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A Critique Of RAND's Three Reports On Asbestos Trusts And Asbestos Litigation

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Commentary

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On May 21, 2015, the RAND Corporation (“**RAND**”) published a report entitled “Bankruptcy’s Effect on Product Identification in Asbestos Personal Injury Cases” (the “**2015 Report**”). This was RAND’s third report on asbestos trusts and asbestos litigation published since 2010 written by Lloyd Dixon and Geoffrey McGovern (the “**RAND Authors**”) as part of a multi-year program primarily funded by asbestos tort defendants and their insurers, who are engaged in a widespread effort to reduce their responsibilities to asbestos victims. The 2015 Report claims to conclude statistically that plaintiffs, when asked during tort system litigation discovery to name the manufacturers of the asbestos to which they were exposed, deliberately fail to identify bankrupt companies. This is a serious accusation and, as we discuss below, one that is not supported by — indeed, is refuted by — RAND’s own data.

The 2015 Report is based on an analysis of a non-random sample of forty-nine mesothelioma cases filed in two jurisdictions over a twelve-year period.¹ These forty-nine cases were supplied to RAND by asbestos defendants and their counsel from the tens of

thousands of cases filed against them across the country.² There is no indication that these cases are representative of a broader trend or illuminate anything other than the peculiar circumstances in this tiny fraction of cases.³ Moreover, from data analyzed in an earlier version of the 2015 Report RAND concluded that plaintiffs did not deny exposure to the products of bankrupt companies in depositions after the bankruptcies. This evidence and conclusion were dropped from the final 2015 Report.⁴

Our law firm, which represents a number of asbestos Trust Advisory Committees,⁵ was one of the recipients of drafts of this report from RAND and we provided many comments in an effort to assist the RAND Authors and correct their errors. We had received drafts of each of RAND’s two earlier reports as well and, similarly, had tried to persuade RAND of the errors in analysis and conclusions. This paper will attempt to set the record straight on RAND’s conclusions in the reports, referencing the drafts and the correspondence generated by the drafting process.⁶

A. The 2010 Report — Introducing the Trusts

RAND’s first report, “Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts” (the “**2010 Report**”) was prepared because the RAND Authors said there was a shortage of information to “help interested parties better understand how trusts operate and their activities to date.”⁷ The 2010 Report was primarily descriptive. What was surprising was how little

the RAND Authors understood about the trusts, their processes, and asbestos disease generally even after they had concluded their research and felt sufficiently informed to circulate their draft⁸ — a draft that contained multiple factual errors even in the non-controversial data collected about the trusts from public documents. A number of trusts that received the draft wrote to RAND to correct these errors.⁹ While this draft review process worked to correct many simple factual errors, it did not work with the broader conceptual flaws in RAND's subsequent reports.

B. The 2011 Report — The Trusts' Effect on the Tort System

Roughly one year later, RAND published a second report, "Asbestos Bankruptcy Trusts and Tort Compensation" (the "2011 Report"). The 2011 Report, like its predecessor, was funded primarily by asbestos defendants, insurers, and their trade association representatives.¹⁰ Its publication occurred concurrently with the asbestos defendants' efforts to seek favorable federal and state legislation while complaining about so-called "double-dipping" by plaintiffs.¹¹ The 2011 Report addressed "whether a lack of coordination between the trusts and the tort system allows plaintiffs to, in effect, recover once in the tort system and then again from the trusts [and] whether the payments by solvent defendants are being properly adjusted to account for the compensation available from the trusts."¹² In other words, the 2011 Report asked whether the existence of the trusts empowered plaintiffs to "recover" more than amounts to which they were entitled under applicable law — what defendants dubbed "double-dipping."

Any discussion of effects on asbestos litigation must begin with an understanding of the litigation itself. Unlike classic litigation where there is one plaintiff and one or a small handful of defendants who participate in an isolated event, tens of thousands of asbestos victims have been industrially exposed to dozens of asbestos-containing products over decades in their jobs. When they fall victim to asbestos disease, they properly call upon each of those dozens of tortfeasors to compensate them for their injuries. As with all tort litigation, more than 99% of the cases resolved are settled between the plaintiff and each of the parties that caused the injury. The plaintiff's compensation, then, is the sum of the settlements entered into, whether from tort system defendants or from

bankruptcy trusts or any combination of them. The use by the RAND Authors of the word "recover" to suggest that the plaintiffs, by "recovering" in the tort system and then "recovering" in the trust system, are "recovering" more than the total to which they were entitled was grossly misleading. Where no verdict and judgment is reached and paid, there is no definition of the amount to which a plaintiff is entitled to "recover". Rather, whether settlement funds come from tort defendants or from trusts the amount that the plaintiff "recovers" is simply the sum of all the settlements achieved. Only in the minute number of cases that actually go to verdict and judgment and the judgment is paid, is there a definition of the amount to which the plaintiff is entitled to "recover". In these rare cases, any settlement amounts received previously by the plaintiff offset the amount due under the judgment and the entity which pays the judgment steps into the shoes of the plaintiff and is empowered to recover any amounts to which the plaintiff would otherwise have been entitled, such as those based upon claims against trusts not yet resolved. This result has its expression in the single satisfaction rule.

The initial draft of the 2011 Report contained many errors. Confusion about applicable legal doctrines manifested itself in various ways, including, unexpectedly, the RAND Authors' lack of knowledge or understanding of the single satisfaction rule, which as discussed, and as well-known to practitioners, precludes a plaintiff from "recovering" in the tort system more than once.

As we tried to explain to RAND, to conform with the operation of the single satisfaction rule, each trust's procedures includes the availability of "indirect claims".¹³ "Indirect claims" are filed with a trust by any entity that as a defendant in an action in which damages were sought for injury caused by asbestos or asbestos-containing products went to judgment and paid all or part of the share of damages for which a trust bears responsibility.¹⁴ In other words, where a tort defendant has paid a trust's share of damages, it steps into the claimant's shoes and can recover from the trust what the trust would have paid the claimant. These indirect claims function much as rights of contribution do in the tort system. RAND misunderstood and mischaracterized the trusts' approach to indirect claims in various ways, including incorrectly reasoning that it is better for defendants if claimants

file trust claims before verdict because “the rights of a direct claimant [plaintiff] are superior to those of an indirect claimant.”¹⁵ Worse yet, the RAND Authors persisted in concluding that in certain cases “the plaintiff can receive full compensation in the tort system and then receive additional compensation from the trusts.”¹⁶

In the absence of any real world evidence of “double-dipping” to examine, RAND created and described a “thought experiment” to “understand the possible impact that the reorganizations and subsequent establishment of the trusts could have on total plaintiff compensation and payments by defendants that remain solvent.”¹⁷ The “thought experiment” consisted of imagining a series of scenarios. RAND first assumed that all potential defendants in an asbestos personal injury case were solvent and that the jury returned a verdict in favor of the plaintiff, allocating liability among the defendants in accordance with the relevant state laws, and then imagined the same plaintiff and defendants, but with some of the defendants reorganized and trusts up and running in their place.¹⁸

In the second phase of the “thought experiment”, the trusts’ predecessors were out of the tort system and the trusts settled the claims. As expected, these settlements had various effects depending on the various state laws governing the calculation of set-offs. However, RAND incorrectly attributed these effects to the trusts. The outcomes were not a consequence of the existence of the trusts because the “results” of the thought experiment could be reproduced by replacing the settlement payment from a trust with a settlement payment by a solvent defendant. The outcomes of their “thought experiment” were the natural result of the tort system, in which some defendants settle and others do not. We demonstrated this to the RAND Authors after reviewing the Second Draft 2011 Report.¹⁹ Nonetheless, in the final version of its 2011 Report, RAND persisted in falsely linking the changes in plaintiff compensation resulting from settlements to the existence of the trusts, not to the natural operation of the tort system where some co-defendants settle.²⁰

C. The 2015 Report — Plaintiffs’ Alleged Misbehavior

RAND’s latest report, “Bankruptcy’s Effect on Product Identification in Asbestos Personal Injury Cases”

(the “2015 Report”), professes to examine “the extent to which exposures to a firm’s asbestos-containing products cease to be identified in tort cases once the firm declares bankruptcy . . . [and] the nature of the exposure information provided in plaintiffs’ responses to interrogatories and in depositions of plaintiffs and plaintiffs’ family members and coworkers.”²¹ As with the 2011 Report, its release coincided with a tort defendants’ legislative effort – Congress’s consideration of the FACT Act,²² which under the guise of “transparency” would require the asbestos trusts to publish the personal information of thousands of asbestos victims.²³

The 2015 Report is based on two false premises about the nature of asbestos litigation, and even accepting the false premises, the data does not support the conclusions. First, RAND assumes that plaintiffs know the identity of all the manufacturers of the asbestos-containing products to which they were exposed decades earlier.²⁴ Second, RAND assumes for the purposes of this analysis that the identification of these manufacturers, while known to the plaintiffs, is unavailable to the defendants in spite of their concession to RAND that it is available.²⁵ RAND then builds on these two assumptions to reach a false conclusion not supported — indeed belied — by its own data: that asbestos victims improperly conceal this evidence in their written and oral testimony to inhibit tort system defendants from proving these exposures so the plaintiffs can recover more funds than they are entitled to.²⁶

1. The Data

In order to explore the “before and after” bankruptcy status, RAND reviewed mesothelioma cases filed between 1998 and 2010 from two exposure sites: cases with exposure at the Brooklyn Navy Yard filed in New York, and cases from the Puget Sound Naval Shipyard and Intermediate Maintenance Facility in Washington State filed in California (what it called “West Coast Navy” cases).²⁷ RAND compared plaintiffs’ identifications of various companies in those cases arising from the same worksite before and after the companies declared bankruptcy.²⁸

From the thousands of mesothelioma cases filed in New York and California between 1998 and 2010, RAND based its ultimate analysis and conclusions about the Brooklyn Navy Yard cases on nineteen

cases and its ultimate analysis and conclusions about the West Coast Navy cases on thirty cases.²⁹ As RAND concedes, neither tiny group of cases was randomly selected. Indeed, the few cases studied were supplied to RAND by defendants' law firms (most of whom were sponsors of the study)³⁰ who selected them from their own thousands of case files. RAND cannot claim that the tiny population it did analyze is in any way representative even of the Brooklyn Navy Yard or the West Coast Navy cases as a whole, let alone the general population of tens of thousands of mesothelioma plaintiffs, yet it lets the reader assume so simply by publishing the article.

Moreover, as RAND knows, the results of its "study" have no statistical significance for any larger or different group of case files.³¹ Ironically, although it examined slightly more West Coast Navy cases, — as RAND noted — the results observed there were not statistically significant even within the group itself.³²

2. The Assumptions

RAND's first false assumption was that plaintiffs knew the identity of all the manufacturers of the asbestos-containing products as they were exposed decades earlier, so that they were in a position to "name" them when asked in discovery. As we told RAND, this is not so. The exposure to asbestos that leads to mesothelioma typically happens thirty or more years before the disease manifests,³³ meaning that elderly and dying victims are being asked to recall the identity of manufacturers of products — not just the nature of the products — they worked with many years before, when at the time there was no reason to learn their names or remember them. Many products — such as installed asbestos insulation, a product of many of the larger bankrupt defendants — did not have the name of the manufacturer printed on them. Plaintiffs who tore out that insulation thirty years earlier to perform repairs on pipes and gaskets did not know the identity of the manufacturer at the time and so they had no basis on which to recall it at depositions thirty years later. Before the bankruptcy of those entities, if plaintiffs sought to prevail against them, their proof was marshaled by their lawyers, not from the memories of the elderly, dying victims, but from libraries of data containing purchase and shipping records, blueprints and build orders, invoices and sales documents, and depositions and affidavits accumulated by the parties

over decades of litigation from knowledgeable witnesses, such as purchasing clerks who ordered and received the products and workers who installed them.³⁴

The second false assumption is that defendants do not have practical access to this information. As RAND itself noted, this assumption was contradicted by plaintiffs' lawyers — and, indeed, its falsity was conceded by defendants.³⁵ Of course, defendants begin with full knowledge of where their own asbestos-containing products were, and so they start with more knowledge than any plaintiff. With respect to other products to which plaintiffs were exposed, the library of data employed by plaintiffs' lawyers is equally available to defendants.³⁶ Any current defendant is almost certainly a repeat player and will have litigated thousands of asbestos cases over decades, with the same co-defendants, often involving the same worksites. (Crane Co., one of the funders of the 2015 Report, reports in its 10-K that it had 2,743 new claims brought against it in 2014.³⁷) To the extent the remaining tort-system defendants want to identify any absent manufacturer, their unfettered access to this accumulated evidence puts them equally in control of the proof.

According to RAND, defendants' lawyers complained that it is expensive and difficult to prove exposure to the products of bankrupt parties³⁸ and explained their failure to offer proof of alternate exposure as part of a litigation strategy.³⁹ In other words, defendants would prefer the plaintiffs to pay the costs to organize and otherwise prepare what would be proof of an issue at trial as to which defendants have the burden.⁴⁰ Moreover, the situation is no different whether the non-party is a trust or a settling solvent defendant.

Even ignoring the fallacies of these underlying assumptions, the 2015 Report not only does not prove RAND's conclusions, but also, RAND's own research contradicts them.

3. The Draft 2015 Reports

The 2015 Report concludes that plaintiffs are failing to identify bankrupt entities as sources of their exposure.⁴¹ RAND's initial study was designed to ensure this result. To do the before bankruptcy and after bankruptcy counts, the initial draft of the study (the "**First Draft 2015 Report**")⁴² reviewed the naming of entities in complaints as well as in interrogatories and

depositions. This design forced the inevitable conclusion that plaintiffs attributed their asbestos exposure to companies before those companies went bankrupt and stopped afterwards. But RAND's conclusion that plaintiffs named these companies before and not after bankruptcy based on a count that included complaints was rigged, since, as everyone familiar with this area well knows and as we told the RAND Authors, the Bankruptcy Code *prohibits* a plaintiff from suing a debtor during its bankruptcy case and plan injunctions prohibit a plaintiff from suing either the reorganized debtor or its asbestos trust.⁴³ *Of course* the plaintiffs stopped naming them in their complaints, since the law forbade them from doing so. It was difficult to understand how the RAND Authors could have made this error after years of examining the process leading to the emergence of the bankruptcy trusts.

Moreover, RAND's First Draft 2015 Report also contained what apparently proved to be an inconvenient finding. RAND investigated for and calculated a so-called "denial rate" — the rate at which plaintiffs "deny" exposure to particular products when asked about them at their depositions. RAND found that there is "no indication that denial rates increase post-bankruptcy"⁴⁴ (the First Draft 2015 Report suggested that the denial rate actually *decreased* post-bankruptcy in the sample). In other words, in the cases RAND reviewed, plaintiffs were telling the truth at their depositions,⁴⁵ a finding inconsistent with the entire direction of the research. All reference to the "denial rate" and RAND's findings about it disappeared from the next draft and final version.

4. The Final 2015 Report

The published 2015 Report changed little from the final draft; it deleted complaint data, but otherwise kept the methodology, which yielded at best ambiguous results. RAND continued to rely on the assumption that plaintiffs control evidence of exposure, and did not consider other reasons to explain the results it found.⁴⁶ The results within the sample remain an observation that has no statistical significance. Although RAND stresses that "[t]he outcome of an asbestos lawsuit crucially depends on whether evidence of exposure to the products of bankrupt parties is introduced in the tort case,"⁴⁷ there is no data to support this assumption.⁴⁸ If it were true, then presumably defendants would prioritize such evidence

and seek it in depositions, which the 2015 Report acknowledges that they do not,⁴⁹ or simply gather it from libraries of data as plaintiffs' lawyers do and offer it at trial.

The 2015 Report assumes that plaintiffs have this evidence that they choose to conceal; it then further implies that they have deliberately chosen to conceal it. The study never addresses the likelihood that the individual plaintiffs do not have personal knowledge of (or are unable to recall) the names of products to which they were exposed.⁵⁰ However, the idea that plaintiffs deliberately lie is nowhere supported by the findings and was contradicted by the "denial rate" findings in the First Draft 2015 Report.

Even if the analysis tells us something about these 49 cases selected by the defendants' firms, it tells us nothing about the two job sites more generally, let alone the rest of the country. There is no evidence that any finding in the 2015 Report is applicable to any location or plaintiff other than the small group which made up the non-random sample.⁵¹ Not only are the samples not representative of anything outside themselves, the two samples do not agree.⁵² And the results for the West Coast Navy cases are still not statistically significant, even among themselves.⁵³

To the extent that RAND claims to have observed a pattern indicating that the identification of bankrupt defendants declines over time even within its small, non-random sample,⁵⁴ the 2015 Report fails to address a number of probable explanations for the pattern. It is unlikely that the gradual decline happens because plaintiffs' firms are slow to learn of a bankruptcy; perhaps it is instead that the bankruptcy is caused by the large numbers of claims filed in the years preceding it. Other variables, such as occupation and whether the plaintiff is alive or dead were not considered.

Moreover, there is no evidence that anything RAND has observed — even if it does exist — has any impact at all on tort system results, especially the settlements that make up 99% of case resolutions in which plaintiffs recover something. In that, the 2015 Report mirrors the 2011 Report, with its imagined (or, per RAND, "potential") effects on the tort system, rather than addressing reality.

CONCLUSIONS

The 2011 and 2015 Reports are completely misleading, based as they are on RAND's unreasonable assumptions.

The tort system in general and the compensation of injuries caused by asbestos in particular are complex and highly politicized. The 2011 and 2015 Reports purport to explain how the asbestos trusts and the bankruptcies of their predecessors alter the tort system. The problem with these reports is that the RAND Authors imply they are analyzing the actual function of the relationships between asbestos trusts, bankruptcies, and the tort system. But they are not. The 2011 Report is speculation cloaked as fact, and the 2015 Report builds on this speculation and a small non-random sample to draw misleading conclusions.

Although the RAND Authors qualify their work, noting that the 2011 Report shows "potential outcomes" and that the 2015 Report's results are "non-representative", the effectiveness of these qualifiers (which completely undercut the Reports) is minimized by the volume of material surrounding them. The Reports were published at critical times and on topics that are controversial and ripe for misuse. The RAND label obscures the poor design and limited applicability of the 2011 and 2015 Reports. RAND can, and should, do better than this.

Endnotes

1. 2015 Report at 13-16. *See also infra* text accompanying note 27.
2. 2015 Report at 16 n.5. They include Ampco-Pittsburgh Corporation; CertainTeed Corporation; Coalition for Litigation Justice; Crane Company; Dow Chemical Company; E. I. du Pont de Nemours and Company; EnPro Industries; General Electric Company; Georgia-Pacific Corporation; Owens-Illinois, Inc.; and the U.S. Chamber Institute for Legal Reform, as well as three anonymous asbestos defendants. *Id.* at iv.
3. 2015 Report, at 38.
4. First Draft 2015 Report at xi, 24-25, Table 3.5. *See also infra* text accompanying notes 43-44.
5. The members of a Trust Advisory Committee are plaintiffs' lawyers who "serve in a fiduciary capacity representing all holders of present P[ersonal] I[njury] Trust Claims." WRG Asbestos PI Trust Agreement § 5.2. We are counsel to the Trust Advisory Committees of the ACandS, AWI, ASARCO, B&W, Burns & Roe, Celotex, Congoleum, DII, Durabla, Federal-Mogul, G-I, Kaiser, Metex, MLC, NARCO, OC/FB, Quigley, USG, US Minerals and WRG Asbestos PI Trusts, and to the Selected Counsel for Beneficiaries which serves the same role vis-à-vis the Manville Trust.
6. The materials we sent the RAND Authors about the draft and final reports (as well as selected correspondence sent by the Trusts to the RAND authors) are available for download at <https://app.box.com/asbestoscommentary>. The draft reports themselves are not available because RAND denied our request to make the drafts of the reports public. We solicited comments on this article from RAND, which advised us that there were misinterpretations in our draft, but declined to specify what they were or to provide further comments without assurances that we would keep them confidential.
7. 2010 Report at xi.
8. For example, the RAND Authors misunderstood trust creation in the bankruptcy process and the operation of the trusts. *See, e.g.*, Lloyd Dixon, et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Leading Trusts*, xix, 12, 19, 20, and 44 (Draft March 2010) ("**2010 Draft Report**"). RAND also misunderstood the operation of the trusts in a number of ways. *See* Letter from Inselbuch to Dixon, April 28, 2010. For a sample of the mistakes found by trust counsel, *see infra* n.9. RAND did not always fix these errors. For example, rather than accepting that it was incorrect to state that the "FCR position (sometimes called the "legal representative" is statutorily required under Section 524(g) of the Bankruptcy Code" (2010 Draft Report at 19), RAND carried this error over into the 2010 Report, and, while acknowledging that "there is no statutory requirement" merely added a caveat that disagreement was

- a different “perspective” –2010 Report at 14 n.6. Similarly, RAND persisted in viewing payment on property-damage claims as the largest deduction from trusts, even though such payments are highly unusual. *See, e.g.* 2010 Report at 35. Out of the more than twenty trusts we deal with, only two have ever had responsibility for property damage claims, and those are not ongoing responsibilities.
9. *See, e.g.*, Letter from Austern, counsel to Manville trust, to Dixon, April 21, 2010, Letter from Irwin, counsel to ACandS Trust, to Dixon, May 7, 2010; Letter from Milch, counsel to B&W Trust) to Dixon, May 5, 2010; Letter from Campbell Davis, counsel to Federal-Mogul Trust, to Dixon, May 5, 2010; Letter from Milch, counsel to OC/FB Trust, to Dixon, May 5, 2010; and Letter from Milch, counsel to USG Trust, to Dixon, May 5, 2010.
 10. “This research was supported by the RAND Institute for Civil Justice (ICJ) and by contributions from the following asbestos defendants and insurers: Bondex International; Coalition for Litigation Justice; Crane Company; Dow Chemical Company; E. I. DuPont De Nemours and Company; Exxon Mobil Corporation; Garrison Litigation Management Group; General Electric Company; Georgia-Pacific; The Hartford; Herzfeld and Rubin; Owens-Illinois General; Saint-Gobain Corporation; Swanson, Martin and Bell; and the U.S. Chamber of Commerce.” 2011 RAND Report at iii. The 2010 Report was funded by “a coalition of asbestos defendants and insurers” and ICJ. 2010 Report at ii.
 11. The 2011 Report was published in August 2011, shortly before the U.S. House of Representatives Committee on the Judiciary Subcommittee on the Constitution held a hearing entitled “How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System.” (Sept. 9, 2011) (Report available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhr68187/html/CHRG-112hhr68187.htm>).
 12. 2011 Report at xi.
 13. Letter from Inselbuch to Dixon, April 15, 2011, at 1-2.
 14. *See, e.g.*, Owens-Corning/Fibreboard Trust Distribution Procedures (“**OC/FB TDP**”) §§ 2.6, 5.6, and Sixth Amended Plan of Reorganization for Owens Corning and its Affiliated Debtors and Debtors-in-Possession (as modified) § 1.220, at 33, *In re Owens Corning*, Case No. 00-03837 (Bankr. D. Del. July 10, 2006) [Dkt. No. 18339].
 15. Lloyd Dixon & Geoffrey McGovern, *Potential Effects of Asbestos Bankruptcy Trusts on Tort Compensation* (Draft January 2011) (“**First Draft 2011 Report**”), at xii-xiii, 18, 30; Letter from Inselbuch to Dixon, February 11, 2011, at 7-8 and sources cited therein. *See also* Lloyd Dixon & Geoffrey McGovern, *Potential Effects of Asbestos Bankruptcy Trusts on Tort Compensation* (Draft March 2011) (“**Second Draft 2011 Report**”) at xiv, 29-31; Letter from Inselbuch to Dixon, April 15, 2011, at 2 (citing Letter from Inselbuch to Dixon, February 11, 2011, at 8-9 and Letter from Trust Counsel to Dixon, February 11, 2011, at 2-3).
 16. 2011 Report, at xv; *see also id.* at 29.
 17. 2011 Report, at 33.
 18. *Id.* at xiii; *see also id.* at 33-34.
 19. Letter from Inselbuch to Dixon, April 15, 2011, App. A, at 1.
 20. Letter from Inselbuch to Dixon, September 8, 2011, at 1, 3. *See* 2011 Report at iii (The 2011 Report “examines how the establishment of the trusts potentially affects total plaintiff compensation, payments by defendants that remain solvent, and the compensation available to future, as compared to current, plaintiffs.”).
 21. 2015 Report, at 2.
 22. The House Judiciary Committee voted to approve H.R. 526, the Furthering Asbestos Claim Transparency Act of 2015 on May 14, 2015. *See* <http://judiciary.house.gov/index.cfm/2015/5/house-judiciary-committee-approves-fact-act-to-combat-asbestos-lawsuit-abuse>. After that action, it can be considered by the full House of Representatives. Companion legislation was (and is, as of the date of writing) currently pending before the Senate Judiciary Committee. *See* S. 357 – FACT Act, <https://www.congress.gov/bill/114th-congress/senate-bill/357>.

23. H.R. 526 (114th Congress) § 2(A).
24. *See, e.g.*, 2015 Report at xii, 2, 7, 13, 23 and *infra* § (C)(2).
25. *See* 2015 Report at 39.
26. *See, e.g.*, 2015 Report at 7 (“In contrast, if evidence of exposure to a product of a bankrupt party were not developed, both plaintiff compensation and payments by the remaining solvent defendants could increase. Plaintiff compensation would increase if, for example, all fault were assigned to the remaining solvent defendants at trial and the plaintiff then recovered additional amounts from the trusts. The remaining solvent defendants would pay more because fault was not appropriately allocated to the bankrupt parties.”). This perpetuates the RAND error from the 2011 Report which ignored the single satisfaction rule and the operation of the Indirect Claims procedures.
27. 2015 Report at 13-16.
28. 2015 Report at xi-xii, 18, 21.
29. 2015 Report, at 33 n.a and n.b to Table 3.4.
30. 2015 Report at 16 n.5 They include Ampco-Pittsburgh Corporation; CertainTeed Corporation; Coalition for Litigation Justice; Crane Company; Dow Chemical Company; E. I. du Pont de Nemours and Company; EnPro Industries; General Electric Company; Georgia-Pacific Corporation; Owens-Illinois, Inc.; and the U.S. Chamber Institute for Legal Reform, as well as three anonymous asbestos defendants. *Id.* at iv.
31. 2015 Report, at 38.
32. 2015 Report, at 29 (“The declines are still of considerable magnitude but no longer statistically significant for the WCN cases when the error correlations are considered.”).
33. Muriel L. Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 *British Journal of Industrial Medicine* 261, 265 (1965) (latency period can be as long as 55 years); C. Bianchi et al., *Latency Periods In Asbestos-Related Mesothelioma of the Pleura*, 6 *European Journal of Cancer Prevention* 162, 162 (1997) (the latency period in one case was 72 years).
34. A plaintiff can recover after a bankruptcy without developing the full panoply of evidence required in the tort system because, unlike tort-system defendants, the trusts concede what they know and publish lists of work sites where past litigation showed that their predecessor’s products were in use. Claims can be submitted to trusts relying only on proof that the claimant worked at a site on the applicable trust’s published work site list in an occupation that typically involved asbestos exposure. In these circumstances, the plaintiff’s lawyer does not need to marshal the evidence of these exposures in the tort suit and the plaintiff simply does not have it. *See also* Janice Robinson Pennington, *A Look at the Record in Garlock’s Celebrated Estimation Order*, Mealey’s Asbestos Bankruptcy Report (July 2014) at 4-5.
35. *See, e.g.*, 2015 Report at xv, 8, 39.
36. *See, e.g.*, Pennington, *A Look at the Record in Garlock’s Celebrated Estimation Order*, at 8 (“As a party for decades to the multitude of asbestos cases filed in Newport News, Virginia, where the USS John Marshall was constructed, Garlock had access to the deposition of Clarence Holland — the primary salesman of asbestos products to the Newport News Shipyard for twenty years — along with all of the purchase orders produced and depositions of plaintiffs, coworkers and corporate representatives taken in that litigation.”).
37. Crane Co. 2014 Form 10-K at 68.
38. 2015 Report at 39.
39. *Id.*
40. Ironically, defendants’ concession to RAND that they have access to all the information needed about plaintiffs’ exposure to other products, essentially through the same tools available to plaintiffs’ lawyers, demonstrates that the new “transparency” legislation for which they are currently campaigning and which would impose substantial burdens on trusts and victims must have some ulterior purpose.

41. 2015 Report at 37.
42. Lloyd Dixon & Geoffrey McGovern, *The Effect of Bankruptcy on Product Identification in Asbestos Personal Injury Cases* (DRAFT Nov. 2014) (“**First Draft 2015 Report**”).
43. Letter from Inselbuch to Dixon, Dec. 2, 2014, at 2 (citing First Draft 2015 Report at x, xii, xiv, 17-18).
44. First Draft 2015 Report at xi, 24.
45. First Draft 2015 Report at 24-25, Table 3.5.
46. For example, RAND did not investigate occupation as a variable on the grounds that the “data on primary occupation provided by the large claim servicer we worked with were often missing for the plaintiffs in [its] sample and because a plaintiffs’ occupation can change during the course of a career. . . .” 2015 Report, at 27 n.2. The RAND Authors also note that occupation would not contribute anything to their existing model. *Id.* This, of course, is the point — the study leading to the report was not designed to take a potentially critical variable into account, nor was the data (which would have been available from the original documents — complaints, interrogatories, depositions) solicited and analyzed.
47. 2015 Report at xi; *see also* 2015 Report at 37.
48. The 2015 Report also fails to contextualize this claim. Whatever its source, evidence of exposure to others’ products is not necessarily helpful to or pursued by defendants, who use a variety of different strategies to avoid or limit liability. These include, *inter alia*, statutes of limitation and repose, the “bare metal” defense, and the “government contractor” defense. *See, e.g., Judge Finds Allegations Overcome Bare-Metal, Government Contractor Defenses*, Mealey’s Litigation Report Asbestos (Nov. 19, 2014); *Valve, Boiler Makers Secure Summary Judgment Under Bare Metal, Statute Of Repose*, Mealey’s Litigation Report Asbestos (Aug. 12, 2015).
49. *See, e.g.,* 2015 Report at 39 (outlining defendants’ excuses for not seeking such evidence). Defendants are already paying to take the plaintiff’s deposition — if evidence of exposure to others’ products was crucial to the outcome, surely they would ask about it during the deposition. Furthermore, this theory does not make sense when applied to the settlement context, which is how most lawsuits are resolved. Since defendants, as repeat players, already have knowledge of the presence of other products at the sites where plaintiffs are exposed, the amounts for which they settle will be informed by this knowledge, irrespective of the evidence introduced in the tort case.
50. *See, e.g.,* 2015 Report at xv (discussing disclosures but omitting this obvious issue).
51. 2015 Report, at 38.
52. *See* 2015 Report at 29.
53. *Id.*
54. 2015 Report, at 37. ■

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