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# The Story of Asbestos Litigation in Texas & Its National Consequences

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TEXANS FOR LAWSUIT REFORM FOUNDATION

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March 7, 2017

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## I. Introduction

An asbestos lawsuit firestorm was kicked off by a 1973 court decision. In the three decades that followed that decision, tens of thousands of asbestos-injury lawsuits were filed nationwide. Many of the plaintiffs in these lawsuits were showing no signs of an asbestos-related illness. And because of favorable laws, Texas was a preferred forum for this litigation inferno.

In Texas—as was the case throughout the nation—the litigation was driven by lawyers who actively solicited clients, bundled them into groups, and filed lawsuits in bulk. Part of the goal was to overwhelm the judicial system and the defendants. It was an industry designed to enrich lawyers, rather than achieve justice for injured people. The plaintiffs' cases were handled *en masse* by law firms that specialized in fomenting and pursuing asbestos litigation. One of the most notable of the asbestos plaintiff law firms even developed a method for secretly coaching its clients to target specific defendants, without any regard for telling the truth.

In 2005, with the passage of Senate Bill 15, the Texas Legislature took the lead in dealing with the asbestos-litigation crisis. Senate Bill 15 required that asbestos plaintiffs' cases be unbundled for trial and that each plaintiff obtain a medical diagnosis of an asbestos-caused disease before his case could proceed to trial. The legislation succeeded in meeting its goals. The thousands of lawsuits that had been filed on behalf of plaintiffs who were not suffering from an asbestos-related illness were set to the side to allow for the accelerated disposition of cases filed by plaintiffs suffering from asbestos-caused cancer.

Eight years later, in 2013, the Texas Legislature passed a unique statute requiring the dismissal of the unimpaired plaintiffs' cases (which had been inactive since enactment of Senate Bill 15 in 2005). House Bill 1325 allowed these plaintiffs to re-file their cases at any time if they were subsequently diagnosed with an asbestos-caused illness. And under House Bill 1325, if these plaintiffs re-entered the court system, they could proceed as if their cases were never dismissed. Very few of the unimpaired plaintiffs have returned to the legal system.

In 2015, the Texas Legislature passed House Bill 1492, requiring asbestos plaintiffs to reveal claims they submitted to the multitude of trusts set up by bankrupt companies to pay asbestos claimants. The goal of House Bill 1492 was to address the problem of “inconsistent claiming” by asbestos plaintiff lawyers, who would reveal one exposure history in litigation for their clients and an entirely different exposure history when applying to the trusts for payment.

Between passage of Senate Bill 15 in 2005 and House Bill 1325 in 2013, the Texas Supreme Court handed down a decision requiring that the evidence presented in asbestos cases be based on peer-reviewed scientific studies, not on conjecture and supposition by a hired-gun expert witness. The court's decision disavowed the “any exposure” theory of causation in

asbestos cases and required use of the causation standard applicable in all other “toxic tort” cases in Texas—a major advancement in the law. Junk science in asbestos litigation was finally disallowed.

Collectively, these actions have doused the asbestos-litigation firestorm in Texas.

*But recent discoveries—most importantly, revelations from the 2015 bankruptcy proceedings for Garlock Sealing Technologies, LLC—have shown that the plaintiff lawyers who created the asbestos-litigation crisis have been gaming the system for years, in ways that are nearly fraudulent, if not actually fraudulent. Their actions probably injured hundreds of solvent defendants and have depleted the bankruptcy trusts, effectively robbing from future claimants (many of whom will be veterans).<sup>1</sup>*

This paper reviews and discusses these topics, and others. It is intended as a brief recitation of Texas’s involvement with the longest running mass tort in the history of the United States of America. Asbestos litigation has lasted for 40 years so far and has resulted in billions of dollars of payments to claimants and untold amounts paid to attorney’s fees and for other litigation-related costs. Asbestos litigation and claiming continues to deserve the attention of the public, lawmakers, and the courts.

## **II. It Begins: *Borel v. Fibreboard Paper Products Corp.***

On September 10, 1973, a small stack of paper placed on a clerk’s desk in New Orleans served as the accelerant for the nationwide litigation firestorm that—although now mostly extinguished in Texas—still is not fully contained in other parts of the nation. It was on that date that the United States Court of Appeals for the Fifth Circuit handed down its opinion in *Borel v. Fibreboard Paper Products Corp.*,<sup>2</sup> holding that asbestos was an “unreasonably dangerous” product, and manufacturers of asbestos-containing products could be held liable for illnesses caused by their products.

Because *Borel* was an appeal from the decision of a federal district court in Texas,<sup>3</sup> it represents the first meaningful connection between asbestos litigation and the state of Texas, a connection that has existed for more than 40 years.

Clarence *Borel* was an industrial insulation worker.<sup>4</sup> He sued eleven manufacturers of asbestos-containing insulation materials (including Fibreboard Paper Products Corp.) to recover damages for injuries caused by the defendants’ alleged breach of their duty to warn him of the dangers involved in handling asbestos insulation.<sup>5</sup> Borel alleged that he had contracted the diseases of asbestosis and mesothelioma (a type of cancer) as a result of his exposure to the defendants’ products over a 33-year period that began in 1936.<sup>6</sup>

At trial, Borel’s lawyer introduced evidence to establish that the defendant manufacturers either were, or should have been, aware of articles and studies indicating that inhaling asbestos fibers could cause asbestosis.<sup>7</sup> The evidence also indicated that during Borel’s working career, no manufacturer ever warned insulation workers like Borel of the dangers associated with inhaling asbestos dust.<sup>8</sup> Furthermore, no manufacturer ever tested the effect of their products on the workers using them, or attempted to discover whether the exposure of insulation workers to asbestos dust exceeded threshold limits suggested by the American Conference of Governmental Industrial Hygienists.<sup>9</sup>

A jury in Beaumont, Texas, found that the manufacturers’ products were “unreasonably dangerous” and the manufacturers had failed to comply with their duty to warn Borel of the dangers of handling asbestos-containing insulation.<sup>10</sup> The jury returned a \$79,436.24 verdict in favor of Borel, and the trial court rendered judgment on that verdict.<sup>11</sup>

In affirming the trial court's judgment, the court of appeals explained that liability could not be imposed merely because a product involves some risk of harm, or is not entirely safe for all uses.<sup>12</sup> Instead, a product is defective only if it is "unreasonably dangerous" to the ultimate user or consumer.<sup>13</sup> "The requirement that the defect render the product 'unreasonably dangerous' reflects a realization that many products have both utility and danger. The determination that a product is unreasonably dangerous, or not reasonably safe, means that, on balance, the utility of the product does not outweigh the magnitude of the danger."<sup>14</sup> The court of appeals decision in *Borel* was precedent-setting because of the court's conclusion that asbestos-containing products could be regarded as being "unreasonably dangerous."

### III. Competing Standards for Proving an Asbestos-Caused Disease

With regard to illnesses caused by exposure to asbestos dust, the court of appeals explained in *Borel*:

The medical testimony adduced at trial indicates that inhaling asbestos dust in industrial conditions, even with relatively light exposure, can produce the disease of asbestosis. The disease is difficult to diagnose in its early stages because there is a long latent period between initial exposure and apparent effect. This latent period may vary according to individual idiosyncrasy, duration and intensity of exposure, and the type of asbestos used. In some cases, the disease may manifest itself in less than ten years after initial exposure. In general, however, it does not manifest itself until ten to twenty-five or more years after initial exposure. This latent period is explained by the fact that asbestos fibers, once inhaled, remain in place in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible. Even if no additional asbestos fibers are inhaled, tissue changes may continue undetected for decades. By the time the disease is diagnosable, a considerable period of time has elapsed since the date of the injurious exposure. Furthermore, the effect of the disease may be cumulative since each exposure to asbestos dust can result in additional tissue changes. A worker's present condition is the biological product of many years of exposure to asbestos dust, with both past and recent exposures contributing to the overall effect. All of these factors combine to make it impossible, as a practical matter, to determine which exposure or exposures to asbestos dust caused the disease.<sup>15</sup>

This passage from *Borel* ultimately led to what came to be known as the "any-exposure" theory of causation in asbestos-disease cases. In application of this theory, the plaintiff alleging an asbestos-related disease was not required to show that the defendant's product actually caused or contributed to his illness. Instead, the plaintiff merely had to show that he was exposed to a particular defendant's asbestos-containing product, and then it was presumed that the defendant's product could have caused or contributed to the plaintiff's illness.<sup>16</sup>

An alternative causation theory was provided by the United States Court of Appeals for the Fourth Circuit in 1986, in *Lohrmann v. Pittsburgh Corning Corp.*<sup>17</sup> The Fourth Circuit held that in order to prove a causal connection between a plaintiff's asbestos-caused injury and the defendant's product, the plaintiff had to show "exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."<sup>18</sup> Texas courts, however, refused to use *Lohrmann's* "frequency, regularity, and proximity" test for causation in asbestos cases,<sup>19</sup> clinging instead to the "any-exposure" causation standard drawn from *Borel*. Consequently, for many years, exposure equaled causation under Texas law.

#### IV. Lawyers Recruiting Plaintiffs

Obviously, the “any-exposure” test for causation presented a very low burden of proof for plaintiff lawyers to meet. Thousands of companies had manufactured asbestos-containing products, used asbestos-containing products, or had asbestos-containing products in their facilities. The low burden of proof coupled with a multitude of deep-pocketed defendants made asbestos litigation irresistible to some lawyers, and they began canvassing aggressively for clients.<sup>20</sup>

While these lawyers occasionally signed up claimants who, in fact, suffered from cancer caused by asbestos exposure, they predominately trolled for non-malignancy clients. They actively sought industrial workers, who they screened for lung-tissue scarring that *might* have been caused by inhaling asbestos fibers.<sup>21</sup> If the lawyers’ hired-gun physicians identified any lung-tissue scarring that arguably could have been caused by asbestos inhalation, the worker would be bundled with a large group of others, and a lawsuit would be filed on their behalf against a group of defendants (sometimes 100 defendants or more).<sup>22</sup> Usually, a huge percentage of these plaintiffs were exhibiting no symptoms of an asbestos-caused illness when the lawsuit was filed on their behalf.<sup>23</sup>

The lawyers’ client-solicitation mechanisms worked exceedingly well. Thousands of asbestos cases were filed in Texas in the decades following the release of the *Borel* decision in 1973, and most of the cases included dozens of plaintiffs.<sup>24</sup> The total number of plaintiffs included in the thousands of asbestos cases filed in Texas courts is unknown. While Texas was a hotbed for asbestos litigation, the same thing was happening in many other states.<sup>25</sup>

Additionally, the exposure-equals-causation regime in Texas led directly to the infamous Baron & Budd “coaching memo” (discussed below).

*Because Baron & Budd (and other lawyers filing asbestos lawsuits in Texas) needed only to prove exposure to a defendant’s asbestos-containing product in order to impose liability on that defendant, and the easiest way to prove exposure to a particular defendant’s asbestos was for their client to claim he worked on a jobsite at which that defendant’s product was present, Baron & Budd coached its clients to identify specific defendant’s products in their testimony.*

The entire system in Texas seemed to be designed to force defendants to settle with anyone who claimed an asbestos-caused injury, no matter whether the person was exhibiting signs of an injury or not. Over time, defendants embroiled in asbestos litigation nationwide settled with tens of thousands of plaintiffs for billions of dollars. But the stream of asbestos lawsuits filed in Texas and other states never ended, and the crush of asbestos litigation caused many of these companies to seek bankruptcy protection.<sup>26</sup>

The United States Congress even passed a special statute in 1994 to allow companies engaged in asbestos litigation to declare bankruptcy for the specific purpose of resolving their asbestos liability.<sup>27</sup> Under the statute, a defendant may file bankruptcy, create and fund a trust, shed all of its existing and future asbestos liability to the trust, and exit bankruptcy.<sup>28</sup> To date, over 100 companies have filed bankruptcy under this statute and created these trusts.<sup>29</sup> Even though billions of dollars in undisclosed claims already have been paid by the trusts,<sup>30</sup> the trusts still hold billions of dollars in assets that should be used to pay asbestos claims.<sup>31</sup>

## V. Baron & Budd's Coaching Memo

### A. Accidental Disclosure of a Scheme to Defraud

In the mid-1990's, the Dallas law firm of Baron & Budd was one of the most prosperous in Texas. Fred Baron was known as the "King of Toxic Torts,"<sup>32</sup> and for good reason. According to the *Dallas Observer*, Baron's firm handled asbestos personal injury cases by the tens of thousands, taking a 40 percent contingency fee on its clients' settlements and judgments.<sup>33</sup>

Texas was a great place for an asbestos plaintiff lawyer—like Fred Baron—to work. As noted above, Texas courts applied the "any-exposure" causation standard, which was the lowest possible standard for imposing liability on asbestos-case defendants. Additionally, Texas's statutes provided that a defendant who contributed in any respect to a plaintiff's asbestos-caused injury would be jointly and severally liable to pay an entire judgment,<sup>34</sup> and Texas's forum rules allowed cases from throughout the nation to be filed in Texas.<sup>35</sup> Asbestos cases flooded Texas courts by the tens of thousands, and Baron & Budd had a large share of the work.<sup>36</sup>

On August 27, 1997, however, Baron & Budd's fortunes took a slight turn for the worse. During the deposition of Willie Roy Reathy, Baron & Budd lawyer Ben Dubose handed defense counsel what he thought was his client's "Work History Sheet."<sup>37</sup> Actually, what he handed over was a 20-page document—written by Baron & Budd—titled "Preparing For Your Deposition."

Baron & Budd's typical client was an industrial worker who had practiced a specialized trade for his entire working life. Presumably, these clients would have known the tools and materials they used daily. Nonetheless, this "coaching memo" contained eight pages explaining what products contained asbestos, what the products looked like, how they were used, and who used them. The memo also described how the client and lawyers would use a document called a "work history sheet" as the witness's script.

*It told the witness what to say—and just as importantly—what not to say, during his deposition. It instructed, for example, "DO NOT mention product names that are not listed on your Work History Sheets." It also directed clients to "memorize" product names on their work history sheet and to "practice saying all the product the [sic] names out loud."*<sup>38</sup>

The memo provided specific answers for clients to use in response to anticipated questions, regardless of the actual facts: "You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself." The memo told clients: "The more you thought about it, the more you remembered!" (exclamation point included in memo).<sup>39</sup> Regardless of their own experiences and memories, the clients were instructed: "Remember to say you saw the NAMES on the BAGS" and "You will be asked if you ever saw any WARNING labels on containers of asbestos. It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER." (All capitals emphasis in original memo).<sup>40</sup>

According to a retired Texas Supreme Court Justice who reviewed it, the memo supplied the instructions required to enable someone who never worked with an asbestos product to give convincing testimony that he did, and was harmed by it.<sup>41</sup>

### B. Baron & Budd's Defense of the Coaching Memo

Word of Baron & Budd's coaching memo quickly spread throughout the legal community, forcing Baron & Budd to try to explain its conduct.

Fred Baron claimed that no one else at the firm knew about or used the memo; and, in any event, the memo was perfectly fine.<sup>42</sup> At one point, he claimed a "duty" to tell clients how

to testify to maximize the amount of money they could recover.<sup>43</sup> All of these explanations must have seemed inadequate to Baron, because, within a couple of days, a new narrative was revealed. Fred Baron began blaming the memo on the work of a single “rogue paralegal.”<sup>44</sup> This paralegal, whose name appeared on the inadvertently produced memo, was Lynell Terrell, who had been with Baron & Budd for about a year.<sup>45</sup>

*Although an affidavit surfaced supposedly written by Terrell wherein she accepted responsibility for the memo,<sup>46</sup> she was nowhere to be found. Defense lawyers wanted her testimony, but she effectively disappeared. To this day, Ms. Terrell has never spoken publicly about her alleged role in the coaching memo scandal.<sup>47</sup>*

### C. Repercussions from the Coaching Memo

Discovery of the coaching memo prompted several defendants to ask for court intervention to investigate whether plaintiffs were being instructed to give false testimony. In Travis County (Austin, Texas), District Judge John Dietz ordered Baron & Budd to produce for deposition the person most knowledgeable about the creation and use of the memo.<sup>48</sup> Despite the “rogue paralegal” story, the firm did not produce the paralegal herself, but, instead, produced Russell Budd.

*In an unusual proceeding, Budd gave his deposition testimony on October 6, 1997, in a Travis County courtroom under the supervision of the trial judge.<sup>49</sup> The next day, Budd gave additional testimony in the trial judge’s chambers. Although the record is unclear, the transcript of that testimony was either sealed or ordered to be provided only to the parties’ attorneys under a protective order.*

After supervising Budd’s deposition and reviewing the coaching memo, the affidavit of the legal assistant who prepared the memo, documents from the pending case, and documents from other cases nationwide, the trial court ordered plaintiffs to produce the memo to the defendants.<sup>50</sup> The court found that the memo was not attorney work product because it was prepared by a non-attorney without supervision by an attorney and without knowledge of an attorney; that the memo was not shielded by the attorney-client privilege because it sought to elicit information that was to be produced at deposition and not remain confidential; that a claim of privilege could not shield the memo because it was used to refresh the witnesses’ recollections before they testified; and that the memo was designed to shape and mold the witnesses’ testimony.<sup>51</sup> Based on these findings, the trial court held that the interests of justice required that the memo be produced because it was unworthy of protection.<sup>52</sup> The court nevertheless left in place a protective order that limited distribution of the memo to counsel of record only.<sup>53</sup>

Baron & Budd, on behalf of the plaintiffs, then filed a petition for writ of mandamus with the Third Court of Appeals (Austin, Texas), seeking to reverse Judge Dietz’s order compelling production of the memo to the defendants. Initially, the court of appeals handed down an unpublished *per curiam* opinion, but that opinion was subsequently withdrawn.<sup>54</sup> After the case was resubmitted, the court of appeals concluded that the memo was protected by the attorney-client privilege.<sup>55</sup> The court also held that the document was not used to refresh the witnesses’ memory (which would require that it be provided to the defendants under the Texas Rules of Evidence), despite the uncontroverted evidence to the contrary:

We conclude that the trial court misinterpreted [Texas Rule of Evidence 612] and abused its discretion by focusing on the purpose of the drafter of the Memo rather than on the witnesses’ purposes... . [W]e find no evidence in the record of what the relators’ purposes in using the Memos were. Baron & Budd’s legal assistant’s sworn statement—that the Memo was intended in part to assist the witnesses in remembering

facts and situations that would be raised in deposition—is not dispositive of the witnesses’ intent in using the writing. The witnesses might have used the Memos merely to communicate the nature of their asbestos exposure to their attorneys and to learn about deposition strategy. These purposes ... would not justify abrogation of the attorney-client privilege.<sup>56</sup>

Thus, the court gave no weight to the evidence that the memo was used to refresh witnesses’ testimony because it was plausible, though unsupported, that the witnesses might not have used the memo to refresh their memories. The court also concluded that “[t]here was no evidence that the clients were aware that the memo was part of any crime or fraud.”<sup>57</sup> This is unsurprising in light of a former Baron & Budd employee’s claim that the firm created a document showing employees how to defend claims under the crime/fraud exception to attorney-client privilege.<sup>58</sup> As of the date this paper was published, the trial court’s protective order remains in place.

In November 2016, a Dallas-based investigative journalist (Christine Biederman) who participated in writing the *Dallas Observer’s* stories about Baron & Budd and the coaching memo, asked the trial court to unseal the transcript of Budd’s 1997 deposition testimony. Biederman apparently hoped Budd’s testimony would shed light on the role of the firm’s attorneys in the creation of the coaching memo, long-blamed on the “rogue” paralegal. Russell Budd responded by objecting to unsealing the record. On January 31, 2017, a state district judge in Austin, Texas, refused to hear Biederman’s motion, citing a lack of jurisdiction. It appears that some parts of asbestos litigation continue to live in the shadows.

#### ***D. FBI Investigation of Fred Baron***

In 1996, the Federal Bureau of Investigation opened a file on Fred Baron when one of his former employees presented evidence that she claimed would show that “Baron & Budd knowingly submitted false claims to several bankruptcy trusts on behalf of clients.”<sup>59</sup> She also claimed that Baron & Budd would manipulate evidence if a statute of limitations had expired by sending clients to doctors who would make a fake “initial diagnosis,” thus resetting a statute of limitations that, in reality, began to run much earlier.

In the resulting investigation of Fred Baron, the FBI interviewed a representative from Raymark (a company that was a frequent target in asbestos cases) and its lawyer.<sup>60</sup> The FBI noted that: “Both [redacted] and [redacted] were very passionate about their beliefs, stating that Baron believed that he was above the law. [Redacted] stated that he was concerned that the FBI could be influenced by Baron’s great wealth and power. [Redacted] was assured by [Special Agent] [redacted] that the FBI would not be influenced by Baron.”<sup>61</sup>

The Dallas-based U.S. Attorney was Paul Coggins, whose wife was running for election to the U.S. House of Representatives. According to the FBI file kept on Baron and produced after his death, Coggins claimed he recused himself from the investigation due to his wife having received a campaign contribution from Baron.<sup>62</sup> But despite claiming to have recused himself, a memo in the FBI file indicates that Coggins ordered the Baron & Budd investigation closed, blaming it on budgetary cuts in Washington: “Because of the administrative nightmare created by the McDade legislation we have closed our investigation into the above captioned matter.”<sup>63</sup> Ironically, the McDade legislation was an amendment passed by Congress in 1998 requiring U.S. government attorneys to follow the ethical rules of each state where they engage in their duties.

The FBI’s long-running investigation failed to resolve the multitude of unanswered questions raised by the *Dallas Observer* in its 1998 investigative report and its aggressive 2001 follow-up article. The FBI’s file on Fred Baron and his law firm, however, is public.<sup>64</sup>

## VI. Dealing with the Ocean of Unimpaired Plaintiffs: Texas Senate Bill 15

In 2005, the Texas Legislature took action to address the part of the asbestos-litigation crisis resulting from the plaintiffs' bar filing of thousands of lawsuits on behalf of tens of thousands of unimpaired plaintiffs.<sup>65</sup> Senate Bill 15<sup>66</sup> (codified as chapter 90 of the Texas Civil Practice and Remedies Code) provided that science-based medical criteria had to be applied to cases brought by asbestos plaintiffs, whether the plaintiff's case was pending when chapter 90 became effective (September 1, 2005) or filed after the statute's effective date.<sup>67</sup>

Generally speaking, chapter 90's medical criteria requires that a plaintiff alleging a non-malignant asbestos-caused illness provide a board-certified physician's affidavit showing that he has diminished lung capacity caused by inhaling asbestos fibers.<sup>68</sup> A plaintiff alleging a malignant illness must provide a physician's affidavit diagnosing an asbestos-caused disease.<sup>69</sup>

Under chapter 90, all pending asbestos lawsuits were effectively put on hold (colloquially, lawyers say the cases were moved to an "inactive docket," although the cases were never actually moved anywhere). Then any plaintiff in a pending asbestos case who could meet chapter 90's medical criteria could file the appropriate physician's affidavit and re-activate his case. For asbestos cases filed after the effective date of chapter 90, the plaintiff must provide the appropriate physician's affidavit within 30 days after the defendant officially appears in the case.<sup>70</sup> If the affidavit is not provided or is insufficient, that person's case must be dismissed without prejudice.<sup>71</sup>

After chapter 90 became effective, malignancy cases were quickly activated and began to proceed through Texas's court system.

*But thousands of asbestos cases involving tens of thousands of plaintiffs remained pending on the "inactive docket."<sup>72</sup> Apparently, the plaintiffs in these cases could not meet, or chose not to try to meet, chapter 90's medical criteria. It can be presumed that most, if not all, of these lawyer-solicited clients were unimpaired, and a lawsuit should not have been filed on their behalf in the first place.*

Very few non-malignancy cases have been filed in Texas since passage of Senate Bill 15 in 2005. Almost all asbestos cases filed in Texas today allege asbestos-caused cancer.

Senate Bill 15 accomplished its goals. Cases filed by individuals suffering a malignant asbestos-caused disease had, and still have, access to the courts. These cases proceed to trial quickly, if the plaintiff lawyers want to move them quickly. Trolling for non-malignancy asbestos cases has basically ceased throughout the nation, and the unwarranted cases filed on behalf of unimpaired individuals have virtually disappeared.

The plaintiff lawyers' quest for—and competition to obtain—malignancy cases continues unabated, however. This quest is conducted largely through television and internet advertising.<sup>73</sup>

*Total legal advertising has increased from \$531 million in 2008 to an estimated \$892 million in 2015,<sup>74</sup> with asbestos plaintiff law firms spending an estimated \$45.6 million on television advertising in 2015.<sup>75</sup>*

Texas leads the top six states in Internet keyword advertising by plaintiff lawyers. "Eight of the top ten most expensive keywords on a cost-per-click basis focused on asbestos/mesothelioma in the first half of 2015. Most of these keywords are tied to attorneys in specific states purchasing the term 'mesothelioma' in combination with the state name or state abbreviation."<sup>76</sup>

The plaintiff law firms also use "shadow sites" and "fishing" to identify and recruit asbestos clients. A law firm owns asbestos.com, "which provides information to potential litigants,

connects them to doctors and treatment centers, directs them to legal options, and collects their contact information, but does not mention the sponsor by name.”<sup>77</sup> The Lanier Law Firm in Houston dominated monthly search demand around asbestos and mesothelioma from April 2014 to May 2015. “The marketing around asbestos/mesothelioma is among the most sophisticated undertaken by plaintiffs’ firms.”<sup>78</sup>

## VII. Fixing the Causation Standard

The next big event in asbestos litigation in Texas occurred in June 2007, when the Texas Supreme Court handed down its opinion in *Borg-Warner Corp. v. Flores*,<sup>79</sup> which applied the causation standard applicable in other kinds of toxic tort cases to asbestos cases.

The plaintiff in *Borg-Warner* (Flores) was a retired brake mechanic.<sup>80</sup> He had smoked for most of his adult life.<sup>81</sup> He was diagnosed with “interstitial lung disease,” which has over 100 causes, including smoking.<sup>82</sup> Nonetheless, his hired-gun expert witnesses testified at trial that his lung disease had been caused by inhaling asbestos fibers released from brake pads he would grind at work.<sup>83</sup> Thus, he sued Borg-Warner and other defendants claiming that he was exposed to asbestos embedded in the brake linings the defendants manufactured, and that these exposures caused him to have asbestosis. A jury returned a \$169,000 verdict in Flores’s favor against Borg-Warner.<sup>84</sup>

On appeal, the Texas Supreme Court was asked to decide whether *Lohrmann’s* “frequency, regularity, and proximity” causation standard should be applied in an asbestosis case, like the one being pursued by Flores.<sup>85</sup> The Texas Supreme Court agreed that *Lohrmann’s* three-part test was “appropriate” and should be used; but, standing alone, it was not sufficient.<sup>86</sup> The Court noted that Flores’s evidence that he was grinding brake pads in a small room five to seven times per week over a four-year period seemingly satisfied *Lohrmann’s* frequency-regularity-proximity test.<sup>87</sup> But, “proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law.”<sup>88</sup> *Lohrmann’s* three terms “do not, in themselves, capture the emphasis our jurisprudence has placed on causation as an essential predicate to liability.”<sup>89</sup>

The Court held that in asbestos cases, “we must determine whether the asbestos in the defendant’s product was a substantial factor in bringing about the plaintiff’s injuries.”<sup>90</sup> According to the Court, “substantial-factor causation... separates the speculative from the probable” but it “need not be reduced to mathematical precision.”<sup>91</sup> The Court continued, explaining:

Defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease, will suffice. As one commentator notes, “[i]t is not adequate to simply establish that ‘some’ exposure occurred. Because most chemically induced adverse health effects clearly demonstrate ‘thresholds,’ there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of ‘causation’ can be inferred.”<sup>92</sup>

Thus, *Borg-Warner* established the requirement that, to satisfy the substantial factor causation test applicable to all toxic tort cases in Texas, a plaintiff had to prove the approximate quantum of a defendant’s asbestos fibers to which the plaintiff was exposed.<sup>93</sup>

Having enjoyed—for decades—the benefits that flowed from the use of the “any-exposure” causation standard in Texas, the plaintiff lawyers reacted strongly against the Court’s decision in *Borg-Warner*. They declared it to be wrongly decided and fundamentally unfair.<sup>94</sup> And they supported attempts to pass Senate Bill 1123 during the Texas Legislature’s 2009 session, a bill that would have compelled Texas courts to use the *Lohrmann* causation standard in asbestos

cases.<sup>95</sup> The opponents of Senate Bill 1123 argued that the “any-exposure” theory was junk science and that *Borg-Warner* did nothing more than require courts to apply the current state of scientific knowledge to asbestos cases, just like courts were required to do in all other cases.<sup>96</sup> After a difficult battle, Senate Bill 1123 failed to pass the Texas Legislature.

Under *Borg-Warner*, Texas no longer has a different causation standard for asbestos litigation than is used in all other cases. With the defeat of the attempt to legislatively reverse *Borg-Warner*, the “any-exposure” causation standard was finally put to rest and replaced by a requirement for science-based evidence of causation.

### VIII. Dismissing the Inactive Cases

By 2013, it was clear that the plaintiffs’ cases that had been sitting on the “inactive docket” for more than seven years were unlikely ever to become active, presumably because they could not meet chapter 90’s minimal medical criteria for diminished lung capacity. Chapter 90, however, did not provide a mechanism for disposing of these plaintiffs’ cases. Unless the Texas Legislature took some action, these cases would remain pending in Texas’s court system forever, unable to move forward and not subject to dismissal. Of course, that was untenable for the plaintiffs, defendants, lawyers, and judicial system.

In 2013, the Texas Legislature passed House Bill 1325 to address the problem of the inactive docket.<sup>97</sup> House Bill 1325, which amended chapter 90 of the Texas Civil Practice and Remedies Code, allowed one year from the effective date of the legislation (*i.e.*, one year from September 1, 2013) for plaintiffs on the inactive docket to activate their cases.<sup>98</sup> Then, the new law required the court managing the inactive asbestos-case docket to dismiss all remaining cases, without prejudice, within the following one-year period.<sup>99</sup>

The Legislature provided that if a plaintiff’s case was dismissed pursuant to House Bill 1325, but that plaintiff subsequently could meet chapter 90’s criteria for an asbestos-caused illness, that plaintiff could file a new lawsuit and return to the judicial system as if his case had not been dismissed.<sup>100</sup> Plaintiffs returning to the judicial system did not even have to pay a new filing fee.<sup>101</sup>

*For many plaintiffs whose cases were dismissed, this unique statutory provision may allow them to proceed under favorable, pre-tort reform statutes. It truly amounted to a dismissal without any possible prejudice to the plaintiff.*

Ultimately, thousands of cases were dismissed in accordance with House Bill 1325. Very few of the plaintiffs whose cases were dismissed have filed another asbestos lawsuit. A favorable consequence of the dismissal process was that a few malignancy cases were identified, activated, and moved through the judicial system.

### IX. Uncovering a Scheme to Defraud and Deplete

The Neoclassical limestone building on Trade Street in Charlotte’s Central Business District seemed an unlikely place for legal history to be made. But, under the careful scrutiny of a judge who returned to the bench from retirement, a decades-old scheme by lawyers to defraud defendants and deplete bankruptcy trusts began to unravel in that federal courthouse. Judge George Hodges found a “startling pattern of misrepresentation” in asbestos exposure claims made to the court and to the trust funds that hold billions of dollars to pay asbestos claimants. Judge Hodges’s opinion “laid bare the massive fraud.”<sup>102</sup> After four decades of endless litigation, an “estimation ruling” by this lone judge dramatically changed the asbestos litigation landscape.

As noted above, more than 100 companies have filed bankruptcy under the weight of asbestos litigation,<sup>103</sup> costing the economy about \$200 billion and costing workers thousands of jobs. A special statute enables companies to file for bankruptcy protection, reorganize, and establish and fund “bankruptcy trusts” to deal with all of the companies’ current and future asbestos claims.<sup>104</sup> Because their clients have claims against the bankrupt companies, the lawyers who represent plaintiffs in asbestos cases participate (nominally on their clients’ behalf) in the bankruptcy court process for creation of these trusts.<sup>105</sup>

Part of the bankruptcy process is for the court to estimate the bankrupt company’s present and future asbestos-related liability for the purpose of determining the amount of money the company must contribute to fully fund the trust it is seeking to create.<sup>106</sup> This “estimation ruling” is a critical part of the process because, once the bankruptcy trust is funded, the reorganized company is free of asbestos-related liability.<sup>107</sup>

Garlock Sealing Technologies, LLC, produced and sold asbestos gaskets, sheet gasket material, and packing used in pipes and valves that transported hot fluids in maritime, refinery, and other industrial applications.<sup>108</sup> Its products spent their working lives bolted between steel flanges or valves.<sup>109</sup> These flanges and valves generally were wrapped with asbestos thermal insulation produced by other manufacturers.<sup>110</sup>

Garlock’s products released asbestos only when disturbed, such as by cutting, scraping, wire brushing or grinding—procedures that were done sporadically by a small number of workers.<sup>111</sup> But access to Garlock’s products typically required removal of the thermal insulation, which caused a “snowstorm” of asbestos dust to which many workers were exposed.<sup>112</sup>

Because Garlock’s products created a relatively low exposure to asbestos to a limited group of workers, Garlock’s responsibility for causing mesothelioma and other asbestos-related diseases was relatively *de minimis*.<sup>113</sup> Nonetheless, Garlock was named as a defendant in thousands of asbestos lawsuits filed throughout the United States.

In June 2010, Garlock, having exhausted all available insurance coverage for its asbestos liability, filed for bankruptcy protection in North Carolina.<sup>114</sup> Federal Bankruptcy Judge George Hodges was assigned to the case.

*By the time it filed for bankruptcy protection, Garlock had been settling asbestos cases for about 30 years.<sup>115</sup> And, as they had done in many previous bankruptcy cases, asbestos plaintiff lawyers participated in Garlock’s bankruptcy proceedings.*

In April 2012, Judge Hodges directed the parties to the bankruptcy case to estimate the aggregate amount of Garlock’s asbestos liability for present and future mesothelioma claims so that the trust could be funded with a sufficient amount of money.<sup>116</sup> The parties—Garlock on one side and the plaintiff lawyers on the other—disagreed over the appropriate method for estimating Garlock’s asbestos-related liability.<sup>117</sup> Garlock argued for an approach that would consider the merits of the claims against Garlock in the aggregate, and the likelihood of recovery by each claimant. Using this method, Garlock estimated its present and future liability at \$125 million.<sup>118</sup> The plaintiff lawyers argued for an approach based on Garlock’s past settlements in asbestos cases.<sup>119</sup> These settlement amounts had accelerated over time, because other defendants had filed bankruptcy, leaving Garlock as one of the few solvent defendants.<sup>120</sup> Using their method, the lawyers set Garlock’s liability at \$1.0 billion to \$1.3 billion.<sup>121</sup>

In defending against the assertion that its liability was over \$1 billion, Garlock argued that the recent increase in the amount of its settlements was due to asbestos plaintiff attorneys withholding their clients’ exposure histories in litigation against Garlock.<sup>122</sup> Garlock informed the bankruptcy court that these attorneys would claim that exposure to Garlock’s products

was the plaintiff's *only* exposure to asbestos; but Garlock believed these claimants had also filed claims against bankruptcy trusts in which the plaintiffs asserted that they were exposed to those companies' asbestos products as well.<sup>123</sup>

To understand and resolve this dispute, the bankruptcy judge allowed Garlock to conduct full discovery of bankruptcy trust claims in only fifteen of the thousands of cases it had settled before filing bankruptcy.<sup>124</sup>

*At the conclusion of the discovery process, Judge Hodges conducted a hearing to estimate Garlock's asbestos-related liability. After hearing weeks of evidence, he wrote an opinion concluding that Garlock had been a victim of a "startling pattern of misrepresentation."*<sup>125</sup>

Judge Hodges observed that initially Garlock was a relatively small player in the asbestos tort system.<sup>126</sup> In the early years it was usually successful at winning defense verdicts, suffered a few million-plus dollar verdicts, but preferred to settle when it could.<sup>127</sup> One of Garlock's main defenses was to point out the true likely cause of the plaintiff's injury—the tons of thermal insulation asbestos that the plaintiff had breathed.<sup>128</sup> Those products had a different type of asbestos than most Garlock products, were more likely to cause cancer, and the asbestos was "friable" (easily released into the air with mere hand pressure).<sup>129</sup> By the early 2000s, almost all of the makers of that friable insulation had filed for bankruptcy. The disappearance of what had come to be known as the "Big Dusties" left companies like Garlock as attractive targets to "pick up the shares" of those companies.<sup>130</sup> Nothing changed about the historical facts of how workers were exposed to asbestos; all that changed was the story that plaintiff lawyers would now tell to impose liability on the remaining defendants.

Judge Hodges concluded that when these bankrupt companies exited the tort system, any mention of their products by the plaintiffs or their lawyers "also disappeared."<sup>131</sup> Garlock's expert, Professor Lester Brickman of the Benjamin N. Cardozo School of Law, testified that "many plaintiffs and their counsel who brought suit against Garlock systematically suppressed the production of evidence of plaintiffs' exposures to asbestos-containing products other than those manufactured by Garlock."<sup>132</sup> He found evidence that during pre-trial discovery in suits brought against Garlock after an earlier 2000-2001 wave of bankruptcies, plaintiffs and their attorneys routinely denied that plaintiffs had any exposure to asbestos-containing products made by bankrupt companies.<sup>133</sup>

*In truth, however, these plaintiffs had filed asbestos bankruptcy-trust claims both before and after suing Garlock, as well as filing sworn statements in multiple bankruptcies asserting that plaintiffs had been meaningfully exposed to the products of other manufacturers. This evidence, Professor Brickman testified, was concealed from Garlock "often by use of deceit and misrepresentation."*<sup>134</sup>

Judge Hodges found that Garlock had presented substantial evidence of this unsavory practice; and the Baron & Budd coaching memo, he concluded, was part of the practice of manipulating testimony.<sup>135</sup> He also found evidence of a regular practice of delaying the filing of trust claims so that defendants remaining in the tort system could not use that information to show the true cause of plaintiffs' injuries.<sup>136</sup> One of the plaintiff lawyers involved in the bankruptcy case testified that he believed he had a duty to do whatever necessary to maximize recovery for his clients. Judge Hodges described that as a "perverted" view of legal ethics.<sup>137</sup>

*As noted, Judge Hodges had allowed Garlock to conduct discovery in fifteen settled cases.<sup>138</sup> After reviewing the evidence, Judge Hodges concluded there had been improper deception in all fifteen cases.<sup>139</sup> On average, plaintiffs disclosed two exposures to bankrupt companies' products in their lawsuits against Garlock, but after settling with Garlock, made claims against nineteen bankruptcy trusts.<sup>140</sup>*

In one particularly egregious example, Garlock suffered a verdict of \$9 million in a suit brought in California by a former Navy machinist.<sup>141</sup> The plaintiff did not admit to any exposure from insulation products containing amphibole asbestos (a type of asbestos that is especially toxic because of the needle-like shape of the fiber), did not identify any specific insulation product, and claimed that 100% of his work was with gaskets, mostly of the Garlock brand.<sup>142</sup>

At trial, Garlock tried to offer proof that the plaintiff was exposed to Pittsburgh Corning Unibestos amphibole insulation, a brand uniquely suited for use aboard Navy ships. The plaintiff denied any recollection of Pittsburgh Corning or Unibestos and his lawyer fought to keep the jury from considering whether Pittsburgh Corning was a cause of his disease.<sup>143</sup> The plaintiff's lawyer even told the jury in his closing argument that there was no evidence that his client was ever exposed to Unibestos because any such evidence would not have been truthful.<sup>144</sup>

After securing a large verdict against Garlock, the plaintiff's lawyers filed 14 trust claims, including with the Pittsburgh Corning trust certifying "under penalty of perjury" that the plaintiff had been exposed to Unibestos insulation.<sup>145</sup> In total, the lawyers concealed exposure to 22 other asbestos products.<sup>146</sup>

Judge Hodges detailed numerous other instances of concealment,<sup>147</sup> commenting that it appeared certain that "more extensive discovery would show more extensive abuse. But that is not necessary because the *startling pattern of misrepresentation* that has been shown is sufficiently pervasive."<sup>148</sup> According to Judge Hodges, "[t]he estimates of Garlock's aggregate liability that are based on its historic settlement values are not reliable because those values are infected with the impropriety of some law firms and inflated by the cost of defense."<sup>149</sup>

"Garlock's evidence at the present hearing demonstrated that the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers. That tactic, though not uniform, had a profound impact on a number of Garlock's trials and many of its settlements such that the amounts recovered were inflated."<sup>150</sup> "The only thing that is important for this proceeding is that the practice was sufficiently widespread to render Garlock's settlements unreliable as a predictor of its true liability. Consequently, Garlock's settlement and verdict history during that period does not reflect its true liability for mesothelioma in the pending and future claimants."<sup>151</sup>

## **X. Inconsistent Claiming: A Pervasive Practice**

A person suffering from an asbestos-caused injury has two distinct mechanisms for obtaining compensation—the bankruptcy trust system and the judicial system. Consequently, the same claimants who seek payments from the bankruptcy trusts often file lawsuits against solvent defendants and claims with multiple trusts. In the litigation, the plaintiffs allege, as they must, that the solvent defendants caused their asbestos-related disease. In fact, many of these claimants assert that the solvent defendants are the *sole* cause of their illness.

In the trust-claims process, a claimant who applies for compensation is asserting (either explicitly or implicitly) that the bankrupt company's product caused his asbestos-related illness. If the trust agrees, the claimant is paid according to a schedule created by the trust's managers—predominately asbestos plaintiff attorneys.

A recent report by the U.S. Chamber of Commerce's Institute for Legal Reform (ILR) found that "the structure of the asbestos bankruptcy trust system, which gave control of the governance and payment criteria to asbestos plaintiffs' attorneys, proved over the next two decades to be rife with fraud and abuse."<sup>152</sup> The Trust Advisory Committees charged with oversight are filled with plaintiff lawyers. According to the U.S. Chamber of Commerce:

In essence the system permits the same firms that stand to benefit when the bankruptcy trust pays claims to write the requirements for payments by those trusts. The standards for claims that result from this process are predictably lax.<sup>153</sup>

In sum, these trusts, which hold billions of dollars, are "black boxes." The lawyers who manage these trusts apparently have no interest in transparency. In many cases, they use the trust system to pay their own clients—or their friends' clients—without oversight. It is essentially impossible to ascertain whose claim has been paid by a trust, how much was paid to any particular claimant, or what asbestos exposure the claimant asserted in the claim form submitted to the trust.

Because they are black boxes controlled by asbestos plaintiff lawyers, it was long suspected that the lawyers representing asbestos plaintiffs were gaming the system—telling litigation defendants one story, while telling some bankruptcy trusts a different story, and other trusts yet another story. The Garlock bankruptcy proved the accuracy of these suspicions.

*"The disconnect between the trust and tort systems has led to inconsistencies with respect to plaintiffs' asbestos-exposure allegations, suppression of evidence in asbestos civil actions, and 'double dipping,' as plaintiffs manipulate the timing of their trust claim filings to maximize their tort system recoveries, and then receive additional asbestos trust payments for the same injury."*<sup>154</sup>

How does the fraud or "inconsistent claiming" occur? The trusts simply do not compare claims, and so there is no way to know if plaintiffs are making different exposure claims to different trusts. One plaintiff lawyer described the system as "institutional loopholes."<sup>155</sup> "The plaintiffs' bar's near-absolute control of the trusts in this model hard-wired a lack of meaningful oversight into the trust system at its earliest stages and incentivized a system with a huge potential for fraud," according to the ILR study.<sup>156</sup> And "as courts began to grant discovery into trust claims, other troubling practices came to light in what one plaintiffs' attorney called 'open[ing] Pandora's Box.'"<sup>157</sup>

In reviewing 100 random Garlock trust claims, ILR "noted three widespread inconsistencies in the information provided to different trusts by single claimants: (1) job site inconsistencies; (2) different products listed with different trusts; and (3) date issues."<sup>158</sup> The ILR report concluded that the "potential for abuse of a system without accountability is high," particularly "when combined with the strong financial incentive... and the documented history of fraudulent claiming practices."<sup>159</sup> And the Garlock data "expose[d] a systemic strategy by plaintiff tort counsel to intentionally withhold relevant exposure assertions related to reorganized companies and their successor trusts."<sup>160</sup>

A growing number of court cases reveal the widespread practice of failing to disclose, or deferring, asbestos bankruptcy trust claims in attempts to make multiple, inconsistent recoveries for the same injury.

- "As part of an investigation into the state of asbestos litigation, *The Wall Street Journal* reviewed trust claims and court cases of roughly 850,000 people filed since the late 1980s, until as recently as 2012. The analysis found numerous apparent anomalies: More than 2,000 applicants to the Manville trust said they were exposed to asbestos

working in industrial jobs before they were twelve years old. 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.”<sup>161</sup>

- *Kananian v. Lorillard Tobacco Co.*<sup>162</sup>: A judge in Cleveland, Ohio, barred a plaintiff law firm from court after discovering “inconsistencies between allegations made in open court and those submitted to trusts set up by bankrupt companies to pay asbestos-related claims.”<sup>163</sup> Plaintiff lawyers presented conflicting versions of how a client contracted cancer and accepted payments from trusts representing manufacturers to whose products the victim was not even exposed, including a trust form that was “completely fabricated.”<sup>164</sup> “In my forty-five years of practicing law, I never expected to see lawyers lie like this,” the judge later said. “It was lies upon lies upon lies.”
- *Warfield v. AC&S, Inc.*<sup>165</sup>: In Maryland, a defendant fought to examine trust claims before going to trial. Once produced, “substantial and inexplicable discrepancies between the positions taken in court and the trust claims” were evident. Exposure alleged in the court case and in trust submissions were completely different. The plaintiff filed at least eight trust claims before trial, yet testified he had only been exposed to the solvent defendant’s product.<sup>166</sup>
- *Bacon v. Amtek, Inc.*<sup>167</sup>: In this Oklahoma case, the defendant “learned at a pretrial hearing that the plaintiff failed to disclose nineteen asbestos bankruptcy trust claims.”<sup>168</sup>
- *Barnes and Crisafi v. Georgia-Pacific*<sup>169</sup>: A New Jersey trial was postponed when the defendant and court discovered that the plaintiff had failed to produce multiple trust filings.<sup>170</sup>
- *Stoeckler v. American Oil Co.*<sup>171</sup>: In Texas, an Angelina County trial had been underway for several days when the plaintiffs’ lawyer disclosed additional trust claims, alleging exposure to a wide range of asbestos products over a longer period. “The court took issue with the discrepancies between the trust submissions and statements made in the plaintiffs’ multiple depositions that no additional asbestos exposures existed.”<sup>172</sup>
- *Brassfield v. Alcoa, Inc.*<sup>173</sup>: Another Texas case in Harris County “demonstrates what appears to be a purposeful disconnect or willful blindness on the part of some plaintiffs’ attorneys in tracking claims submitted to the trusts and within the tort system.” The plaintiff’s lawyer in this case testified at a hearing that he could not verify “for the purposes of discovery what claims were pending with which asbestos trusts.” The presiding judge found that the plaintiff’s lawyer had not made a good faith effort to comply with discovery and was “frankly ashamed” to be part of a process that rewarded such behavior.<sup>174</sup>

These examples demonstrate a pattern of misconduct. One commentator called the plaintiffs “perjury pawns” and said, “The implication is an almost assembly line approach to perjury.”<sup>175</sup>

## XI. Solving False Claiming in Texas

Garlock’s bankruptcy, standing alone, proved that plaintiffs in asbestos cases were gaming the system by telling different stories to different listeners. It was plainly apparent, therefore, that the Texas Legislature’s effort to fix the asbestos-litigation abuse was not finished.

As noted above, when a claimant/plaintiff applies to a trust for compensation, he acknowledges (explicitly or implicitly) that the bankrupt company’s asbestos caused his illness. Consequently, whether a litigation plaintiff has applied to one or more bankruptcy trusts is relevant to the litigation defendants because, at least in Texas, the defendants in

the judicial system are entitled to present that exposure history to a jury so that the jury can properly allocate fault,<sup>176</sup> and also to obtain “settlement credits” for any amounts received by the plaintiff from the bankrupt companies.<sup>177</sup>

*But, as noted, the trusts are black boxes and do not reveal that kind of information, giving license to plaintiff lawyers to hide bankruptcy trust claims filed on behalf of their clients.*

Recognizing the gamesmanship being employed by the asbestos plaintiff lawyers, the Texas Legislature, in 2015, passed House Bill 1492, requiring plaintiffs to reveal any trust claims they have submitted, and to submit claims to all trusts from which they may be entitled to compensation.<sup>178</sup> But the trusts continue to be black boxes, and so confirming the information provided to the defendants by plaintiff lawyers is almost impossible.

This present impossibility may not be permanent, however. In January 2016, the United States House of Representatives passed the “Furthering Asbestos Claims Transparency Act” (FACT Act)<sup>179</sup> for the second time.<sup>180</sup> (Unfortunately, the United States Senate, to date, has not voted on any version of the FACT Act.) The various versions of the Act all have proposed requiring the asbestos trusts to file with the Executive Office of U.S. Trustees detailed quarterly reports on claims filed and paid.<sup>181</sup>

If the FACT Act eventually is passed by the United States Congress and it compels the trusts to be transparent about claims filed and paid, it will be possible, for the first time, to determine when litigation defendants are being misled by plaintiffs about their exposure histories, which is done to increase the defendants’ liability. And it also will be possible to determine when claimants are being inconsistent in their requests for payments from the bankruptcy trusts, which is done to increase trust payouts to individual claimants,<sup>182</sup> but has the effect of depleting the trusts and decreasing their ability to pay future claimants.

## **XII. Post-Garlock RICO Cases**

Once Garlock discovered the pattern of deception with the bankruptcy discovery (see Part IX, above), it filed a fraud case in January 2014 against four plaintiff law firms for conspiracy, fraud, and violations of the Racketeering-Influenced and Corrupt Organizations Act (RICO), a statute generally associated with organized crime.<sup>183</sup> Garlock sued in federal district court in North Carolina, where its bankruptcy case was pending. Among the defendants were two Dallas, Texas, firms—Simon Greenstone Panatier Bartlett, PC and Waters & Kraus, LLP.<sup>184</sup> Three of the named partners of these firms were lawyers at Baron & Budd when use of the “coaching memo,” discussed earlier, was discovered. Garlock’s lawsuit was settled in 2016, after the trial court denied the defendants’ motion to dismiss the case.<sup>185</sup>

Garlock alleged that the law firms engaged in a deliberate and ongoing scheme to defraud solvent companies.<sup>186</sup> An expert report filed by Professor Lester Brickman outlined some of the fraud he believed was perpetrated by “the same baker’s dozen or so law firms that represent the large majority of asbestos claimants,” including Simon Greenstone and Waters & Kraus.<sup>187</sup> The Garlock complaints asserted that these firms and their principal lawyers had conspired for many years to conceal evidence and misrepresent facts to maximize settlement offers and verdicts.

These spin-off firms appeared to have retained some of the same practices as Baron & Budd. For instance, Professor Brickman pointed out a similarity in bankruptcy filings in the Western District of Pennsylvania.<sup>188</sup> Rule 2019 of the Bankruptcy Rules of Procedure requires that attorneys make certain disclosures including potential conflicts of interest that could arise from representing multiple clients, as well as a statement regarding their client’s exposure to

asbestos. Oddly, the Rule 2019 filing from Waters & Kraus contains two paragraphs that are almost identical to the Baron & Budd filing, suggesting that Waters & Kraus, Simon Greenstone, and other Baron & Budd spin-off firms, had continued to use standardized filings developed years earlier at Baron & Budd.<sup>189</sup>

As further noted by Professor Brickman, Peter Kraus of Waters & Kraus admitted his firm would delay filing trust claims against bankrupt defendants when there was a possibility that the bankrupt defendants could be included on verdict sheets given to the jury and, therefore, assigned a portion of liability that would be effectively uncollectable.<sup>190</sup>

In the Garlock bankruptcy case, Judge Hodges had allowed discovery about activities in a number of cases that had been closed for years. After that process was complete, plaintiff law firms fought to keep other defendants and the public from seeing that evidence.<sup>191</sup> Judge Hodges initially agreed with the plaintiff lawyers, taking the extraordinary step of closing his court during the presentation of evidence.<sup>192</sup> But a higher federal court ruled that Judge Hodges had been wrong to close the court and seal the evidence.<sup>193</sup>

*For the first time ever, other companies and the public have access to evidence of the plaintiff firms' practices of saying one thing in a civil suit and another thing to bankruptcy trusts.*

Garlock is not alone in seeking recompense for the misconduct to which it was exposed. In January 2016, John Crane, Inc. filed lawsuits against Texas-based Simon Greenstone Panatier Bartlett, PC and Pennsylvania-based Shein Law Center Ltd.<sup>194</sup> Crane alleged that it had been a co-defendant in many of the asbestos cases filed against Garlock, and that it, too, had been defrauded in those cases by these law firms. Crane claims the law firms violated federal mail and wire fraud statutes, violated witness tampering laws, and obstructed justice, among other things. The complaints cite examples of allegedly false claims, undisclosed asbestos exposure trust fund claims, and other alleged abuses. In the lawsuit against Simon Greenstone, Crane included claims against that firm's principals, Jeffrey Simon (who was serving as President of the Texas Trial Lawyers Association) and David Greenstone.

In September 2016, three major insurance companies—Humana, Inc., United Healthcare Services, Inc., and Aetna, Inc.—filed a lawsuit against Texas-based asbestos plaintiff law firms, seeking \$19 million in damages.<sup>195</sup> The health insurance companies allege that the law firms failed to reimburse them for medical care payments they made on behalf of these firms' clients from the settlements, judgments, and trust payments their clients received. The insurers allege the law firms have “unjustly enriched” themselves while disregarding the insurers' subrogation and reimbursement rights.

### **XIII. Conclusion**

Texas has a long and unfortunate history with asbestos litigation and with the lawyers who pursued asbestos cases for their own enrichment. The application of Senate Bill 15 (2005) and House Bill 1325 (2013) to the asbestos cases pending in Texas on September 1, 2005, essentially proves that thousands of lawsuits had been filed in Texas's courts on behalf tens of thousands of unimpaired plaintiffs—persons who did not have an injury for which to seek compensation. The entire asbestos lawsuit scheme—in Texas and nationwide—was caused by the conduct of a handful of lawyers. These lawyers' actions were taken at the expense of the judicial system, thousands of plaintiffs who were pawns in the game, hundreds of defendants who paid lawyers and settlements to uninjured plaintiffs, and the 100+ companies that filed bankruptcies that hurt their employees and shareholders and reduced America's economic output.

When it comes to abuse or fraud in asbestos litigation, as one journalist noted, “most readers just look at the headlines and yawn.”<sup>196</sup> While the media and public pay little attention, there is no end in sight for the litigation. It is estimated that “mesothelioma claims arising from occupational exposure to asbestos will continue for the next thirty-five to fifty years.”<sup>197</sup>

*The fact that this litigation will be on-going for another three decades gives impetus to the effort to reveal and end abusive and fraudulent practices.*

Enactment of the FACT Act would shine a light on the bankruptcy trusts and their actions, making it possible—for the first time—for all participants in asbestos cases to know when plaintiffs are telling different stories to different participants. Allowing asbestos bankruptcy trust assets to be depleted through misleading, and possibly fraudulent, claims has national consequences. There may be nothing left for future victims, including military veterans. And the cost to society of this scheme—which continues to this day—will likely never be known in full. ■

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## ENDNOTES

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- 1 Since 2008, 23 asbestos bankruptcy trusts have reduced their payments to people suffering from asbestos-related illnesses. See John J. Hare and Daniel J. Ryan, *Uncloaking Bankruptcy Trust Filings In Asbestos Litigation: Refuting the Myths About Transparency*, MEALEY'S ASBESTOS BANKR. REPORT, April 2016, at 2, <http://www.marshall Dennehey.com/media/pdf-articles/O%20413%20by%20J.%20Hare%20%26%20D.%20Ryan%20%2804.2016%29%20Mealey%27s%20Asbestos%20Bankruptcy%20Report.pdf>. An asbestos victim who files trust claims today may receive less than half as much as he would have received a decade ago. *Id.* Thousands of veterans were and are victims of asbestos exposure.
- 2 493 F.2d 1076 (5th Cir. 1973). The clerk's office for the United States Court of Appeals for the Fifth Circuit is located in New Orleans, Louisiana.
- 3 *Borel* originated in the United States District Court for the Eastern District of Texas, Beaumont Division.
- 4 *Borel*, 493 F.2d at 1081.
- 5 *Id.*
- 6 *Id.*
- 7 *Id.* at 1086.
- 8 *Id.*
- 9 *Id.*
- 10 *Id.* at 1087.
- 11 *Id.* After application of "settlement credits" resulting from the fact that four of the defendants had settled with *Borel* prior to judgment, the trial court signed a judgment for \$58,534.04. *Id.* *Borel* had died from his asbestos-caused cancer before trial. *Id.* at 1081.
- 12 *Id.* at 1087.
- 13 *Id.*
- 14 *Id.*
- 15 *Id.* at 1083.
- 16 See, e.g., *Celotex Corp. v. Tate*, 797 S.W.2d 197, 204 (Tex. App.—Corpus Christi 1990, writ dismissed).
- 17 782 F.2d 1156 (4th Cir. 1986).
- 18 *Id.* at 1162-63.
- 19 See, e.g., *North American Refractory Co. v. Easter*, 988 S.W.2d 904, 911 (Tex. App.—Corpus Christi 1999, pet. denied); *Click v. Owens-Corning Fiberglass Corp.*, 899 S.W.2d 376, 377-78 (Tex. App.—Houston [14th Dist.] 1995, no writ); *Keene Corp. v. Rogers*, 863 S.W.2d 168, 173 (Tex. App.—Texarkana 1993, writ stayed); *Keene Corp. v. Mason*, No. 05-91-01322-CV, 1993 WL 42878, at \*7 (Tex. App.—Dallas, Feb. 17, 1993, writ denied) (not designated for publication); *Keene Corp. v. Gardner*, 837 S.W.2d 224, 227 (Tex. App.—Dallas 1992, writ denied).
- 20 See Tex. S.B. 15, 79th Leg., R.S., ch. 97, § 1(f), 2005 Tex. Gen. Laws 169, <http://www.legis.state.tx.us/tlodocs/79R/billtext/pdf/SB00015F.pdf#navpanes=0> (hereinafter "Tex. S.B. 15").
- 21 See *Id.*
- 22 See *id.*; see also *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 83 (Bankr. W.D.N.C. 2014) ("The Complaint in the typical asbestos lawsuit names 30 to 100 defendants.").
- 23 See Tex. S.B. 15, § 1(f).
- 24 See *id.*, § 1(d), (e).
- 25 See *id.*; see also Texas Civil Justice League, *Journal, Special Report, A Texas success story: Asbestos and silica lawsuit reform*, at 4 (2010) (on file with Texans for Lawsuit Reform Foundation) (hereinafter "TCJL Special Report") ("By the mid-2000s, it is estimated that more than 700,000 people had filed claims for asbestos related injuries in United States courts .... Texas was a magnet for asbestos litigation. From 1988 through 2005, more asbestos-related lawsuits were filed in Texas than in any other state. No one knows for sure how many asbestos plaintiffs filed cases in Texas during the heyday of asbestos lawsuit filing, but everyone agrees it was in the tens of thousands.")
- 26 According to a RAND Corporation study published in 2015, more than 100 companies have filed bankruptcy as a result of, or to deal with, asbestos litigation. See Lloyd Dixon and Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases*, at xi (RAND Corporation, 2015), [http://www.rand.org/pubs/research\\_reports/RR907.html](http://www.rand.org/pubs/research_reports/RR907.html).
- 27 See 11 U.S.C. § 524(g).
- 28 See *Id.*
- 29 See n. 26, *supra*.
- 30 See Marc C. Scarcella and Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview Of Trust Assets, Compensation & Governance*, <https://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2013/12/11/asbestos-bankruptcy-trusts-a-2013-overview-of-trust-assets-compensation-amp-governance.aspx?Redirected=true> (hereinafter "Scarcella & Kelso") (using "publicly available documentation produced by various asbestos bankruptcy trusts" to report that "[i]n the thirteen years since the bankruptcy wave began, the trust system has paid out over \$18 billion to claimants with an additional \$5 to \$6 billion paid by certain debtors prior to confirmation as part of bankruptcy pre-packaged... settlement negotiations").

- 31 See *id.* (estimating assets as of the end of 2012 totaling “over \$18 billion” with “approximately \$11 to \$12 billion in proposed funding from bankruptcies still pending confirmation”).
- 32 Skip Hollandsworth, *The Unsinkable Lisa Blue*, TEXAS MONTHLY, Dec. 2012, <http://www.texasmonthly.com/articles/the-unsinkable-lisa-blue/>.
- 33 Christine Biederman, *et al.*, *Toxic Justice*, DALLAS OBSERVER, Aug. 13, 1998, <http://www.dallasobserver.com/news/toxic-justice-6406744> (hereinafter “Biederman, *Toxic Justice*”).
- 34 See Tex. S.B. 5, 70th Leg. 1st C.S., Ch. 2, § 2.09, 1987 Tex. Gen. Laws 37, 42 (codified at TEX. CIV. PRAC. & REM. CODE § 33.013(c)(3)) (providing that each liable defendant was jointly and severally liable for the damages recoverable by a claimant if the claimant’s injury or death resulted from a toxic tort, which was defined to include asbestos-caused injuries). Section 33.013(c) was amended in 1995 to provide that each liable defendant was jointly and severally liable for the damages recoverable by a claimant if the percentage of responsibility attributable to the defendant was equal to or greater than 15 percent and the claimant’s injury or death resulted from a toxic tort. See Tex. S.B. 28, 74th Leg., R.S., Ch. 136, § 1, 1995 Tex. Gen. Laws 971, 974. Section 33.013 was amended again in 2003 to delete subsection (c), thus eliminating the 15 percent threshold and making the generally applicable 51 percent threshold for joint and several liability applicable to asbestos cases. See Tex. H.B. 4, 78th Leg., R.S., Ch. 204, §§ 4.07, 4.10, 2003 Tex. Gen. Laws 847, 858, 859.
- 35 See TEX. CIV. PRAC. & REM. CODE § 71.031 (allowing lawsuits in Texas for acts or omissions occurring in other states); see also *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990) (finding that Texas had statutorily abolished the common-law doctrine of forum non conveniens by enacting Civil Practice and Remedies Code section 71.031), subsequent mandamus proceeding sub nom. *Shell Oil Co. v. Smith*, 814 S.W.2d 237 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding). In response to the decision in *Alfaro*, the Texas Legislature passed a *forum non conveniens* statute in 1993. See Tex. S.B. 2, 73rd Leg., R.S., Ch. 4, § 1, 1993 Tex. Gen. Laws 10, 11-12 (codified at TEX. CIV. PRAC. & REM. CODE § 71.051).
- 36 Biederman, *Toxic Justice*
- 37 Biederman, *Toxic Justice*
- 38 Coaching Memo, on file with Texans for Lawsuit Reform Foundation.
- 39 *Id.*
- 40 *Id.*
- 41 Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, n.412 (2004).
- 42 Thomas Korosec, *Homefryin’ with Fred Baron*, DALLAS OBSERVER, Mar. 29, 2001, <http://www.dallasobserver.com/news/homefryin-with-fred-baron-6398334> (hereinafter “Korosec, *Homefryin’*”).
- 43 *Id.*
- 44 Biederman, *Toxic Justice*
- 45 See Coaching Memo, on file with Texans for Lawsuit Reform Foundation.
- 46 Biederman, *Toxic Justice*
- 47 As of the date of the publication of this paper, Ms. Terrell is believed to still be a Baron & Budd employee, living in a city in which Baron & Budd does not have an office.
- 48 See documents filed in *In re All Asbestos Related Personal Injury or Death Cases Filed or to be Filed in Travis County*, Cause No. CI-10078 in the 250th District Court, Travis County, Texas, October 8, 1997 (hereafter *Travis County Asbestos Cases*).
- 49 See *In re Brown*, 03-97-00609-CV, 1998 WL 207793, at \*1 (Tex. App.—Austin Apr. 30, 1998, orig. proceeding) (not designated for publication) (noting that Budd’s testimony was supervised by the trial judge).
- 50 *Id.*
- 51 *Id.*
- 52 *Id.*
- 53 *Id.*
- 54 See *In re Brown*, No. 03-97-00609-CV, 1998 WL 36418 (Tex. App.—Austin Jan. 29, 1998). Westlaw no longer publishes the withdrawn opinion itself, but retains its citation to the opinion.
- 55 *In re Brown*, 1998 WL 207793, at \*4.
- 56 *Id.*
- 57 *Id.*
- 58 FBI File of Fred Baron, on file with Texans for Lawsuit Reform Foundation.
- 59 *Id.*
- 60 *Id.*
- 61 *Id.*
- 62 *The Observer* reported that Baron contributed to Montoya Coggins’s campaign fund. Korosec, *Homefryin’*.
- 63 FBI File of Fred Baron, on file with Texans for Lawsuit Reform Foundation.
- 64 See <https://www.scribd.com/doc/34955829/Fred-Baron-FBI-file>.
- 65 The United States Supreme Court correctly called it an “asbestos-litigation crisis” in a 1997 opinion. *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

- 66 See Tex. S.B. 15.
- 67 See TEX. CIV. PRAC. & REM. CODE § 90.003(a).
- 68 See *id.* § 90.003(a)(2).
- 69 See *id.* § 90.003(a)(1).
- 70 See *id.* § 90.006(a).
- 71 See *id.* § 90.007(a).
- 72 In a report provided to the Texas Legislature by the judge handling the great majority of asbestos cases in Texas, the judge stated that there were 6,451 inactive asbestos cases pending in his court as of August 1, 2010, containing between 25,000 and 84,000 plaintiffs. See TCJL *Special Report* at 35, 36.
- 73 There is “intense competition among plaintiffs’ law firms for these high-value [mesothelioma] cases.” Testimony of Mark Behrens, Esq., to the United States Senate Committee on the Judiciary, Feb. 3, 2016, at 5 (on file with Texans for Lawsuit Reform Foundation) (hereinafter “Behrens Testimony”).
- 74 See U.S. Chamber of Commerce, Institute for Legal Reform, *Trial Lawyer Marketing*, October 2015, at 4, <http://www.instituteforlegalreform.com/research/trial-lawyer-ad> (hereinafter “ILR Trial Lawyer Marketing”).
- 75 Behrens Testimony, n. 69, *supra*, at 5.
- 76 ILR *Trial Lawyer Marketing*, at 2.
- 77 *Id.* at 14.
- 78 *Id.* at 17.
- 79 232 S.W.3d 765 (Tex. 2007).
- 80 *Id.* at 766.
- 81 *Id.* at 768. Flores smoked from age 25 until three weeks before trial. His physician reported that he was a 50-pack-per-year smoker. *Id.*
- 82 *Id.* at 766.
- 83 *Id.*
- 84 *Id.* at 768.
- 85 See *id.* at 769.
- 86 See *id.* at 770.
- 87 *Id.* at 772.
- 88 *Id.*
- 89 *Id.* at 770.
- 90 *Id.*
- 91 *Id.* at 773.
- 92 *Id.* (citations omitted).
- 93 *Borg-Warner* was an asbestosis cases. The Texas Supreme Court has subsequently held that *Borg-Warner’s* causation standard, and not the “any-exposure” standard, also must be applied in mesothelioma cases. See *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 338-39 (Tex. 2014).
- 94 See, generally, testimony of Bryan Blevins, Jr., on behalf of Texas Trial Lawyers Association, at Texas Senate State Affairs hearing on Texas Senate Bill 1123, March 23, 2009, [http://tlcenate.granicus.com/MediaPlayer.php?view\\_id=14&clip\\_id=2565](http://tlcenate.granicus.com/MediaPlayer.php?view_id=14&clip_id=2565).
- 95 See Tex. S.B. 1123, 81st Leg., R.S. (2009), <http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB01123E.pdf#navpanes=0>.
- 96 See, generally, testimony of Kay Andrews, on behalf of Texans for Lawsuit Reform and Texas Civil Justice League, at Texas Senate State Affairs hearing on Texas Senate Bill 1123, March 23, 2009, [http://tlcenate.granicus.com/MediaPlayer.php?view\\_id=14&clip\\_id=2565](http://tlcenate.granicus.com/MediaPlayer.php?view_id=14&clip_id=2565).
- 97 See Tex. H.B. 1325, 83rd Leg., R.S., Ch. 146, §§ 1-3, 2013 Tex. Gen. Laws 572, 572, 572-73 (codified at TEX. CIV. PRAC. & REM. CODE § 90.010, <http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/HB01325F.pdf#navpanes=0>).
- 98 See TEX. CIV. PRAC. & REM. CODE § 90.010(d-1).
- 99 *Id.*, § 90.010(d-1), (l). The deadline for dismissing the inactive cases was subsequently extended to December 31, 2015. See Tex. H.B. 1492, 84th Leg., R.S., Ch. 532, § 2, 2015 Tex. Gen. Laws 1912, 1912-13, <http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB01492F.pdf#navpanes=0> (amending TEX. CIV. PRAC. & REM. CODE § 90.010(d-1)).
- 100 See TEX. CIV. PRAC. & REM. CODE § 90.010(n).
- 101 *Id.*, § 90.010(o).
- 102 See Sara Warner, *Court Order Disrupts Asbestos World, But What of the ‘Perjury Pawns’?*, HUFFINGTON POST, Feb. 28, 2014, [http://www.huffingtonpost.com/sara-warner/court-order-disrupts-asbestos-world\\_b\\_4859569.html](http://www.huffingtonpost.com/sara-warner/court-order-disrupts-asbestos-world_b_4859569.html) (hereinafter “Warner, *Perjury Pawns*”) (quoting Cardozo Law School Professor Lester Brickman).
- 103 See n. 26, *supra*.
- 104 See 11 U.S.C. § 524(g).

- 105 See U.S. Chamber of Commerce, Institute for Legal Reform, *Insights and Inconsistencies*, Feb. 2016, at 2, 16, <http://www.instituteforlegalreform.com/research/insights--inconsistencies-lessons-from-the-garlock-trust-claims> (hereinafter "*ILR Insights and Inconsistencies*"); see also Scarcella & Kelso ("The formation of a reorganization plan and resultant trust under section 524(g) involves negotiations with representatives of asbestos personal-injury claimants, the debtor, the legal representative for future claimants and other creditor constituencies with standing in the bankruptcy. Subsequent to the establishment of the trust following plan confirmation, it is often the representatives of asbestos claimants who assume the leadership roles in advising the management of trust assets and distribution of claim payments over time.").
- 106 See *In re Garlock*, 504 B.R. at 73.
- 107 See *id.* at 87-88 (describing estimation rulings).
- 108 *Id.* at 73, 77-78.
- 109 *Id.*
- 110 *Id.*
- 111 *Id.*
- 112 *Id.*
- 113 *Id.* at 73
- 114 *Id.*
- 115 *Id.* at 82
- 116 *Id.* at 73-74
- 117 *Id.* at 74
- 118 *Id.*
- 119 *Id.*
- 120 *Id.*
- 121 *Id.*
- 122 *Id.* at 73
- 123 *Id.* at 84
- 124 *Id.* at 85
- 125 *Id.* at 86. A state judge who had been in charge of all asbestos litigation in Delaware called Hodges's opinion "required reading" for all trial court judges in asbestos cases. Peggy L. Ableman, *The Garlock Decision Should be Required Reading for all Trial Court Judges in Asbestos Cases*, 37 Am. J. Trial Advoc. 479 (2014).
- 126 See *Garlock*, 504 B.R. at 82.
- 127 *Id.*
- 128 *Id.* at 83.
- 129 *Id.*
- 130 *Id.*
- 131 *Id.* at 86.
- 132 Expert Report of Lester Brickman, Esq., filed in *In re Garlock Sealing Technologies LLC, et al.*, Case No. 10-BK-31607, April 23, 2013 (on file with Texans for Lawsuit Reform Foundation) (hereinafter "*Brickman Report*").
- 133 *Id.*
- 134 *Id.*
- 135 *Garlock*, 504 B.R. at 84 ("One of the leading plaintiffs' law firms with a national practice published a 23-page set of directions for instructing their clients on how to testify in discovery.").
- 136 *Id.*
- 137 *Id.*
- 138 *Id.* at 85.
- 139 *Id.* ("In 15 settled cases, the court permitted *Garlock* to have full discovery. *Garlock* demonstrated that exposure evidence was withheld in *each and every one* of them. These were cases that *Garlock* had settled for large sums.").
- 140 *Id.*
- 141 *Id.*
- 142 *Id.*
- 143 *Id.*
- 144 *Id.*
- 145 *Id.*
- 146 *Id.*
- 147 *Id.* at 84-85.
- 148 *Id.* at 86 (emphasis added).

- 149 *Id.* at 73.
- 150 *Id.* at 82.
- 151 *Id.* at 94.
- 152 ILR *Insights and Inconsistencies* at 1.
- 153 *Id.* at 4.
- 154 Behrens Testimony at 9.
- 155 See Thomas M. Wilson, *Institutionalized Fraud In Asbestos Bankruptcy Trusts*, MEALEY'S ASBESTOS BANKR. REPORT, May 2014, at 1.
- 156 ILR *Insights and Inconsistencies* at 5.
- 157 *Id.* at 6.
- 158 *Id.* at 8.
- 159 *Id.* at 12.
- 160 See U.S. Chamber of Commerce, Institute for Legal Reform, *The Waiting Game*, Dec. 2015, at 5, <http://www.instituteforlegalreform.com/research/the-waiting-game-delay-and-non-disclosure-of-asbestos-trust-claims> (hereinafter "*ILR Waiting Game*"). For their part, plaintiffs' lawyers dismiss the concerns. Joseph Rice of Motley Rice, a South Carolina plaintiffs' firm with a sizeable asbestos practice, says the inconsistencies can be attributed to the volume of claims processed by trusts and that "there are going to be errors, and errors are not fraud." Dionne Searcey and Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL STREET JOURNAL, March 11, 2013, <http://www.wsj.com/articles/SB10001424127887323864304578318611662911912>.
- 161 See *id.*
- 162 No. CV 442750, 2007 WL 4913164 (Ohio Ct. C.P., Jan. 19, 2007).
- 163 Behrens Testimony at 10 (discussing court's decision in *Kananian*).
- 164 *Id.* at 11 (quoting Daniel Fisher, *Double-Dippers*, FORBES, Sept. 4, 2006, at 136-37).
- 165 No. 24X06000460, Consolidated Case No. 24X09000163, Jan. 11, 2011, Mesothelioma Trial Group (M 112).
- 166 Behrens Testimony at 11-12 (quoting and relying on James L. Stengel, Problems with Asbestos Compensation System, Hearing Before The Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 111th Cong. (Sept. 9, 2011) available at 2011 WLNR 24791123) (hereinafter "*Stengel Testimony*").
- 167 No. CJ-08-328 (Okla. Dist. Ct., Dec. 2011) (Memorandum in Support of Defendant CertainTeed Corporation's Motion to Strike the Testimony of Jasper Hubbard and for Sanctions Due to Plaintiff's Discovery Abuse).
- 168 Behrens Testimony, at 14.
- 169 Nos. MID-L-5018-08 (AS) & MID-L-316-09 (AS) (N.J. Super. Ct. Middlesex County June 12, 2012) (Pre-Trial Conf. Trans.), [http://www.stopasbestostrustfraud.com/wp-content/uploads/2012/10/Barnes\\_Crisafi\\_Pre-Trial\\_Conference\\_Transcript.pdf](http://www.stopasbestostrustfraud.com/wp-content/uploads/2012/10/Barnes_Crisafi_Pre-Trial_Conference_Transcript.pdf).
- 170 Behrens Testimony at 14-15 (discussing court's decision in *Barnes*).
- 171 No. 23,451 (Tex. Angelina County Dist. Ct. Jan. 28, 2004) (Trial Trans.).
- 172 Behrens Testimony at 16-17 (discussing court's decision in *Stoeckler*).
- 173 No. 2005-61841 (Tex. Harris County Dist. Ct. Nov. 22, 2006) (Trans. of Motions Hearing).
- 174 Behrens Testimony at 17-18 (discussing court's decision in *Brassfield*).
- 175 See Warner, *Perjury Pawns*.
- 176 See TEX. CIV. PRAC. & REM. CODE § 33.003(a) (requiring fact finder to allocate responsibility).
- 177 See *id.* § 33.012(b) (providing for defendant to obtain settlement credits).
- 178 See Tex. H.B. 1492.
- 179 See Furthering Asbestos Claims Transparency Act of 2015, H.R. 526, 114th Cong. (2015). The FACT Act of 2015 was introduced in the U.S. House of Representatives on January 26, 2015, by Representative Blake Farenthold of Texas. It was referred to the House Judiciary Committee, where it received a favorable vote (19-9) on May 14, 2015. In December 2015, the FACT Act was folded into H.R. 1927 (the "Fairness in Class Action Litigation Act"), and became section 3 of that bill (which then was renamed the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016"). See <https://www.congress.gov/bill/114th-congress/house-bill/1927/all-actions> (showing all action on bill). On January 8, 2016, the U.S. House of Representatives passed H.R. 1927 by a vote of 211 to 188. See <http://clerk.house.gov/evs/2016/roll033.xml> (showing record vote results).
- 180 See Furthering Asbestos Claims Transparency Act of 2013, H.R. 982, 113th Cong. (2013), by Representative Blake Farenthold of Texas. H.R. 982 passed the U.S. House of Representatives on November 13, 2013, by a vote of 221 to 199. See <https://www.congress.gov/bill/113th-congress/house-bill/982/all-info?r=1> (showing all action on bill). See also Furthering Asbestos Claims Transparency Act of 2012, H.R. 4369, 112th Cong. (2012), by Representative Benjamin Quayle of Arizona. H.R. 4369 was reported favorably from the House Judiciary Committee on September 12, 2012, but did not receive a vote in the full House.
- 181 See, e.g., text of FACT Act of 2015, H.R. 526, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/526/text?r=1>.

- 182 A past national commander of the American Legion described the plaintiff lawyers' practice of filing inconsistent trust claims for their clients as follows:  
The lawyers who usher veterans and other victims through the process of accessing awards from asbestos trust funds are like kids in a candy store; it's almost impossible for them to resist taking an extra lick or bite for themselves.  
John Brieden III, *Veterans and the FACT Act: What's the Truth?* January 7, 2016, <http://thehill.com/blogs/congress-blog/healthcare/264945-veterans-and-the-fact-act-whats-the-truth>.
- 183 See Plaintiff's Original Complaint in *In re Garlock Sealing Techs., LLC*, Case No. 10-31607, in the United States Bankruptcy Court for the Western District of North Carolina, Charlotte Division.
- 184 See *id.*
- 185 Sara Warner, *In Asbestos Bankruptcy Settlement, Conflicts and Racketeering Clouds Loom*, HUFFINGTON POST, March 22, 2016, [http://www.huffingtonpost.com/sara-warner/in-asbestos-bankruptcy-se\\_b\\_9525362.html](http://www.huffingtonpost.com/sara-warner/in-asbestos-bankruptcy-se_b_9525362.html).
- 186 See Plaintiff's Original Complaint in *In re Garlock Sealing Techs., LLC*, Case No. 10-31607, in the United States Bankruptcy Court for the Western District of North Carolina, Charlotte Division.
- 187 Brickman Report, n. 128, *supra*.
- 188 *Id.*
- 189 *Id.*
- 190 *Id.*
- 191 See T.K. Kim, *Federal Judge Closes Portion of Garlock Bankruptcy Trial*, LEGAL NEWSLINE, July, 27, 2013, <http://legalnewsline.com/stories/510515809-federal-judge-closes-portion-of-garlock-bankruptcy-trial>.
- 192 See *id.*
- 193 *Legal Newsline v. Garlock Sealing Techs., LLC*, 518 B.R. 358, 361 (Bankr. W.D.N.C. 2014).
- 194 See Complaint filed in *John Crane, Inc. v. Simon Greenstone Panatier Bartlett, Jeffrey B. Simon, and David C. Greenstone*, District Court No. 1:16-CV-5918 in the United States District Court for the Northern District of Illinois, Eastern Division.
- 195 See Complaint in *Humana, Inc., United Healthcare Servs., Inc., and Aetna, Inc. v. Brent W. Coon, P.C., Reaud Morgan & Quinn, LLP, The Bogdan Law Firm, Foster Sear, LLP, Hissey Kientz, LLP and Shrader & Associates, LLP*, Civil Action No. 16-240 in the United States District Court for the Southern District of Texas, Galveston Division.
- 196 See Daniel Fisher, *The Judge Won't Call Asbestos-Lawyer Shenanigans Fraud, But It Sure Smells Like It*, FORBES, Jan. 11, 2014, <http://www.forbes.com/sites/danielfisher/2014/01/11/the-judge-wont-call-asbestos-lawyer-shenanigans-fraud-but-it-sure-smells-like-it/#2ce7be2a1430>.
- 197 Behrens Testimony at 1.

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