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HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE HEARING

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HARRISBURG, PA

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ROOM 205

MONDAY, APRIL 8, 2013
10:30 A.M.

PRESENTATION ON
TRANSPARENCY IN LITIGATION
INVOLVING BANKRUPTCY TRUSTS

BEFORE:

HONORABLE RON MARSICO, MAJORITY CHAIRMAN
HONORABLE BRYAN CUTLER
HONORABLE SHERYL M. DELOZIER
HONORABLE BRIAN L. ELLIS
HONORABLE GLEN R. GRELL
HONORABLE DICK L. HESS
HONORABLE MARK K. KELLER
HONORABLE BERNIE O'NEILL
HONORABLE MIKE REGAN
HONORABLE RICK SACCONI
HONORABLE TARAH TOOHL
HONORABLE THOMAS R. CALTAGIRONE, DEMOCRATIC CHAIRMAN
HONORABLE BRYAN BARBIN
HONORABLE MATTHEW D. BRADFORD
HONORABLE VANESSA LOWERY BROWN
HONORABLE MADELEINE DEAN
HONORABLE DEBERAH KULA
HONORABLE BRANDON P. NEUMAN
HONORABLE JESSE WHITE

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*Pennsylvania House of Representatives
Commonwealth of Pennsylvania*

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DEMOCRATIC EXECUTIVE DIRECTOR

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P R O C E E D I N G S

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MAJORITY CHAIRMAN MARSICO: Good morning, everyone. Welcome to the House Judiciary Committee public hearing on the issue of promoting transparency in litigation involving bankruptcy trusts.

Before we go to that, I want to ask the Members to introduce themselves and what district you represent, starting from my far right.

REPRESENTATIVE KELLER: Thank you, Mr. Chairman.

Representative Mark Keller. I represent the 86th District, which is Perry and Franklin Counties.

REPRESENTATIVE ELLIS: Representative Brian Ellis. I represent the 11th District in Butler County.

REPRESENTATIVE KULA: Representative Deberah Kula, Fayette and Westmoreland Counties, 52nd District.

REPRESENTATIVE BARBIN: Representative Bryan Barbin. I represent the 71st District, Cambria County.

MS. ORAZI: Lauren Orazi, Democratic Executive Director.

MINORITY CHAIRMAN CALTAGIRONE: Tom Caltagirone, Berks County.

MAJORITY CHAIRMAN MARSICO: Ron Marsico, Dauphin County.

MR. DYMEK: Tom Dymek, Republican Executive

1 Director.

2 REPRESENTATIVE HESS: Representative Dick Hess,
3 78th District, Bedford, Fulton, and Huntingdon Counties.

4 MAJORITY CHAIRMAN MARSICO: A new Member of the
5 Committee. Welcome.

6 REPRESENTATIVE TOOHL: Representative Tarah
7 Toohil, southern Luzerne County, 116th Legislative District.

8 REPRESENTATIVE BROWN: Representative Vanessa
9 Lowery Brown. I represent Philadelphia County.

10 REPRESENTATIVE DEAN: Good morning.
11 Madeleine Dean, Montgomery County.

12 REPRESENTATIVE SACCONI: Rick Saccone,
13 39th District, Allegheny and Washington Counties.

14 REPRESENTATIVE CUTLER: Hi. Good morning.
15 Bryan Cutler, the 100th District, southern
16 Lancaster County.

17 REPRESENTATIVE GRELL: Good morning.
18 Representative Glen Grell, the 87th District,
19 Cumberland County.

20 REPRESENTATIVE NEUMAN: Representative Brandon
21 Neuman, the 48th District, Washington County.

22 REPRESENTATIVE REGAN: Mike Regan, the
23 92nd District, York and Cumberland Counties.

24 REPRESENTATIVE WHITE: Jesse White,
25 Representative of the 46th District, Washington, Allegheny,

1 and Beaver Counties.

2 MAJORITY CHAIRMAN MARSICO: Okay.

3 Representative Cutler, a Member of the Committee,
4 has recently introduced the bill on the subject that I
5 mentioned earlier, which is HB 1150. This new bill
6 addresses the topic of litigation involving
7 asbestos-related bankruptcy trusts.

8 The bill would create the Fairness in Claims and
9 Transparency Act, which would do two things. Actually, I'm
10 going to let Bryan Cutler explain that, and we'll just go
11 on to other comments here.

12 The asbestos litigation and bankruptcy laws can
13 be complicated topics, as we know, and certainly can be
14 intimidating topics for those Members who are not familiar
15 with them. For that reason, the Committee decided to have
16 this public hearing so that the Committee Members and the
17 public could better understand the issues raised by
18 asbestos litigation involving bankruptcy trusts and by
19 HB 1150.

20 I am very pleased to announce that we have a very
21 top-notch group of testifiers here today to educate us
22 about those issues. Joining us today are Sam Marshall from
23 the Insurance Federation of Pennsylvania, and I understand
24 Mr. Marshall will be joined by a group of lawyers and
25 former judges, each of whom have deep experience in

1 asbestos and toxic tort litigation. I also understand that
2 Mr. Marshall will be moderating this group to address
3 different aspects of the issue before the Committee. He
4 will introduce each of his colleagues in a moment.

5 Two representatives of the Pennsylvania
6 Association for Justice: Robert Paul, a partner in the law
7 firm of Paul, Reich & Myers, which specializes in asbestos
8 law. He will be joined by Lawrence Cohan, a shareholder at
9 the law firm of Anapol Schwartz and Chair of that firm's
10 Toxic Tort Litigation Department.

11 And finally, we are joined by Sam Denisco from
12 the Pennsylvania Chamber of Business and Industry, and
13 Kevin Shivers from the NFIB.

14 We welcome all of you and look forward to your
15 testimony.

16 Before I turn things over to Representative
17 Cutler, just to remind you that we are being videotaped and
18 recorded, and then also make sure that your cell phones are
19 off.

20 Representative Cutler for comments.

21 REPRESENTATIVE CUTLER: Thank you, Mr. Chairman.

22 Thank you, Members of the Committee and members
23 of the audience, for the opportunity to discuss HB 1150
24 here this morning.

25 As the Chairman already highlighted, the goal of

1 the bill is to provide fairness and transparency in claims
2 involving asbestos bankruptcy. This is one of those rare
3 areas that I'm not certain was completely contemplated when
4 the Fair Share Act was passed in the prior session.

5 Because of the way the current systems are set up, you can
6 have essentially successive claims, both in the State
7 courts as well as Federal bankruptcy courts, that
8 ultimately will result in payout or compensation for
9 injuries.

10 And under the Fair Share Act, the entire idea is
11 to apportion liability based on what portion each company
12 had responsibility for in regard to the plaintiff's
13 injuries. Well, I personally believe that the only way
14 that you can ensure that is to make sure that all of the
15 responsible parties are in fact in one suit, and what you
16 wish to avoid is essentially double payment for the same
17 injury.

18 Many of the complications caused by asbestos are
19 difficult to track, and, you know, on a strictly medical
20 level you begin looking at some of the different kinds of
21 claims and it's difficult to tell if the asbestos fibers
22 came from one place of employment or another, whether it's
23 a solvent business that's still in business in the
24 Commonwealth or a bankruptcy trust that would ultimately be
25 held responsible.

1 For that reason, I had worked last session with
2 Representative Turzai and again this session on this item.
3 I believe it's important. I believe it's the best way that
4 we can ensure that we avoid increasing costs and increase
5 judicial efficiency, by making sure that we litigate each
6 case once and that we hold the proper parties responsible.

7 I look forward to the testimony here today and
8 certainly welcome the opportunity to discuss the issues as
9 well as highlight any potential changes that might need to
10 be considered going forward. So thank you, Mr. Chairman.

11 MAJORITY CHAIRMAN MARSICO: Well, thank you,
12 Representative Cutler.

13 As the Members remember, last session we did pass
14 the Fair Share Act, and this bill actually applies the
15 principles of the Fair Share Act to asbestos litigation.

16 Chairman Caltagirone for comments.

17 MINORITY CHAIRMAN CALTAGIRONE: Thank you,
18 Mr. Chairman.

19 I'm anxious to hear the testimony, and just as a
20 proviso, I have a meeting at 11:30 with one of the judges
21 on the mental health legislation that we're working on and
22 I'll have to excuse myself at that time. But I look
23 forward to reading the testimony and listening to what you
24 have to say today.

25 Thank you, Mr. Chairman.

PANEL I

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3 MAJORITY CHAIRMAN MARSICO: Our first group of
4 testifiers is led by Sam Marshall. Sam, I'll have you
5 introduce -- is that okay? -- the members, the testifiers.

6 MR. MARSHALL: Sure.

7 Thanks for having me here today, and thanks for
8 considering the legislation.

9 Today you're going to hear from people who
10 confront the problem this bill addresses, and they confront
11 it on a daily basis. Before turning it over to them, I'll
12 offer an initial observation.

13 Now, I know what people might think: When the
14 House Judiciary Committee has a hearing on a bill, and it's
15 sponsored by Representative Cutler, and you have the
16 business and insurance communities on one side and the
17 plaintiffs' bar on the other, that can only mean one thing
18 -- tort reform. That's not the case today. You'll soon
19 hear what the bill does, but let me start by saying what it
20 doesn't do.

21 It doesn't alter the tort balances now in place
22 in Pennsylvania, it doesn't change the responsibilities and
23 obligations of defendants in tort claims, and it doesn't
24 throw impediments on plaintiffs bringing tort claims.

25 This isn't a tort reform bill. It's a bill that

1 ensures that the tort responsibilities Pennsylvania enacted
2 in its Fair Share Act apply to asbestos claims just as much
3 as all other tort claims. No more, no less.

4 We and the trial bar have and will come before
5 you many times asking for changes in tort laws and balances
6 in Pennsylvania, but this time, at least from our
7 perspective, we're not asking for that. We're asking that
8 you close a loophole never intended in the Fair Share Act,
9 one that has allowed some asbestos claimants to collect
10 more and forced some Pennsylvania businesses to pay more
11 than their fair share.

12 In setting this up, we wanted to explain the bill
13 by answering the questions you might have, or at least we
14 had as we undertook this. It's always hard to anticipate,
15 and we'll stick around and answer any questions you might
16 have, but this should be a good outline.

17 So what I'd like to do is call up individually
18 our panelists, who can share their perspectives and their
19 expertise on the questions outlined, you'll see, in my
20 remarks, but I think will lead you through this.

21 The first one is, what's the problem under
22 current Pennsylvania law, and I'd like to bring up
23 Nick Vari.

24 MR. VARI: Mr. Chairman, Members of the
25 Committee, thank you for giving me an opportunity to appear

1 before you today.

2 My name is Nicholas Vari. I'm an attorney with
3 the K&L Gates firm in Pittsburgh. I've had the privilege
4 of representing Crane Company in asbestos lawsuits
5 throughout the Commonwealth, and it's that representation
6 across the Commonwealth that shapes my comments here today.

7 Over the last 30 years, over 50 companies have
8 gone into bankruptcy as the result of asbestos-related
9 liabilities. Now, when those companies go into bankruptcy,
10 they are removed from consideration in the tort system, and
11 instead, there are trusts established in those bankruptcy
12 proceedings that are intended to compensate the asbestos
13 claimants who were exposed to that company's products.

14 As of the year end of 2008, it's estimated that
15 the bankruptcy trusts held over \$30 billion in assets, and
16 that seems to be, presently, even a low estimate, and it's
17 further estimated that those trusts pay billions of dollars
18 a year to asbestos claimants.

19 At the same time that we have these duplicate
20 compensation systems -- that is, the trusts and the court
21 system -- we have a minimal interface between the two. As
22 a result of that, we have tort defendants in Pennsylvania
23 paying disproportionately, and that is because the jurors
24 can't consider the potential cause of the bankrupt
25 companies, even though the tort system plaintiffs were

1 exposed to those companies' products and even though those
2 same plaintiffs are eligible to receive compensation from
3 those trusts. And as a result of that, the tort system
4 defendants are asked to pick up not only their share as
5 allocated to them by a jury, but they also have to pick up
6 these other shares of the bankrupt entities that are beyond
7 the reach of the jury, because the jurors consider a
8 total-damages number and they divide it between who's
9 there.

10 I don't want to repeat Representative Cutler's
11 comments on the Fair Share Act and, in the interests of
12 time, don't want to belabor that, but only to say that the
13 Fair Share Act permits some of these trusts to be reached
14 in certain circumstances, but certainly not all. All this
15 legislation does is create greater specificity to the
16 Fair Share Act and to whom the jurors can allocate
17 liability under the Fair Share Act. In so doing, it
18 removes a disproportionate burden on solvent tort
19 defendants, and those funds can be used to otherwise fund
20 expansion and growth in the Commonwealth.

21 For those reasons, I believe that this carries on
22 the mission of current Pennsylvania law, and I would urge
23 its passage. Thank you very much.

24 MR. MARSHALL: Now, the next question we had, and
25 there have been some publications that have said that this

1 is a problem in theory but not in practice, so we thought,
2 here, does it really happen? And to talk about that, I'd
3 like to bring up John Hare, who practices in this area down
4 in Philadelphia. John?

5 MR. HARE: Thank you, Sam.

6 Good morning. As Sam said, my name is John Hare,
7 and I am the Chair of the Appellate Litigation Department
8 at Marshall Dennehey Warner Coleman & Goggin, which has
9 18 offices in 6 States. I appreciate the opportunity to
10 talk to you today, and I especially appreciate your
11 willingness to take on a subject like bankruptcy trusts and
12 asbestos on a Monday morning after a long break.

13 I've submitted a written statement, and I would
14 just like to make a couple of points.

15 This is a very important piece of legislation to
16 Pennsylvania companies and to many, many others that are
17 routinely brought into asbestos litigation.

18 My firm, Marshall Dennehey Warner Coleman &
19 Goggin, is based in Philadelphia, but we handle at any
20 given time more than a thousand asbestos cases across the
21 Commonwealth. At any time, we have about 350 cases pending
22 on the Philadelphia trial docket and, among the dozens of
23 corporate defendants we represent in Pennsylvania, include
24 Pep Boys, a large national but Pennsylvania-based company;
25 Honeywell, which also has a large presence in Pennsylvania;

1 et cetera.

2 In this litigation, we routinely see the problem
3 that Nick and Representative Cutler have described and
4 commentators and judges from around the country have in
5 fact noted, and that's this problem of what others have
6 described as "double dipping," plaintiffs who delay or
7 conceal the filing of claims with these trusts that have
8 been described and then also seek compensation in the civil
9 tort system for the same injuries. This results in double
10 dipping insofar as it's seeking recovery from two
11 independent sources for the same harm, and in my personal
12 experience and that of my firm, it happens all the time.

13 Just by way of one brief example, in preparation
14 for this hearing, we looked at 21 recent cases where
15 plaintiffs had denied in writing, in responses to discovery
16 requests, that they had filed claims with asbestos trusts.
17 The cases were then resolved either by settlements or a
18 verdict, and we went back to one of the most prominent of
19 these trusts, the Johns-Manville Trust, and asked in fact
20 whether these plaintiffs had filed claims, and the
21 responses we got back were astounding, frankly.

22 In 17 of the 21 cases where the plaintiffs had
23 denied filing claims with bankruptcy trusts, it turns out
24 not only had claims been filed but they had actually been
25 paid, and in an 18th case, a claim was pending. So that is,

1 18 of the 21 cases where representations had been made that
2 claims were not filed, they were in fact filed and in most
3 cases paid. And please keep in mind, that's only with
4 Johns-Manville, which is one of the 56 trusts of this type
5 that are out there with over \$30 billion in assets.

6 So this happens all the time. My written
7 statement quotes the comments of, for instance,
8 Judge Levin, a well-respected Philadelphia trial judge, who
9 called this the system of double recovery, because you have
10 these two parallel, noncommunicating systems of trust
11 recoveries and tort recoveries for, again, the same harm.
12 Judge Ableman, who is on this panel, saw this all the time
13 in her courtroom.

14 My written statement discusses a couple of cases
15 that garnered national attention when the representations
16 made in the trust system in support of claims there were
17 compared to the allegations in the tort litigation. And
18 the level of fraud, or at least inconsistency, led a couple
19 of judges -- and the Wall Street Journal and others have
20 reported on this -- to comment on the extreme
21 misrepresentations that had been made because these systems
22 don't communicate.

23 So the result of this double dipping is that
24 solvent defendants like Pep Boys and others who are
25 routinely brought into this litigation pay far more than

1 their fair share of asbestos claims, but it also depletes
2 trust assets for future claimants who may have legitimate
3 claims.

4 So this FACT bill, the bill you're considering,
5 squarely addresses these problems, and I would ask you to
6 support it. Thank you very much.

7 MR. MARSHALL: And now to talk about how the bill
8 addresses the problem, I'd like to call up Peter Neeson
9 with the Rawle & Henderson firm down in Philadelphia.

10 MR. NEESON: Good morning, ladies and gentlemen.

11 First of all, thank you for the privilege of
12 letting me speak before you today. Sam has asked me to
13 discuss -- by the way, my name is Peter Neeson. I'm a
14 partner in the law firm of Rawle & Henderson in their
15 Philadelphia office, and I chair our firm's Environmental,
16 Toxic and Mass Torts Department, and we represent many
17 corporate defendants in asbestos litigation in this State
18 and elsewhere.

19 Sam has asked me to talk a little bit about what
20 problems are solved, or to put it another way, what are the
21 solutions that are going to occur if this legislation is
22 passed in its current form. So let me see if I can't
23 summarize for you in a very efficient way just what those
24 problems are and how they're going to be solved.

25 First of all, this legislation connects the

1 bankruptcy trust system of compensation with the civil tort
2 system of compensation and, for the first time, will permit
3 a jury at a trial here in this Commonwealth to consider
4 evaluation and allocation of all the products that the
5 plaintiff was exposed to during the course of his work
6 life, including those products covered under the bankruptcy
7 trusts, which are not now the present situation.

8 As a result, under this legislation, the juries
9 in Pennsylvania will now have a basis of comparison, to
10 compare the products that were exposed under the bankruptcy
11 trusts to those that are products that are of the
12 defendants that are sued in the civil tort system. So what
13 you'll have is a more balanced and accurate allocation of
14 responsibility for the injuries that the plaintiffs, the
15 asbestos victims, sustained.

16 Now, this will benefit Pennsylvania businesses
17 that are being sued, because the presence of bankruptcy
18 trusts will provide the jury with that opportunity to
19 allocate among all the parties. At the present time,
20 Pennsylvania businesses are in these trials and before the
21 jury for their consideration without the benefit of
22 allocating against all the responsible parties.

23 Now, one of the things that this legislation
24 does, it creates incentives for the plaintiffs and their
25 attorneys to file these bankruptcy trust claims sooner and

1 more quickly and indeed to do so before the actual trial
2 takes place, and I think that's an important factor,
3 because under the current practice, there's no incentive
4 for the plaintiffs to complete their bankruptcy trust
5 applications. As a result, they're incomplete and
6 unsettled at the time the actual civil trial takes place,
7 and as you can imagine, without the benefit of information
8 on that, the juries cannot make any decisions.

9 Now, the legislation benefits Pennsylvanians in
10 many ways. First of all, for the Pennsylvanians that are
11 asbestos victims, the people that are bringing lawsuits,
12 one of the principal benefits of this legislation is that
13 they will get their trust applications completed sooner and
14 their bankruptcy trust awards sooner. They'll get their
15 money sooner. And as I said, under the present system,
16 there's no incentive for the plaintiffs' lawyers to do
17 that. When the trial begins, as I said, the plaintiffs
18 will have an opportunity to not only get their money sooner
19 but have the juries make a full and fair determination.

20 Let me just summarize four -- there are several
21 highlights that this legislation accomplishes, but let me
22 just close by summarizing four principal reasons.

23 One: Jury trials will ensure that the plaintiff
24 gets awarded what he or she deserves.

25 Two: There will no longer be the double recovery

1 for the same injury.

2 Three: The plaintiffs will get their trust money
3 sooner and quicker.

4 And number four: Pennsylvania businesses will
5 now pay their fair share of money for whatever they owed
6 the plaintiff and will no longer have to pay a percentage
7 or a share of the verdict that would be attributable to the
8 bankruptcy trusts. This will help the Pennsylvania
9 businesses conserve their assets for future claims by no
10 longer having to pay excess claims in the present ones.

11 Thank you.

12 MR. MARSHALL: Now we thought, and as you can
13 see, you know, the goal in this legislation is to prevent
14 the gaming of the two systems of recovery, the bankruptcy
15 trust system on the one hand and the State tort system on
16 the other. But we thought, well, okay, if you're going to
17 force or encourage or incentivize, whatever you want to
18 call it, people to make sure that they get their bankruptcy
19 trust claims filed, how does that system work? Because we
20 were sensitive to the attack, isn't this just a delay
21 mechanism to avoid paying asbestos victims? So to talk
22 about how the asbestos trust process works, I'd like to
23 bring up Marc Scarcella.

24 MR. SCARCELLA: Thank you, Sam, Mr. Chairman,
25 Members of the Committee.

1 Thank you for holding today's hearing and
2 allowing me to speak in support of the bill. My name is
3 Marc Scarcella, and as an economist who has been studying
4 trends in claim filings and compensation for over a decade,
5 I agree with what you've heard so far from some of the
6 attorneys that transparency from these dual compensation
7 systems is critical for the proper allocation of fault in
8 the tort system.

9 I currently work in the Environmental and Product
10 Liability practice of Bates White, where I consult on a
11 variety of issues relating to mass tort litigation,
12 including those that surround the evaluation and litigation
13 risk of asbestos claims. I currently work for defendants
14 and insurers who are actively litigating cases in the tort
15 system, but prior to my time at Bates White I spent almost
16 a decade as a consultant to claimant representatives in
17 524(g) bankruptcy proceedings. I consulted with some
18 trustee boards of some of the largest asbestos trusts in
19 this country, as well as an in-house statistician of the
20 Johns-Manville Personal Injury Settlement Trust that was
21 referenced earlier.

22 It is from this unique, I guess, experience of
23 seeing the world from both the tort and trust systems as
24 well as working for both defendants and claimants that I've
25 gained a unique perspective on how these systems work, and

1 when I started working in Bates White, I felt there was a
2 lacking on the tort side of transparency with the trust
3 system and how the trust system worked, and that's what I'm
4 here to talk to you today about.

5 This issue of trust transparency is quite common
6 at the State and Federal level in recent years. Despite
7 the fact that asbestos litigation, bankruptcy, and
8 bankruptcy trusts have been around for decades, it has only
9 been in recent years that the asbestos trust compensation
10 system has been funded with tens of billions of dollars and
11 is paying out billions of dollars a year to claimants. So
12 the issue is really coming to the forefront, and especially
13 with the passing recently of the Fair Share Act here in the
14 Commonwealth, it raises more concerns and questions about
15 transparency relating to these claims.

16 What I'm going to focus on today, as Sam
17 mentioned, is what these trusts are and how they operate.
18 I'm going to keep some of my statements brief because some
19 of it has already been covered by Mr. Vari, Mr. Hare, and
20 Mr. Neeson, but one thing I think is important to point
21 out, when you talk about bankruptcy trusts, you're talking
22 about billions of dollars in a dual compensation system
23 that has been funded by the bankruptcies of some of
24 litigation's most culpable defendants.

25 Most scientific literature would agree that those

1 defendants that engaged in the manufacturing, installation,
2 or distribution of thermal pipe and block insulation
3 products were by far the most culpable defendants, because
4 their products presented the most exposure risk to American
5 workers and, therefore, resulted in the highest incidents
6 of asbestos-related disease, not only in the past but in
7 the future.

8 So when Mr. Vari talks about his concerns over
9 not having information relating to these bankruptcy trust
10 shares available during a tort case, you're talking about
11 billions of dollars that are paid out each year; in fact,
12 over \$14 billion between 2006 and 2011 not being brought
13 into the tort system, which represents shares of some of
14 the most culpable defendants. So this information truly
15 does matter if you're a defendant in this litigation.

16 One thing I really want to highlight which kind
17 of plays off of something that Mr. Neeson brought up was
18 this idea of the incentive to delay the filing of trust
19 claims currently. Most trusts, the 40 or 50 that I've
20 either worked for or have studied in the last few years,
21 have statutes of limitations in their procedures that don't
22 require trust claims to be filed until 3 years after the
23 date of diagnosis, and that duration can be extended even
24 longer by plaintiff attorneys having the right to file
25 incomplete or placeholder claims, that they can defer even

1 further the review of those claims. So this kind of speaks
2 to what Mr. Neeson was talking about earlier, about
3 sometimes the information they do get, when they do get
4 disclosure of these trust claims, is kind of incomplete.
5 So the juries have a tough time trying to figure out, well,
6 what does this mean when I have an incomplete claim form?

7 So the third point, the main point I want to
8 highlight today is, what does this mean when you actually
9 have claims filed actively and currently with the tort
10 case, and what does it mean to the plaintiff counsel and
11 the information that will be disclosed into the tort
12 system?

13 I believe the idea that filing a trust claim is a
14 bit of a gross exaggeration of really what happens. I've
15 worked with these trust facilities following their
16 bankruptcy confirmations. My former firm would consult on
17 issues of procedures and the processing of trust claims,
18 and in my experience, the trusts operate and are designed
19 to be as efficient as possible because their whole goal is
20 to get money to claimants as quickly as possible. So to do
21 this, they set up procedures. I'm just going to list a
22 couple of the highlights of those procedures, and again, in
23 the studying I've done or working for numerous trusts in
24 this area, I find that the majority of these procedures are
25 the same across trusts, so it's not like these procedures

1 might differ from one trust to the other significantly. So
2 it really makes it as efficient as possible for a plaintiff
3 counsel to file claims with as many trusts as possible.

4 First, I want to point out that the resolution
5 procedures are often standardized across trusts, as I just
6 mentioned. And what that means is that on a per-cost
7 per-claim basis, it doesn't require a lot of resources from
8 plaintiff counsel to file against multiple trusts. One of
9 the reasons why that is is that there are joint processing
10 facilities. What that means is, for instance, the Verus
11 Claims processing facility in New Jersey, they process
12 claims for, I believe now up to 16 bankruptcy trusts, and
13 one of the benefits of filing with trusts in this facility
14 is they have electronic processing systems, like filling
15 out a form online or submitting claims online. What that
16 allows you to do is, if you feel your client was exposed to
17 the products of, let's say 8 of those 16 trusts, you can
18 very quickly file against all 8. And of course you have to
19 make specific exposure allegations to each of the eight
20 which are specific to the trust, but being able to file
21 some of the claimant information, demographic information,
22 the representative information, that kind of generic claims
23 material and medical information across so many trusts so
24 quickly, really cuts down on the cost and burden for
25 plaintiff counsel.

1 One other thing that's worth pointing out is that
2 experienced law firms already have a lot of discovery
3 available to them on the bankruptcy trusts and the products
4 that their predecessors, who are engaged in manufacturing
5 and distributing, are installing. These litigations took
6 place in the seventies, eighties, and nineties, and before
7 filing for bankruptcy, these companies had disclosed quite
8 a bit of discovery on what their products were, where they
9 distributed, and what occupations were most likely to be
10 exposed to those products.

11 Plaintiff counsel and experienced ones have this
12 information. They can cull this information very quickly
13 and they can leverage it very quickly when working up
14 claims against potential bankruptcy trusts and potential
15 exposures. So this idea that requiring a plaintiff law
16 firm to work up cases against bankruptcy trusts at the same
17 time they are working up cases against defendants in the
18 tort system would somehow spread their resources too thin I
19 feel is a little bit of an exaggeration.

20 In fact, you'll see advertising on some plaintiff
21 counsel Websites where they talk about having departments
22 dedicated solely to the filing of trust claims, where they
23 have both attorney and nonattorney professionals who are
24 there just to file trust claims. So the idea that filing
25 trust claims would detract from the efficiency and quality

1 of the representation of the client and the tort system I
2 think is a little bit of an exaggeration.

3 One other thing that's really worth pointing out,
4 since this litigation is about mesothelioma victims, which
5 are the people who are by far the sickest when it comes to
6 asbestos-related diseases and the ones that should be
7 compensated first and foremost, is that many trusts, like
8 many jurisdictions across the country, have exigent claim
9 statuses. If you are a living mesothelioma victim, this
10 process the trusts have already established, which is very
11 expeditious to begin with, can be made even faster, because
12 they want to get people who are living, who may need money
13 to pay medical bills or other reasons that may cause
14 financial strain due to loss of income, they're going to
15 try and get them the money as fast as possible, just like
16 extremist dockets that exist in a lot of different
17 courtrooms around the country.

18 So this idea of promoting the filing of trust
19 claims at the same time a complaint is filed in the tort
20 system, because that's when you have the best chance of
21 actually having the victim alive, is a great idea, and any
22 bill that supports that I would support, because as it has
23 already been pointed out, that's how you're going to get
24 money to plaintiffs the quickest. The bankruptcy trust
25 system will get money in the hands of plaintiffs if those

1 claims are actively pursued and filed far faster than the
2 tort system, probably far faster than you'd even get a
3 trial date in the tort system.

4 So that really talks about my final point, which
5 is, the benefit to plaintiffs could be great. To promote
6 the expeditious and active filing of trust claim forms by
7 their counsel is the best way to get them money as quickly
8 as possible, in addition to some of the benefits we've
9 already heard from getting that information into the tort
10 system so shares can be properly allocated.

11 Thank you.

12 MR. MARSHALL: Then as we thought about it, well,
13 is it even possible to ask plaintiffs and their lawyers to
14 identify claims that they might reasonably have, which is
15 part of the bill, and to talk about that we have retired
16 Judge Peggy Ableman.

17 JUDGE ABLEMAN: Good morning, Mr. Chairman,
18 Congressmen. Thank you for the opportunity to address you
19 today. I bring greetings from your neighbor State,
20 Delaware.

21 Prior to my retirement last December, I served
22 for more than 29 years as a trial judge in the Delaware
23 State court system. During the last few years of my term
24 on the Delaware Superior Court, I was solely responsible
25 for the asbestos litigation docket, which comprised

1 approximately 500 to 600 cases filed by plaintiffs from all
2 over the United States and even by foreign nationals. My
3 experience gave me a unique insight into the inherent
4 unfairness built into a system that permits plaintiffs
5 filing with bankruptcy trust claims to remain secret and
6 undisclosed while a plaintiff is also actively engaged in
7 tort litigation.

8 And I have been asked specifically to address the
9 question of whether this legislation will place an
10 impossible burden on plaintiffs and their counsel to
11 identify potential other claims that they reasonably may
12 file, particularly if a plaintiff genuinely forgets or
13 overlooks a potential claim or source of exposure.
14 Mr. Scarcella had talked about this previously, but I think
15 it is worth emphasizing.

16 As asbestos litigation has evolved over the past
17 few decades, the vast majority, if not all of these
18 plaintiffs, have been recruited by law firms specializing
19 exclusively in asbestos litigation and in the pursuit of
20 maximum compensation for victims of asbestos-related
21 disease. Plaintiffs' counsel are experienced,
22 accomplished, and seasoned attorneys in this field of law.
23 They are cognizant of the identities of every manufacturer,
24 employer, or landowner who may at any time have been a
25 potential source of asbestos exposure. They are fully

1 aware of the names of the entities that have established
2 asbestos bankruptcy trusts, the products with which these
3 entities were associated, the manner in which maximum
4 compensation can be achieved, the diseases that are most
5 likely to maximize recovery, and the identity of
6 manufacturers of any component part that may have been
7 incorporated in the products to which the plaintiff may
8 have been exposed.

9 Tort lawsuits filed by asbestos plaintiffs
10 typically name as many as 50 to 100 defendants, all of whom
11 are known by plaintiffs' attorneys, as they are often the
12 same recurring defendants in asbestos suits nationwide.
13 Indeed, plaintiffs' attorneys have actually become more
14 aggressive and technologically savvy in their pursuit
15 of defendants with even an incidental connection to
16 asbestos-containing materials.

17 The Internet and social media have expanded
18 opportunities for plaintiffs to connect with law firms that
19 specialize in this litigation, and these firms, in turn,
20 have discovered an ever-increasing number of peripheral
21 defendants who now find themselves front and center in the
22 defense of their alleged asbestos-related liability.

23 Under the present compensation system as it has
24 evolved since the 1980s and 1990s with experienced and
25 savvy plaintiffs' firms who utilize extraordinarily

1 sophisticated methods to connect with plaintiffs and who
2 have an acute awareness of the entire universe of potential
3 defendants, it makes little sense to believe that a
4 plaintiff in these circumstances would forget, omit, or
5 overlook any source of compensation, either through tort
6 litigation or from bankruptcy trusts.

7 Thank you.

8 MR. MARSHALL: And then a final question we had,
9 and I would imagine many of you would have: Is this really
10 something for legislation or should it be done by the
11 courts, you know, through the Supreme Court Rules
12 Committee? Is this really a proper province for the
13 General Assembly? And to address that, I would like to
14 bring up Rob Byer, who has some experience on the judicial
15 end. Robert?

16 MR. BYER: Thank you, Mr. Chairman and Members of
17 the Committee.

18 I am Robert Byer, and it's my pleasure to be here
19 today, and I appreciate the opportunity to discuss the
20 issue of whether the statute falls within the powers of the
21 General Assembly under Article V, Section 10(c), of the
22 Pennsylvania Constitution.

23 I speak from my background as a former member of
24 the Commonwealth Court bench in this State. I also have
25 experience as head of the appellate practice at

1 Duane Morris, where I practice in both the Philadelphia and
2 Pittsburgh offices of our firm. I've been involved in
3 asbestos litigation on the appellate side.

4 I also have particular experience teaching and
5 working in the area of procedural rulemaking, having served
6 for many years as a member of one of our Supreme Court's
7 Rulemaking Committees. But I hasten to add that I am not
8 here in any capacity that is related to that committee.
9 That's simply background by way of showing you my
10 experience in this area.

11 It is my view that HB 1150 is within the powers
12 of the General Assembly to regulate the substance of law of
13 this Commonwealth. The distinction between substance and
14 procedure can be a difficult one, but normally the Supreme
15 Court has looked at the issue of whether a statute is
16 procedural or substantive by considering the question of
17 whether the statute deals with the creation of rights,
18 including the regulation of those rights, or whether the
19 statute deals more with the manner in which those rights
20 are to be enforced in the courts.

21 This statute, in my view, shares the same
22 substantive roots as the prior legislation that the General
23 Assembly has enacted in the form of the Comparative
24 Negligence Act, the Fair Share Act, and the Uniform
25 Contribution Among Tortfeasors Act. These are statutes

1 that are on the books, statutes that are unquestionably
2 within the power of the General Assembly. And as the prior
3 speakers have indicated, what this statute, HB 1150, would
4 do is simply to provide for provisions that are in
5 furtherance, particularly of the Fair Share Act, and this
6 is all in the nature of creating rights with respect to how
7 verdicts in asbestos cases are to be allocated. Also, with
8 respect to the information that is necessary to provide for
9 that allocation, there is some regulation there. And
10 anything that is dealing with what goes on in the courts in
11 this bill is more in the nature of setting the parameters,
12 and that's something that the Supreme Court has recognized
13 is within the power of the General Assembly to do.

14 So thank you very much for the opportunity to
15 address this.

16 MR. MARSHALL: And that's who we have. That
17 concludes it. I'm obviously happy to answer any questions,
18 and we could call the people up, whoever feels most
19 comfortable answering.

20 MAJORITY CHAIRMAN MARSICO: Okay. We'll go ahead
21 and do that.

22 Before we do that, the Chair would like to
23 recognize Representative Delozier from the 88th District in
24 Cumberland County.

25 So now we're going to go to questions, like we

1 said, to Panel I. Any questions from the Members?

2 Representative Kula. Go ahead.

3 REPRESENTATIVE KULA: Thank you, Mr. Chairman.

4 I guess, I think Mr. Hare mentioned the
5 Johns-Manville cases, and you said that there were 21 of
6 those cases filed and that 18 had filed trust claims. How
7 many of those cases were in Pennsylvania? Do you know?

8 MR. HARE: Yes. Those were all Pennsylvania
9 cases.

10 REPRESENTATIVE KULA: Those were all Pennsylvania
11 cases?

12 MR. HARE: Pennsylvania.

13 REPRESENTATIVE KULA: And were those claims filed
14 before or after settlement?

15 MR. HARE: Those claims were filed after
16 settlement, either settlement or verdict. They were
17 resolved, so I lumped settlements and verdicts together.
18 So the claims were filed afterwards, which is the usual
19 practice and one that this bill seeks to address.

20 REPRESENTATIVE KULA: Okay. And one more, and
21 this is for you.

22 Once a trust assigns a value to a particular
23 victim's injury, does the victim automatically receive that
24 amount or is there a reduced amount? Normally.

25 MR. HARE: It's hard to speak for all 56 of the

1 trusts, but the usual process is that they have schedules
2 of claims. So if you have a certain type of disease,
3 et cetera, there is a listed amount of payment so that
4 every plaintiff is treated equitably, if not equally, okay?

5 So it is my understanding that if the trust has
6 sufficient assets, they pay that amount. If the trust
7 starts to run down where they're starting to question
8 whether there are going to be sufficient assets for the
9 claims that they have, then they assign percentages of
10 those numbers to the plaintiffs, and so they would get a
11 percentage then.

12 REPRESENTATIVE KULA: And do you have any figures
13 at all as to relatively what those claims normally are? I
14 mean, are they usually at 100 percent or would you say most
15 of those are probably lesser amounts?

16 MR. HARE: You know, I'm really not sure. There
17 might be others on this panel who could address that. I'm
18 just really not sure whether most of them are paid at the
19 assigned scheduled value or not. I'm just not sure.

20 MR. MARSHALL: And Marc Scarcella may be able to
21 quickly answer that question.

22 REPRESENTATIVE KULA: Okay.

23 MR. SCARCELLA: Thank you. And I think John did
24 a very good job describing the payment process, but to
25 answer your question, I can't think of a trust that

1 currently pays 100 cents on the dollar. But keep in mind
2 that the values, the scheduled values that are set in their
3 procedures, if they're set high enough, then it makes it
4 very difficult to pay 100 cents on the dollar. But I think
5 the key to the payments is that in the aggregate, it's
6 billions of dollars a year that are being paid out. So
7 while there may be trusts that pay very little to an
8 individual collectively, especially if you worked in the
9 types of industrial settings like the Philadelphia Naval
10 Shipyard or some of the plants that are all across the
11 Commonwealth, those types of individuals will likely
12 collect from upwards of 15, maybe even 20 different trusts.

13 So in the aggregate, a plaintiff could receive
14 hundreds of thousands of dollars. And just like the tort
15 system, if the individual, let's say, is younger, is still
16 working, has dependent family members, just like the tort
17 system, the trust will value those claims at more money and
18 award them appropriately.

19 And one thing that is very important to
20 understand about payments from trusts is that those
21 payments can go down over time. You know, this is one of
22 the issues we're dealing with at the Federal level. We're
23 trying to bring transparency at the Federal level because
24 we're not sure the trusts are actually operating
25 appropriately when it comes to distributing money. But in

1 recent years, individual payments have gone down to the
2 claimants, and I think that further highlights the benefit
3 of this bill, which is to promote the filing of claims as
4 quickly as possible. There's only downside or risk if you
5 wait to file the trust claim because those values can be
6 decreased. This percentage that you asked about can be
7 decreased over time, so there really is no upside to
8 waiting.

9 REPRESENTATIVE KULA: Thank you, Mr. Chairman.
10 Thank you for your answers.

11 MAJORITY CHAIRMAN MARSICO: The Chair would like
12 to recognize Representative Bradford of Montgomery County.

13 Next in the line of questioning, Representative
14 Barbin.

15 REPRESENTATIVE BARBIN: I'll just leave this
16 question open to whichever member of the panel would like
17 to answer it.

18 In the testimony that was provided, there was a
19 statement made that in the trust system there was about
20 \$30 billion, and over the period of time from 2006 to 2011,
21 \$14 billion was paid out. Now, roughly you're looking at
22 5 or 6 years, a little more than \$2 billion a year. What
23 I'm worried about with this legislation is that if you have
24 \$30 billion and you're paying out \$2 billion a year, then
25 there would seem to be a significant amount of money in the

1 trust fund itself, and what I can't seem to figure out is
2 why this shouldn't be handled by the trust system itself.
3 If you're worried about double dipping, which I don't
4 really believe happens, because, you know, you've got
5 somebody who's going to die in a couple of years if they
6 have mesothelioma, so if that person's going to die, he's
7 going to try to get a full recovery. The trust system
8 doesn't allow a full recovery against any individual
9 defendant; they only allow modified settlements against
10 individual defendants, and what you're trying to say is you
11 have to disclose all those things, even though you don't
12 know the person is going to get a full recovery, to somehow
13 make it fairer to those defendants that aren't in
14 bankruptcy.

15 So, again, my question would be this: If you
16 believe there's some sort of double dipping involved or
17 some sort of unfairness that there's more than a full
18 recovery being made, why isn't the appropriate remedy to go
19 to the Federal bankruptcy system and ask the judges to make
20 that system more transparent?

21 MR. SCARCELLA: Well, I think I can answer at
22 least part of that question and then maybe one of the
23 attorneys would like to answer, I think, the other part of
24 it.

25 To the first part as to why this should be

1 handled at the Federal level, the way these trust
2 procedures are set up, because it's a finite amount of
3 money -- I mean, obviously, more companies can file for
4 bankruptcy and increase the overall fund that's in the
5 trust system over time. But since we're dealing with a
6 finite amount of money for any one individual trust, they
7 set up their procedures to be largely administrative. So
8 they try not to deal with what's happening externally,
9 because that could be costly. I know you're talking about
10 maybe blurring the line between an administrative process
11 and a more of a litigious process. So they really just
12 look at the information that has been submitted to them by
13 plaintiff counsel, so this idea of knowing what the
14 individual has already received from maybe tort defendants
15 or even other trusts is not transparent to the trusts
16 themselves, and they're designed that way so they don't
17 have to bog down their operations trying to gather
18 information and do more due diligence than what their
19 procedures require, which is, a person has filed a claim,
20 they have submitted reasonable evidence as to why they
21 think they were exposed to the products that the trust now
22 represents and they can prove that they have the medical
23 criteria requirements met, and therefore, they should get
24 paid.

25 So I think to look at the trust system to do this

1 type of what I would think more of a litigious due
2 diligence on who's getting paid and how much would take
3 more money away from claimants, and since we're already
4 doing that in the tort system with tort defendants, it
5 seems like a much more efficient fit.

6 Thank you.

7 REPRESENTATIVE BARBIN: I guess as a followup,
8 my question would be this: If you are only spending
9 \$2 billion a year from this \$30 billion fund and your
10 settlements don't really have anything to do with the
11 ultimate liability of any one of the hundred alleged
12 defendants, why are you asking to minimize the verdict
13 settlements that come out of the court system when you
14 can't ensure that an individual defendant is being fully
15 compensated?

16 MR. NEESON: I'll do my best to try to answer
17 your question.

18 At the present time, you have a substantial
19 number of cases that are settled rather than tried, but you
20 still have resolution of cases under both ways. Under the
21 present system, whether you're settled with a settlement
22 master or whether you get a jury verdict, the impact of
23 exposure to the products under the asbestos trusts is not a
24 factor or a consideration, either in the settlement or in
25 the jury's determination.

1 Now, in a jury's determination, they're asked to
2 assess the total amount of damages that should be given to
3 the plaintiff; that's their job, and whatever that number
4 is, that's 100 percent of what that plaintiff is deserving
5 of, at least according to that jury. When that's done,
6 under the present system, there's no impact whatsoever or
7 consideration for many of the products that the plaintiff
8 was exposed to that are under the bankruptcy trusts. So
9 what you have is, in a verdict situation, a 100-percent
10 jury award, and then after that is resolved, they go to the
11 bankruptcy trusts and get additional money. So that's
12 double recovery.

13 So I think it depends on how you look at it, but
14 you're getting additional money over and above what the
15 jury has already awarded you. And you can make that
16 similar kind of argument when you're talking about a
17 settlement or a resolution before trial.

18 REPRESENTATIVE BARBIN: The only problem with
19 that theory is, you're admitting, at least in the context
20 of the trusts, that there are 100 defendants. The
21 plaintiffs go into the court system against an individual
22 defendant or an individual two or three defendants. So,
23 yes, I think you're right when you say that the jury has
24 made a decision against that individual defendant or
25 defendants, that that's the individual amount of damages

1 that is due from those particular, but I don't know that it
2 necessarily follows that his total injury from all
3 asbestos-related products has been satisfied by any single
4 jury case or jury settlement.

5 MR. NEESON: Well, it's sort of hard to explain.
6 I think that if you look at the bankruptcy trusts -- there
7 are 60 or 70 of them, I think, as Marc mentioned -- not
8 every trust is involved in every case, not every product is
9 involved, and not every application that is made to a
10 bankruptcy trust is accepted by the trust. There are some
11 that are rejected. It's a user-friendly process, but some
12 are rejected.

13 So I think the explanation is that systems are
14 separate and distinct from each other. There's no
15 connection. So there are two separate sets of recovery
16 going under two separate paths here. So the bottom line is
17 that if they're permitted to continue going on their
18 separate ways, you're going to end up with resolution under
19 the civil side for 100 percent of the value of the person's
20 claims and injuries, and then they go, subsequently, to the
21 bankruptcy trust side and get additional money. Under any
22 mathematical calculation, that's more than what would be
23 deserved, certainly by what a jury may tell them at a
24 trial.

25 So the whole point here is to have a fairer

1 allocation, a more complete allocation among all the
2 products that this plaintiff was exposed to during his work
3 life, and to do that, you have to integrate the two
4 systems.

5 MAJORITY CHAIRMAN MARSICO: Are you finished,
6 Bryan? Okay.

7 The Chair would like to recognize Representative
8 O'Neill from Bucks County. Okay.

9 We have time for two more questions.

10 Representative Dean and then followed by Representative
11 Neuman.

12 Representative Dean.

13 REPRESENTATIVE DEAN: Thank you, Mr. Chairman.

14 I'm over here; sorry. I'm a little
15 height-challenged in this chair. Excuse me.

16 A couple of quick questions.

17 The statute of limitations, for clarity on that,
18 for a victim of mesothelioma is how long? Two years to
19 court. In the trust system, however? Three years. Okay.
20 So in the courts, it's a 2-year statute of limitations from
21 the time of diagnosis. Am I right? On the trust side,
22 it's 3 years from the time of diagnosis.

23 What is the life expectancy of somebody who is
24 diagnosed with mesothelioma?

25 MR. NEESON: I think that varies. It can be as

1 short as 3, 6, 9 months. It can be as long as 2 years.
2 I've seen instances where it has been 5 or 6, but that's
3 very rare.

4 REPRESENTATIVE DEAN: Yeah. From just some
5 research we did, the American Cancer Society says it's
6 about 4 to 18 months average, and as you point out, a very
7 small percentage of people do survive 5 years.

8 MR. NEESON: Yes. Can I make one additional
9 comment?

10 Even though it's 3 years for the statute of
11 limitations for bankruptcy trusts, they're permitted under
12 most trusts to file what we call placeholder claims, which
13 means that you file your paperwork before the 3 years
14 expires, but that permits them or gives them additional
15 time over and above those 3 years, perhaps maybe 2 or
16 3 years after that, to complete the claims, get an
17 application completely filed, and get a resolution from the
18 bankruptcy trusts.

19 So I don't want to mislead you that the 3 years
20 is an end line for the bankruptcy trust application and
21 completion.

22 REPRESENTATIVE DEAN: I appreciate that, and I
23 understand that. So the victim him or herself could
24 continue after that placeholder claim or his estate.

25 MR. NEESON: Or his estate. That's correct.

1 REPRESENTATIVE DEAN: Okay. Thanks.

2 What I'm kind of confused about is how is it that
3 our discovery system is inadequate to reveal what system a
4 victim or plaintiff is in? I don't understand why, in the
5 normal course of discovery, we're not getting that
6 information.

7 MR. VARI: While strides have been made, the main
8 reason is one of relevance.

9 REPRESENTATIVE DEAN: I'm sorry; I can't hear
10 you.

11 MR. VARI: I'm sorry. Strides are being made in
12 that regard, but it's largely an issue of relevance.
13 Unless the jury can consider the liability of these
14 entities, the plaintiffs argue that that information is
15 simply irrelevant, and that's the problem that we raised.
16 The two systems don't talk to each other. So we're in a
17 tort system where the jurors can't consider the liability
18 of the trusts. If we ask for information of the trusts,
19 the question is, well, why is that even relevant, because
20 it can't be considered.

21 REPRESENTATIVE DEAN: But even before you get in
22 front of a jury, how is discovery handled in order to try
23 to get at that information?

24 MR. VARI: Based upon these relevance objections,
25 inconsistently. In some instances we get the information

1 and we can put it in front of a jury and talk about
2 alternative causes; in other instances, we're largely
3 precluded from obtaining that.

4 REPRESENTATIVE DEAN: It reminds me of the point
5 of law where you really aren't allowed to ask about, do you
6 have insurance, because juries really shouldn't be
7 considering, well, did you insure against this? And so
8 maybe in that way it's a little bit parallel. Is the
9 bankruptcy court acting as an insurer in some way?

10 MR. VARI: These are not insurers, no.

11 REPRESENTATIVE DEAN: I know they're not, but---

12 MR. VARI: These are tortfeasors. These are
13 entities that supplied asbestos-containing materials that
14 these claimants claim injured them. They file forms saying
15 "I was injured by these products." It's not an insurer;
16 it's not a collateral source. This is a compensation from
17 a tortfeasor, just like the person standing in front of the
18 jury.

19 REPRESENTATIVE DEAN: And one of the ambitions of
20 this legislation would be to force plaintiffs to complete
21 the bankruptcy trust portion of their claim first before
22 civil litigation.

23 MR. VARI: If they care to do so, and if they
24 don't, then it would just enable those trusts from whom
25 they could have recovered to go on the verdict slip.

1 REPRESENTATIVE DEAN: Yeah.

2 MR. VARI: So those entities with fault can be on
3 the verdict slip. It's really up to the plaintiffs whether
4 they actually want to file the claim or not.

5 REPRESENTATIVE DEAN: It remains unclear to me
6 how our own discovery process doesn't reveal this
7 information, so that I'm not getting.

8 The other thing is that the goal is transparency.
9 I do want to mention just that the language used here
10 today, I don't know if anybody else heard some of it, but
11 it was quite alarming to me in its kind of use of biased
12 language that plaintiffs have an incentive to delay, that
13 plaintiffs are gaming a system. They're in a set of
14 systems that is not a system they wanted to be in. So I
15 would take offense, as somebody involved in this kind of
16 litigation or this life or this crisis of one's life, to
17 the use of the words "placeholder claims" as though it were
18 a derogatory.

19 Plaintiffs are trying to find their way through
20 these systems as well. Even though on the other side I'm
21 hearing wonderful language that trust claims can file very
22 quickly -- eight claims for eight different products,
23 whether it was 16 different products. That kind of
24 simplicity I don't really think plaintiffs enjoy, that it's
25 a user-friendly system.

1 So my question is, if we're seeing that the
2 bankruptcy system, it looks like you're boasting that it
3 would compensate plaintiffs and victims faster, the tort
4 system is slower -- as we all know, it's hard to get in
5 front of a jury and it's hard to get that far down the road
6 -- is there anything in this legislation that will help us
7 on the jury side, the civil side, to get victims
8 compensation or determinations of compensation faster?

9 MR. VARI: Representative Dean, the language was,
10 if you noticed, it wasn't in my comments so I don't want to
11 speak to those.

12 Yeah; this is just a clarification of the
13 Fair Share Act that is already on the books, which just
14 says that a plaintiff should be able to proceed against a
15 defendant in the court system and that defendant, if
16 they're liable, should be assessed liability and they
17 should pay that share. So absolutely.

18 And there are systems in the courts -- and this
19 is outside of the purview, perhaps, of the Committee --
20 where they do provide for expedited claims for exigent
21 plaintiffs, who are plaintiffs that have just been
22 diagnosed, they can file their claim quickly, and the
23 courts try to prioritize those claims so that they get to
24 trial during the claimant's lifetime. It doesn't always
25 work, but the system does try to accommodate those things.

1 But from the jury system, it's absolutely set up
2 so the plaintiffs can proceed against liable, solvent
3 defendants, a jury can assess liability against those
4 defendants, and they should pay the share of that award
5 that they're allocated. No quarrel on those points.

6 MR. BYER: And if I might provide a couple of
7 further comments in response to your questions,
8 Representative Dean.

9 The issue of whether something is relevant, of
10 course, is a question of substantive law. It's relevant
11 because the law makes it relevant, and that's something
12 that the General Assembly has the power to do. Now, the
13 question of discovery, that becomes procedural. So once
14 there is a relevance, once there is a right established or
15 a duty established by substantive law in the form of this
16 legislation, then it becomes up to the courts to make sure
17 that the discovery processes proceed in a way that is
18 adequate to get that information where it needs to be.

19 In terms of the timing of judicial decisions and
20 getting cases before juries faster, that is an area that is
21 inherently procedural. And so while the court can do some
22 -- while the Legislature can do some things in terms of
23 suggestions with respect to timing and things of that
24 nature, that would be falling into the area that is really
25 reserved to the Supreme Court under Article V of the

1 Constitution.

2 REPRESENTATIVE DEAN: No; I appreciate that.

3 Thank you, Your Honor.

4 I guess my final point is just, and it's by way
5 of comment, that I'm all in favor of transparency and
6 adequacy of people's rights to recover, and at the same
7 time I wonder, you know, why is it that within our system
8 we don't take a stronger use of our discovery system to
9 make sure that adequate information is provided and that
10 plaintiffs then remain in control of their own litigation,
11 that they choose which system to go to at which time as it
12 suits their requirements and their needs.

13 So I just think I'm unclear on why we can't get
14 more through discovery and let plaintiffs unfortunately go
15 through this system and collect what they are due.

16 MAJORITY CHAIRMAN MARSICO: Okay.

17 Representative Neuman, a question?

18 REPRESENTATIVE NEUMAN: Yes. Thank you.

19 I'd like to start with Marc, if I could.

20 Marc, you stated that if we had this new system,
21 it would be beneficial to plaintiffs to file early to the
22 bankruptcy trusts. Does that mean that if I have
23 mesothelioma, my client has mesothelioma, I file early
24 versus somebody that files late, the person that files
25 early is going to get more compensation than the person

1 that files late?

2 MR. SCARCELLA: It's more about risk. Because
3 these individual payments that trusts have been making to
4 claimants over time in recent years has declined, you do
5 run the risk as counsel if you delay the filing of your
6 clients' trust claims.

7 Let's say, for instance, the Owens-Corning Trust,
8 when they first opened their doors in, I believe it was
9 2007, they were paying on average to an individual, net of
10 any payment percentage, \$108,000. Again, that was for your
11 average claimant. Somebody younger, with more dependents,
12 would have gotten far more. After about a year and a half
13 of paying people, they thought that they were spending
14 money too quickly. In order to preserve assets for the
15 indefinite future, to pay off future claims, they dropped
16 from \$108,000 down to \$27,000.

17 REPRESENTATIVE NEUMAN: So I hope you agree with
18 me, there are some instances where a plaintiff can't help
19 the timing of the filing and they could get less recovery
20 from the trusts.

21 MR. SCARCELLA: Yes. And one thing that's
22 important to note is, most trusts, when we talk about these
23 changing payment percentages, as has been noted, they can
24 go up. You know, just like if claim volumes are higher
25 than expected, those payment percentages might come down to

1 kind of balance out the need to preserve assets. Well, if
2 claim volumes are and payments are less than expected, you
3 can see an increase in payment percentage.

4 However, most trusts today have a "true-up"
5 provision which says if you are a plaintiff and you got
6 paid, let's say -- let's take the reverse of the
7 Owens-Corning situation. Let's say after they dropped
8 their payment amount to about \$27,000 on average, if you
9 were a plaintiff and you got paid at that amount and
10 3 years later they increased their payment percentage such
11 that you would have received maybe \$60,000 if you had filed
12 3 years later, they will give you the difference. They
13 will "true you up." So it really puts all the risk for the
14 plaintiff on filing later rather than sooner.

15 REPRESENTATIVE NEUMAN: Okay.

16 You stated very broadly that the companies in
17 bankruptcy trusts are more culpable than the companies such
18 that you may represent. I'm bothered by that. Saying that
19 a company that produced and made and manufactured asbestos
20 versus a company that used asbestos knew that it harmed
21 people and still used it without warning their workers, I
22 don't understand how you can make a broad statement of
23 who's more culpable in that situation.

24 MR. SCARCELLA: Oh, and I'm sorry if that was
25 what you took from that statement. That was more speaking

1 from a scientific standpoint, and it's more of a relative
2 term of "culpability," which kind of speaks to this issue
3 of shares.

4 The thermal insulation pipe and block products
5 that were the focus of the litigation in the seventies,
6 eighties, and nineties, the reason why they were the focus
7 of litigation is because those are the products that most
8 scientific literature would conclude were the most
9 dangerous to American workers and, therefore, the most
10 responsible, relatively speaking, to the onset of
11 asbestos-related disease.

12 So it's not to say that defendants today in the
13 tort system aren't culpable at some level, but when you
14 look at somebody who might have been exposed to, let's say,
15 some wallboard as opposed to pipe insulation, most
16 scientific literature would suggest that the pipe
17 insulation was a much greater cause of risk to that
18 individual and likely contributed to a higher rate of that
19 person getting the disease.

20 So it's kind of a relative term. I didn't mean
21 to insinuate that defendants today have no culpability. If
22 they didn't, I think the litigation would look much
23 different.

24 REPRESENTATIVE NEUMAN: I think we're all about
25 transparency here. Would you be open to companies that are

1 solvent to releasing anybody that may have been exposed to
2 asbestos as a worker so that other solvent companies can,
3 you know, go bring you into a suit and make everything
4 transparent in that way, on the other side of things?

5 MR. SCARCELLA: I mean, I'm with you where I
6 think transparency ultimately is the best for everyone. I
7 mean, again, my role as an economist is I'm asked to value
8 the litigation risk and damages associated with asbestos
9 and other types of mass torts, so the more information I
10 get, the easier and better and more accurate I can make my
11 predictions.

12 But one thing I would say to that point is, when
13 you're talking about a particular defendant, let's say
14 Defendant XYZ Corporation, they're appearing in multiple
15 cases, as Judge Ableman pointed out. They appear over and
16 over again in these cases, possibly hundreds of cases a
17 year, and even in a particular jurisdiction. So when
18 discovery is achieved on that particular defendant, it's
19 I think a lot easier for courts to accept that information
20 as fact. So if 10 years ago Company XYZ disclosed
21 information about all of its products, there were answers
22 to interrogatories that laid out where those products were,
23 I think courts have an easier time accepting that
24 information as fact.

25 When you're talking on the plaintiffs' side, the

1 plaintiffs change each case, so I think it's harder without
2 transparency for courts to wrap their head around some of
3 the potential exposures to bankruptcy trusts. I think it's
4 a lot easier to eliminate assumptions and actually promote
5 the filing of these claims. So you take away a lot of the
6 questions. I think it would make it a lot easier on the
7 courts if there was that level of transparency, because I
8 think there is quite a bit on the defendants' side at this
9 point.

10 REPRESENTATIVE NEUMAN: Also, as an economist,
11 you probably have experienced this: Companies have the
12 same right to go against the bankruptcy trusts as the
13 plaintiff. Isn't that correct?

14 MR. SCARCELLA: That's---

15 REPRESENTATIVE NEUMAN: To file a claim against
16 the bankruptcy trusts?

17 MR. SCARCELLA: That's correct, but that is made
18 to be very difficult. The trusts will have provisions in
19 their TDPs for what they'll call indirect claims, which I
20 think probably in the litigation system you could think of
21 as a cross-claim or a contribution claim. If a defendant
22 can show that they picked up the shares of that bankrupt
23 entity or reorganized entity, therefore they now own the
24 right to the liability and so any payment that would
25 otherwise go to the plaintiff should go to them as kind of

1 a contribution claim, that's not made very easy by the
2 trusts, because one of the difficult things you have to be
3 able to show is that you as a defendant in fact did pick up
4 that bankruptcy trust's share, and without transparency,
5 it's really hard to get assigned shares, if not impossible,
6 because they're not on the verdict sheet.

7 So I think in spirit the asbestos trusts do allow
8 for contribution claims, but there's so much uncertainty
9 and so many roadblocks to getting those shares apportioned
10 in the tort system, it makes it kind of a dead-end street
11 even before you get going.

12 REPRESENTATIVE NEUMAN: Well, just a general
13 comment on that.

14 I would say then, welcome to the plaintiff's
15 world in trying to prove who caused the mesothelioma, and
16 to sit here and say that somebody who has mesothelioma is
17 going to experience a painful death to not get a
18 100-percent recovery is crazy.

19 I just have one question for John. Thank you,
20 Marc. I do appreciate all your testimony.

21 John, just real quick.

22 MR. HARE: Sure.

23 REPRESENTATIVE NEUMAN: I appreciate your
24 testimony. I just -- you were able to prepare awhile. I'm
25 just wondering when you found out that we were going to

1 have this hearing.

2 MR. HARE: Within the last month, maybe 3 weeks.

3 REPRESENTATIVE NEUMAN: Okay. Thank you.

4 MAJORITY CHAIRMAN MARSICO: Okay. We do have to
5 move along, but I know that there are three Members that
6 have questions. If you can ask those questions quickly and
7 get a quick response, we'll allow you to do that, starting
8 with Representative Saccone, I believe?

9 REPRESENTATIVE SACCONI: I'll waive off.

10 MAJORITY CHAIRMAN MARSICO: You waive off?

11 Representative Dean?

12 I'm sorry; Representative Brown.

13 REPRESENTATIVE BROWN: I'm sorry. Thank you.

14 I'll be very brief.

15 My question was for Mr. Scarcella. Mr.
16 Scarcella, you just gave us an example of someone who had
17 filed from Owens-Corning who received \$108,000 because they
18 filed quickly, and I'm trying to, because I'm not an
19 attorney, I'm not really used to all of this, so I'm trying
20 to get an understanding between filing for the trusts and
21 filing a tort claim. So if this person actually received a
22 settlement in a tort, for a tort claim, what would that
23 amount usually be?

24 MR. SCARCELLA: Oh, it's difficult to say. It
25 depends on the defendant and the exposures. I mean,

1 different individuals will have more or less exposures to
2 different defendant products. But I think by and large
3 I've seen studies that suggest that, on average, an
4 individual in the tort system will receive a million, a
5 million and a half dollars in total settlements. I've seen
6 verdict data that suggests for that select few that
7 actually go to trial, and I think there is a selection bias
8 there, they can get, you know, more than that, because
9 again, these are probably the people that have better cases
10 and that's why they go to trial.

11 But I think collectively when you look at the
12 trust system, for somebody who did work in industrial
13 settings where they were exposed to thermal pipe and block
14 insulation products, for them to receive \$300,000,
15 \$400,000, \$500,000 for being a typical claimant from the
16 bankruptcy trust system would be rather common. And again,
17 if they're younger and have a more severe case because they
18 have dependents and greater loss of income, they can
19 probably receive more.

20 So it may not be on par with what's received in
21 the tort system, but it's definitely a substantial amount
22 of money. It's nothing to scoff at. And the fact that
23 people can get that money quicker if they file with the
24 tort system, it seems like it's worthwhile to do.

25 REPRESENTATIVE BROWN: Thank you for the

1 explanation. The only reason why I'm asking this question,
2 because most of the people that I represent are not
3 attorneys, and I had the unfortunate position -- this is
4 for all of you -- to watch a neighbor of mine who worked
5 the Navy Yard who was affected by mesothelioma, and I saw
6 him suffer greatly, and he did not make it to his claim.
7 And I can remember him waiting on the mail for the letters
8 to come to see how his claim was going along.

9 So for me to go back home and talk to my
10 constituents about this, I would recommend that they would
11 file in both courts also, because in one court you're
12 looking at somebody just giving you enough to pay your
13 bills to make it; in the other, you're waiting for the
14 amount that you justly deserve. So this is very hard for
15 me to, you know, understand from the layman's term what
16 would be the benefit of changing this law, and I just
17 wanted to put that on the record.

18 Thank you, gentlemen.

19 MAJORITY CHAIRMAN MARSICO: Representative
20 Toohil.

21 REPRESENTATIVE TOOHL: Mr. Scarcella --
22 actually, if you can go back to that, Chair, for one
23 moment. My question kind of piggybacks off of
24 Representative Brown's. When you just spoke of the
25 \$300,000, that was a settlement that you were referring to?

1 MR. SCARCELLA: Oh, no, that was actually what an
2 individual could receive from the trust system depending on
3 where they worked and what they were exposed to. And
4 again, these aren't set numbers. This is, you know, every
5 case is different. I've looked at cases where an
6 individual could receive from the trust system close to a
7 million dollars. But, you know, I think it's important to
8 point those types of numbers out, because we are talking
9 about this idea of trust payments going down to
10 individuals. So you'll hear testimony, I'm sure, that
11 certain trusts may only pay \$1,000 to a mesothelioma
12 victim, but collectively, when you look at these types of
13 exposures, they can get hundreds of thousands of dollars.

14 REPRESENTATIVE TOOHL: And are those at times
15 like a victim can then collect from -- can they collect
16 from two different trusts or three different trusts, or is
17 it just generally one trust that they collect from?

18 MR. SCARCELLA: Oh, no. I would say, like, for
19 example, somebody who worked at the Philadelphia Naval
20 Shipyard would probably collect anywhere from, depending on
21 what their occupation was, anywhere from 15 to 20, maybe
22 even more trusts, because there are dozens that have filed
23 for bankruptcy, and since most of them were involved in the
24 types of industrial products where people would be exposed
25 to those types of products on a regular basis, it could

1 lead to quite a number of claims being made.

2 REPRESENTATIVE TOOHL: Is it possible -- I don't
3 know, Mr. Chairman -- if we can request from these people
4 that have testified today to give us some hard numbers that
5 we could then go on and have a little bit more confidence
6 when looking at settlements?

7 I mean, I guess settlements are undisclosed
8 numbers, but if we can look at jury awards in Pennsylvania,
9 what's going on in other States, then I think that maybe
10 some of our concerns would be appeased a little bit.

11 MAJORITY CHAIRMAN MARSICO: That's a good idea,
12 and you'll submit those when you can? Okay. Thank you.

13 REPRESENTATIVE TOOHL: Thank you.

14 MAJORITY CHAIRMAN MARSICO: We're finished with
15 questions. I just want to thank Panel I for your testimony
16 and your time and your expertise. Thank you very much for
17 being here.

18

19

PANEL II

20

21 MAJORITY CHAIRMAN MARSICO: Moving right along to
22 Panel II. Panel II is Robert Paul, Esq., from Reich &
23 Myers, PC, and Larry Cohan, Esq., Anapol Schwartz.
24 Welcome, and you can begin.

25 You have a third? I'll let you introduce your

1 other---

2 MR. PAUL: We brought him in order to understand
3 the difference between Philadelphia and Pittsburgh.

4 MAJORITY CHAIRMAN MARSICO: Okay.

5 MR. PAUL: In case any of the Members of the
6 Legislature had any questions about what goes on in
7 Philadelphia versus Pittsburgh, we brought Charlie from
8 Goldberg Persky in Pittsburgh in case any of the Members
9 had any questions about Pittsburgh.

10 MAJORITY CHAIRMAN MARSICO: That's fine. You may
11 begin your testimony.

12 MR. COHAN: Thank you, Mr. Chairman and Members
13 of the Committee.

14 My name is Larry Cohan. I'm an attorney who has
15 represented victims of asbestos exposure for the last
16 34 years across the State of Pennsylvania. I'm with the
17 law firm of Anapol Schwartz Weiss and Cohan based in
18 Philadelphia, and I'm here today to address this bill that
19 has been proposed, 1150.

20 First, I want to make it very clear that this
21 bill is tort reform, and it's tort reform of the highest
22 order. This bill will guarantee that the victims of
23 asbestos exposure will receive significantly less money
24 than they do today, number one.

25 Number two, it will guarantee that the claims of

1 these individuals will be delayed in the civil justice
2 system for substantial periods of time, probably until
3 after the living mesotheliomas have passed away.

4 Number three, the only beneficiary in this might
5 be the carriers and some of the defendants, and they will
6 gain a few dollars in the process at the direct expense of
7 the plaintiffs.

8 Now, I want to make something clear: The
9 plaintiffs, the individual victims here in Pennsylvania of
10 mesothelioma, do not receive full compensation.

11 Considering both the bankruptcy system, the trust system,
12 and the civil justice system, they do not receive full
13 compensation. An individual victim today receives
14 dramatically less compensation than they did 10 years ago
15 or 20 years ago. That is a fact. When you add the
16 bankruptcy trust recoveries to the civil justice system
17 recoveries, that total equals dramatically less than what
18 they have received over the decades. You must consider
19 that.

20 Ninety-five-plus percent of all cases are
21 settled, so when you look at verdicts, that's misleading.
22 There are some very high verdicts. I think we just heard
23 that. You have to consider the reality of the litigation.
24 Most of the cases settle. What does that mean? Well, what
25 you didn't hear in the presentation we just all listened

1 to, and I was personally rather shocked by it, and somebody
2 asked the question, well, are they getting full value from
3 these trusts? What are they getting? And it was only
4 after the question was asked that one of the initial
5 speakers volunteered, in response to the question, that
6 they're getting percentages on the dollar. They are
7 getting pennies on the dollar from those trusts -- pennies.
8 And I have statistics, and I'm going to share them with you
9 all in a few minutes. They're not getting 100 cents on the
10 dollar.

11 This bill, what they're seeking, is a
12 100-percent, \$100-for-\$100 setoff against a nonbankrupt
13 defendant's payment. Even though the plaintiffs might get
14 \$5, they want a \$100 setoff. That's how this bill reads.
15 You must read it carefully. This bill vests in the
16 defendants in the litigation complete control over the
17 timing of when a case can come to trial. Read it closely.
18 I'm going to get into the detail of that in just a few
19 minutes.

20 I do want to note, and I just heard it, that we
21 learned about this hearing just last week. Well, I'm not
22 sure that we've been given sufficient time. We can
23 certainly respond to the bill. We weren't given the bill
24 until last Wednesday. So here we are; our clients, our
25 victims across the State, don't even know yet that this

1 bill is here. And I assure you, they and their counsel
2 will be upset, because this will mean less compensation and
3 a lower likelihood that our clients will be alive to
4 receive that compensation. For those reasons we would
5 request significant followup to today's hearing.

6 They call this transparency. This will make
7 nothing more transparent. The defendants in the litigation
8 now are completely nontransparent, those who are asking for
9 this bill to be passed. They will not tell us what
10 products they supplied. They will not tell us how much
11 they've paid. We want transparency. We'd like to see it
12 from those who supplied the asbestos for the last 50,
13 75 years so the litigation system can be fair.

14 Our discovery system -- the question was asked --
15 is sufficient. Right now as we sit here, there's a
16 standing order in Philadelphia County, where the largest
17 percentage of cases are handled, that counsel for
18 plaintiffs have to provide trust settlement data before
19 trial, and we do. To suggest otherwise is simply untrue.

20 There can be an offset for those dollars. That
21 power is reserved to the defendants. They have the right
22 to make cross-claims. They have the right to seek offsets.
23 Sometimes they do; sometimes they don't. Passing
24 legislation to try to give them a right that they already
25 have that will only serve to diminish the recovery of the

1 plaintiff and delay the trial is not appropriate.

2 I am sure that if this process goes on and you
3 want to hear more, you will hear from the trusts
4 themselves. They are not complaining about double dipping,
5 number one.

6 Number two, this bill calls for an enormous
7 document production from them, and you will hear that that
8 will essentially drive these trusts to a second bankruptcy.
9 They cannot produce the documents they're being asked to
10 produce by the language of this bill.

11 If I can, I just want to step back for a couple
12 of minutes for the Members of the Committee who may not be
13 familiar with the intricacies of asbestos litigation. And
14 to those of you who are and who have handled these cases or
15 are familiar with victims and what they've been through, I
16 apologize. I'm only going to take 2 or 3 minutes, but it's
17 important to understand the background.

18 The disease is called mesothelioma, or
19 mesothelioma. Either one is fine. The term "meso" or
20 "meso" is fine. We can all say it. These are all real
21 people. These are not fender-benders. These are
22 catastrophic injuries. Every single client that I've
23 represented in the last 34 years with mesothelioma has died
24 within a year or two. Most of them, many of them, have
25 spouses, children, leaving behind dependents.

1 Their exposures were from these defendants'
2 products that are seeking legislation today as well as
3 those in the bankruptcy trusts, both equally. We have a
4 system; we don't have joint and several liability here
5 anymore, but we have a system that says that multiple
6 parties can be responsible for the same injury, and they
7 are. All this act will do is serve to give additional
8 dollars to some of those defendants in the litigation. The
9 current law perfectly well addresses the issues raised by
10 asbestos cases.

11 Let me go back one step further. Asbestos is a
12 mineral. It's mined from the ground. People breathe it
13 in, usually 30, 40, 50 years ago, and over time it embeds
14 in their lung tissue and people develop disease, often
15 cancers -- mesothelioma.

16 The products they were exposed to 50 years ago,
17 40 years ago, well, most people couldn't possibly remember
18 all the detail. Pennsylvania law requires that every one
19 of our clients come into court, and to the bankruptcy
20 trusts, and identify with particularity the product by name
21 -- trade name, brand name -- year of exposure, dates of
22 exposure, amount of exposure, and we have to do that in
23 every single case, and we have to do it for the bankruptcy
24 trusts as well as the court system.

25 The suggestion that the bankruptcy trust process

1 is simple is absurd. A huge percentage of our claims
2 submitted to the bankruptcy trusts are rejected by those
3 trusts.

4 What do the trusts actually pay? I brought
5 with me -- and this is just a sample. My colleague here,
6 Bob Paul, has a more comprehensive list. If I may,
7 Mr. Chairman.

8 I haven't skewed the numbers. This is a
9 representative sampling of some of the principal trusts,
10 and you'll find that if you look at all of the trusts, that
11 the spread is exactly the same as what you're looking here,
12 ranging from -- I don't have the 1 percenters here. There
13 are trusts that pay 1 percent up to 25 percent. The list
14 you'll get from Mr. Paul, which is the complete list, you
15 can see them all.

16 Why am I giving you this? It is critical for you
17 to understand what's behind this proposal. These are some
18 of the major trusts. The scheduled value is a
19 predetermined number in the bankruptcy court that bears no
20 relationship to the exposure of our individual client. As
21 bankruptcy courts do, they set up a payment amount, and
22 then, based on each trust, they have a percentage payment
23 that goes to the individual. So if you were exposed to
24 Armstrong's product, you don't get \$110,000, you get
25 \$22,000 and so on down this list.

1 This bill, if you read it carefully, and it's
2 important that you do, obviously, because what it says is
3 that the plaintiff, the victim, will not get an offset for
4 \$22,000 but rather the defendant in the tort system will
5 get a \$110,000 offset. Who is getting the double dip? Who
6 is getting the benefit? Not the plaintiff, not the system,
7 but the people who have proposed this legislation are
8 getting a benefit that doesn't exist in reality. It's
9 critical to understand how this is actually working as it
10 has been proposed.

11 I'm going to take a few minutes to address some
12 of the specifics in this legislation beyond what I just
13 mentioned. They indicate that this is an allocation which
14 is not based on fault. Well, yeah, that's what they're
15 telling us, because they want to get 100 percent of the
16 scheduled value from these bankruptcy trusts deducted from
17 what they have to pay. Of course it has to be fault, and I
18 don't mean fault in the sense of negligence; I mean the
19 ability to prove responsibility, and that has to be
20 allocated at a dollar amount. You can't give them a
21 \$110,000 credit when the victim has only received \$22,000.

22 They suggest right up front here in Section 2,
23 part (3), that they want to preserve trust assets, and that
24 is nonsense, because what's going to happen if this kind of
25 legislation goes through is that not just one or two or

1 three trusts will be pursued, but every single trust is
2 going to have to be pursued in every single case whether
3 they're good claims or not, because at the end of this act
4 it says that you can't go to trial unless all defendants in
5 the asbestos action consent. They get to consent in
6 Subsection (d), part (3), to whether or not we can go to
7 trial. They get to determine how many claims are submitted
8 to how many trusts, not the victims. Since when has the
9 system been built that way, a civil justice system?

10 Section 4(b) says in its own terms that liability
11 shall be apportioned without any judicial or jury finding
12 based upon these bankruptcy trust dollars. This will
13 effectively, when you take that allocation and the mandate
14 that the defendants will issue that every trust has to be
15 chased down and that the trusts have to produce documents
16 down to the last detail from every single plaintiff, this
17 will drain the trusts overnight. And I submit that if you
18 take the time and we have subsequent hearings, the trusts
19 will appear, their representatives will appear, and you
20 will hear that from them.

21 Section 4(c)(2) in this bill makes it very clear
22 that the plaintiff's award will be reduced by amounts of
23 money that those victims never received.

24 I would suggest that with notice just being given
25 to us, that it's important that all of the interested

1 parties have an opportunity to be heard on this issue. If
2 we're going to go further, you need to hear from victims,
3 you need to hear from the trusts, and you need to hear from
4 other stakeholders that represent these victims. This is
5 tort reform, and it is a denial of victims' rights and the
6 right to compensation, and I do not believe there is any
7 merit or need for this proposed legislation.

8 Thank you.

9 MR. PAUL: Mr. Chairman, my name is Robert Paul.
10 I represent plaintiffs throughout the State, and I want to
11 talk a little bit about things that Larry has not talked
12 about because I don't want to burden all of you with things
13 that you've already heard.

14 First, obviously, I want to thank you for giving
15 us the opportunity to comment on this bill, although we
16 just got it, as you know, and we really would like to have
17 victims and we'd like to have the trusts, because it's
18 important to understand that there is also a bill going on
19 at the Federal level, that Mr. Scarcella is very heavily
20 involved in, to require some of the same things, and that
21 the trusts came to that hearing and explained the enormous
22 costs that these kinds of bills and the requirement of
23 turning over the kind of documentation and the effort --
24 the trusts, for example, estimate that one request costs
25 them half an hour. You multiply that times the number of

1 cases across the State, you're talking about a huge amount
2 of depletion of the trusts' assets.

3 I want to talk, and not to insult Representative
4 Cutler since I'm sitting right next to you and it's your
5 bill, but first of all, your first purpose is already in
6 the law, because the case management orders in our county
7 -- and in Pittsburgh as well; you can ask Charlie about
8 Pittsburgh -- require the turning over of this information.
9 They've already got the information.

10 The second point, the second purpose for the bill
11 is that in fact it changes State law, as indeed they've
12 told you they want to do, because the purpose is to reduce
13 the amount which our victims will get from these companies
14 that remain in the case. I mentioned, of course, the
15 depletion of the assets of the trusts. No plaintiff was
16 ever exposed to all the trusts that exist.

17 My power plant plaintiffs who worked out of
18 Holtwood on the Susquehanna River and they live in
19 Lancaster, my boilermakers who live in Clearfield and
20 worked in the central part of the State, my 44-year-old
21 female mesothelioma victim whose husband bought brakes from
22 Pep Boys and they did the brakes on the side of the house,
23 were never exposed to a shipyard trust. They were never
24 exposed to a steel plant trust. None of those people had
25 anything to do with those kinds of trusts.

1 It's necessary to understand that, because you
2 hear these numbers, and, I mean, let's be frank with each
3 other, I've seen the ads on the TV just like all of you
4 have -- \$16 billion in trusts from some of my rivals. I
5 don't do that kind of work; I don't do those kinds of ads.
6 But you see that, and so our opponents come in and try to
7 talk about this.

8 But I think it's important, Larry passed out a
9 sheet on some of the bigger trusts. And, Mr. Chairman, if
10 I may, I've prepared a more complete list which I'd like to
11 pass out, if I may. This is a list as of last weekend that
12 we prepared where we went down all of the trusts that we've
13 ever heard about and that we've ever submitted claims to
14 and what those actual percentages are, and it makes a great
15 deal of difference when you're adding up numbers, and
16 Mr. Scarcella is very good at this, of course, but when you
17 add these numbers up and you say, well, there's all this
18 money that has been gotten in the trust, well, yeah, if
19 every single plaintiff is exposed to every single trust.

20 Now, I'm not going to bore the Committee by
21 explaining what each of these trusts are, but just to use
22 the examples that I used, the three that I used, those
23 three people are not going to collect from all of the
24 trusts and they're not going to collect from the biggest
25 trusts, because the biggest trusts are the West Coast

1 shipyard trusts and the steel plant workers' trusts, and
2 none of those three plaintiffs that I talked about are ever
3 going to see a nickel from any of those trusts.

4 Now, it's also untrue -- you've heard some untrue
5 statements from some of our opponents here. First of all,
6 as to Manville, which Mr. Hare's office used to represent,
7 in fact they can get today, as a matter of law, credit for
8 the Manville Trust today. It's already in the bankruptcy
9 plan.

10 In the Celotex plan, for example, if I don't
11 settle with Celotex before the case goes to trial, well,
12 Mr. Neeson gets the money; I don't get the money. That's
13 the incentives that appear in the trust documents right now
14 in order to encourage the exact thing that you've heard our
15 opponents talk about what they want, which is to force us
16 to file early. Well, there are lots of incentives, and
17 I've just given you a couple.

18 Let me talk a little bit about the bill quickly
19 and then I'm going to stop.

20 The appellate courts, Section 4 talks about
21 apportionment. The appellate courts made a decision a long
22 time ago that it's impossible to apportion among
23 successors. The case that's involved was the case where
24 the testimony was this defendant is big, this defendant was
25 middle, this defendant was low, and they said, well,

1 therefore, you can apportion, and the courts said, you
2 can't do that; you need mathematical certainty, which of
3 course you can't do.

4 Section 4(b) is even worse because it directs the
5 court to apportion, which takes away the jury trial right,
6 and a jury should decide this question. And I love judges,
7 but that's a job for a jury, not for a judge, and the way
8 the statute is written, Representative Cutler, is you wrote
9 it so that the judges make that. That's wrong.

10 I don't understand 4(c). What's a settlement
11 credit exactly? Who gets the settlement credit? I think
12 the settlement credit goes to them, but the way it's
13 written is really very unclear.

14 Section 4, of course -- Larry has talked about
15 this a little bit -- we're never going to get 100 cents on
16 the dollar from the bankrupts. You've got the chart. The
17 statute specifically says, the way you wrote it,
18 Representative Cutler, specifically -- and again, I'm not
19 trying to be mean to you but just so you understand what
20 our problems are -- we're never going to get the whole
21 amount, and to assume that we will, to assume what
22 Mr. Scarcella talked about, that we're ever going to see
23 more money than the percentages now, is not likely to
24 happen when you realize there are over a million claims now
25 that have been filed with the bankruptcy.

1 We suggest that if we want transparency, then the
2 settlements that these defendants who are not in bankruptcy
3 have made should be included, that they should disclose
4 that to us and that they should disclose to us -- I have
5 a situation, for example. I have a case from the
6 Harbison-Walker plant in Pittsburgh, and I've asked a
7 number of the distributors to give me the information on
8 what asbestos products of other people were supplied to the
9 plant, and their answer was, well, the company doesn't have
10 it, so we can't give it to you because we destroyed them,
11 but the lawyers have it. And our point is that these
12 defendants should be required to disclose, because they've
13 defended the depositions from the locations. They have
14 better knowledge than we do about exposures and about who
15 else is in each of these locations, and they should be made
16 to disclose them.

17 Section 5 is the worst, as Larry said, and I'm
18 just going to go over it quickly, because I think the
19 language of it is particularly disturbing. Section 5 says,
20 page 6, "A plaintiff's asbestos action shall be stayed in
21 its entirety until the plaintiff certifies that all
22 existing or potential claims identified...have been filed
23 and identified. Unless all defendants in an asbestos
24 action consent, an asbestos action may not begin trial
25 until...30 days after a statement is supplemented...." And

1 there's a procedure, which I won't go into at great length,
2 about if Defendant A thinks that we should have applied to
3 one of the other trusts and we say, well, no, we shouldn't,
4 well, then we have to have a whole ancillary proceeding
5 under this statute to decide whether that was right,
6 whether we did the right thing in refusing to file that
7 claim.

8 Now, there are certain defendants in this
9 litigation who do not settle, ever -- ever, ever, ever --
10 and whose position is fight, fight, fight all the time.
11 Those defendants will take the position, I assure you, to
12 stall every single case of every single plaintiff in this
13 Commonwealth. That's not fair.

14 Thank you.

15 MR. McLEIGH: Mr. Chairman, my name is Charlie
16 McLeigh. I'm with Goldberg, Persky & White in Pittsburgh.

17 I have had the privilege of representing victims
18 of mesothelioma as well as asbestos-caused lung cancers and
19 asbestosis for about 20 years now, and I just found out
20 about this hearing a few days ago. I have no prepared
21 remarks. I pretty much came up with what I'm planning to
22 tell you today sitting here and thinking about it. I'll
23 try to be as brief as possible.

24 I think it's really important for the Committee
25 to hear from the victims, because the victims really are at

1 the heart of this, the people whose lives have been
2 decimated and destroyed by these diseases that we're
3 talking about, particularly mesothelioma.

4 You know, I get calls all the time from clients
5 of mine asking about settlements, about compensation that
6 they're expecting and hoping for to pay medical bills, to
7 make up for lost wages from a loved one who passed away as
8 a result of these terrible diseases.

9 And I heard a comment earlier which disturbed me,
10 and that is that the victims somehow are getting more than
11 they're due. How much is a person due for losing a loved
12 one, for suffering and agonizing, a debilitating condition
13 and dying from it, knowing, knowing for the entire period
14 of time that they suffer with this disease, that they're
15 going to die from it? How much is that person due? All
16 we're trying to do as plaintiff lawyers is to get as much
17 compensation as we can for these injured people and their
18 families. And the pittance, really, that we get from these
19 trusts, it doesn't do them justice. This legislation is a
20 -- it's a solution in search of a problem. There's really
21 no problem.

22 The questions earlier about whether or not the
23 tort system is capable of handling, through discovery, the
24 questions that are raised by the defense interests,
25 certainly the interrogatories that were mentioned earlier

1 are directed to the plaintiffs, and we're asked to provide
2 information about trust claims that we've made, and we do
3 that. There's already a mechanism in place in the court
4 system to handle these issues.

5 So first of all, I would urge the Committee to
6 just put aside the consideration of this bill. I think
7 it's a terrible bill, from my clients' perspective. But if
8 you are inclined to hear further information on this point,
9 on this very important topic, I would strongly encourage
10 you to entertain some live witnesses who are actively
11 suffering from this disease and to hear from the victims
12 themselves.

13 Thank you very much.

14 MAJORITY CHAIRMAN MARSICO: Okay. Thank you.

15 Representative Bradford for the first question.

16 REPRESENTATIVE BRADFORD: Thank you, Chairman.

17 I guess my first thought is kind of similar to
18 during the debate during the Fair Share Act. It seems like
19 we're going to be reducing civil awards by an amount from a
20 defendant who will never -- there's no recovery to be made,
21 and it seems to me that this is just the logical, if
22 "logic" is the right word for it, but the logical extension
23 of a bad premise, which is what underlied the Fair Share
24 Act, which I would argue defendants will not recover so
25 that, or plaintiffs will not recover so that defendants

1 will not have to otherwise put out funds that they're on
2 the hook for.

3 Is this the same as the Fair Share Act? Is this
4 different? I mean, explain to me, you know, it was said
5 that this isn't tort reform. Explain to me the logic to
6 all of this.

7 MR. COHAN: Thank you.

8 This is not the Fair Share Act. This goes a
9 quantum leap beyond that act. In that act, if you had two
10 parties held responsible, basically the plaintiff can only
11 recover from the one held responsible, and there's an
12 offset for what the jury found. The plaintiff may not get
13 that money if it doesn't exist.

14 Here, what this legislation is suggesting is that
15 there will be an offset by a party who may or may not be
16 responsible, and as Bob read to all of you, there will be
17 no determination by a jury; there will be no finding. It
18 will be a court order made like that that says if the
19 defendant identifies a trust, the nonbankrupt defendants
20 will get a credit for the full scheduled value on this
21 chart, even if there's no finding, no facts to support it.

22 And going one step further, in the real world, if
23 there was an offset to the plaintiffs for moneys they
24 actually received that would be reasonably fair, that would
25 be the Fair Share Act. Obviously it wouldn't be joint and

1 several; it would be the Fair Share Act. It might be
2 appropriate, and of course it happens. They're asking for
3 much more. They're going way -- this is not an application
4 of the Fair Share Act. Let's be very clear on that.

5 REPRESENTATIVE BRADFORD: Yeah. I guess I would
6 just sum up.

7 One of the things that I found troublesome about
8 the Fair Share Act, in a budget hearing earlier this month
9 I asked the Insurance Commissioner what was the impact of
10 the Fair Share Act in terms of, you know, insurance
11 companies sua sponte just writing refund checks or reducing
12 premiums, and he actually at that hearing stated that most
13 property and casualty insurers had increased premiums.

14 And I think, again, this is another tort reform
15 that is really about leaving victims without recourse to
16 the benefit of tortfeasors, and it just seems patently
17 obvious that these haven't resulted in lower premiums or,
18 you know, more jobs or any of the things that are normally
19 thrown out there. It's just a grab, in this case, by those
20 who sold and perpetuated asbestos among our workers, and it
21 just seems to be misguided.

22 So I appreciate your side of it. Thank you, sir.

23 MAJORITY CHAIRMAN MARSICO: Representative Dean.

24 REPRESENTATIVE DEAN: Thank you, Mr. Chairman.

25 Thank you, gentlemen, for your testimony this

1 morning also.

2 A couple of things. This is sort of a
3 medical/scientific question I don't know the answer to.
4 But is asbestos exposure limited to the worker or can one
5 get secondhand exposure? Your one case---

6 MR. PAUL: Well, I've got at least eight that I
7 can think of off the top of my head of wives of asbestos
8 workers who have their own separate diseases.

9 I have a woman in her eighties whose husband ran
10 a TV business out of their house in the fifties, and she
11 developed mesothelioma from that exposure from vacuuming
12 out the back of the TV. I used my example of my
13 44-year-old woman whose husband did a little bit of brake
14 work in their house as the sole exposure.

15 So the answer is, there have been downwind cases
16 in Pennsylvania, not just for asbestos but for other
17 things, for a long time. The Phillip Carey plant in
18 Plymouth Meeting, which is relatively close to your
19 district, you know, was dumping asbestos soot in the 1930s,
20 and there were lawsuits about injuries from that. So it
21 has been around a long time.

22 The earliest such case that appears in literature
23 appeared in 1897. An English author wrote about three
24 cases, and there's a 1960 paper and there are other papers.
25 So there are quite a few of these nonoccupational cases,

1 which makes it even more difficult, because the trusts are
2 particularly suspicious and unfriendly, for want of a
3 better word, toward the family member cases. They only
4 want to pay the worker cases.

5 REPRESENTATIVE DEAN: Okay. Thank you.

6 Mr. Cohan, I thought if you could just step us
7 back to, a victim comes to your office. We've been told
8 that part of the goodness of this legislation is it will
9 get victims money faster and it will get them through the
10 system in a faster way.

11 I've been an attorney in my past life. I know
12 what it's like to take plaintiffs through some very
13 difficult claims, but you're talking about claims that are
14 far more difficult than I ever had to handle. What is a
15 day in the life of the filing of the beginning of claims in
16 such cases?

17 MR. COHAN: Thank you for that question.

18 This bill will have no positive impact on the
19 speed with which our clients recover and have certainly
20 diminished the actual gross recovery by any victim.

21 When a victim, or oftentimes their spouse, comes
22 into our office from day one, not only do we have to work
23 up the medical side of their case, we're required to hire
24 experts about their disease, the pathology, the exposure,
25 but we also, more importantly and much more difficultly,

1 have to generate data and evidence about product
2 identification.

3 This is a time-consuming, often gut-wrenching,
4 often impossible process, and my colleagues here and I
5 spend vast percentages of our lives trying to find
6 coworkers, witnesses, documents that can identify the
7 product with particularity that our client worked with
8 40 years ago. And we do that, and sometimes it takes
9 months, sometimes years tragically, sometimes never, and we
10 get that evidence. Having this bill will not accelerate
11 anything.

12 REPRESENTATIVE DEAN: And my last question goes
13 back to where I began, which is the portion of discovery
14 that already covers this, that you said really makes this
15 bill unnecessary. Could you explain to us that process of
16 discovery that really requires the revealing of this
17 information anyway?

18 MR. PAUL: Yeah. Let me answer that, if I may.

19 In Philadelphia County, and Charlie can talk to
20 Pittsburgh, but in Philadelphia County there is a standard
21 case management order which actually was -- thanks to
22 Mr. Neeson, who asked for it, as a matter of fact -- which
23 says that every claim form and every document attached to
24 that claim form must be turned over. So that's why we say,
25 well, why do you need something you've already got? That's

1 one of our objections here.

2 REPRESENTATIVE DEAN: Thank you.

3 Thank you, Mr. Chairman.

4 MAJORITY CHAIRMAN MARSICO: Okay. Representative
5 Cutler.

6 REPRESENTATIVE CUTLER: Thank you, Mr. Chairman.

7 Thank you for your time this morning. I just
8 have a couple of quick questions, if I may.

9 You actually already kind of referenced the claim
10 management system. Could you just very briefly go into the
11 mechanics of that, what in fact is disclosed, you know,
12 from a management standpoint? I just want to make sure I
13 understand that side of it a little bit better.

14 MR. PAUL: Well -- Charlie, go ahead.

15 MR. McLEIGH: Thank you.

16 Well, what's disclosed is all of the materials
17 that were filed with the trust. So take, for instance, the
18 Johns-Manville Trust. Our office would file a claim form,
19 which would consist of several pages of demographic
20 information about the individual filing the claim as well
21 as supporting medical and expert reports from our
22 pathologist, for instance, and that would be the substance
23 of our claim with the Johns-Manville Trust.

24 Typically these trusts have approved job sites or
25 locations where, if a person worked there, the claim will

1 be approved based on that. So sometimes there is some
2 documentation as far as the person's particular exposure to
3 that entity's product and sometimes there isn't.

4 REPRESENTATIVE CUTLER: Okay.

5 MR. PAUL: And I think it's important for all of
6 the Members of the Committee to understand that my friend,
7 Mr. Scarcella, makes it sound like the process of applying
8 for these claims is a lot easier than the truth is, and
9 what I mean by that is, let me take the example I used with
10 Representative Dean.

11 For example, if I've got a female, or a son --
12 I've got a couple of those -- whose parent worked in a
13 location, the trust wants somebody to take an affidavit or
14 a deposition, which, of course, they get those, and the
15 defense get those as well, that actually deals with that
16 particular location. And there are lots of locations
17 where, even though they're approved locations, the trusts
18 want an actual person who is prepared to be deposed and
19 takes an affidavit under the penalties of perjury to talk
20 about all of those documentations, the product
21 identification as well as the medical and the demographic.
22 The defendants get all that today.

23 REPRESENTATIVE CUTLER: Thank you.

24 Now, in regard to specifically what needs to be
25 turned over, though, it is all paperwork filed up until

1 that time? Is that correct?

2 MR. McLEIGH: Yes, that's correct.

3 REPRESENTATIVE CUTLER: Okay. And then since you
4 keep referencing Pittsburgh and Philadelphia, would you
5 agree then that that's not a consistent standard across the
6 State necessarily?

7 MR. COHAN: No. What we said was that in those
8 two jurisdictions, there are standing orders. But I have
9 cases in Franklin County and Delaware County and every
10 county pretty much across the State, and the judges, who
11 may only have one or two asbestos cases, enter the very
12 same order. All the defendants have to do is ask for the
13 production of those documents, and either we give it to
14 them or they'll get the court to enter an order and we give
15 it to them.

16 MR. PAUL: Montgomery, for example.

17 REPRESENTATIVE CUTLER: Right. But I guess my
18 concern is that we're relying on the individual actions of
19 a judge as opposed to setting a standard across the State.
20 That would be the first point.

21 MR. COHAN: With all due respect, in the handling
22 of every civil case in this State, we rely on judges to
23 enter orders and to enforce the rules of discovery. This
24 is no different.

25 MR. PAUL: And to protect the rights of the

1 parties, the defendants as well as---

2 REPRESENTATIVE CUTLER: Understood.

3 MR. PAUL: And that's one of the rights that they
4 have.

5 REPRESENTATIVE CUTLER: If through the further
6 course of investigation -- as Mr. Cohan pointed out, you
7 know, sometimes this can be a very lengthy process -- what
8 happens should you discover a different party that's
9 liable, a different bankruptcy trust, a different set of
10 scenarios, a different product exposure? What happens
11 there from a retrospective standpoint? Are you barred from
12 then filing that information since you didn't turn that
13 over during the course of litigation?

14 MR. COHAN: Like any other case, it depends. I
15 mean, if the case is still pending, then you can proceed.
16 You can go after them. You turn it over.

17 MR. PAUL: If you find out the day before you're
18 putting your case on that you have another trust, I believe
19 that under the rules, you're required to turn that over to
20 the defendants.

21 MR. COHAN: And we do.

22 REPRESENTATIVE CUTLER: Understood. I guess my
23 concern would be the scenario where you find out a day
24 after it has already been settled, because I don't, you
25 know, there's certainly a timing element. I hope we all

1 could agree on that.

2 MR. PAUL: Understand that that's unlikely,
3 because the most attention you're going to pay to a case
4 is, as it's going forward and you're getting ready to put
5 it on, that's when you're going to be the most focused on
6 the medicals, that's when you're going to be most focused
7 on whatever product identification testimony it is. So the
8 likelihood of that occurring is very rare.

9 REPRESENTATIVE CUTLER: Understanding that
10 there's a proration that occurs with the bankruptcy trusts,
11 and then that's certainly a mechanism of the bankruptcy
12 trusts, what happens in nonasbestos cases where you have a
13 defendant that goes bankruptcy? Are their claims also
14 prorated in a similar manner? You know, you get a very
15 large judgment that would essentially bankrupt a company
16 and then send them into bankruptcy; what happens to those
17 judgments for those plaintiffs in those cases?

18 MR. COHAN: I mean, I think that if you want to
19 get into an analysis of the bankruptcy laws, we should have
20 the opportunity to bring in a good bankruptcy lawyer to
21 address those issues. But I certainly will suggest to you,
22 having handled litigation for the last 34 years here in
23 Pennsylvania, that no defendant in a case gets an offset
24 for a defendant in bankruptcy at a scheduled amount as
25 opposed to a judicially jury-determined amount. That

1 doesn't happen.

2 REPRESENTATIVE CUTLER: Thank you. And actually,
3 that's a great segue into my last question, and that is
4 this: You had alluded to the Fair Share Act, that it would
5 actually be fair if an appropriate amount was accurately
6 represented in the offset, and my question to you as
7 individuals and as an organization would be, if the
8 percentage of proration and actual payout amount were
9 actually considered in the bill through the mechanics,
10 would you individually support it and would you as an
11 organization support it?

12 Thank you.

13 MR. PAUL: I'd have to think about that.

14 MR. COHAN: As an organization, I'm not here
15 speaking as an organization; I'm speaking on behalf of my
16 clients. To my knowledge, in the 3 days since we got the
17 bill, there is no organization that has evaluated it, at
18 least not for the victims.

19 Certainly, and I'm speaking for myself, if I got
20 \$22,000 from AWI and I had a case that went to judgment at
21 trial, it would be totally appropriate to have a \$22,000
22 offset, and I believe most of my colleagues would agree
23 with that.

24 MAJORITY CHAIRMAN MARSICO: Representative
25 White.

1 REPRESENTATIVE WHITE: Thank you, gentlemen, for
2 coming up on short notice and giving your thoughts and
3 insights into this bill. I think it has been really
4 useful.

5 My question kind of tails onto something that
6 Representative Dean asked to the last panel, which was, it
7 seems as though if the average time from onset of diagnosis
8 to death is less than 2 years, would it be more likely that
9 a victim will be dead before a tort suit is litigated and
10 can you speak to that?

11 MR. PAUL: Well, it depends on -- well, the quick
12 answer is, it depends on your county and what the judge in
13 the county is willing to do. If you have a judge who says,
14 well, exigent cases should go to trial, then you've got a
15 shot at getting them heard in the person's lifetime. If
16 you have a county which doesn't believe in that, then you
17 won't.

18 MR. COHAN: And let me follow up on that because
19 it's a good question, and I think that what's important to
20 recognize is how important it is to be able to get your day
21 in court while you're still alive, for three reasons: one,
22 the individual wants to be there to know whether he and his
23 family are getting compensation before he passes; two, that
24 individual can actually offer the testimony about the
25 products that he or she was exposed to; and three, the

1 whole context of a life of pain and suffering, what they've
2 gone through, a jury can't appreciate that if that person
3 has passed. This bill assures that those of our clients
4 who do make it to trial now will never be able to make it
5 to trial.

6 REPRESENTATIVE WHITE: So this bill would
7 essentially prevent, in practice, the victims of this
8 disease from having their day in court.

9 MR. PAUL: In their lifetime, yes, that's
10 probably true.

11 REPRESENTATIVE WHITE: And my second and final
12 question is, to go off of something that was brought up by
13 Representative Cutler back and forth, we're looking at this
14 just in the scope of asbestos cases, but I think the
15 question is, does this open the door for other sorts of
16 mass tort cases down the line? And I ask that, because in
17 my legislative district I'm looking around and there may be
18 some mass tort-type situations developing that need to be
19 looked at 20 years from now, and by passing this bill, are
20 we kind of setting a template that would kind of encourage
21 how to give a blueprint for bad actors going forward?

22 MR. COHAN: No question. This bill sets a
23 template for every kind of litigation imaginable, down to
24 not just personal injuries but commercial litigation that
25 would create some type of an offset from a bankrupt party

1 way beyond anything that either the bankruptcy laws or our
2 regular civil justice system has ever contemplated.

3 REPRESENTATIVE WHITE: So what it says is, come
4 into our State, make as much money as you can while you're
5 here, don't worry about the long-term ramifications,
6 because if you go bankrupt down the line, your liability is
7 basically predetermined to be very limited.

8 Thank you.

9 MAJORITY CHAIRMAN MARSICO: Representative
10 Neuman.

11 REPRESENTATIVE NEUMAN: Thank you, Mr. Chairman.

12 Thank you for your testimony today.

13 I think one thing that's important to point out
14 is nobody is denying that there's liability, but how hard,
15 because we're dealing with particles ingested into people's
16 lungs, how hard is it to determine which particles, who
17 designed which particles, who used which particles, and
18 which particles caused the mesothelioma, and how hard is
19 it, how much harder is it than other cases that you deal
20 with, maybe not asbestos related, to actually find a
21 percentage of culpability?

22 MR. McLEIGH: Perhaps I can take that one.

23 It's virtually impossible to determine which
24 fiber caused a person's mesothelioma. The disease is
25 caused by the cumulative exposure to asbestos over a

1 person's lifetime. So if a person is exposed to 5 or
2 10 different asbestos products, how do you say which one of
3 those contributed or caused the disease? It's really a
4 matter of getting expert testimony as to the sufficiency of
5 a particular exposure to be a contributing cause.

6 So it's a scientific question; it's a difficult
7 question, but you can't mechanically allocate the
8 percentage of fault based on any kind of formula that I'm
9 aware of.

10 REPRESENTATIVE NEUMAN: Thank you for your
11 answer.

12 I think it's really important to point out that
13 we are talking about individuals here that develop a
14 painful death, a cancer that causes a painful death, and
15 nobody here is saying that they're not liable. They're all
16 saying they're liable to some extent; prove to me how
17 liable I am under this bill. Prove to me, under the
18 Fair Share Act or whatever you want to call it, how liable
19 I am and I'll show you that somebody's more liable than I
20 am.

21 My point is that these victims, these thousands
22 of victims in our State, in our Commonwealth, our
23 constituents, they expect that if a jury awards them or
24 somebody awards them, say, \$10, they expect to get \$10.
25 Because don't forget, the victim is not at fault here. The

1 victim is the one that ingested this asbestos without
2 knowing, with no warning, and the companies and the
3 producers knowing that the asbestos was harmful. The
4 victims are at no fault here and deserve the recovery that
5 is just, and to say, to use numbers like \$500,000 or
6 \$100,000, that sounds like a lot of money, and it is a lot
7 of money, but it's a percentage of what is due to them
8 based on the justice system.

9 Thank you.

10 MAJORITY CHAIRMAN MARSICO: Once again, if we can
11 have quick questions and quick responses.

12 Representative Saccone.

13 REPRESENTATIVE SACCONI: Yes. Thank you,
14 Mr. Chairman.

15 This is really important and it's important that
16 I get this right, and I'm not an attorney and I want to
17 make sure I understand this. This is a great hearing, by
18 the way. Both sides present important points.

19 But to distill this all down, the way I've
20 understood this from the beginning was that it's important
21 during the litigation that all those responsible for the
22 onset of this disease are disclosed in the case, and so if
23 you're having a case against me, it's only fair that we
24 disclose all those others that may be liable and that you
25 may have filed claims with, that may be responsible for

1 your disease, and my understanding has been that that isn't
2 the case, that they're not disclosed, and so they go along
3 and file in separate trusts, and that would present a
4 scenario that, to me, is inherently unfair. Now, you're
5 telling me that that's not the case.

6 MR. COHAN: Correct.

7 REPRESENTATIVE SACCONI: And then we've had
8 testimony this morning that says, well, they have given us
9 examples where the plaintiffs denied that any trust claims
10 were filed when actually they did file them and after the
11 fact -- he gave specific examples of that. So now I'm
12 really torn; I don't know where the truth is. Can you
13 elaborate on this? Can you comment on, am I
14 misunderstanding this whole process or is there something
15 wrong? What am I missing here?

16 MR. COHAN: What you heard was one counsel's
17 anecdotal calculation of Manville claims. We don't know
18 what database he got that from. The fact is that claims
19 filed in cases going to trial are disclosed. The rules,
20 rules of discovery, cover it, so they are disclosed.

21 What we heard in response to a question from that
22 witness was, in those 18 cases that the discovery responses
23 had already been filed and, yes, there were claims made
24 later on, we did not hear whether or not those cases went
25 to trial, whether there was a verdict, or whether there was

1 some form of nondisclosure. So it's all a question of
2 timing.

3 If a case does go to judgment -- and we have to
4 be aware, well less than 5 percent of these cases go to
5 judgment, so we're looking at the universe of settled
6 cases. Settlement means compromise. If one of these
7 defendants chooses to pay a settlement, they're doing so
8 paying a very compromised sum of money.

9 If a case goes to verdict and there's a judgment,
10 the defendants have the right to ask the judge for an order
11 about continuing submissions to bankruptcy trusts. There's
12 nothing to stop them from doing that, and they can get an
13 offset for that against a judgment.

14 REPRESENTATIVE SACCONI: Thank you. Thank you
15 for that explanation.

16 The only other thing I don't understand about all
17 of this is the offset. Why is there an offset? If a jury
18 awards something, why is -- I don't understand the offset.
19 Is it the court came up with this chart to say we've got to
20 preserve the assets of the trust so we're only going to
21 give a certain amount on the dollar?

22 MR. PAUL: Well, the reason the trust amounts are
23 based upon the amount of money that the various companies
24 had when they filed for bankruptcy, and they varied in how
25 much money they had and how much insurance they had and the

1 percentage of payments, the chart that I gave you, is
2 simply a reflection of what the reality is of how much
3 money there was. Some companies had more money, some
4 companies had less. That's why the percentages vary from
5 the 1 percent, you know, the \$900 from Amatex to the higher
6 numbers. It's a question of how much money that particular
7 company had.

8 The offset that you're talking about has to do
9 with the comparison, to use a nonlegal word, the comparison
10 between the defendants that are sued and the bankrupts, and
11 those concepts have to be kept separate. But the reason
12 for the difference in the percentages is the difference in
13 the amount of money that the company had.

14 REPRESENTATIVE SACCONI: Thank you. Thank you
15 very much.

16 MAJORITY CHAIRMAN MARSICO: One last question.
17 Representative Brown.

18 REPRESENTATIVE BROWN: Thank you. I appreciate
19 it.

20 Just as we talk about the payments, I'd like the
21 public to really understand the payment schedule that you
22 presented to us, because they can't see that, and these
23 payments go from \$900 to \$100,000. As I look at this,
24 maybe 90 percent are above \$70,000 and about -- I'm sorry;
25 backwards. About 10 percent are above \$70,000 and about

1 90 percent are underneath that, and if I look at this, more
2 than half of the payments are under \$30,000. Is that
3 correct to say?

4 MR. PAUL: That's right. That's right.

5 REPRESENTATIVE BROWN: I did take math in
6 college. I'm not a lawyer, but I did do math.

7 And when I look at the awards around \$1,000,
8 \$7,000, \$900, \$2,000, and we start talking about -- because
9 I want to talk about the victim and what I'm hearing, and
10 the way that we've been describing the victim is that
11 they're double dipping. And to say to someone who is
12 looking at 2 years of life or less in front of them and
13 receiving a payment of \$2,000 and to say that they've
14 double dipped, that's a really, really hard thing for me to
15 swallow and to believe, that that's how you would actually
16 characterize that person, as double dipping, or taking
17 advantage of a situation where they probably would have
18 gotten at least a \$200,000 settlement to a million-dollar
19 settlement. I still cannot understand why we're sitting
20 here when most of the lawyer fees for even bringing this in
21 front of us today are more than the payments that we're
22 discussing.

23 And I just have to keep that on the record. I
24 have to keep the victims forward and make sure that they
25 are not being criminalized for standing up for their

1 rights. Thank you.

2 MAJORITY CHAIRMAN MARSICO: Thank you.

3 If I could just -- if you have a quick response,
4 go ahead.

5 MR. COHAN: I was just going to say,
6 Representative Brown, that couldn't be more well said, and
7 these victims are not double dipping. They're not even
8 getting a full dip; they're getting a fraction of a dip,
9 even with bankruptcy trust money as is. Thank you.

10 MAJORITY CHAIRMAN MARSICO: Well, thank you for
11 your time, your testimony. We appreciate it very much.

12 MR. COHAN: Thank you.

13 MR. PAUL: Thank you for listening to us.

14 MR. McLEIGH: Thank you.

15

16 **PANEL III**

17

18 MAJORITY CHAIRMAN MARSICO: Moving on to
19 Panel III.

20 Panel III: Sam Denisco, the Vice President of
21 Government Affairs, the Pennsylvania Chamber of Business
22 and Industry; and Kevin Shivers, the Executive State
23 Director of NFIB/Pennsylvania.

24 Welcome, and you may begin. We have about 10 to
25 15 minutes, which I'm sure you're aware.

1 MR. SHIVERS: Sure.

2 Mr. Chairman, both Chairmen of the Committee, and
3 Members of the Committee, I am Kevin Shivers, and I'm the
4 Executive State Director of the Pennsylvania NFIB.

5 If you would allow me, in the interests of time,
6 I'm just going to submit our comments for the record and
7 just talk briefly about why our members support this
8 legislation and our concern about this issue.

9 I represent small and independent businesses in
10 Pennsylvania. We have 15,000 members here, about 350,000
11 nationally. A typical NFIB member has five or fewer
12 workers.

13 What we're finding is that, you know, for many
14 small businesses, they are being brought into these actions
15 with very little responsibility, you know, relating to
16 injuries. We have, you know, small building supply
17 companies or maybe a plumbing supply company who is brought
18 into a lawsuit with relatively no significant
19 responsibility in that action, and so ultimately the claim
20 that is paid, either in settlement or if it does go to an
21 award, you know, is potentially disproportionately larger
22 than it would be had the bankruptcy trusts been a party to
23 that lawsuit as well.

24 And so ultimately what we're asking is that there
25 is some transparency in the system so that a solvent

1 defendant, and in our cases, those small or midsized
2 companies, you know, have access to that exposure
3 information, that juries have access to that information,
4 so that they can make real comparisons of the level of
5 fault and then make real comparisons about the level of
6 responsibility, the level of liability that all of those
7 individuals have in that claim.

8 Effectively what we're asking for is to apply the
9 concepts from the Fair Share Act to this type of asbestos
10 litigation so that you pay for damages that are
11 proportionate to your share of the responsibility.

12 So thank you.

13 MR. DENISCO: Mr. Chairman Marsico, Chairman
14 Caltagirone, thank you for giving the Pennsylvania Chamber
15 the opportunity to testify.

16 I'm Sam Denisco. I'm the Vice President of
17 Government Affairs. As you know, we are a large
18 broad-based business advocacy association headquartered in
19 Harrisburg, and our membership ranges from Fortune 100
20 companies to our sole proprietors and we cross multiple
21 industry sectors.

22 Like Mr. Shivers, we submitted a statement for
23 the record, and I'll be brief. I don't want to be
24 redundant, and everything that Kevin says is directly on
25 point to what we're to achieve here with this bill

1 sponsored by Mr. Cutler in that it brings fairness to the
2 table. It brings more equity to a system that badly needs
3 it in this specific case, just like the Fair Share Act did
4 when we came in line with 40-plus other States to modify a
5 common law doctrine of law.

6 And just to get at certain things that were
7 brought up in previous testimony, when we talk about a dip,
8 whether it be a double dip, a fraction of a dip, a triple
9 dip, it's all about fairness. It's all about bringing
10 everything before the jury so they can consider all
11 payments within both systems, whether it be a bankruptcy
12 system or the civil justice system, that they make a
13 balanced and accurate allocation of responsibility, taking
14 into consideration all payouts, again, regardless of the
15 system.

16 We can call it tort reform, we can call it civil
17 justice reform, we can call it anything, but again, it's
18 all about making Pennsylvania attractive for companies to
19 come here, stay here, grow here, and hire individuals. And
20 when companies come here, regardless of who you talk to,
21 whether it be a general counsel, a COO, or an executive
22 vice president or the CEO, they look at the tort system and
23 whether it's fair, whether we've modified a doctrine of
24 common law or whether we're looking at trust reform and
25 transparency. And that's, again, what we want to bring to

1 the table here.

2 Mr. Vari said something that resonated with me,
3 just two words: It's minimal interface, and that's what we
4 have here in this system, and what we want is to connect
5 it, because there is a disconnect between the two systems.
6 The companies that are currently in bankruptcy trusts,
7 whether there are 50, 60, 70 actual trusts out there, they
8 want to do the right thing and appropriately compensate
9 victims fairly and promptly, and this bill in no way seeks
10 to let wrongdoers off the hook.

11 Proper payouts for claims for the actual cause
12 will remain and it will remain for years, but appropriately
13 disclosing these trust claims at the civil level and
14 applying, as Kevin said, the concepts of the Fair Share Act
15 will, in the end, allow companies to properly direct their
16 resources back into Pennsylvania's economy.

17 So with that, I'm happy to take your questions,
18 and again, thank you for the time to present here before
19 you today.

20 MAJORITY CHAIRMAN MARSICO: Representative
21 Saccone.

22 REPRESENTATIVE SACCONI: Yes. Thanks,
23 Mr. Chairman.

24 I mean, again, it comes back to this question, as
25 Mr. Shivers said, that the plaintiffs have access to all

1 the information about people who might be responsible for
2 the onset of this disease. And I think the previous
3 testifiers were agreeing; they were shaking their heads,
4 but they say that they do have access and others are saying
5 that they don't have access, and so, to me, this is the
6 sticking point. I really need to understand, do they have
7 access or don't they, and is this process open enough?
8 Because as Mr. Shivers just said, small businesses can be
9 victims, too. No one wants to be assigned a liability for
10 which you're not responsible. Otherwise, you become a
11 victim, and no one wants a business to be assigned a
12 liability for which they didn't have any part in.

13 So if it's about making sure that businesses and
14 all the plaintiffs that might be named in one of these
15 suits, that everyone has access to all the information, I
16 should say, that both sides have access to all the
17 information, if it's about that, I'm 100 percent behind
18 that. I just need to know whether they're really being
19 denied access or they're not. That seems to be the basic
20 disagreement here. People are saying "Yes, they are" or
21 "No, they're not." So is there a way that we can come to a
22 conclusion on whether the information is there or it isn't?
23 How can we really get to the bottom of that?

24 Thanks.

25 MAJORITY CHAIRMAN MARSICO: Thank you.

1 Any other questions?

2 Seeing none, thank you for your testimony and
3 your being here. We appreciate it.

4 Thanks again to all the testifiers today. Just
5 so you know, the Committee will keep the record open after
6 this hearing in order to receive written comments from
7 other persons interested in this particular bill.

8 So once again, thanks to the Members and thanks
9 to the testifiers. This concludes the hearing.

10

11

(The hearing concluded at 12:52 p.m.)

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

5
6
7 Debra B. Miller

8 Committee Hearing Coordinator

9 Notary Public

10
11 Kristin O'Brassill-Kulfan

12 Transcriptionist