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GEORGE MASON JUDICIAL EDUCATION PROGRAM
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HENRY N. BUTLER: This session is on asbestos bankruptcy trust with the bigger policy question about their impact on the tort system, and we have a great lineup of folks to explain how this works.

Lloyd Dixon from the RAND Institute for Civil Justice is going to kick things off for us by sharing some empirical results on the use of bankruptcy trusts. And then Nathan Finch from Motley Rice, is going to talk about the plaintiff’s perspective in some of these cases. He will be followed by James Stengel, who represents defendants in a lot of these cases.

Then we have Judge Mark Davidson who handles the asbestos MDL in Harris County, which is Houston. Mark and I met many years ago when he came to one of our programs at the University of Kansas, and he has served several terms on our judicial advisory board.

LLOYD DIXON: Good afternoon, a pleasure to be here today. I’m just going to give you a little background on the work we’ve been doing, and just a background on this issue in general. First let me start by saying the Institute for Civil Justice is located in Santa Monica, California. We’re a non-profit and we’ve been looking at asbestos issues for many years. Back in 1983, we were the first to examine and collect empirical information on asbestos claims. We did a series of studies in the 1990s looking at national administrative solutions to asbestos, and then a 2005 report updated the data on litigation dynamics and number of claimants.

Through 2002, we found that there were roughly 730,000 asbestos claimants, about 8,400 defendants, and about $50 billion had been spent on compensation. Well, much has changed in asbestos claiming since then. In different areas, there have been numerous actions in courts and legislatures that have reduced the number of unimpaired claims. There have been tort reforms in various states that have changed where filings occur.

Most importantly for what we’re talking about today, many of the major defendants responsible for exposure have filed for bankruptcy and bankruptcy trusts—the trusts are set up for those insolvent firms, and are now paying substantial amounts. Well, what’s the problem from the defendant’s point of view, what’s the problem? Well, the peripheral—what are called peripheral defendants—didn’t pay much in the 1990s. The primary defendants went bankrupt, and payments by once peripheral defendants, increased.
Then the trust came online—the trust set up for those insolvent parties came online—and what the remaining defendants see, is that payments by the once peripheral defendants did not fall much. So what the defendants argue is that they’re not receiving setoffs for trust payments, or they’re concerned that they’re not receiving enough setoffs for trust payments, and are concerned that insolvent parties are not being sent appropriate share of liability in states with acceptable liability. On the other hand, plaintiff’s attorneys don’t see these same problems. They assert that remaining defendants are receiving setoffs for trust payments.

They also point out that trusts pay only a fraction of the liability of the bankrupt firms. Trusts, because of assets—their assets aren’t adequate to cover the full costs that were projected for their claims—only pay twenty to twenty-five percent of the liquidated value of a claim. Then the plaintiffs point out, when liability is joint and several, the remaining defendants appropriately pick-up the unpaid share of bankrupt defendants in states with joint and several liability. They also point out that it’s really up to the defendants to establish the liability share of the bankrupt parties, not the plaintiffs. So that by way of background of what’s setting up the issue here.

We have a study underway that’s first trying to provide more information on what’s going on with the bankruptcy trust, how many there are, how much they’re paying, what their performance is. We’re trying to provide information to understand better what that linkage between the trusts and the tort system is, and finally to collect some data to update what compensation is for asbestos victims, both from the trusts and from the defendants. We produced a first report last summer and it’s available on our website, www.rand.org. Also, if you give me your card, I’d be happy to send people a copy.

It provides some overview of trust governance and procedures, and summary statistics, and has a detailed appendix on the operations of twenty-six of the largest trusts. This graph shows what’s going on with the number of bankruptcies for asbestos. Bankruptcies where asbestos liability has been involved—that’s the red line—and it shows that from the late 90s through 2002, 2003 there was a big jump in the number of bankruptcies involving some asbestos liability.

You can see from the yellow line: that’s the number of asbestos bankruptcy trusts that have been set up. There’s something on an average of a four-year lag between the date of bankruptcy and the date a trust is set up. You can see on this chart, between 2003 and 2007, the number of asbestos bankruptcy trusts jumped from roughly twenty to around fifty. So a big jump, and there are a good number of trusts in the pipeline. These trusts hold a substantial amount of assets. At the end of 2008, the largest trust held about $18 billion in total assets. Now here’s just a little background on asbestos litigation, and where we are in that litigation.

This line shows estimates that were produced many years ago actually, but many people think that these numbers have held up over time. It shows
the number of excess mesothelioma deaths in the United States, and it peaked at roughly 3,000 in the first part of 2000, 2002, and 2003. It’s starting to gradually taper off, but as you can see there’s many years of asbestos litigation ahead because even in 2016 you have 20,000 excess deaths a year. These two lines show the estimates or data—the red line is the amount paid by the trusts, and you can see the rapid jump increase in the amount paid by the asbestos trust to asbestos claimants.

This is not just mesothelioma, this is all asbestos related injuries. It was $4 billion in 2008. Now, that may well come down because there are a lot of new trusts that came online, and they’re going through a backlog of claims, so I wouldn’t necessarily assume that that will stay up at $4 billion. It may drop. On the other hand, there are new trusts coming online that will keep or tend to push that number up. The yellow line is the estimates from our 2005 study on the total payouts for asbestos compensation, and it was over $8 billion in 2002.

That number may have come down as well because of the reduction of unimpaired claims, and so we’re hoping to update that number in future work. Okay, so that’s the second part of our study—that’s just a brief overview of some work in the study that came out in the summer. The second part that we’re working on now is to better understand the linkages between the torts, and the tort cases and the trusts. We’re working with this kind of conceptual framework for the claiming process for plaintiffs with asbestos related injuries. So from a plaintiff’s point of view, what are their sources of compensation?

They can approach firms prior to the filing of a case in what are often called matrix deals or administrative settlements, pre-suit settlements. They can file tort claims, and that’s a familiar process of trial; if there’s a plaintiff verdict it is some type of verdict molding that considers the setoffs or payments that have already been received. Or a plaintiff can submit a trust claim, and the trust uses different evaluation criteria than the tort system does, and there’s payment or no payment on those claims.

One way that these two systems—no, I don’t really think of them as separate systems—the trust and tort sources of compensation interact, is through the evidence that is shared or not shared in the claim evaluation process: the data that’s submitted with trusts, or the evidence that’s submitted in a trial. There’s a lot of back and forth, and we’ll hear about what evidence and what information is shared from a trust claim versus the information submitted in trial.

A second way that these different sources of compensation interact is through the setup process and the verdict. During the verdict molding, payments through the matrix deals or payments from the trusts are considered or not considered as it may be in the verdict molding stage of a case. And finally, post-verdict. A verdict defendant may or may not be able to file an indirect claim with the trust, and recover payments that the plaintiff would otherwise have been due from that trust. So what we’re doing is
looking at six separate states and we’re finding that situations are very different in the states. Here’s an example of one example of what we’re seeing in West Virginia.

West Virginia is a state where they seem to have a pretty full integration of the trust and the tort modes of compensation. In West Virginia, liability is joint and several, and because of that the verdict defendants pick up the liability of insolvent parties that’s not paid by the trusts. In West Virginia, there are full setups for past trust payments, payments made before verdict, regardless of whether trusts are on the verdict sheet. So if there’s any kind of trust payment, those trust payments are set off from the verdict amount. And then in West Virginia, the verdict defendants are assigned the rights to recover from the trusts, post-verdict.

According to the case management order in West Virginia, the plaintiffs are supposed to assist the defendants in making those recoveries, although what exactly that entails is not specified. But the point is that if there are any post-verdict trust recoveries, they go to the defendants, and as a result plaintiffs don’t receive more with the trusts than without the trusts in West Virginia.

West Virginia seems to have addressed this issue about the interaction of the trust and the tort, and I would say the area most open is how are defendants really going to be able to recover from the trusts post-verdict? That’s the issue there. Now in Pennsylvania it’s very different. Pennsylvania is also a joint and several liability state. In Pennsylvania, insolvents do not appear on the verdict sheet, and there are no setoffs for parties not found liable. So in Pennsylvania, you can have a situation where if a plaintiff settles, receives a settlement from the trust prior to the verdict, the verdict amount is not reduced by the amount of that payment.

There you get an issue where there are not full setoffs. As a result, plaintiffs can recover more with the trust than without the trust, and solvent defendants may not be receiving credit for all trust payments. We’re going through this for all the other four states; that’s just a part of what we’re reporting out for those two states. Just to summarize, these are the issues that we’re seeing concerning how the trust and the torts interact. The first one is that defendants see limited ability to assign fault to insolvent parties in states with several liability. Defendants are concerned that they are not able to get the information they need to assign fault to the insolvent parties.

We also see that in some states, setoffs for pre-verdict trust payments are incomplete, and that’s an issue in some states for these two sources of compensation. And then finally, I didn’t go into it a great deal, but there’s a large amount of uncertainty, and confusion, I would say, about the circumstances under which verdict defendant files indirect claims with the trusts. You’ll talk to some trust officials, people who work at the trusts, and they’ll say that the verdict extinguishes the right of a plaintiff to bring a direct claim.
And you’ll talk to another trust official, and they’ll say there’s nothing in our trust distribution procedures that extinguishes the right of a plaintiff to bring a claim post-verdict. Because the plaintiff still has the right to bring that claim, the verdict defendant does not. So these are three different areas that we’re focusing on that need to be addressed moving forward in this area.

HENRY N. BUTLER: Well, thank you Lloyd for setting up this issue. This is an interesting one, it’s been nine years now since we had a program where Dickie Scruggs attended. One of the judges asked him a question about that—at that point I think we were probably dealing with our second or third wave of asbestos litigation. Someone asked him what he thought of that, and Dickie said, “Well, I don’t have a dog in that hunt, but to me it appears that it’s the never ending pursuit of a solvent bystander.”

NATHAN D. FINCH: Right.

HENRY N. BUTLER: All right, we’ll turn it over to Nate.

NATHAN D. FINCH: Good afternoon, may it please the courts. My name is Nate Finch. Some of you may see in your program that the speaker for this, the plaintiff’s perspective, was supposed to be Elihu Iselbuch. He sends his regrets—he’s had some recent health issues. He and I were law partners for the past ten years until I recently moved to Motley Rice. Motley Rice is a firm that is known to do asbestos litigation from time to time, Caplin & Drysdale is a firm that is known to do asbestos bankruptcy litigation and the creation of a lot of these trusts from time to time.

I think that I’m probably one of the only people in the country that’s both tried a case in front of a federal district court that lead to the creation of a bankruptcy trust, and tried an individual mesothelioma case. I didn’t know until 4:00 p.m. Friday afternoon whether I would be here in front of you all, or in Virginia picking a jury in a mesothelioma trial. Just so I can get a little bit of a feel for my audience, I’m going to do some voir dire very briefly. How many of you have either tried an asbestos case or overseen a docket of asbestos cases, either as a judge or in the private practice? So it’s a fairly small percentage of the audience.

I think there are some basics about asbestos litigation that might—and maybe Mr. Stengel might disagree with me, but probably not by much—be helpful here. Unlike in the food litigation we heard about earlier today, there is no personal responsibility defense in asbestos litigation. Every one of my clients who get sick and die, all they ever did was go to work. They worked around products that contained asbestos, and those products contained asbestos because companies back in the 60s and 70s continued to make choices to put asbestos in the products without warning them.
On the science and the medical side—outside the great state of Texas, and this includes in federal courts as well, pretty much any place you are—any nontrivial exposure to asbestos can cause mesothelioma, or it can be a substantial contributing factor in causing mesothelioma, and that’s both under a Daubert standard,\(^1\) or under state substantive law standards. The federal district courts that have—the federal MDL that hear all the asbestos cases—recently denied Daubert motions on that ground, and in front of juries, oftentimes it comes in the causation context.

If this is all the asbestos exposure that the client had from multiple companies, including bankrupt companies, this is the asbestos exposure from Union Carbide, then what caused mesothelioma? What was the last straw that broke the camel’s back? In most places, not everywhere, but in most places most of the time, you get to a jury on a case like that.

Asbestos litigation is often different from other types of tort litigation in that there are legitimately ten to twenty to thirty companies that made asbestos, companies that emitted fibers that my clients and other people breathed, which caused or contributed to causing mesothelioma. My clients didn’t do anything wrong, and the juries oftentimes get to decide complicated medical and factual questions about who got who, who caused this man’s mesothelioma, this woman’s mesothelioma, and who caused this exposure. But like most civil litigation, most cases get resolved short of trial.

A lot of asbestos cases get tried just by the sheer number of cases, and just by the fact that if a case starts out with twenty defendants and you settle with eighteen of them, you go to trial with the last three or four. So I have that big pie up there to sort of represent, graphically speaking, how asbestos cases typically get resolved; you have multiple defendants, you have multiple responsible parties.

Some of those responsible parties went into bankruptcy long ago. Some of those responsible parties went into bankruptcy a few years ago. Some of those responsible parties are still at the table, they’re still solvent defendants. Some of the responsible parties start the trial and settle during the course of the trial. Some of the responsible parties are in the trial all the way through. And sometimes plaintiffs win, and sometimes defendants win if it goes all the way to a verdict. But generally speaking, the 524(g) trust system is a creation of Congress.\(^2\)

It creates a special statute that allows companies to shed themselves of their asbestos responsibilities by putting an amount of money into a trust that’s effectively equal to the equity value of the company, to pay the claims going forward for the next thirty or forty years, so that the company can reorganize and continue doing business and doesn’t have to deal with asbestos liabilities or asbestos claims—the trust has to deal with that.

The first example of that, the biggest, well-known example of that was the Johns Manville Company.\(^3\) After Manville went into and came out of bankruptcy, it had some problems with the stock market believing that it
had actually resolved its asbestos liability. Congress went and passed the statute in 1994 that effectively codified what the federal judges had done in the Manville case. The main point, from the plaintiff’s perspective is the 524(g) trust system isn’t designed to change anything about basic common law rules as they relate to discovery, or setoffs.

It’s just in the way it’s applied in asbestos litigation—it’s by nature of the litigation it’s somehow different than maybe other types of litigation you might be used to. As I was saying, the vast majority of cases are resolved before a verdict. The trust systems and the trust rules are not designed to change state law; either the state law relating to discovery or the state law relating to setoffs. I think there are some basic principles that apply to asbestos litigation just as they apply to all kinds of litigation. The first is if the plaintiff gets to choose who he or she sues. The plaintiff can sue all the potentially responsible parties, some of the potential responsible parties, or none of them.

Believe it or not, there are mesothelioma victims in the United States today who do not sue anybody because they decide they would rather spend what little time they have left on this planet doing something else, not very many, but there are some. The general rule is that bankrupt entities or companies that went into bankruptcy can’t be sued. That’s not just an asbestos rule, that’s bankruptcy 101. You can’t go out and sue Johns Manville anymore; you can’t sue Owens Corning anymore. What has stepped into their shoes are these bankruptcy trusts. I don’t think anybody would dispute that the facts that what a plaintiff did, what he worked with, where he worked, that is discoverable. That is discoverable from the plaintiff himself. You can take the plaintiff’s deposition. You can get a list of the places where the plaintiff worked. You can take depositions of the plaintiff’s coworkers. You can do document discovery from the premises owners of the places that he worked. You can go out and hire expert witnesses, and I’ll get to that in a little bit. In a case I just tried—we had some experience dealing with expert witnesses working for one of the defendants who researched the various types of asbestos containing materials that were on the ship that my client was on. There are lots of ways you can discover the evidence of what the plaintiff was exposed to.

Where I think the dispute or the rub is, and you’ll hear about this more from Mr. Stengel, is this—can the defendants get access to the materials that the plaintiffs provide to the asbestos bankruptcy trusts in the context of settlement negotiations with those trusts. And at what stage in the proceedings is that material discoverable? And are the defendants entitled to know how much money the plaintiffs collect from the trust, and at what stage in the litigation?

I would argue that in general, the defendants already know, or have a pretty good idea of what plaintiffs either can recover or are likely to recover from asbestos bankruptcy trusts; and they can use that information both in
settlement negotiations with plaintiff’s counsel and in trial. The final sort of basic principle is that—and generally speaking in litigation, not always but most of the time—settlements are confidential in that the terms and the amount of settlement are confidential, unless and until a judge needs to know it to mold a verdict or calculate a setoff. One thing I think is absolutely crystal clear is that a settlement agreement is not the same thing as tort liability.

The fact that someone can obtain money from either a solvent defendant or a bankruptcy trust by providing a certain set of documents or providing a release, doesn’t mean that the defendant has agreed that its product was defective; or, that it caused the plaintiff’s mesothelioma or any other asbestos related disease. It doesn’t mean the plaintiff says that that particular entity is not liable. But generally speaking, almost every settlement agreement I’ve ever seen or negotiated says that the defendant does not accept or admit responsibility for whatever it is the lawsuit was about.

The settlement contract may well be a contractual liability. It may well create a liability in a financial sense. It may well create a liability that you should have to measure if you’re trying to estimate the total cost of asbestos claims that some company might be faced with in the future; maybe a liability for 10K reporting purposes or insurance coverage purposes—but it’s not a tort liability. At least in the federal system, and most states have similar rules. Evidence of settlements is not admissible in a trial to prove liability on a claim or lack thereof.

I don’t know how many of you have tried cases where there are multiple defendants at the start of a case. If some of them settle out during the course of that trial, is the jury told that there was a settlement, and that defendant “X” paid “Y” amount of dollars to resolve its differences with the plaintiffs? I don’t know of any court in the country where a jury is told that. There are evidence rules that prevent that. So what we’re really talking about here, I think, and I guess Mr. Stengel can correct me if I’m wrong, is at what point is the bankruptcy trust submission discoverable, and how is it to be used in the context of solvent defendant litigation?

I would argue that a lot of the information that is sort of disputed or that the defendants would like to see more of, is already either available to them or, the type of information that they want to see discoverable, or want to get is exactly the type of information that they don’t want to give plaintiffs or courts.

Bankruptcy trusts, particularly the newer ones—and those would be the vast majority of them, the ones that my old firm did a lot of litigation to create over the past ten years—create these trusts, and the corpus of the trust has assets with the duty to pay asbestos claims that would’ve belonged to Johns Manville, or Owens Corning, or some other company that is no longer available in the tort system because they use the bankruptcy code to resolve their asbestos problem.
These trusts have what’s called trust distribution procedures, which are effectively standing settlement grids that say if you provide us with certain information, if you can prove that you worked at such and such a site, or if you can prove through an affidavit that a coworker provides that you worked with such and such a product, we’ll make a standing settlement offer to you of “X” amount of dollars. The trusts publish those settlement offers; the standing offers in something called a trust distribution process which is available online—it’s freely available.

The standards for receiving a settlement from a trust are very different from the standards that you would have to meet to prove up a case to get all the way to jury and judgment in the tort system. It may be similar to the standards that the predecessor company used to settle cases. Generally speaking, a lot of companies figured out that if a plaintiff could prove that he worked at a place where their product was probably used, then more likely than not the plaintiff would probably be able to put on admissible evidence to prove that he breathed the asbestos fibers from that product. But proving that you worked at a place is not nearly the same thing as proving up liability of that company.

Judge Davidson has a very famous order out of Texas and I’ll let him describe it himself, which I call the “What’s sauce for the goose is sauce for the gander” rule: effectively, the defendants have the same sort of burden that the plaintiffs do to show that other people are responsible. Any good defense lawyer worth his or her salt, I would argue, already knows what plaintiffs are likely to get from asbestos bankruptcy trusts—they know where the guy worked, they know what kind of jobs he had, they have thousands of depositions taken in these cases where they can look to see what products are at what place. So what this really boils down to is what I call, “who has to pay the cost of trying the empty chair.”

I put an empty chair underneath the screen there because trying the empty chair is a time honored way that defense lawyers—and believe it or not I have done some defense work in my career—use to defend themselves. As one brief case study in this federal MDL case tried last month, I was on the losing side of a defense verdict. We started the case with four solvent defendants. Our client had done an affidavit of exposure to multiple companies for products, including many bankrupt companies.

The federal district court judge denied a Daubert motion based on each and every exposure. The defendants argued that the exposures from their products were trivial, the last little bit in the glass so to speak. We tried the case for two weeks, we settled with two of the defendants along the way, went to verdict with the last one. The solvent defendant we went to verdict with did a very good job with trying the empty chair—using the types of information which they say is not available, but actually was, and they got a defense verdict.

So I would just argue that, I don’t see the interplay between the trusts and the solvent defendants as a big problem in asbestos legislation.
trusts are not designed to, and do not really change the way state settlement, verdict setoff, or discovery rules work.

HENRY N. BUTLER: Thank you very much Nate. Jim, are you ready?

JAMES L. STENGEL: Sure. Good afternoon everybody, my name is Jim Stengel. The more astute of you reading Nate’s materials may have inferred that I represent Union Carbide, which is true. I have past experience, though for most of the 90s I was outside counsel to Manville Trust. So I’m reasonably familiar with what the trusts do and how they operate. None of us so far have said why any of this matters to you. Many of you are probably in that fortunate position of having states where there is a dedicated asbestos bench, and you’re not it, in which case you may think you’re not at all worried about this. But I think that there are some broader policy implications for how we as a justice system work.

Some of what Lloyd talked about highlights that the money at stake here is staggering. To quote Senator Dirksen from Illinois, “A billion here, a billion there, eventually you’re talking real money.” This is a huge amount of money. We’re not covering ourselves with glory in terms of how we process these claims through the system, the amount of transactions cost involved, and the fairness to the outcomes. From a solvent defendant perspective, there is an inherent unfairness in the way these cases are tried. Lloyd put up the slide, which is a preliminary assessment of West Virginia versus Pennsylvania.

What wasn’t perhaps as clear as it should be, is that in West Virginia there is a case management order specifically addressing discovery and disclosure from the trusts. In West Virginia, the plaintiffs were required within a fairly short period of time to disclose all claims that have been made and all claims that will be made, so that the defendants are given a full disclosure of what trust claims will exist. It also includes penalties, such as loss of trial dates, if that information is not provided. It also deals with judgment molding or setoffs. As I think Nate would suggest, we don’t get that information until late.

There are a couple of things that Nate described, and generally I agree with his description of the system—there are some areas where I think, frankly, red herrings were raised. I candidly don’t care, until I have a judgment, what a plaintiff is getting from a trust. That’s not the crux of what we as solvent defendants are looking for. To understand what we’re looking for, I think I need to take you through what modern asbestos litigation and trust claims look like, at least in brief.

At the dawn of asbestos litigation, the claimants or plaintiffs were largely insulators. They worked directly with thermal insulation products containing asbestos. They knew they worked with Manville Asbestos, they knew they worked with Kaylo; they knew they were spraying limpet. There was not really a big question in their minds if they became ill, and
they were also the members of certain unions that did a very good job about informing their membership about where their health problems were coming from. But we are several generations removed from having a plaintiff population that is largely made of people who have a reason to know what they were exposed to and how is contributed to their illness.

One of the values of the plaintiff’s bar gives to their clients is with today’s claimants: if you’re a seventy-eight year old gentleman with mesothelioma, you probably know where you worked, and you have some surmise as to who may be responsible there. But frankly, it’s the plaintiff’s bar who can help educate them as to what products they’ve been exposed to, and which of those products contain asbestos. There’s a whole store of intellectual property at the plaintiff’s bar level that’s not immediately apparent, and those claimants may not know that they have a claim, say against Union Carbide, my client, until they actually talk to a plaintiff’s lawyer.

Unless in that consultation, that educational process goes forward, that claimant may proceed in blissful ignorance that he’s had that exposure. Which is why the timing here is very critical. Because the disconnect which we fight against, because we think these systems should, as in West Virginia act as an integrated system, we try today primarily in malignancy docket. The waves of the unimpaired claim which were the bane of the early 2000s, have largely passed away because of case management orders, legislation in some states, or the economics of the process.

We’re dealing with a population of people who are seriously ill, largely mesothelioma, although there are lung cancers and other cancers in the mix. Because of that, in most jurisdictions we are going to trial from twelve months to as short as four months. We are going to trial right here, right now. That puts in a tremendous burden on the defendants to be able to gather the evidence we need to defend these cases. Now, Nate has said, and I’m from another context, “Well wait a minute, this isn’t the plaintiff’s problem, you guys do your job.”

As you heard earlier, we get paid by the hour as opposed to on a contingent basis, so we should be happy out there, churning away doing discovery on all the trust exposures. The problem is that’s ineffectual and its inefficient, and to the extent recollection has not been refreshed by a claimant’s own lawyer, it will be very difficult for us to do that discovery in the time allowed. The corresponding development here within the last several weeks, a motion that has been filed to amend the standing order in Madison County, Illinois that will strip the duration of evidentiary depositions of the plaintiff to three hours in total, with an hour and a half available to the thirty to forty defendants in each case, and an hour and a half available to the plaintiff.

So we get put in a box where it’s impossible for us to adequately discover the exposures. If we get a complaint obviously, we can go through the list, we see who is in the case, we know that, since it’s disclosed by the plaintiff. There’s typically no statute of limitations in the trust world, and
here I’m not accusing plaintiff’s lawyers of misconduct. There are some notorious examples of bad conduct in the trust context.

But here they are probably doing their job by their ethical obligations—which if I’m the plaintiff’s lawyer and I don’t have an affirmative obligation to help produce information about trust predecessor exposures, and I can sit back and file that claim in a year and a half or two years, and get my money from the Manville trust and from Owens Corning and all the other dead entities, and I can go to trial against Union Carbide and other solvent defendants—I’m probably doing the right thing from that lawyer’s and that claimant’s perspective. Now, you’re not doing the right thing when they’re knowingly helping obscure the fact that there may be other claims.

What is it that we’re really looking for? Nate talked a lot about settlement amounts, the fact that settlements don’t prove liability—absolutely right. The trust claim process is very streamlined right now. I think other than Celotex, all the trusts take e-filing. A very detailed proof of claim form will be filed with the trust, and with that claim form will go medical information and records. But from our perspective as a solvent defendant still in the tort system, what’s critical is not the amount the trust may pay that person; if we have a verdict that will matter a great deal, but unless and until that happens, what we really care about are the assertions of exposure to somebody else’s products or premises.

Because that’s really the critical evidence, and from our perspective, those are essentially admissions by the plaintiff that they’ve been exposed to somebody else’s asbestos. That matters a great deal because the level of exposure may vary; there are different kinds of asbestos with different capacities to cause disease. So if I find that I have a plaintiff in a case against me who claims that he was working around a Manville product, that’s really a very critical piece of information that I have to have to fairly evaluate the case, and if I have to, try it under fair conditions.

That’s really what we’re looking for, and it’s easy to do because they’ve made this submission; if the plaintiff’s lawyers know they need to marshal the evidence they will do so. Now think about pre-Manville bankruptcy filing: no competent plaintiff’s lawyer would have said, “I’m going to sue some of the responsible parties, but not all of them. I’ve got five or six defendants I don’t really care about, so I’m going to leave them off the complaint, and just let things unfold.” Malpractice? Clearly. In today’s environment there’s no need, there’s no reason for them to put them in the complaint. What does that mean from a defendant’s perspective?

It’ll vary by jurisdiction, and it still matters in joint and several jurisdictions because we can prove intervening cause; we can disprove causation on the part of our clients because it may be there were massive exposures to Manville or some other bankrupt entities’ asbestos. But if we were in joint and several liability, or any other jurisdiction where we are allocating fault, we don’t get to put the bankrupts on a verdict for them because we say so.
We can’t say, “Your honor, here’s my list, I’d like all these entities there.” We have to come forward with proof that there’s an evidentiary basis to list those entities. As Judge Davidson has observed, we have to prove other exposures.

And we can use the trust information, the assertions of exposure, as a very efficient way to prove that exposure. It’s not that we’re creating something, or that we’re distorting something—it is a submission to receive compensation made by or on behalf of a claimant that says, “I was exposed in the following ways to this asbestos.” As we get to increasingly peripheral levels of defendants in this drama, it is harder and harder for those defendants to know what other exposures may have taken place.

So this is really critical, it matters a great deal. When you take the hyperbole out of the discussion, what defendants see is nothing more than a true return of what the tort system looked like, by reintegrating the trusts and their evidentiary processes into the tort system, so we have full transparency. Again, if we were looking for dollar amounts, that was our primary concern pre-verdict, if we wanted to go into court and say, “Your honor, we need prove no more about the Manville exposure because they’ve gotten paid by the trust.” That’s definitive. It’s on the record. We get a directed verdict in essence on that causation. But that’s not what we’re looking for.

We just want the evidence that we can go to a jury, so we can prove the other thirty-five exposures, and that’s not an outsized number given where we are—and we operate in a world with a level playing field, with fairness to all litigators. Thank you.

HENRY N. BUTLER: Mark Davidson.

JUDGE DAVIDSON: Judge to judges: let me tell you what a court of general jurisdiction needs to know about asbestos and then what you need to know about asbestos trusts in the rest of my time. You’ve already heard there are three kinds of asbestos disease. Asbestosis consists of an internal scarring of the lung. None of you will probably ever have to have one of those cases come to your court because for the most part, they’re out of business nationwide—a few states will still pick up a few.

Cancer cases. There are a number of cancers that have an association with asbestos inhalation. It’s not just lung cancer. I’ve seen esophageal cancer. I’ve seen testicular cancer allegedly associated, if not caused by asbestos. Finally, there’s mesothelioma. Those are the ones that you may have seen in your courts. You may see advertisements on television by lawyers—a person that is diagnosed with mesothelioma typically has a year to live, and essentially over the course of the year, they suffocate to death. I have seen day-in-the-life films ad nauseum on mesothelioma cases, and I have nightmares from having seen those day-in-the-life films.

Okay, those are the three kinds of asbestos related diseases that you will see. By the way, Henry was gracious enough to say that I’m the MDL
asbestos judge for Harris County. Not true: I’m the asbestos judge for the State of Texas, all 254 counties; all 85,000 asbestos cases is what I live with—that’s all I’m doing right now, it’s one heck of a job. You heard that any exposure, however slight, can cause mesothelioma. Maybe that’s true, maybe it’s not.

If a person smoked thirty different packs, thirty different brands of cigarettes over their lifetime, and came down with lung cancer, say, and we knew that the lung cancer was caused by cigarette smoking, which one of the cigarette companies would be liable? The answer, for purposes of your state’s courts, depend upon what state you’re in. If you’re from California you’re probably familiar with the Rutherford case, which requires you to show frequency, proximity and duration of exposure to asbestos. If you’re from Maryland you’re probably familiar with the Lohrmann case. A number of states have adopted Lohrmann, a number of states have adopted the Rutherford test. Texas had the loosest standard. Texas had adopted the “one fiber” test.

And my favorite case was the guy that worked in the auto parts department of a dealer—a car dealership in Marshall, Texas. Three buildings over, they did brake drum repairs, and the argument was that the asbestos that flowed out of the brake drum department through two different buildings, into the door of the parts department, caused mesothelioma. By the way, he also spent thirty years as an attic insulator blowing asbestos insulation, but they settled with those people; they didn’t settle with the car dealer—that case went to trial. They poured him out, but he got a trial.

Texas had a one fiber theory that in June 8, 2007, our supreme court promulgated in the Flores v. Borg-Warner case, which took Texas from the loosest state proving causation on asbestos disease, to by far the strictest state. In Texas, you must prove how much—that is, the quantum of asbestos fibers that the plaintiff was exposed to from each defendant. There’s a recent case out of the Dallas court of appeals, which indicates you have to prove which defendants’ asbestos started the tumor that led to the mesothelioma.

To turn Professor Posner’s comments on its head, that’s the case where science has to follow law, and not law following science—that one can’t be done.

Now, let me get to asbestos trusts, and what you need to know. You had all these companies that filed a bankruptcy, and you had all these companies that set up asbestos trusts. You already heard that you can file an application with the bankruptcy trusts, and the plaintiff will get some money. First of all, there’s no statute of limitations on an obligation of the plaintiff to file with a bankruptcy trust.

Some plaintiff’s lawyers therefore don’t file with a bankruptcy trust until after their litigation with solvent defendants is over. In states where you have dollar-for-dollar credit for trusts therefore attempt to prevent the solvent defendants from being able to get a credit from those bankruptcy trusts.
trusts. I heard for the first time today—did you say that in Pennsylvania—a defendant gets the benefit of post-litigation bankruptcy trust distributions. I was unfamiliar with that because in Texas, you do not because we have a finality of judgment rule.

If you have a final judgment against a bankrupt asbestos entity or a final settlement that ends everything, the defendant who paid money can’t come back and seek compensation from an asbestos trust. The more interesting consequence of that is—I’ve heard from the Johns Manville director that his job is to spend all of the billions of dollars that is in the Johns Manville trust.

Now, they’re paying to current applicants the amount of money that they’ve allocated; they will have enough money for it but at some point that curve will end, and there will be no more making claims against the Johns Manville trust, but there will still be money. And at that point, he says, he’s going to go back and distribute money to everybody who’s ever made a claim. How we’re going to find those people in twenty or thirty years is an interesting question. How the defendants are going to be able to come make a claim against that—how are the plaintiff’s lawyers going to find their clients?

How are you going to be able to find some of the plaintiff’s lawyers, is a set of interesting questions that I don’t want to have anything to do with; but those of you in a state that give a defendant who paid money in settlement or verdict, a right to seek a distribution from a plaintiff’s bankruptcy trust distribution, are going to have an interesting time come fifteen, twenty, thirty or thirty-five years from now. I will no longer be a part of this litigation then. The issue however, has come to me several times is: whether a trial judge can order an asbestos plaintiff’s lawyer and plaintiff to seek a bankruptcy trust application before a verdict.

I have ruled that under Texas law, our statutes do not authorize me to compel an asbestos plaintiff to make a pre-lawsuit or pre-verdict application with the bankruptcy trust. I’m familiar with maybe one state that has held otherwise, and I think that was as a result of a statute.

NATHAN D. Finch: West Virginia, right?

JUDGE DAVIDSON: Pardon me?

NATHAN D. Finch: I think that was West Virginia?

JUDGE DAVIDSON: Okay, whatever state it was, I believe this to be a legislative policy matter and that is better taken up with legislatures. I feel that judges should follow statutory law to the letter, and can sort of adjust the common law as I believe the appellate courts would do so. The one final thing you do, if you have an asbestos case in your court and there were
bankruptcy trusts filed—you have two implications. One relates to discovery, and one relates to admissibility.

Discovery. You’ve heard that the applications paid by a bankruptcy trust and the applications made to bankruptcy trusts are confidential unless there’s a court order. If you’re in a state that requires dollar-for-dollar credit, the defendant is probably entitled to the amount of money paid by the bankruptcy trust to the plaintiff, so that you can apply dollar for dollar credits.

If you’re in a state that has either a proportionate responsibility, a comparative negligence standard, or better yet, a responsible third party standard, the statement made by a plaintiff in his application to the bankruptcy trust that he was exposed to the product of one of the bankrupts, in my opinion, is admissible to attempt to prove that exposure. In Texas, that’s not enough because you have to prove a causative link, and I ruled that if the plaintiffs in Texas have to prove dose, the defendants have to prove dose as to alleged responsible third parties or settling parties under the doctrine of poultry equivalence.

Everybody know about the doctrine of poultry equivalence? What’s good for the goose is good for the gander. One final thing, can a plaintiff deny causation as to a bankruptcy trust after they’ve alleged exposure from the entity behind the bankruptcy trust? Interesting question and I think I’ve ruled that they are not, but only because of the unique Texas Borg-Warner standard.

Do any of you have a so-called “innocent retailer statute” in your state other than Judge Moye, who I know does? Well, if you don’t, then I’m not going to talk about it—Ohio did—but if you don’t, then I’m not going to talk about it because it’s unique to Texas.

HENRY N. BUTLER: Sure, so why don’t we run back through the group and see if there are any comments, additions that people would like to add, Lloyd?

LLOYD DIXON: Oh, just in West Virginia, there is a requirement for the plaintiffs to declare what trust they could conceivably, or might be able to recover from, but not actually a file.

JUDGE DAVIDSON: Statutory or Rule based?

LLOYD DIXON: Case management order. And now in New York, my understanding is that there is a requirement to file with all trusts that you would be eligible for prior to verdict. However, when I’ve talked to plaintiff’s attorneys that practice in New York, they don’t really think that’s enforceable and don’t do it—is my understanding. Just clear that up.

HENRY N. BUTLER: Okay, Nate would you like to add here?
NATHAN D. FINCH: Yes, two points about the bankruptcy trust issue. The full transparency argument. A lot of bankruptcy trusts, particularly the newer ones for mesothelioma claims, all they say that there has to be meaningful and credible evidence of exposure; but that can be just a site list. That can be working at a site where somebody is; it could be the equivalent of the guy who was at the place where the auto parts were three buildings over. I would argue that doesn’t prove causation, and while that may be admissible to prove something, it’s not the same thing as the type of proof that would get you to a jury, or get you past a directed verdict motion on the defense’s cross claim against another defendant.

If after a verdict, if you’re in a joint and several state, the defendant takes a verdict and it can show that it’s extinguished the liability not only of itself but also of the bankrupt companies to the plaintiff. Depending on whatever the state law is, defendants can go and make applications to these bankruptcy trusts. The bankruptcy trust system doesn’t change underlying state law. In fact, there’s a special provision in the bankruptcy trust distribution procedure to deal with exactly that issue. If a defendant extinguishes a liability of some other entity, i.e. an insolvent bankrupt trust, they step into the shoes of the plaintiff so to speak, and they can make an application to the trust.

So the argument that the trust system somehow tilts the playing field in favor of the plaintiffs is not what it was intended to do, and I don’t think it does. I do think that there are lots of ways to get the discovery of the facts of exposure beyond getting the settlement communications. What my view of what the defendants want, is they want to tilt the field in their favor by saying, “Look we want evidence of your settlement communications with these bankruptcy trusts.”

Well, how is that any different than Mr. Stengel who represents Union Carbide going to Georgia Pacific, which is another solvent defendant in asbestos litigation, and saying, “I want the evidence of what the plaintiff said to you to settle the case”? I was in trial last month, where two different solvent defendants settled out, two solvent defendants stayed in. The ones that stayed in went all the way to verdict. They didn’t have any more right to go after the settlement communications between me or my co-counsel and the solvent defendants. What they really want is the ability to get that from the trusts, but not be able to have their own settlement negotiations or statements made to them by plaintiff’s discoverer.

HENRY N. BUTLER: Jim, do you have anything to add?

JAMES L. STENGEL: Sure, a couple things. One on West Virginia: I think some of the limitations the case made were reflected in this concern about jurisdiction and power. The claimants there are all required to disclose the claims that they may have or have made; they aren’t forced to file anything.
Post-verdict there’s provision where claims have not been either made or they’re still in process. They will be assigned to the defendants. So there is a mechanism, I think, that avoids some of the sort of overt coercion aspects. This is probably true in a broader basis about asbestos litigation.

The federal trust fund legislation\(^8\) was a very good idea, and that would have made all this irrelevant, but it didn’t pass. There are legislative proposals; the American Legislative Exchange Council has a fairly comprehensive proposal that’s been out for a couple of years now.\(^9\) It’s been considered in some states, most notably West Virginia where it was very close to passage, which I think the skeptical among us may presume that’s probably why there’s a consented amendment\(^10\) to CMO\(^11\) in that state.

As to Nate’s point, we’re not looking for settlement information. I don’t care about what somebody says to a trust officer about his or her claim, but I do care about the factual submission made, and we don’t need that from co-defendants because they’re in the case with us. We know by virtue of the complaint what the plaintiff thinks about their responsibility for this injury.

**JUDGE DAVIDSON:** I’ve tried hard to stay neutral in discussions at every forum I’ve ever been in between plaintiffs and defendants but I want to slightly disagree with you on one thing. In my view, an application made online by a plaintiff to a bankruptcy trust is not settlement discussions. It’s an application for proceeds from a bankruptcy trust. In my experience, there’s no negotiation: you file your application, often online, and often get money back, well, reasonably quickly.

In Texas where we not only allow, but we’ve been trying referral fees—there are lawyers who do heavy advertising, and will bring in plaintiffs, file the asbestos bankruptcy applications online, take forty percent of the money they get back within a month or two, and then refer a case to somebody that can actually try a case, that can actually take a deposition. And sometimes when they refer the case, they don’t bother telling the plaintiff’s lawyer that they’ve already skimmed $100,000 or $150,000 or whatever they get off the top.

My point in saying all this is, sometimes discovery is going to be necessary by the bankruptcy trusts. Something else that nobody has told you today and I’ve just remembered to tell you: do you know who’s running the asbestos bankruptcy trusts set up by these bankrupt companies? For the most part, plaintiffs’ lawyers are the board of directors; true?

**NATHAN D. FINCH:** No, not true. Independent trustees; the trustees are court approved by the federal bankruptcy court of federal district court judge. They typically are retired judges—a lot of them. There are plaintiff’s lawyers that are on something called the Trust Advisory Committee. Which has the right to give comments to the trustees, but the trustees—for example the trustees of the Manville trust—none of them are plaintiff’s
lawyers. The trustees of the USG trust include a former retired judge who used to have the asbestos docket in Cook County.

The trustees run the trust. Anything that the trustees do that is challenged by the plaintiff’s lawyers in Trust Advisory Committee ultimately gets decided by the federal bankruptcy court judge, who oversees the trust. So it’s sort of a myth that the plaintiff’s lawyers run these trusts.

**JUDGE DAVIDSON:** A plaintiff lawyer in Dallas has told me he’s on the board of trustees of three different trusts.

**NATHAN D. FINCH:** He’s on the Trust Advisory Committee—he’s not a trustee of any of them.

**JUDGE DAVIDSON:** I only know what he told me. In any event, it is not easy for defendants to get the applications or the amount of settlements, and yes, is does often require an order. Handling all the cases statewide in Texas, I sign those orders any time I’m asked and people have stopped fighting. Because it’s something I think defendants legitimately need. But remember that under the Texas system because we require a dose, alleging that you were exposed to a product does not prove a dose. In other states where any exposure is enough—

**NATHAN D. FINCH:** Probably would.

**JUDGE DAVIDSON:**—and allegation of an exposure to a bankruptcy trust’s product probably would get you to the jury.

**NATHAN D. FINCH:** Yes, absolutely, and it absolutely does. In the case I just tried in the federal district court, in the MDL, my causation expert was asked on cross by one of the defendants, “Isn’t it true that one day of exposure to Unibestos,” which is an amosite product that was on the ship, “contributed to causing his mesothelioma?” And my expert said, “Yes, of course it did.” That was enough—I don’t know exactly why the jury poured us out, but that may have had something to do with it.

**JUDGE DAVIDSON:** In any event, if any of you ever draw the black thing and have a bankruptcy case—sorry, asbestos case fall in your court, give me a call because asbestos litigation is my life. That tells you just how low my life has descended [inaudible]. No, it’s challenging, it’s rewarding. I have wonderful lawyers every week, and it’s not the same old, same old. They continually challenge me with new questions that I never thought they would before. I mean it’s a judge’s dream to have no home foreclosures, no tax suits, no slip and falls, no car wrecks, and only have million dollar cases with million dollar lawyers. That’s what I’m doing right now with my
docket. Having said that, I’m called by my colleges, a dust judge. So that’s where it is.

**Henry N. Butler:** Any other comments or reactions on the panel here? Okay, any questions out there?

**Judge Steve Brick:** Well, let me observe that I raised my hand as one of the few judges in the room who’s tried a few asbestos cases to verdict or statement of decision judgment, and settled or watched settle several others. So here’s my observation and question: I’ve observed that most of the cases that go away without a verdict do so after several days, sometimes weeks of *in limine* motion hearings, and several days and sometimes a week of jury selection.

I’d love to get a perspective of what’s going on through national council behind the scenes to settle these cases, and why it takes swearing in the first witness or sometimes during jury selection to get the defendants to drop out, and is there anything that we as trial judges can do to move that process up two months?

**Judge Davidson:** Let me answer your last question first. Is there anything you can do? No, I’m sorry. Mediation won’t help, maybe a .357 magnum pointed at somebody’s head might—but remember, I’m from Texas.

**James L. Stengel:** That’s acceptable judicial procedure.

**Judge Davidson:** Yeah, yeah we do it all the time. The answer to that last question there, I’m afraid to tell you, is no. Asbestos is a mature tort; for the most part the same group of experts go nationwide. To a large and growing extent, the same group of lawyers go nationwide, and without regard to what state they practice in, try cases nationwide. You know it’s funny, I hear you must be from California?

**Judge Steve Brick:** Right.

**Judge Davidson:** I heard judges from California say two weeks or more of motions *in limine*. I usually blow through motions *in limine* in Texas in about forty-five minutes, both sides.

**Judge Steve Brick:** 250 in one month.

**Judge Davidson:** 271 from the defendants, usually about 117 from the plaintiffs, but I’ve ruled on all of them before, and under the Texas system my rulings are binding on the trial judge. I don’t try the case, I only do the motions *in limine*, the exhibits, the video deposition excerpts, and I’ve now convinced the lawyers that the ruling I made on their 271 defendants and
113 plaintiffs motions in limine last week are the same ones I’m going to make this month. If you could find one judge in California to make those rulings, and have it stick with all of your judges, I think you’d find that those two and three weeks in voir dire would whittle down to about fifteen or twenty minutes.

That is, which of those motions in limine is unique on this case? To me there’s only two states, Texas and Delaware, that have a statewide system. But I know there are counties in California—San Francisco and Los Angeles come to mind; Philadelphia and Allegany County in Pittsburg, and of course Madison County, Illinois, have one judge that handles all pre-trial cases in asbestos cases. So the solution to three weeks of voir dire, which I’m sympathetic to, or motions in limine, is uniform rulings. If you do that, it won’t happen again.

I’m also told by lawyers out in California that some of the motions in limine that you spend a day or two in pre-trial relate to motions for summary judgment that have already been ruled upon. If that’s the case, then the trial judge should say, “No, my ruling on all summary judgments will carry forward to motions in limine,” and I’ve been told that would trim two weeks from your three-week motion in limine experience. Just that one statement, I’ve ruled before, I’m going to rule the same way again. Now, I can’t tell you for sure that’s the case, but that’s what I’ve been told. In terms of voir dire, it is a mature tort, but sometimes the amount paid depends upon who’s on the jury.

It may not surprise you that there are some juries that are thought to skew plaintiff and some juries that are thought to skew defendant. Having said all that, there are some firms that refuse to discuss settlement until a week before trial on both sides of the docket, and there are some firms that encourage settlement discussions a month or two months after. Have I answered your question?

JUDGE STEVE BRICK: It won’t hurt to hear the other discussions.

JUDGE DAVIDSON: Take it away.

JAMES L. STENGE: Yes, from my perspective, Judge Brick, it’s a quandary that we’ve always faced. Now, part of it is that we’ve developed this very specialized asbestos forum. People are lurching from trial to trial, and it’s hard to get clients to attend to cases where they’re literally there. The jury configuration does matter, because it will skew perceived value in a case pretty substantially, particularly if we’re in San Francisco or Alameda—places where we generally expect the jury not to be in love with large chemical companies.

Sometimes you get a jury picked that’s pretty good, and that will impact your value. The bigger problem, I think is just the multiplicity of parties and I would be interested to hear Nate’s perspective on this. We’ll be
in cases where we think we should be able to get out with either no payment or very low payment, and we’re so far down the food chain—at least as the plaintiffs have configured the case—that they won’t even talk to us.

We’re sort of ahead in a case, but we’re forced to spend time and money defending the case because you don’t want to not prepare and then find yourself the last standing defendant. Some claimant’s lawyers are obviously much better than others; there are some firms where we resolve our cases fairly early, I think on a full exchange of information, but we just know they’ll talk to us, when they file. Other plaintiff’s firms I know, that until we’ve got at least a couple jurors in the box, it’s a waste of time to even try.

Now, there’s another element here which I hesitate to disclose in front of this group as a defense lawyer, but back to who gets paid by the hour, I think there are defense lawyers who keep cases alive long after they should be. There’s a lot of file churning that goes on in the asbestos world on the defense side. People have tried to squeeze it out of the system, but it’s proved to be very intractable; clients give dire warnings to their outside council about what will happen if they discover it, and then little or nothing happens. One of the things that a judge can do is to make sure there isn’t unnecessary delay.

The one thing that I don’t know if it would work, I mean if you had the equivalent of Federal Rule 16 conferences—remember we’re talking about malignancy cases—these are million dollar plus cases—they’re serious cases; we’ve washed all the unimpaired cases out. The cases probably merit that kind of judicial attention. And I don’t know, but I suspect if judges hauled litigants in fairly early and said, “What’s this case about? What did this person do? What were the exposures?” and maybe require lead council to attend, or somebody with authority, you might clear at least some of your cases. But judges in Judge Davidson’s position are probably better equipped to see what the pattern by firm is because I think there’s a real personality issue there.

NATHAN D. FINCH: My perspective is basically in agreement with Judge Davidson and Jim Stengel, although people always refer to me as the War Department, not the State Department. I almost never get involved with settlement negotiations, but I give advice or comments to people who are doing that. Without getting into the specifics of anything, a lot of times I and people like me will move from case to case, and a lot of the defendants will have gone away earlier in the process on motions for summary judgment, or if there’s settlements. Or if there’ll be, I think Lloyd referred to them as matrix deals; sometimes there are defendants who will just settle up an entire docket just because they want to get rid of that docket with that particular law firm.

Oftentimes in the last week or two before trial, like the case I was supposed to be picking a jury in today. I didn’t get put on that case until about
ten days ago, when we had settled out with most of the defendants. We were down to the last two, did the causation experts deposition, my client’s expert got deposed, and really focused on, what’s left, what do we have to do? There’s an old saying—one of my mentors taught me long ago—that in trial work, particular jury trial work, you can have 100% of the facts on your side, 100 percent of the law on your side, Abe Lincoln as your lawyer and still have only about an 85% chance of winning.

That really hits home in jury trials because until you know exactly who’s in the box, it can definitely swing the dynamics one way or another. There are good plaintiff jurisdictions and there are good defendant jurisdictions, but there are good defense juries in good plaintiff jurisdictions and there are sometimes good plaintiff juries in good defense jurisdictions. And until you go through the voir dire process, you may not know exactly how to value the case properly.

**JUDGE DAVIDSON:** There’s one more thing you need to know, and all of you need to know this if you have an asbestos case: asbestos to me is the only form of litigation anywhere in America where trial counsel has no role in settlement discussions. Let me repeat that. There’s national council, which is a different firm most of the time, then the defense firm representing the defendant, and there are settlement lawyers with the firm that are totally separate and are not in the courthouse when the trial lawyers are doing their thing.

Both sides are getting a report from their teams at the courthouse, but they negotiate with each other sometimes on one case, sometimes on teams of cases. I’ve literally seen it happen—you’ve probably seen it happen—where voir dire will be going on, and all of a sudden everybody’s Blackberry will go off, and everybody will look at their Blackberry at the same time and say, “Golly, this case just settled.”

Well, that’s what they say in North Carolina; in Texas they say something else, but it’s an obscene word, so I won’t—in any event, they’ll say, “Golly the case just settled,” they’ll approach the bench and discharge the jury. Did that happen in your cases?

**JUDGE STEVE BRICK:** It happened during jury selection, and in one case we had.

**JUDGE DAVIDSON:** Okay, but trust me when I tell you the trial lawyers didn’t know what settlement discussions were, weren’t told, and had no role in the process. I think that asbestos litigation is unique in this regard. You can hammer the lawyers in front of you all you want, and it will do no good because they have no role in settlement discussions.

**NATHAN D. FINCH:** Advisory, limited advisory capacity. I mean we report accurately what’s going on from our perspective, we want to be as ac-
curate as possible, but do I engage in settlement negotiations? No, I try cases that’s what I do.

HENRY N. BUTLER: Any more questions?

AUDIENCE MEMBER: Let me ask you: are you aware as you got away from the low-hanging fruit to the upper-tier fruit, that what happened in a lot of the trusts is the trusts actually own the reorganized entity? And what are you doing in that context in your numbers on the dollar that are flowing out, and on yours, on the setoff issues—because the structure on the companies that are not viable with big-dollar payments to supposed claimants, is that the trust earns all the equity, it is the reorganized entity which actually frequently gets the setoff rights?

[Inaudible]

MALE SPEAKER: The original one was done by Ness Motley.

NATHAN D. FINCH: Yes, I know that. The companies, the whole point of 524(g) is to separate the liabilities from the companies, and while initially the trusts owned the stock of the company, the Manville trust owned the stock of Johns Manville; like any trustee, they don’t want to put all their eggs in one basket, so they typically try to sell off the companies at some point in the process. I think of the asbestos bankruptcy trusts, there’s only a handful that actually own the majority of the stock of the reorganized company. I think the Owens Corning trust still owns a big chunk of Owens Corning. I can’t remember what that state of Armstrong is.

I know in the USG case we basically did a deal with Warren Buffett where he bought the company back from us and put cash in there. So it’s not always the case that the trust owns the company, but even if it does own the company, the entity that is potentially liable is not the company; unless the United States Supreme Court says that 524(g) is unconstitutional, the setoff goes to whatever that entity that held the liability.

The Owens Corning trust is Owens Corning for purposes of asbestos litigation, and whether you call it Owens Corning or the Owens Corning trust, I don’t think really matters from his perspective. It’s just which box made something, or which box his predecessor made something a long time ago that had asbestos that gives right to a cause of action against that entity. And because the entity is protected by a channeling injunction, you can’t go after Owens Corning or the trust.

HENRY N. BUTLER: Let’s declare victory on this one. Please join me in thanking the panelists.

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6 See Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986).
9 Asbestos Claims Transparency Act, §2(b), American Legislative Exchange Council (2007).
11 Asbestos Litigation Case Management Order.