivocal representations [by plaintiff's counsel] to the Court." *See* Letter to Judge Ableman Requesting Sanctions, *Montgomery v. Foster Wheeler*, C.A. No.: 09C-11-217-ASB (Del. Super. Ct. Nov. 6, 2011).

By late afternoon the next day, Foster Wheeler learned that plaintiff had submitted a total of 20 bankruptcy trust claims. As the presiding judge, Peggy L. Ableman, noted in open court that same day:

> The core of this case has been fraudulent. … [T]his whole litigation is based on who was responsible. Nobody can say which fibers did what. But the most important thing is that a plaintiff disclose what they think caused their disease. And if they don't disclose honestly when they're asking [for] money from another company and they don't even let the defendant know about that, that's so dishonest. It is just so dishonest.

Hearing Transcript, at 25, *Montgomery v. Foster Wheeler*, C.A. No.: 09C-11-217-ASB (Del. Super. Ct. Nov. 7, 2011). The unfair prejudice to Foster Wheeler was substantial: Under then-applicable Florida law, which governed the case, jurors could allocate fault to parties not present at trial, including bankrupt entities. *See* Fla. Stat. § 768.81(3) (2011). That said, despite the existence of 20 bankruptcy trust claims in which the plaintiff admitted broad exposure to asbestos from many

products not manufactured by the defendant, Foster Wheeler was nearly denied any meaningful opportunity to explore alternative causation defenses.

B. North Carolina: *In re Garlock Sealing Technologies*

Perhaps the most glaring evidence of the need for greater transparency in bankruptcy trust submissions came to light in 2014, when U.S. Bankruptcy Judge George Hodges issued his widely cited estimation ruling in the bankruptcy reorganization of gasket and packaging manufacturer Garlock Sealing Technologies. *See In re Garlock Sealing Technologies, LLC,* 504 B.R. 71 (Bankr. W.D.N.C. 2014). During the estimation phase, the claimants' counsel had calculated Garlock's asbestos liabilities to be somewhere between $1 billion to $1.3 billion. *Id.* at 74. The court then required all Garlock claimants to respond to personal information questionnaires and provide all individualized data previously submitted to any asbestos bankruptcy trust (information contained in the very same 2019 Exhibits sought by Appellants in this case). *Id.* at 95. That court-ordered disclosure resulted in "the most extensive database about asbestos claims and claimants that has been produced to date." *Id*.

Based on a thorough review of these disclosures, Judge Hodges found that Garlock's pre-bankruptcy litigation history was "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." *Id.* at 82. In particular, he discovered that some plaintiffs' counsel had engaged in "suppression of evidence"

when their clients were "unable to identify exposure in the tort case, but then later (and in some cases previously) [were] able to identify it in Trust claims." *Id.* at 86. He also uncovered an "effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)." *Id.* at 84. After conducting a sampling of personal injury cases that Garlock had settled or tried to verdict before it entered bankruptcy, the court found that "exposure evidence was withheld in *each and every one* of them." *Id.* (emphasis in original).

Although "certain that more extensive discovery would show more extensive abuse," Judge Hodges believed it was unnecessary "because the startling pattern of misrepresentation that has been shown is sufficiently persuasive." *Id.* at 86. Such systemic misconduct not only "prejudiced Garlock in the tort system," Judge Hodges explained, but because Garlock had repeatedly settled cases in which it had little to no liability, it rendered Garlock's "settlement history an unreliable predictor of its true liability." *Id.* Given the artificially inflated litigation costs Garlock faced when trust-related disclosures were improperly concealed, the court estimated Garlock's liability for all present and future claims to be no more than $125 million—over $1 billion *less* than the estimate urged by claimants' counsel. *Id.* at 97.

Based on the systematic abuses uncovered during the bankruptcy court's estimation proceedings, Garlock filed multiple civil suits against prominent plaintiffs' firms under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c). The complaints alleged that by "concealing exposure evidence and telling different stories about what caused their clients' injuries to Garlock on the one hand and (bankruptcy) trusts on the other, Defendants obtained inflated settlements and verdicts from Garlock and committed fraud against Garlock." John O'Brien, *Unsealed RICO Complaints Detail Fraud Allegations Against Asbestos Plaintiffs Firms*, Legal Newsline, Jan. 21, 2015. In March 2016, a leading Dallas-based asbestos firm reached a settlement with Garlock on those claims. Jessica Karmasek, *Asbestos Firm Says It Has Settled With Garlock in RICO Suit*, Legal Newsline, Mar. 24, 2016.

C. Ohio: *Kananian v. Lorillard Tobacco Co.*

In *Kananian v. Lorillard Tobacco Company*, No. CV-442750 (Ohio Ct. Comm. Pl. Cuyahoga Cnty. Jan. 17, 2007), one of the more infamous examples of improper gamesmanship by plaintiffs' counsel, the plaintiff denied any exposure to Johns Manville or Celotex products. Over plaintiffs' counsel's repeated objections, the court granted Lorillard's request for discovery of the plaintiff's multiple bankruptcy trust submissions. *Id*. at 6. When those submissions were ultimately produced, they revealed not only that the plaintiff had received generous recoveries

for asbestos-related injuries from the Manville and Celotex Trusts, but that the plaintiff's attorneys had presented conflicting accounts of how and when the decedent acquired his mesothelioma. *Id.* at 6-7. For example, to ensure recovery under the differing exposure criteria of the two trusts, plaintiff's attorneys provided irreconcilable versions of the decedent's military service record. *Id.* at 9-10. Of course, plaintiff's counsel never notified the Manville or Celotex Trust of his client's sudden denial of any exposure to those companies' products; nor did the plaintiff ever return to those trusts the substantial monies he received as compensation for the decedent's asbestos-related injuries. *Id.* at 5.

Given these revelations, Judge Harry Hanna conducted a thorough investigation into plaintiff's counsel's conduct in the case. Ultimately concluding that plaintiff's counsel had failed to abide by the rules of the court requiring candor and truthfulness, Judge Hanna barred plaintiff's counsel and his entire firm from practicing before the court. "In my 45 years of practicing law," Judge Hanna later explained, "I never expected to see lawyers lie like this. It was lies upon lies upon lies." James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit*, Cleveland Plain Dealer, Jan. 25, 2007, at B1. Both the Ohio Court of Appeals and the Ohio Supreme Court declined to reverse Judge Hanna's ruling. *See Kananian v. Lorillard Tobacco Co.*, No. 89448 (Ohio Ct. App. Feb 21,

2007) (dismissing appeal as moot, *sua sponte*), *review denied*, 878 N.E.2d 34 (Ohio 2007).

As the *Cleveland Plain Dealer* reported, Judge Hanna's decision to authorize discovery of the plaintiff's earlier bankruptcy trust submissions "effectively opened a Pandora's box of deceit." *Id.* The *Kananian* case attained national prominence for exposing glaring inconsistencies between allegations made in open court against solvent asbestos defendants and those submitted to trusts established by bankrupt companies to compensate asbestos-related claims. Describing the case as "one of the darker corners of tort abuse" in asbestos litigation, the *Wall Street Journal* editorialized that Judge Hanna's opinion should be "required reading for other judges" to highlight the need for "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts." Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14.

D. Maryland: *Warfield v. AC&S, Inc.*

In a Maryland case, *Warfield v. AC&S, Inc.*, No. 24X06000460, Consolidated Case No. 24X09000163, (Md. Cir. Ct. Baltimore Cnty. Jan. 11, 2011), defendants moved to compel production of records from multiple asbestos bankruptcy trust claims, which prior court rulings had already required plaintiff's counsel to produce. "At a hearing on the matter, plaintiff's counsel explained that he had been slow in producing the trust materials because he disagreed with the

court's prior ruling, some two years previously, and went on to complain that the court had 'opened Pandora's Box' by requiring their disclosure." *See* Problems with Asbestos Compensation System, Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 11th Cong., at 2011 WLNR 24791123 (Sept. 9, 2011) (statement of James L. Stengel).

On the eve of trial, when plaintiff's counsel finally produced the bankruptcy trust records, the reasons for counsel's reluctance to produce the materials became clear. The trust records revealed "substantial and inexplicable discrepancies between the positions taken in [c]ourt and the trust claims." *Id.* Despite "specific and explicit discovery requests," plaintiff "failed to disclose nine trust claims that had been made. As revealed in the claim forms, the period of exposure alleged in the litigation versus that alleged in the trust submissions was materially different." *Id.*

In the Maryland litigation, the plaintiff averred that he was exposed to asbestos *exclusively* between 1965 and the mid-1970s, which pointed to liability on the part of the solvent defendants while avoiding application of a Maryland statutory damage cap for later exposures. In earlier bankruptcy trust claim submissions, however, the plaintiff claimed exposure from 1947 to 1991, a greater exposure period not only "different in scope, but also clearly triggering the

[statutory] damage cap." *Id.* Eight of the nine trust forms had been submitted *before* the plaintiff testified in court. *Id.*

* * *

These cases reveal unsavory tactics that *some* plaintiff's attorneys are willing to use to gain an unfair advantage in asbestos cases. As these examples show, such abuse may arise in varying ways, ranging from deliberately suppressing earlier trust filings to obtaining duplicative, windfall recoveries for questionable claims. In any case, the effect is to unjustly manipulate the civil-justice system. To remove the incentive for such gamesmanship and prevent further abuse, individualized bankruptcy trust claims data must be made more widely available. This appeal presents an excellent opportunity to ensure that much-needed transparency.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully urges this Court to reverse the Bankruptcy Court's November 8, 2016 Opinion and Order and grant Appellants unrestricted access to the 2019 Exhibits.

Dated: June 9, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 8015(a)(7)(C) and 8016(d)(3) of the Federal Rules of Bankruptcy Procedure, this brief complies with the typeface requirements of Rule 8015(a)(5) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2010, in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing brief was served upon all counsel of record via the U.S. District Court for the District of Delaware's CM/ECF filing system and via electronic mail upon the parties listed below on this 9th day of June, 2017.

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