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# *489 THE ASBESTOS LITIGATION TSUNAMI—WILL IT EVER END?

Joseph W. Belluck, Charles S. Siegel, Michele Hale DeShazo, Mark A. Behrens, Moderator: S. Todd Brown



D. BRUCE JOHNSEN: If you all will please take your seats we can get started with our last panel of the day following which we will have lunch and a keynote speaker. With that it is my pleasure to introduce our next panel moderator for a panel addressing the question of asbestos litigation and whether it will ever end. Our moderator is S. Todd Brown. I am always happy to meet and introduce people who go by their middle name as I, myself, go by D. Bruce Johnsen.

S. Todd Brown is an Associate Professor of Law and the Director of the Center for the Study of Business Transactions at SUNY Buffalo School of Law where he teaches bankruptcy, torts, mass torts, and business courses. He is the author of a very influential article, Section 524(G) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox, which has been cited in a number of district court and circuit court opinions. [FN1] Todd has also testified before the House Judiciary Committee concerning the bankruptcy trust system. [FN2]

Todd earned his Juris Doctor degree from Columbia University School of Law where he was the Articles Editor of the Columbia Business Law Review. He earned his LLM from the Beasley School of Law at Temple University in 2009 and prior to law school he received his Bachelor of Arts in Philosophy summa cum laude from Loyola University in New Orleans, Louisiana. For some period of time, eight years I believe, he practiced law at WilmerHale in Washington, D.C. and at Jones Day. Thank you very much and let us welcome Todd.

S. TODD BROWN: Well thank you D. Bruce. You know a few years ago I was on the teaching market and told one of my advisers that I was going to be giving my job talk on asbestos bankruptcies and he looked me squarely in the eye and said, "Are you trying to chase people out of the room?" Most academics do not like to hear about bankruptcy and even fewer like to hear about asbestos and somehow I managed to merge them. And I think— ***490** I hope—you will find this panel very interesting and informative. We have a fantastic panel and although we are still waiting for a couple panelists to arrive I am going to introduce them and then let them carry most of the labor in this

discussion. Then I will come back and talk about how we situate a bankruptcy trust in the current state of asbestos litigation.

So I will begin with Michele Hale DeShazo. I hope I am pronouncing the last name, DeShazo, correctly. She is a Senior Counsel with Kuchler Polk Schell Weiner & Richeson, which I have also mispronounced, in New Orleans. She focuses on product liability defense.

Mark A. Behrens, who is immediately to my left, is a partner at Shook, Hardy & Bacon in the District of Columbia. He has probably written more law review articles than most academics I know. He has also taught at American University and been a Practitioner in Residence at Pepperdine. He is a member of the ALI and he is very active in the asbestos field. I could run down all the organizations that he has been involved with but I will spare you that.

Also joining the panel will be Charles S. Siegel, who leads the appellate practice at Waters & Kraus & Paul in Dallas. He has been an adjunct professor and lecturer at the University of Houston, the University of Texas, Southern Methodist University, and others.

And then of course there is Joseph W. Belluck who is a graduate of the law school where I teach. He is a name partner at Belluck & Fox in New York City. Prior to establishing that firm he worked for Baron & Budd in Texas. He was also a staff attorney and lobbyist with Public Citizen. He focuses on asbestos litigation, as does Mr. Siegel.

To begin our discussion today, Mark is going to walk us through how we got to where we are and set the stage of where we are going.

MARK A. BEHRENS: Thank you Professor. It is an honor and a privilege to be here this morning and I want to thank you all. This is the second time I have presented at this conference. Last year I spoke about causation evidence and today I am going to take up a 50,000 foot view of the asbestos litigation. Before I start and our colleagues come in to the discussion, we had stressed the need for balance on this panel and we put the other speakers on the panel to have balance. Hopefully, they will decide to come and provide the balance that they sought so hard to get. If not, then I can probably argue Joe's position.

Early in my career, in the early nineties, my senior partner was a real legion in the tort field, a guy named Victor Schwartz. [FN3] Victor wrote the torts casebook, Prosser, Wade, and Schwartz, [FN4] which is used in about eighty percent of law schools in America. Prosser was sort of a Dean of tort law ***491** and he and Wade were the authors of the Restatement Second [FN5] and 402A. [FN6] Then Victor took it over from them. And so in the early nineties I was a young associate right out of law school working with Victor and we were working on federal product liability reform legislation. And Joe was Ralph Nader's right hand person and we had a lot of fun because we were about the same age and used to do these radio shows together. And it got to the point where we did them so often that we could literately say, “Hey tonight let us switch places. And you be me and I will be you and we will have some fun.” So if we get stuck today I think I can probably do Joe pretty well. Actually, I could probably sum up their conversation in a hurry because whenever I speak they will just say, I disagree with everything that he says, and so they do not really need to be here to say that, I can just do it for them.

But when I come to groups like this I think that it is very important to note that there is a time and a place to be an advocate. When I am in the court room I am an advocate, when I am writing articles, and amicus briefs—which is really my specialty, we file about twenty-five amicus briefs a year in state supreme courts around the country, I have filed over 130 amicus briefs in the state appellate courts in the last decade—that is a time to be an advocate, this panel is not.

I also sometimes teach in law schools and when I go and talk to the students I always feel that the students do not come there to be indoctrinated, they come there to learn. I know that you all are here for the same type of reasons. To learn something and hopefully be a little bit entertained and go home knowing more than you did. It is really impressive to see—I wish all of the folks in your jurisdictions could see how hard you all work. I know coming to programs like this can be a little overwhelming, getting hit over the head with one panel after another on many different topics. But you all take your jobs very seriously and we appreciate that very much.

I am going to start off with where are we in the asbestos litigation and it may astound you. How many of you all have had asbestos cases in your courts—a good number of you. That is actually surprising to me as one of the things that we are going to talk about is how the litigation is really concentrated in a few jurisdictions, which has always been the case but is now increasingly so.

Asbestos cases in the modern era began in 1973 with a case out of the fifth circuit called Borel v. Fibreboard. [FN7] The court held that the asbestos producers could be strictly liable for failure to warn about the hazard of asbestos. [FN8] That case really kicked off asbestos litigation and not long after that Johns Manville became the first company to go bankrupt due to asbestos***492** litigation. [FN9] We are now in our fourth decade of asbestos ligation; the longest running mass tort in United State history. What is more astounding is not that we are four decades into it but that the most recent actuarial studies project that asbestos claims will continue until 2050. [FN10] That is forty years from now so when you think about it we are only half way through this litigation, which is really mind-boggling. The good news, if there is a silver lining, is that even though we are only half way through the litigation those same studies project that half of all the claims we will see in the next fifty years are probably going to come within the next ten years.

So we are really looking at the next decade or so—hey Joe how are you, good to see you. I told them that we used to battle each other when you were with Nader and that I could probably sum up your remarks by just saying, I disagree with everything he had to say, after I finish. But we will give you fifteen minutes to say that yourself. And Charles, good to see you again.

JOSEPH W. BELLUCK: I do have a rebuttal.

MARK A. BEHRENS: I have just been telling jokes until you came in so we will get going on this now. In all seriousness we are really glad to have these guys here because they are the best for representing people who are victims of asbestos related injuries and so we are very pleased to have you all here. What I was saying was that Borel was forty years ago and we are now four decades into asbestos litigation and at the latest studies that I have seen, and the latest actuarial studies say, that this is going to go on for another forty years. What is really mind-boggling is

that we are expected to see half of those cases come within the next decade.

So this is going to continue be a problem of monumental proportions for probably as long as most of you are going to remain on the bench. When we talk about who is suing whom today the makeup of the plaintiffs are different, the makeup has changed over time. When the litigation first started the plaintiffs were people who were really sick. If you look at studies that [inaudible] did in the 1980s they said that the claimants had mesothelioma, [FN11] which is a horrible asbestos related cancer, that they had asbestos related lung cancer, [FN12] that they had debilitating asbestosis. [FN13] But as we ***493** moved into the late-1990s and into the early-2000s the make up of the plaintiffs changed.

There were a 100,000 cases being filed in that time frame and almost all of the studies said that around eighty to ninety percent of those plaintiffs were asymptomatic. [FN14] They were exposed to asbestos but they had nothing wrong with them in-terms of their ability to continue their daily lives. These cases were causing a crisis. They were causing companies to go bankrupt and were putting pressure on the people who actually had serious illnesses. Some of the plaintiffs' lawyers, whom I respect most, like Charles and his firm, recognized that people suing on behalf of the uninjured were becoming a problem. These cases were taking resources away from the people who were injured and needed those resources. The courts responded and the legislators responded.

We will talk a little bit about what those responses were. But what we are seeing today is that the problem with unimpaired plaintiffs, which was the hallmark of the litigation in the late-1990s and through the mid-2000, is no longer the case. Today the litigation has been refocused on people who are seriously ill. You have probably seen the mesothelioma TV ads running all day long. They are no longer asking simply whether you have been exposed to asbestos but are asking whether you have mesothelioma. That is where the litigation is today and that is where the money is today. So we are seeing that the nature of the plaintiffs has reverted back to where it started, to people who are actually sick.

Who are these plaintiffs suing? This is one of the questions today. Even though the plaintiffs may have legitimate illnesses, virtually all of the cases today concern a real controversy over whether many of the defendants being sued are what the defense bar would consider “legitimate defendants.” Because the major producers of asbestos have virtually all been forced into bankruptcy. There are now ninety-seven companies that have been forced into bankruptcy due to asbestos litigation. [FN15]

What has happened as those companies have gone bankrupt? Solvent companies that are more peripheral are brought in. There are now over 10,000 defendants that have been named in asbestos cases [FN16] and many of those defendants would question whether they legitimately belong as a defendant even when the plaintiff has a legitimate illness. So we are seeing the nature of the defendants change and we will talk about the change in the theories used to bring in new defendants.

***494** Where are the asbestos cases being filed? They continue to be brought mostly in specific pockets of the country. In Illinois—this is astounding— there are about 3,000 Mesothelioma cases filed a year, there will be about 1,000 Mesothelioma cases filed this year in Madison County, Illinois. If you add in Cook County, Chicago to that number, then roughly forty percent of the mesothelioma cases brought in the United States are going to be in Illi-

nois. Really unbelievable.

Where the rest of the cases being brought? New York City, Philadelphia, the Bay Area of California, Los Angles, some in Texas, many in Philadelphia, and some in Norfolk. They tend to be based in areas where there is shipping—Baltimore is another one. So that is where we are today. Many of you have been a part of successes in this area. The reason unimpaired plaintiffs are no longer bringing cases is because of reforms that many courts have adopted. One of the things that courts discovered first is that when the sick were competing with the healthy for resources it was bad for the cancer victims, it was bad for my clients, the corporate defendants, and it was bad for the courts.

To remedy the problem of limited resources, many courts created inactive dockets. [FN17] They said if you are sick you can get your case heard and if you are not sick we are going to park it. We will suspend the healthy plaintiff's case so the statute of limitations will never run out on that plaintiff. We will treat the plaintiff fairly but the healthy plaintiff will not get a trial date until they can actually show that they are sick. That way the healthy plaintiff's claims are preserved and the sick get their day in court faster.

That reform was really a good idea. We advocated for that all over the country. Many state courts responded, Chicago, in New York City, Boston, Baltimore, Texas, Florida, Kansas, and in South Carolina the courts have responded by taking the healthy plaintiffs out.

Another thing that judges were doing in the late-1990s and early-2000s was consolidating a large numbers of cases. The thinking was that if we just get these cases through the pipeline then we would get through this problem faster. But we have learned in the last twenty-five, and now in forty years of this, is that if you make it easier for people to sue you do not get through the pipeline faster. It is not like you speed through tunnel and you come out the other end faster instead you simply invite more people to come. This made the ligation worse and judges have now learned that if you treat these asbestos cases like any other complex product liability case then the legitimate cases will come forward and the junk cases will not.

***495** So now we are seeing Judges that have said no more trial consolidations. The Michigan Supreme Court did this under administrative rule, [FN18] the Ohio Supreme Court did it through changes to the Ohio rules to civil procedure, [FN19] and just this year the Philadelphia courts said no more trial consolidations unless the parties consent. [FN20]

So we are seeing judges screen the screeners. One of the problems ten years ago were that bogus claims were coming forward by doctors that were signing off on reports that no real physician would ever do. Judges are now getting rid of those bogus claims. You are not seeing those come forward. Judges are doing their job and focusing the litigation on the people who are really sick.

Now we have new challenges, as I said, ninety-six companies have been forced into bankruptcy. [FN21] So how do you go after those companies that are still solvent that are on the periphery. One of the things that we are seeing, and we can get into this in questions, we are seeing some claims where they are saying to a pumper valve company, that maybe never had asbestos in their product, they are saying that if you sell a widget to the Navy then Navy in-

stalls it and puts it into an engine room, and the Navy covers it with asbestos made in Manville, they are saying that the widget maker has a duty to warn of the asbestos made by an entirely different company. This is the third party duty to warn. We are seeing this type of claim come forward. The California Supreme Court, about a year ago, ruled unanimously that you are only responsible for the product that you make. [FN22] But this is one of the theories that are being tried. It is coming up all over the country and courts so far are almost all ruling no on the third party duty to warn theory.

We are also seeing new claims against property owners for secondary exposures. The fact pattern is: the worker worked around asbestos in a plant, he had asbestos on his clothes, he takes them home, most often it is the spouse, a female spouse at home would handle those clothes, or young children in the family, and these secondary handlers contract an asbestos related disease. These secondary handlers are now suing property owners and the courts are really split down the middle on whether there is a duty owed in that situation. The decision depends on how the state looks at the secondary duty issue.

We are also looking at the science behind exposure. When you go after more peripheral defendants those exposures are going to be more peripheral.***496** Today, there is a great battle going on in the country over the level of evidence that plaintiffs must bring to the prove causation against some of these more peripheral defendants or peripheral exposures. Recently, the Texas Supreme Court has spoken on that subject [FN23] and the Pennsylvania Supreme Court has said that it is not enough for a plaintiff's expert to simply come in and opine that any exposure is enough to overcome summary judgment. You actually have to show that the plaintiff had enough exposures to cause disease and just saying that any amount of fiber is enough is not good enough. That issue is now before the Virginia Supreme Court and before the Ninth Circuit.

The final issue that is being ligated all over the country is what to do now that there ninety-seven companies that have been forced into bankruptcy due to this litigation. [FN24] The money from those trusts is out there. This is going to blow you away, last year, the GAO looked at the trusts that have been set up from the bankrupt companies and said that there is $36.8 billion available in the trust system to pay claimants, [FN25] almost $40 billion out there to pay claimants, completely outside the torts system. Now there is a big battle among the defendants that are left at the settlement table because they say that the money that had always been on the settlement table is now outside the tort system. They say that we should be able to get some sort of credit for that so the plaintiffs do not get paid twice for the same injury. That is a big battle we will talk about.

Those are the issues that we are seeing at the 50,000 foot level that you are going to see in your courts over the next decade. With that I will be happy to turn it over to the next panelist and we can discuss a little bit more about this when we go to questions.

Charles S. Siegel:I think the way that Joe and I, who are outnumbered here, are going to attempt to deal with this is that I will respond to some of the points that Mark has made and Joe, will focus particularly on some of the assertions that have been made about the bankruptcy system and how it interacts with the torts system and so on. I want to thank Mark for his compliments about my firm and Joe's firm. Our firms exclusively represent mesothelioma victims. We also represent the occasional victim of lung cancer, and other kinds of cancer, who has the temerity to sue for that damage.

I have to respond first to the portrayal of certain kinds of plaintiffs, or categories of plaintiffs, as non-sick, bogus, or asymptomatic. It is true today that people who have malignant diseases, mostly mesothelioma, bring the vast majority of claims, though a number of claims are of lung cancer as ***497** well. As most of you know, mesothelioma is a cancer of the lung lining, though in less frequent cases it can be peritoneal mesothelioma or pericardial mesothelioma and these tumors tend to show up in the linings of the abdomen and the heart, respectively. But there is also lung cancer—cancer of the lung itself, sometimes in people who also smoke but sometimes in people who did not smoke at all and instead had occupational exposure to asbestos.

In years past there were many claims brought by people who do not have a malignant process but had asbestosis, which was a classic disease, irreversible, progressive, and an eventually fatal scarring of the lung tissue. People also sometimes had a less serious condition called pleural thickening [FN26] or pleural plaques. [FN27] These cases are obviously typically resolved for much less than a case concerning fatal mesothelioma. However, I am pretty sure that there is not a single person in this room that would trade their pristine lungs, that there is not a single person in this room that would say, I would gladly accept pleural thickening or pleural plaques for the typical settlement value that results in those kind of case. I do not think anybody would want that condition.

Many of those cases were filed because of the pressure of limitations. And Mark's clients and other counsel's clients very capably asserted that once you have any kind of disease process going on your barred period—then your limitations period begins running, no matter what, no matter what condition may eventually assert itself, including mesothelioma. As Mark said, that tension has been solved by the enactment of a number of, so called, inactive dockets, where you can file your case and be placed on an inactive docket and not worry about the limitations pressure that might result if you developed a more serious condition like lung cancer or mesothelioma. I need to resist the characterization of bogus cases that we had decades ago as, again, I do not think anybody in here with these conditions would view them as bogus.

Mark is really a master at this, he does this all over the country. Mark is freed from the obligation of actually representing individual clients in ongoing lawsuits like Joe and I have to do so he can take the 50,000 foot view, as he put it, and he is practiced at this using this phrase, you heard it three times just since I walked in, ninety-seven companies forced into bankruptcy. [FN28] You notice that he was at pains to repeat that phrase.

This is like speech to spelling that has to occur here; when we hear the word bankruptcy we think of padlocked factories, thousands of employees out of work, production lines shut down, and so on. That is not the case in ***498** the typical asbestos bankruptcy. Fiberglass went into bankruptcy because of its asbestos liabilities; however, it has more employees today than it did on the day it filed for bankruptcy and it continues to produce fiberglass. The day after it declared bankruptcy it did the same thing it was doing the day before. It produced tons and tons of fiberglass.

Bankruptcy these days is simply an elective way to deal with asbestos liabilities. Let me give you another example. Some of you may have heard of a company called Halliburton. Dick Cheney had the bright idea to buy Halliburton or have Halliburton buy into asbestos liabilities, I should say KBR, in the nineties. [FN29] Halliburton then declared bankruptcy to solve its asbestos liabilities. [FN30] Halliburton is not, and never has been, nor has KBR ever been, bankrupt in any sense that is familiar to anybody in this room, or certainly in any way that is familiar to

anyone outside the legal system. Halliburton is a thriving, sprawling company that elected to declare bankruptcy to deal with its asbestos liabilities. [FN31]

The same could be said for other presently functioning companies like WR Grace and any other companies you could name. Yes, there have been small mom and pop outfits that have declared bankruptcy because of asbestos liability, but the large asbestos bankruptcy liabilities that we tend to hear of these days, and certainly for the last fifteen years or so, are all business decisions of the type that Halliburton took. That is one thing I want to make sure we understand.

Mark said that 10,000 entities have been sued in asbestos litigation. I do not know if that is true as that is a ballpark figure. It could certainly be true. We have to sit back and think about it in the following way, there has been asbestos litigation for forty years now and why is that? Why have there been so many cases? Why has it occupied so much of the legal system's attention? Why have there been so many suits filed against so many different entities?

The reason is that there has never been another product like asbestos and probably never will be, in the sense that it was used so pervasively, in so many applications, in so many different kinds of products. Unfortunately, it has resulted in millions and millions of deaths and injuries. It has occupied a central place in the legal system for the last forty years for that reason and that reason only. There have been so many people exposed in so many different settings, from so many different products, on so many different work-sites, working for so many different employers, on land owned by so many different premises owners, exposure that resulted in terrible consequences. So it is really not surprising that so many different entities have been drawn into legal proceedings.

***499** When Mark said that 10,000 entities have been sued, or 10,000 defendants have been named in asbestos cases, again, I do not know if that is true. Ten thousand entities is a ballpark figure that gets tossed around. But when you think of the hundreds of thousands or millions of people who have been affected, and the fact that a typical asbestos worker may work with dozens of different products over his career, and for many different employers, on many different job sites, at premises owned by many different companies, that number is really not that surprising.

I want to advert to what Mark said about so-called peripheral defendants. Again, it is true that the most straightforward defendants in the legal system have gone into bankruptcy. They have not been forced into it, but they have gone into it. Most of the defendants these days are not the direct makers of asbestos insulation products, however, some of them are. Owens-Illinois, which made pipe covering, was an asbestos products manufacturer that DeShazo's firm represents, and is, perhaps, the most straightforward defendant there could possibly be. I believe her firm represents Union Carbide, which actually mined raw asbestos out of the ground. [FN32] You cannot find a more straightforward defendant than that.

To take the example that Mark used, about pump companies, say that a pump company like Crane Company or Buffalo Pumps sold a pump to the Navy, and when that pump left Crane Company's factory it asbestos in it. It had asbestos containing gaskets inside of it, it had asbestos containing packaging, and so on. It was probably insulated with exterior insulation by the Navy but Crane knew that would happen and Crane, or its fellow pump companies like Warren, told the Navy to put on the exterior insulation, and so on.

These are products that had asbestos in them and had to use asbestos on the exterior. It is true that Johns Manville, Owens Corning, and Pittsburgh Corning, that those companies that made asbestos containing insulation are not the defendants these days however, the defendants that do remain are not defendants that are being sued on some sort of crazy attenuated theory. They are being sued on a theory that has commended itself and has made sense to many juries. And certainly defendants like Union Carbide, are being sued on very straightforward theories.

Mark talked about the causation theories that are the subject of many debates in courts. It is true that there is a decision out of Texas called the Borg-Warner decision, which provided an extremely stringent and difficult causation standard to meet. [FN33] This standard requires evidence of the exact dosage of a particular product to which a plaintiff was exposed. Unfortunately, neither my clients nor Joe's clients ever brought a toxic dosimeter to work every day so they could measure the number of fibers in their workspace***500** in case developed mesothelioma thirty years later. So the Borg-Warner decision is a very difficult standard to meet. No other court in the country has really adopted it.

But that is the subject of a lot of litigation these days. What level of exposure evidence is required to get to the jury as to a particular defendant? Defendants like to characterize it as plaintiff's advanced theory that even exposure to a single fiber of asbestos is sufficient to cause disease. That is not a theory that we have ever advanced, it is not a theory that our experts advanced.

Defendants frame the contention as effective but no firm that I am familiar with ever sues a defendant, or certainly, never attempts to go to trial against a defendant on that kind of theory. We only sue companies to whom we can document non-de minimis substantial exposure. No plaintiff is well advised if they attempt to proceed on any bases other than that.

Finally, on the bankruptcy issue, and Joe is going to deal with this more, to say there are $36 billion dollars out there to pay claims is not entirely true. If you take all of the dollars today that are either sitting in trust or may one day sit in trust under currently existing or anticipated trust distribution plans, that total may add up to $36 billion but that money is not sitting there available to pay any plaintiff or all plaintiffs. There is certainly no plaintiff that would ever qualify for a payment from every trust or even a majority of all of the trusts. The trusts exist for a variety of different defendants and there is no plaintiff who would have ever been exposed to all those different kinds of products. You might have a person who was a plasterer who may have a claim against the United States Gypsum Trust. But the plasterer probably would not have worked with a Babcock & Wilcox Boiler, or he would be entitled to a claim against the Babcock & Wilcox Trust.

So to say that there is $36 billion is simply an overstatement—I mean it is not an overstatement but it is sort of an irrelevant statement. There are very few claimants who qualify for anything close to a million dollars, accumulatively, from all trusts. So what these cases are worth—what the average mesothelioma case is worth—is a matter for philosophical debate and is really ultimately up to the jury and the governing state's law. There are vast differences in the damages that are recoverable in different states and so a case's worth is determined by the particular jurisdiction, on the particular day, tried to the particular jury. And then whatever the component of that might be, or should be, from a bankruptcy trust depends on what particular products that worker was exposed to and what evidence there is that has been put forward about the worker's exposure to those products.

That is the defendant's burden just as it is our burden, to develop evidence against the defendants in the legal system. Anyway, that is sort of my off the cuff response to the points I heard Mark making after I walked ***501** in and I am sorry for being late but maybe we will have time for questions later and we can develop some of these topics further. Thank you.

S. TODD BROWN: All right thank you Charles. Michele, would you like to lead us through a discussion on other current issues?

MICHELE H. DESHAZO: Yes. I would like to touch on some of the points that Charles made. Our firm, as Charles suggested, represents many of the more peripheral defendants in asbestos cases and what we have seen are that the bankruptcies are really driving the lawsuits now.

Mark touched on this already as well, certain defendants file for bankruptcy and the nature of plaintiffs' cases have changed as a result of those bankruptcies. A good example would be a plaintiff submitting bankruptcy trust documents, for a company like Johns Manville, alleging that their main exposures to asbestos were from Johns Manville products. However, the name Johns Manville never comes up in plaintiff's tort suit when the plaintiff is asked about products that caused his exposure to asbestos.

So there is a contrast between the exposures alleged in the tort system and the exposures alleged in the bankruptcy process. Clearly, the purpose of this contrast is to try to remove the advocacy hat and to try to be objective and provide the facts. The purpose of not disclosing that information in the tort suit is because the plaintiff is going to recover less in the tort suit if they disclose the bankrupt companies. If we are really trying to figure out how these plaintiffs were exposed to asbestos in the tort suit then that information must be disclosed.

In Louisiana, we have had some battles over the ability to discover and obtain information submitted by plaintiffs in the bankruptcy trust process. This information is really necessary in the tort suit to paint a picture of the plaintiff's exposures. Plaintiffs' counsels have fought us and said that that information is not discoverable and so we have obtained relief from the court system. In order to be completely transparent we need that information and I would think that you, as judges, would really want that information as well, to access a plaintiff's case.

Charles touched on some other issues regarding what defendants are left in cases and has said that they are culpable defendants and they are not peripheral defendants. Again, speaking from my vantage point in Louisiana, we are seeing an increase in cases against peripheral defendants like pump manufacturers and valve manufacturers. These are defendants not in the business of manufacturing products containing asbestos but, at some point down the line, maybe a Navy specification required that asbestos be put on the product and asbestos may have been put on the product by another entity, but there may not have been asbestos on the product when it left the factory.

Mark talked about O'Neil vs. Crane Company from the California Supreme Court, where the court did hold that a manufacturer was not liable ***502** for downstream replacement parts it did not manufacture. [FN34] So that is one issue that will continue to be litigated at the state level. It is certainly important, but we have seen, after the California O'Neil decision, efforts to eat around the edges of the O'Neil decision in California suits and a gearing of testi-

mony in an effort to escape the reach of the O'Neil case. [FN35]

These are issues that we will face in the cases moving forward. Unfortunately, asbestos cases will continue to be filed. It seems that in every decade there is a prediction that it will be the last of the asbestos suits and that we will not see anymore. Then, you see predictions that these cases will be filed until 2050, I think is the latest one. So these cases are here to stay. I think we just need to come up with some common sense solutions to try to manage them.

JOSEPH W. BELLUCK: Good Morning, my name is Joe Belluck, and I want to thank the Law and Economics Center for inviting me. Mark and I, as you were saying, have known each other for a long time. We used to have a little road show around the country debating tort reform. At that time he was representing Big Tobacco and now he has moved to Big Asbestos, but you know, one conspiracy for another.

S. TODD BROWN: Actually, back then his firm represented Lorillard, which made a cigarette that had asbestos filters in it, which was the all-time, most lethal product ever.

MICHELE H. DESHAZO: This is the crossfire reunion show here.

AUDIENCE MEMBER: I am waiting for him to call it.

JOSEPH W. BELLUCK: It is coming, do not worry. I am proud to be here with Professor Brown. I am a graduate of the University of Buffalo Law School. I am also now a trustee of the State University System, which means I am his boss, so I have to be—no, but I am very proud to have him here. Buffalo is an excellent law school and he has been a great edition to the faculty there.

I just want to make a couple of comments and later we will be talking more about the bankruptcies. I hope to show you what actually happens with the bankruptcies in an actual lawsuit that we tried to a verdict in New York and show you exactly what has happened with the bankruptcy claims.

The first point I want to make is, if you were asking financial advice from someone in this country it would not be Mark Behrens, it would be Warren Buffett. And the reason that is significant is because Warren Buffett has made a big play in asbestos in two ways. Number one, he has ***503** bought several of the companies that have gone into bankruptcy, Johns Manville and U.S. Gypsum are now owned by Warren Buffett. So, again, when you hear that these companies have gone into bankruptcy they have not gone into a traditional bankruptcy. They have shut the door one day the next day they are open again and in many cases have become valued investments for investors like Warren Buffett.

Number two, within the last year Warren Buffett has bought the asbestos liability policies from many of the major insurance companies in the United States. Why would he do that? He has done that because he believes that he can buy those policies and save money on the payouts and make a profit for his insurance subsidiaries. Those are two important things to keep in mind about when you hear that there is a litigation tsunami, when you hear it is never going to end, and when you hear that there are no checks and balances on the system. You have to look a little

broader and see what the people who have done extensive analysis of the actuary and claims data are actually doing. The most important one, in that regard, is Warren Buffett. I am sure Michele will tell you that she deals with Resolute Forest Products, which is Warren Buffet's company, and the role that they now play in the litigation.

The second point I want to make is that we live in a great country and one of the greatest things about it is the jury system and the role that judges and juries play in our system. As a plaintiff's lawyer, I trust judges and I trust juries pretty much implicitly. In the state that I practice in, New York, the judges and the juries have done an excellent job of grappling with issues like, when is there a duty? Mark likes to talk about this outlandish idea that a company that sold a product that had asbestos added to it may be responsible. That it is an expansion of duty, it is a third party duty, and the courts are running away with it, but this is not the case. In New York, we use very standard principles of tort law. The question revolves around foreseeability. If it was foreseeable to the defendant that there was a risk about which they should have warned then the company is held responsible. If it was not foreseeable to them then they are not held responsible.

It is the same law that has been applied for hundreds of years in New York and it is now just being applied in the asbestos context. As I am going to show you later, the same is true with bankruptcies. We have a well-developed law about joint liability in New York and in many states; a law about joint, about offsets, about contributions, and about the role of settlements. These principles are being applied in these cases by judges who are acting as gatekeepers, who are applying the law, and who are coming to a balance in the system. So I just wanted to make those comments to provide a more practical response to the broader critique of the system. Now I think we are going to have some discussion.

I am actually going to stand up because I am used to teaching standing. Some of what I am going to cover is really just a basic primer on what bankruptcy trusts are. We have heard a lot about them, but what are they in ***504** reality? Today, the bankruptcy trust is formed under Section 524G of the bankruptcy code. [FN36] The idea there is that we want these companies to come in and we want them to reorganize, because if they reorganize they are going to have more value. That value can then be saved for compensating injured plaintiffs. That was the basic decision that went into establishing Section 524G in 1994.

In order to do that you have to go through certain steps, which are not going to be really relevant to many of you. But after this bankruptcy is filed, typically a Chapter Eleven case, [FN37] we process some claims but not asbestos claims. Asbestos claims are typically left to the side and not dealt with during the bankruptcy case. Some may be investigated for estimation purposes, for figuring out how big the liability is ultimately going to be, but there is very little actual claim review.

In bankruptcy, the reorganization stage is where the debtor comes forward and says, this is how we are going to pay off our debts, this is how we are going to resolve all of our liabilities going forward and hopefully get a discharge and come out as a clean company. Once the case is toward this stage then the court will consider what has been proposed and whether or not it complies with applicable law, whether or not it actually treats all different creditors fairly.

The bankruptcy code does not really tell us what the bankruptcy trusts have to do. It simply says that you can

establish a bankruptcy trust. It says that you have to provide reasonable assurance that current claims on the trust will be paid in roughly the same manner to people who get sick ten years or twenty years from now as they will to people who are sick today. So that requires thinking about what the liabilities are going to be in the future, figuring out what the size of that pool is, and then trying to apportion the assets that are available evenly across the entire range of claimants.

Of course, that does not happen. What we typically see in these bankruptcy cases is that we have what Francis McGovern would have coined as The Field of Dreams—if you build it they will come. When you build a bankruptcy trust you see an onslaught of claims filed. I am not going to go into speculation as to why that is, others have done that pretty extensively and that is not really relevant for your purposes, but it is relevant, for those who might be dealing with asbestos trusts in the tort system, to understand that a trust that was paying $100,000 for a mesothelioma claim a year ago might only be paying $10,000 on that claim today.

The reason for that is that a trust can set a payment percentage. [FN38] Once they realize that the volume of claims far exceed what were projected, they can go back and say, we realize our projections are not right and we are ***505** going to reduce payments going forward. We are going to reduce our percentage of what we allocate the value to be today and hopefully that is going to be the end of it. Some trusts have been reducing payment percentages yearly since 2006. U.S. Gypsum has reduced its payment percentage four times in the last four years. [FN39] And so the assets that are available to pay any one claim from any particular trust are going to be in flux.

How does the payment process actually work under the trust? The first thing you are going to do is submit a claim form. I track thirty-seven trusts on a consistent basis because those are the ones that control over ninety-eight percent of the assets throughout the trust system. These trusts also largely control some of the same government system, the same basic trust distribution design. So the first thing you do is file a claim form and that is going to require that you identify your exposure. If they have recognized work-site lists, you can just say, I worked at this site therefore I was exposed, so you can list that site. You then have to establish some sort of injury and those injuries are going to be broken down into different categories; mesothelioma is consistently the highest level of compensation, but then you also have lung cancer one, lung cancer two, and you may have different categories of asbestosis.

And down at the very bottom we have what we would call an ordinary bankruptcy parlance, convenience class claims. Where the standards are much lower but the payments are very low.

For many of these claims, if they are submitted under expedited review, there may not be a significant challenge from the trust. If you submit the information that they request and you are not seeking some kind of extraordinary claim value then they can take that information, they can process it, and they can assign a value according to a grid that has been established under the trust issue distribution procedures. Once that is done there is really no negotiation, there is no settlement discussion to take place. According to the GAO Report from last year ninety-eight percent of claims that are submitted to the bankruptcy trust system are submitted for expedited review. [FN40]

If they are approved then they are going to receive a scheduled value. That will be according to the value that is assigned in the trust distribution procedure. But that is not the amount that is going to be paid unless the trust is paying one hundred cents on the dollar, currently no active trusts are paying at one hundred cents on the dollar, then

you are going to multiply that by the payment percentage. So if USG assigns a $130,000 value to a mesothelioma claim whose payment percentage is now twenty percent, you do the math, you break it down, it comes out to under $30,000.

***506** Knowing this is important if you are considering contribution because there are variations across states as to how contribution might be considered. I would take up our entire time going through all the different variations. But if you are considering a contribution, you really need to take into account what is actually being paid after the payment percentage is applied. If you applied and said, well they settled this for $135,000 under the USG settlement criteria, then that plaintiff is not going to receive $135,000. They will never receive $135,000, ever. At best you may expect that that payment percentage is going to go up a few percentage points if claim volumes suddenly decline at a level below what they have been seeing. That has not been our history but perhaps it could happen.

This remainder value, this additional amount that goes above what they actually receive after the settlement is offered. If it were me I would say let us make this remainder value the actual amount that is being offered in the settlement. If I were going to apply a more active law in economics approach I would say, is there a remainder value to that leftover portion that is unpaid. That would be my own approach.

So that is one thing, one contribution. The biggest area of dispute right now, and we have seen it touched on today, is discovery. Can we get discovery of trust forms? What can we do with that information as judges, as defendants? What can you do? Trusts do have confidentiality language. Much of the confidentiality language for trusts that were established after 2006 was added after the bankruptcy court confirmed the case. We did not really start seeing many of those until trusts that were confirmed around that time. Before then it was rare. These do not purport to bar discovery nor do the confirmation orders that approve them today. But they do say that we are not going to freely give this information up. And there is a reason for that—the bankruptcy code does not have provisions for saying the bankruptcy trust can suddenly ignore applicable state law. If you establish a trust you can just ignore state law as discovery and that is still a state law issue.

Trying to figure out who is responsible for what and trying to allocate recoveries, that is still firmly within the states. You might recall a few years ago when one of the big energy producers out in California, Pacific Gas & Energy, filed for bankruptcy. [FN41] And they came in with their plan and tried to say, well you know what we are no longer going to have to abide by the regulatory agencies or the rate determinations and so forth, and we are going to put that in our plans, and we are going to get that approved. Bankruptcy court said, where is the bankruptcy plan that says you can do that? That is not the bankruptcy issue. I would argue that this is the same case here. What happens in the tort system is not the bankruptcy court's concern.***507** The bankruptcy court is focused on this case, these assets that are available, and the plaintiffs who have legitimate claims against those assets.

It is not about co-defendants. In fact, when you talk about co-defendants coming in and trying to argue these cases in bankruptcy court they are routinely denied standing. They are denied standing because the court says, this is not your issue.

Just a word about the assets available in the tort system. While it is true, as Mr. Siegel noted, that the $36 billion is not just money that is sitting in a field somewhere, it is not just cash sitting in a field somewhere, where plaintiffs'

lawyers are given kind of a ordinance and told to come running and get it. However, if we look at how much has been paid out of the trust system since 2006, it has been more than $14 billion, [FN42] since 2006 and that is a lot of money. The rates peaked in 2009. Approaching 2009 the rates were just under $4 billion, which is about $10 billion in in 2009 alone.

Payments in 2010 and 2011 were over $2 billion per year. [FN43] So we are seeing a lot of money come through the trust system and paid to claimants. Now which issues—what should you be looking at, as a judge, if you are asked to consider discovery of a trust claim form or trust communications. There has been a pretty substantial amount of ink spilled on this in just the last few years. We saw, of course, the Volkswagen case in California, which dealt with this issue. [FN44] The court ultimately concluded that the trust forms were discoverable. [FN45] Most of the courts that considered this have followed Volkswagen, though a couple courts have not.

The real issue for these courts has been whether or not this is going to generate information that is reasonably calculated to lead to a discovery of admissible evidence. Of course that does not mean that the evidence that has been discovered has to be admissible itself. The question is whether or not it is reasonably calculated to lead to the discovery of admissible evidence.

The response that we often see is that trust exposure criteria, are uninformitive. We saw this on a panel here, I believe, three or four years ago. Mr. Finch was up here and said, look the trust standards are so low that they do not tell you anything about exposure under the tort system. As a bankruptcy academic I find that troubling. But even if that is the case, the courts that have considered that argument have said that the trust standards can also reveal a lot more. They can be used to impeach, they can be used to identify things that were not identified in discovery, and sadly, we do see some lawyers who will, either intentionally or not, fail to disclose trust ***508** forms they have filed. But probably more commonly there was simply a miscommunication when that happens.

Some law firms represent their clients in all aspects of asbestos litigation. Some do not. Some recruit clients, keep the asbestos trust commissions for themselves, and then refer the cases to lawyers more familiar with the law in the appropriate jurisdictions. A case in Delaware that we recently saw ran into that issue, where a firm in Texas referred a case to lawyers in Florida. The Texas firm submitted bankruptcy trust claims to, I think it was twenty or something (lawyers), and did not tell anybody. The Delaware lawyer goes through the entire case and literally two days before the hearing, this case was supposed to go to trial, they suddenly discover that all of these bankruptcy trust claims forms were filed and it completely wrecked the entire preceding.

That is one way that it happens. Another way that we have seen it happen involves very large firms that have compartmentalized responsibilities for trust claims. One of the more prominent firms that is out there, I will not name them because they are not here, they had three different tracks. They had one group that filed claims in their local area, another group that was responsible for claims filed outside of the state, and then a third group that was responsible for filing bankruptcy trust claims, all within the same firm.

The left hand, the right hand, and the other hand, did not know what any of the other hands were doing. And so they actually filed twenty plus bankruptcy trust claims again, they filed a suit in their local court against, something like, eighty defendants, and then in the foreign court they also filed against another seven or eight defendants. So it

is not just that maybe the lawyer in front of you is being untruthful, it may be that there has simply been a lack of communication. Defendants who try to take this approach may have some basis for believing that there are some weaknesses there.

Now the problem with all of this is that it is hard to quantify how often any of this happens. This is largely because none of the asbestos trust claims keep the process for these claims secretive. Even if you do get discovery of these documents you may be subject to some kind of confidentiality restrictions, and therefore, will not be able to disclose them to people like me, who go in and try to figure out what is going on in this process. So there is that possibility.

The other thing I would say is that when we talk about confidentiality the Volkswagen court said, well how do we characterize bankruptcy trusts as they are an entirely new animal. They are not something that we have seen out there before. One theory is that we should treat the trust as stepping into the shoes of the defendants and therefore any kind of settlement that they ultimately make and every discussion related to that settlement should be subject to settlement privilege.

If you look at how the trust operates, as the Volkswagen court and as some others have, you will see that it does not exactly work the same way ***509** as the settlement. You have a very clear set of criteria that you have to satisfy, you have put it into an official form, you swear to under penalty of perjury that everything that you are asserting there is truthful and accurate, very much like a complaint. And so trying to say that it is similar to one or the other, those courts have said that it is very much like a complaint and therefore would not be subject to the settlement privilege.

This is something that I think ultimately you have to look at under your own respective laws. Figure out what is demanded under the settlement privilege, what applies, and whether the trust system looks more to you like a private entity that is settling claims and engaging in discussions that help avoid litigation, which is typically how the settlement privilege is viewed. Or is the trust system simply something that they are going to be filing, much like they would with a workers compensation board or some other administrative regime.

The last thing I am not going to talk about but will raise, is the concern of timing on the defense side. Most trusts allow three years from the date of discovery to file a trust claim. That can actually be pushed back under certain conditions. So the idea here is, why would you file a trust claim if you have active litigation pending in the tort system? When you look at the RAND Report from 2010 when they interviewed different lawyers, some lawyers said we have a duty to be sure that we do not file those trusts claims till after discovery is ended. [FN46] Why, because they might be discovered. Others said no, we have a duty to file them quickly because if we do not then the payment percentages are going to go down and our clients are going to get less money from the trusts.

The fact that there is disagreement, even amongst the plaintiffs' bar on this issue, which is very telling, how novel these issues are and how far we have to go in sorting out these issues. Some legislative efforts have been made to try to force plaintiffs in the tort system to file trust claims before trial takes place. I will leave that debate to others who are more attuned to that. The one thing that I would caution anyone who is considering doing something novel in this area, carefully consider what—how that novel approach might unduly balance the litigation or the settlement

incentives on both sides. One of reasons we have seen some of the dysfunctions in the tort system is that perhaps those unintended consequences were not bedded out as fully as they might have been and have led to some dysfunctions, frankly, on both sides.

This is a very contentious area of law. Perhaps the most contentious area of practice that I have seen and as a former bankruptcy lawyer, I have seen it all. You want to be very careful when you are looking at making changes that could have a dramatic shift in the perception of your process ***510** and in the way that the different parties approach each other in settlement negotiations. That is all I have for this one.

JOSEPH W. BELLUCK: So I wanted to quickly, so that there will be some time left for discussion, walk you through a couple of trials that we handled in New York, and show you, from a practical standpoint, why I think much of what you have just heard is not really accurate.

So the first thing is, I have a client to represent. I am not a professor, I am not a public relations person, I have a client and my obligation for that client is to get the largest recovery I can for my them and their family. This means what? This means I have to prepare them adequately for their deposition within the ethical guidelines of where I practice. It means I have to take whatever steps necessary to make sure that they get as full of a recovery as possible, and it means I have to explain to them what the law is in the state where the case is filed. This is what I do in every case, I explain to my clients what the law is, I tell them about the questions they are going to be asked at the deposition, I refresh their recollection if appropriate, and I try to prepare my client's case in the best way that I can.

The issue in asbestos cases today, ninety-nine percent of where the battle is in these cases, is over the allocation of responsibility to the defendants in the case. The issue of whether my client has mesothelioma is almost never contested. The issue of whether or not the mesothelioma is asbestos related is almost never contested. There are some issues about whether we have the right company or the right product, but usually those are resolved well in advance of settlement or trial.

The issue is really the percentage. As I say to my clients, the best way to think about your case is like a big pizza and the issue is going to be how much, or how large each slice of the pizza is going to be. That is what all of this stuff is about.

The first thing that happens in my clients' cases is that they testify at a deposition. This is my biggest problem with this whole discussion that you have heard. At the deposition my clients are asked to say their name, their social security number, their father, what do they do for a living, talk about their medical history, when they got sick, what treatment they have gotten, and then how they where exposed to asbestos. The people asking those questions, that is her. I do not tell her what to ask. She is free to take a list of every bankrupt company. She is free to take a picture of every bankrupt product and show it to my client and say, sir did you work with Johns Manville? Did you work with Owens Corning? Did you work with US Gypsum? That is her discovery about my client's exposure, or at least what my client knows about bankruptcy exposure.

I do not know Michele at all. And from what I have heard, she is a great lawyer. The lawyers in New York who do this, who represent the defendants, they do a poor job questioning my clients. I would not hire them. I am being

perfectly honest with you. And you can ask Michele ***511** because she has sat in depositions with her colleagues and they do not ask the right questions. My client comes in for a deposition prepared, and his recollection about his exposure to asbestos refreshed, he testifies about how he was exposed to asbestos, and they ask about their product. Sir you said you worked with Union Carbide asbestos, what did it look like? How big was the bag? What was the name on it? How often did you use it? They do not ask that about the bankrupt exposures. They do not do the work to prove up the bankrupt exposures.

Beyond my client's deposition, how do I prove bankruptcy exposures? One way that I do it, for example, if the person worked in the Navy I go to the Naval Archives in Washington and I get the ship specifications. In the specifications it will say, there was a Babcock & Wilcox boiler on the ship. Babcock & Wilcox is bankrupt and that is a basis for me filing a bankruptcy claim. These other lawyers do not do it. They do not do the work. They could go to Washington and pull the ships specifications, they could serve discovery on my client's employer and ask for the product identification the same way we do but they want to have me do their work for them. Then when they go to trial they can put these other companies on the verdict sheet and ask the jury to assign responsibility to these other entities.

That is what all of this is about. In my practice, the way we do things, we do not file the bankruptcy claims until after the case is resolved. In New York, we are not obligated to do it before. [FN47] And unless my client is in a particular situation where he would benefit from the filing of the claims we do not file them during the pendency of the action. If we do file them we turn them over. Every court in New York has determined that the bankruptcy claim forms, if filed, have to be provided to the defendants. [FN48] And we do provide that. Apart from us filing the bankruptcy claim form nothing precludes the defendants from getting this in discovery. They can ask my client and his co-workers about his positions. They can serve discovery on the job sites. They can hire investigators. They could prove all these shares without any of the need for these transparency discovery issues you are hearing.

So let me just quickly show you this. These are recent verdicts in New York. The last two my office tried last summer. The majority awarded $32 million and $19 million. The judge remitted both of them to about $8.5 million. This is the number of active trusts that we deal with. There are some that are particular to a particular locality, like California, but in New York we deal with about forty-one trusts. My clients get an average of about $300,000 total from those forty-one trusts. The verdict value in New York, after remittance, is $8 million. My client gets $300,000 from all the bankruptcy trusts combined in a mesothelioma case. That is an average, some get higher, maybe $400,000, and some get lower.

***512** There is not a pot of gold sitting in the bankruptcy trusts for my clients. Why? This is what they actually pay. This is the actual pay out from a number of bankruptcy trusts. If you qualified for all of them, you would get about $750,000 to $800,000. But our clients do not qualify for all of them because they have to submit proof of exposure. Look at Johns Manville, $26,000, and these are going down. In the abstract, it sounds like there is a lot of money but the actual payout per trust is pretty low. If you look, some of them are $4,000, $6,000, and $1,200. Most of our clients do not qualify for the largest one on here, Western Asbestos Trust in California, because we practice in New York and our clients were not exposed in California.

AUDIENCE MEMBER: Joe, if I could interrupt for one second. It is important to recognize that Johns

Mansville was the largest distributor of asbestos containing products, probably the defendant from which most of our clients had the most exposure, or the largest single exposure, and so that is what they pay. That is what the bankruptcy system yields with the single biggest supplier of asbestos ever in the United States.

JOSEPH W. BELLUCK: This is a case we tried in Buffalo, New York, called In re Eighth Judicial District Asbestos Litigation. [FN49] As you go through the questions—this is the actual verdict—I am going to go through this quickly but I just wanted to show you this. The first question was, was the defendant, Fisher Controls, negligent? And the jury found that they were. The second question was, were they exposed to the defendant's products? And they answered yes, that the plaintiffs were. The third question was, our causation question in New York, was the plaintiff's exposure to the defendant's product a substantial factor? The jury found that it was. The next question is important in New York because it is a finding of recklessness. New York is basically a several liability state meaning that unless the defendant is found reckless, or more than fifty percent responsible, then it becomes a joint defendant in several states. And when the jury answered this question, the jury held that Fisher Controls was one hundred percent responsible for my client's damages. [FN50]

This is important. This is a question that is asking the defendants and asking the jury to determine which other defendants are responsible. On this list are a number of bankrupt companies that the jury heard evidence from. The defendants put on the evidence at trial that my client was exposed to GAF Ruberoid—bankrupt, Garlock—bankrupt, Johns Manville—bankrupt, Special Asbestos Company—bankrupt, Vermont Asbestos Group—bankrupt. The defendants had the evidence to give to the jury to hold the bankrupt entity partly responsible. They then asked them, was the ***513** exposure a substantial—were they exposed to these products? The answer was yes.

Now what you will see as I flip through this. The last few questions I did not show you were questions about whether the employer was responsible. This is the jury's actual allocation. They found the trial defendant five percent liable after hearing all of the evidence. They found the plaintiff's employer sixty-two percent liable, and they assigned a percentage to the other companies, many of who were bankrupt. There is no issue of transparency in this case. The defendants had evidence of bankrupt products being used in my client's factory, they showed the jury the evidence, we had some bankruptcy claims forms that we filed, we gave the forms to them, and the jury assigned a percentage to those companies.

This is not an aberration. This is the Dummitt case, [FN51] which we tried this summer. The verdict was $32 million, remitted to about $8.5 million. [FN52] They asked the same questions as the previously discussed case. Where the plaintiffs exposed to asbestos from Cranes valves? Yes. Was Crane negligent? Yes. Was there a substantial contributing factor? You will that see as you go through it they are answering questions about the trial defendants, which were Crane and Elliot. Here is where they asked whether other people were responsible? You will see that on this list are some bankrupt companies, Babcock & Wilcox and Flexitallic.

Now here is the interesting part about this verdict. The jury found that even though my client was exposed to bankrupt products the bankrupt companies were not negligent. Why? Because the defendants did a poor job. They did not give evidence of the defendants' negligence. They said to the jury, Mr. Dummett was exposed to Babcock & Wilcox's boilers. However, they did not offer evidence that Babcock & Wilcox knew asbestos was harmful and that they had a duty to warn. The law in New York says, if you are going to hold someone responsible, you have to show

that they were negligent; it is pretty simple. If we did not have to show that they were negligent Mark would be running around the country saying, this is crazy you can hold people responsible without showing that they are negligent.

So, what did the jury do? They said that Babcock & Wilcox were not negligent. Then, they assigned ninety-nine percent of the responsibility to one trial defendant and one percent of responsibility to the other trial defendant. The jury understood there were two defendants at trial and they should be handled differently. What happened to this case? This is the judge's post-verdict decision. The defendant in this case argued that the jury did not act appropriately when they found no negligence on the part of ***514** these other entities. After eight weeks of testimony the trial judge wrote a 130 page decision saying that the defendant seeking to apportion liability to non-party bankrupt companies has the burden of showing those companies' the negligence. [FN53] And in this case, they did not show that. So the judge said that the jury was fully within their province to say, you do not get to apportion any fault to the other companies. [FN54]

Now, this is what happened in the judgment. The defendant at trial, Crane Company, received an $8 million offset from the verdict for what we had already settled, which was about four million dollars in settlements. Bankruptcy settlements were included in these four million dollars. Any money that I had already collected from a bankrupt entity, Crane was able to offset that. What happened in this case is exactly what they are telling you they want. We received settlements from non-party tort [inaudible] and they got an offset for them. Their responsibility was reduced by what I had already collected.

Now the timing issue. Professor Brown said that there was a timing issue because we do not file all of the bankruptcy claims until the case is done. So, theoretically, after this judgment, I can go out and file additional bankruptcy claims. What did the judge say? The judge said, Mr. Belluck, you have a judgment for the full value of the case. You will now give the trial defendant the right to file any other bankruptcy claims, any claims that you did not already file at the time of the judgment, now belong to Crane Company. And Crane Company can step into your shoes and collect the money from the other bankruptcy trusts and reduce what they have to pay, they are free to do this. It is a pretty reasonable solution for the timing issue; the plaintiff can file it before the verdict and it will offset the damages. However, if the plaintiff does not file it before the verdict, then the defendant gets to go out and collect and reduce their payment, but the judgment is a full verdict.

I just wanted to show that this case was not an aberration. This is another case we tried this summer. The verdict was $19.5 million reduced to $8 million. They held that the premises owner liable and reckless. These are the questions about whether the trial defendant was responsible, whether they were substantial contributing factor. This question here is whether the plaintiff was exposed to other company's products besides the products of the defendant at trial? The jury answered yes. Included in that list is US Gypsum, a bankrupt company. How did the jury know that? They know that because of the deposition, this lawyer happened to do their job. And they asked my client, were you exposed to a US Gypsum compound? The client answered, yes. And here it is on the verdict sheet.

So they found the bankrupt entity responsible. They found them negligent and found that they were a substantial factor. These are the percentages.***515** You can see that they awarded a percentage of the total verdict to US Gypsum, a bankrupt entity. I would say that there is really not a transparency issue. If these cases are well litigated on

both sides by competent lawyers then all of the information about these exposures is available. All that has to happen is that the lawyers on the defense side have to do their job. They have to ask the questions. They have to do discovery. They have to prove that there was exposure to a bankrupt entity. I personally believe that if you file a bankruptcy trust form as a plaintiff's lawyer during the pendency of an action that you should turn it over and that is what we do.

Todd mentioned that there are some communication issues. Sometimes we get cases referred to us where we do not actually file the bankruptcy claim forms, and there are problems like that. But in general, I would tell you that the system is working.

UNIDENTIFIED SPEAKER: I want you all to know I have sent an email to my partners to immediately begin filing more suits in New York.

MICHELE H. DESHAZO: Yeah. It seems like everything in New York works so perfectly, but for the defense attorneys.

UNIDENTIFIED SPEAKER: I just want to add that there has been a rule in place in New York for quite a while that does require connection with the original interrogatories that actually has the list of all of the bankruptcy trust defendants to the extent that those lists are available. It is ultimately going to depend upon the quality of the defense representation. Unfortunately, we do not see that in all states. I think we have fewer than a dozen states that have adopted a statewide Claims Management Order of that nature. And unfortunately, it also relies upon the ability of the lawyers who are involved, and even the plaintiffs themselves, to say that these are the companies we filed claims against.

I have a number of relatives who have been exposed to asbestos, my grandfather died from asbestos cancer. I have seen how these things unfold in other jurisdictions. It is a little disturbing when somebody comes to you and tells you that they have received a number of settlement dollars but they have no idea why. No idea who they sued. I think it is important to note in this area of litigation that there are good apples and there are bad apples on both sides and, unfortunately, it is not always easy to distinguish the good from the bad.

This is an emerging area and those of you who have asbestos claims are going to be at the forefront of it. Look at what has been done out there. If you like what you have heard about the New York model, I happen to like a lot of what I have seen in the New York model, then it is a good starting point. But you have to adapt and you have to adjust. Hopefully we have been able to provide you with some insight in this area. I am going to ***516** open the floor to some questions now. We will be happy to answer them. Yes?

AUDIENCE MEMBER: I have a two-part question. One, to Mr. Belluck, in the case involving the property owner, can you give just a brief example of the kind of evidence that showed that the property owner was reckless. What evidence did you rely on? Number two, does New York have the same relentless television advertising for plaintiffs that Florida has? I am from Florida. And do you think that advertising has affected jurors' attitudes about the cases at all? And do you take that into consideration in jury selection?

JOSEPH W. BELLUCK: I can tell you that my firm does not advertise on television. I think the advertising is terrible. It has made my job harder because now when you do jury selection everybody has seen the ads and I think in some ways it has diminished the severity of the claims. Mesothelioma cases are serious cases. These are people who are not going to live longer than a year and a half to two years and there is no cure. Mesothelioma is a signature injury caused by asbestos exposure and personally, I think that the television ads have made litigating these cases harder. We have them in New York, my competitors in New York run them twenty-four hours a day.

The evidence of recklessness was a little thin. I will grant that to you. But there was evidence that—the defendant was a construction company— there was evidence that they knew about the hazards of asbestos and had not provided appropriate protection to my client, who was on the site doing other work. The trial judge sustained the recklessness finding. There is a little bit of a backstory to it. In New York we are not allowed to get punitive damages in asbestos cases, they are basically deferred. So I think that the judges, and there has been some [inaudible] case law in this too, have to kind of split the baby a little bit and allow us to prove recklessness, but have then found that we do not have enough evidence for punitive damages.

Like everything else it is a little bit contextual.

MARK A. BEHRENS: I want to make one quick comment. I have sat through being called every bad thing in the world. I know it is lunchtime so I will not keep you here until three P.M. responding to those things. In defense of the lawyers of New York, though I do not litigate there, one of the issues that comes up, the reason the trust claim forms are an important tool, is that a plaintiff maybe asked about it at the deposition. In some of these cases maybe those defendants did ask the plaintiff, tell me what you were exposed to, because I know they do in other cases.

The plaintiff may not know the answer to that question. But you know who does know the answer? His law firm. If you go to the plaintiff's law firm's website, they recruit plaintiffs by telling the world how easy it is to ***517** file a claim and how they have all of the information to do it because they have testimony from co-workers. They have documents from the plant. Therefore, you may not receive the information from the plaintiff but the information is out there and some of it may be out there if the defendants did the work, but the plaintiff's firms have it. Go to any of their websites and it is there. This is one of the reasons why the claim forms are an important tool.

I see an element of hypocrisy here because we hear about how the jury system is the most important cornerstone in our democratic system. We hear that we have to trust juries and yet, what is really going on, is they want to hide the ball from the jury. They want to file the claim forms after the jury trial is over because they do not want the jury to have all of the information about the plaintiff's exposures. If you really trust the jury system you would file the claims before the case goes to trial and give the jury all of the information and let them make a fully informed decision about what is going on.

UNIDENTIFIED SPEAKER: I do not know how badly people want to get to lunch but— there is obviously a response to that. You know it is really not the plaintiff's lawyer's job to do the defense lawyer's work, it is the plaintiff's lawyer's job to maximize the plaintiff's recovery and it is the defense lawyer's job to assign blame to as many other sources as possible. If you know that a plaintiff worked at a particular job site and the plaintiff's lawyer has evidence of which products were used at that job site that would seem like a pretty easy thing for the defense lawyer

to put together. It is not the plaintiff's lawyer's job to create other shares of apportionment for the defense lawyer.

Having said that, we know from the results of Joe's trials—I have testified in congress and brought many examples of verdict sheets from cases that my firm has tried—we know that no balls are being hidden and we know that juries are getting the full story because juries routinely assign responsibilities to bankrupt entities. My firm tries a lot of cases in California and it is very typical in California for bankrupt entities to make up the majority of jury fault allocation so we know that no balls are being hidden from the jury.

MICHELE H. DESHAZO: Just a final thought. I know that we can go back and forth forever and that each time somebody makes a point there will be a rebuttal. I know that Joe has discussed how well New York works, and that is great, but many other states do not work as well. In Louisiana we have issues getting the trust forms from the plaintiff's counsel. Although we can ask questions in a plaintiff's deposition about their sources of exposure, as Mark has said, many times either they do not know or there may be some emphasis on not disclosing the bankrupt entities in the deposition. So the ***518** trust forms are of vital importance to obtain and hopefully other plaintiffs' attorneys throughout the country will follow Joe and the New York model.

MARK A. BEHRENS: I should say that our firm does not contest the discoverability of any trust claim forms we file. I do not disagree with that at all. I think that if a trust form claim has been filed it is totally discoverable and that is our firm's practice.

S. TODD BROWN: I think that is going to end our session. Thank you to everyone here for being here.

D. BRUCE JOHNSEN: We will have lunch around the corner and we have a great speaker there for you to listen to so we will see you there.

[FN1]. S. Todd Brown, Section 524(G) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox, 2008 COLUM. BUS. L. REV. 841 (2008).

[FN2]. Hearing on the Furthering Asbestos Claims Transparency Act: H.R. 4369 Before the H. Comm. on the Judiciary: Subcommittee on Courts, Commercial and Administrative Law, 112th Cong. (2012) (written statement of S. Todd Brown, Professor, SUNY Buffalo Law School).

[FN3]. Victor Schwartz is a partner and the chair of the Public Policy Group of the law firm Shook, Hardy & Bacon L.L.P.

[FN4]. VICTOR E. SCHWARTZ ET AL., CASES AND MATERIALS ON TORTS (11th ed. 2005).

[FN5]. RESTATEMENT (SECOND) OF TORTS (1977).

[FN6]. RESTATEMENT (SECOND) OF TORTS §402A (1977).

[FN7]. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973).

[FN8]. Id. at 1092.

[FN9]. In re Johns-Manville Corp., 26 B.R. 420, 422-23 (Bankr. S.D.N.Y. 1983).

[FN10]. JENNI BIGGS, ET AL., TOWERS WATSON, A SYNTHESIS OF ASBESTOS DISCLOSURES: FROM FORM 10-KS, 4 (2010).

[FN11]. Mesothelioma, MAYO CLINIC, http:// www.mayoclinic.com/health/mesothelioma/DS00779 (last visited Jan. 23, 2013).

[FN12]. Asbestos Related Lung Cancer, THE MESOTHELIOMA CENTER, http:// www.mesotheliomacenter.org/about/asbestos-related-lung-cancer.php.

[FN13]. Asbestosis, MAYO CLINIC, http:// www.mayoclinic.com/health/asbestosis/DS00482 (last visited Jan. 23, 2013).

[FN14]. Stephen J. Carroll et al., Asbestos Litigation Costs and Compensation 41 RAND INST. FOR CIVIL JUSTICE (2002).

[FN15]. Amici Curiae Brief at 6, Simpkins v. CSX Transportation, Inc., 2012 IL 110662 (Ill. 2012) (No. 110662).

[FN16]. JENNI BIGGS, ET AL., TOWERS WATSON, A SYNTHESIS OF ASBESTOS DISCLOSURES: FROM FORM 10-KS, 1 (2010).

[FN17]. HOUSE RESEARCH ORGANIZATION, TEXAS HOUSE OF REPRESENTATIVES, FOCUS REPORT: ASBESTOS LITIGATION: AN INACTIVE DOCKET PROPOSAL 1 (Apr. 2, 2004).

[FN18]. Prohibition on “Bundling” Cases, Administrative Order No. 2006-6 (Mich. Aug. 9, 2006), available at http:// courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2003-47-080906.pdf.

[FN19]. Ohio R. Civ. P. § 42(A)(2) (2005).

[FN20]. In re: Mass Tort and Asbestos Programs, General Court Regulation No. 2012-1, 2 (2012).

[FN21]. Amici Curiae Brief, supra note 16.

[FN22]. O'Neil v. Crane Co., 53 Cal.4th 335, 365 (Cal. 2012).

[FN23]. Borg-Warner Corp. v. Flores, 232 S.W.3d 765 (Tex. 2007).

[FN24]. Amici Curiae Brief, supra note 16.

[FN25]. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES: ASBESTOS INJURY COMPENSATION, THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3 (2011).

[FN26]. Pleural Thickening and Asbestos, THE MESOTHELIOMA CENTER, http://www.asbestos.com/mesothelioma/pleural-thickening.php (last visted Jan. 23, 2013).

[FN27]. Pleural Plaques and Asbestos, THE MESOTHELIOMA CENTER, http://www.asbestos.com/mesothelioma/pleural-plaques.php (last visted Jan. 23, 2013).

[FN28]. Amici Curiae Brief, supra note 16.

[FN29]. Peter Elkind, The Truth About Halliburton, FORTUNE MAGAZINE (Apr. 18, 2005), http://money.cnn.com/magazines/fortune/fortune_ archive/2005/04/18/8257012/index.htm.

[FN30]. Id.

[FN31]. Id.

[FN32]. Union Carbide, THE MESOTHELIOMA CENTER, http://www.asbestos.com/companies/union-carbide.php (last visited Jan. 23, 2013).

[FN33]. Borg-Warner Corp. v. Flores, 232 S.W.3d 765 (Tex. 2007).

[FN34]. O'Neil v. Crane Co., 53 Cal.4th 335, 365 (Cal. 2012).

[FN35]. Id.

[FN36]. 11 U.S.C. § 524 (2012).

[FN37]. 11 U.S.C. § 101-12 (2012).

[FN38]. Lloyd Dixon et al., Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts 38 RAND INST. FOR CIVIL JUSTICE (2010).

[FN39]. Hearing on the Furthering Asbestos Claims Transparency Act, supra note 2 at 12.

[FN40]. Reyes et al., Accusations of Fraud in the Asbestos Bankruptcy Courts: Plaintiff's Deception of Defendant's Obfuscation, MESOTHELIOMA LAWYERS BLOG (Dec. 5, 2011), http://www.mesothelioma-lawyersblog.com/?page=3.

[FN41]. In re Pacific Gas and Elec. Co., 283 B.R. 41 (N.D. Cal. 2002).

[FN42]. Marc. C. Scarcella & Peter R. Kelso, Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance, MEALEY'S ASBESTOS BANKRUPTCY REPORT, June 2012, at 1, 1.

[FN43]. Id. at 3.

[FN44]. Volkswagen of America, Inc. v. Superior Court, 139 Cal.App.4th 1481 (Cal. App. 2006).

[FN45]. Id. at 1497.

[FN46]. Lloyd Dixon & Geoffrey McGovern, Asbestos Bankruptcy Trusts and Tort Competition 19 RAND INST. FOR CIVIL JUSTICE (2010).

[FN47]. Id. at xiv.

[FN48]. Id.

[FN49]. In re Eighth Judicial Dist. Asbestos Litig., 92 A.D.3d 1259 (N.Y. App. Div. 2012).

[FN50]. Id. at 1260.

[FN51]. Dummitt v. A.W. Chesterton Inc., No. 1090196/10, 2012 WL 3642303 (N.Y. Sup. Ct., N.Y. 2012).

[FN52]. Id. at 24.

[FN53]. Id. at 21.

[FN54]. Id.

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