IN THE COURT OF APPEALS OF MARYLAND

No. 533, September Term, 2013

UNION CARBIDE CORPORATION,

***Petitioner*,**

v.

CHRISTINE PITTMAN, et al.,

***Respondents*.**

On Appeal from the Court of Special Appeals of Maryland
No. 0596, September Term, 2011

MEMORANDUM OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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QUESTION PRESENTED

Does a trial court have an affirmative duty to redress substantial and protracted discovery violations to prevent parties and their counsel from profiting from their wrongful conduct?

INTEREST OF *AMICI CURIAE*

Amici are organizations which include companies that have been named as asbestos defendants in Maryland.[1] In order for *amici*'s members to receive fair trials in asbestos cases, they must be able to obtain full, accurate, and timely information about alternative exposures that may be partially or entirely responsible for a plaintiff's injury. *Amici* submit this memorandum to assist the Court in its understanding of the importance of asbestos bankruptcy trust claim transparency with respect to allowing defendants to receive fairer trials before fully informed juries.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

STATEMENT OF FACTS

Amici adopt Petitioner's Statement of Facts as relevant to *amici*'s argument.

SUMMARY OF THE ARGUMENT

This case is a poster child for the type of gamesmanship that can, and too often does, take place in modern asbestos litigation. Nearly 20 years ago, Congress established in the Bankruptcy Code a process to allow any company with significant asbestos liability to contribute funds to a trust that assumes the company's asbestos liability while barring civil asbestos litigation against the company. Although the trust system was established to help ensure recovery for past, present, and future claimants, the trusts' assets are being depleted by asbestos claimants who, in some documented instances, file questionable claims with multiple trusts while pursuing civil litigation claims against solvent defendants who are kept blind to the claims made against the trusts.

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[1] None of the parties or their counsel, or anyone other than the *amici*, their members, or their counsel, authored this memorandum in whole or in part or made a monetary contribution intended to fund its preparation or submission.

The failure – whether willful or negligent – of asbestos plaintiffs' counsel to timely and accurately respond to targeted, material interrogatories and/or longstanding discovery orders regarding the submission of asbestos bankruptcy trust claims information undermines the fairness of asbestos civil litigation. Defendants deprived of information about the totality of a plaintiff's purported asbestos exposures are deprived of the opportunity to present every available defense, such as showing alternative causation of a plaintiff's asbestos-related injury. Trust claims information can also be vital to defendants in fairly valuing a case in light of potential set-offs or credits for moneys that have been, or are expected to be, recovered from asbestos bankruptcy trusts. Such amounts are not insignificant; recent research indicates that the typical mesothelioma asbestos bankruptcy trust claims can yield as much as $1.3 million – and the figure is creeping up toward the $2 million mark. *See* Charles Bates et al., *The Naming Game*, 24:1 Mealey's Litig. Rep.: Asbestos 4 (Sept. 2, 2009). Obtaining information about claims made to asbestos trusts on the eve of trial (if at all) can effectively diminish its value to defendants and dramatically and unfairly change the dynamics of a litigation.

This is precisely what occurred in the instant case. Plaintiffs and their counsel initially failed to provide bankruptcy trust claims submissions sought in interrogatories and ignored a continuing duty to supplement information. This strategy paid off in that Petitioner, Union Carbide, did not learn of Plaintiffs' claims filed against *twenty-two* bankruptcy trusts until mere days before trial was set to commence. *See Union Carbide Corp. v. Pittman*, No. 0596, at 10 (Md. Ct. Spec. App. Sept. 11, 2013). This put Union Carbide in the difficult position of either seeking a trial delay (and therefore assuming all the costs of such a delay), or proceeding with the scheduled trial but potentially sacrificing all or part of an alternative causation defense. The fact Union Carbide did not know the full scope of the claims information it had been denied also meant it could not make a fully informed decision in this regard.

Plaintiffs' delay, in effect, created a trial by ambush. It diminished the ability of Union Carbide to examine potential inconsistencies in claims filed with the bankruptcy trusts and statements made throughout this litigation. Such a result is incompatible with

this Court's decisions requiring plaintiffs to provide defendants with information regarding trust claim submissions, presumably in a timely manner. *See Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 16 A.3d 159 (2011); *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998). As *amici* will show, this case also shares similarities with documented examples of gamesmanship in asbestos litigation. The survey of cases described by *amici* demonstrates the need for state appellate courts to support lower court judges presiding over asbestos cases who are struggling to deter and appropriately sanction discovery gamesmanship.

ARGUMENT

I. FAILURE TO TIMELY DISCLOSE ASBESTOS BANKRUPTCY TRUST CLAIMS INFORMATION IS A SERIOUS PROBLEM THE COURT SHOULD ADDRESS

The situation that occurred in this case, whereby Plaintiffs failed to timely divulge twenty-two bankruptcy trust submissions to Union Carbide, is not unique or an anomaly in modern asbestos litigation. Rather, it appears to be part of a disturbing national trend in which asbestos plaintiffs and their attorneys, either through errors of omission or otherwise, have manipulated the litigation system to gain an unfair advantage.

To date, over 100 companies with asbestos-related liabilities have filed bankruptcy, allowing them to channel their asbestos liabilities into trusts and insulate themselves from tort claims in perpetuity. *See* 11 U.S.C. § 524(g).[2] According to a 2011 report by the U.S. Government Accountability Office, "the number of asbestos personal injury trusts increased from 16 trusts with combined total of $4.2 billion in assets in 2000 to 60 with a combined total of over $36.8 billion in assets in 2011." U.S. Government Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and*

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[2] *See also* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Corp. 2010); Mark D. Plevin et al., *Where Are they Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11:7 Mealey's Asbestos Bankr. Rep. 1 (Feb. 2012).

Administration of Asbestos Trusts 3 (Sept. 2011).[3] Although Congress established in the Bankruptcy Code a system to provide present and future victims with compensation while ameliorating the impact on businesses, the opacity of the system has resulted in widespread abuse. *See, e.g.,* William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 Norton J. Bankr. L. & Prac. 257 (2008). The following examples – from Maryland, Delaware, Ohio, Oklahoma, New Jersey, Texas, and Virginia – illustrate the unfair advantages that discovery gamesmanship gives plaintiffs in asbestos litigation, and the frustration of state court judges with such tactics. Increased appellate court supervision in Maryland and elsewhere is necessary in order to help.

A. Maryland: *Warfield v. AC&S, Inc* and *Beverage v. AC&S, Inc.*

Two Maryland examples are illustrative. In *Warfield v. AC&S, Inc.*, No. 24X06000460, Consolidated Case No. 24X09000163 (Md. Cir. Ct. Baltimore City Jan. 11, 2011), defendants aggressively pursued discovery of asbestos bankruptcy trust claims and were forced to file motions to compel, despite the fact that prior rulings made it clear that trust claims material must be produced. *See* Problems with Asbestos Compensation System, Hearing Before The Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 111th Cong. (Sept. 9, 2011) (statement of James L. Stengel), *at* 2011 WLNR 24791123. "At a hearing on the matter, plaintiff's counsel explained that he had been slow in producing the trust materials because he disagreed with the court's prior ruling, some two years previously, and went on to complain that the court had 'opened Pandora's Box' by requiring their disclosure." *Id.* Production was ultimately not made until the eve of trial. *See id.*

In this case, the "reasons for counsel's reluctance to produce the trust materials were made clear. There were substantial and inexplicable discrepancies between the

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[3] *See also* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011); Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, 11:11 Mealey's Asbestos Bankr. Rep. 1 (June 2012).

positions taken in [c]ourt and the trust claims." *Id.* "Despite specific and explicit discovery requests, plaintiff had failed to disclose nine trust claims that had been made. As revealed in the claim forms, the period of exposure alleged in the litigation versus that alleged in the trust submissions was materially different." *Id.*

In the tort system, Mr. Warfield claimed under oath that he was exposed to asbestos exclusively between 1965 and the mid-1970's, focusing on the products of the solvent defendants and avoiding application of a Maryland statutory damage cap for later exposures. In the trust claim submissions, however, Mr. Warfield claimed exposure from 1947 to 1991; exposures "different in scope, but also clearly triggering the damage cap." *Id.* "Of note, eight of the trust forms had been submitted before Warfield testified" in court. *Id.*

Another, still pending Maryland case, *Beverage v. AC&S, Inc.*, No. 24X08000439, Consolidated Case No. 24X11000785 (Md. Cir. Ct. Baltimore City), provides an example of a related tactic: waiting until after trial to file bankruptcy claims in order to avoid informing the court or counsel during the case. In the litigation, the plaintiff, Mr. Gonzalez, alleged his mesothelioma was caused by exposure to asbestos from only two sources: joint compound and CertainTeed pipe. *See* Defendant CertainTeed Corporation's Motion for Sanctions and Request for Hearing, *Beverage v. AC&S, Inc.*, No. 24X08000439, Consolidated Case No. 24X11000785 (Md. Cir. Ct. Baltimore City Aug. 26, 2013), at 6-7. Mr. Gonzalez testified to this exposure history on several occasions and his counsel also affirmed that no other exposures were being alleged. *See id.* Yet, following the 2009 defense verdict, Mr. Gonzalez, represented by the same counsel (and, indeed, Plaintiffs' counsel in this case), submitted twenty-three trust claims alleging numerous new exposures to asbestos-containing products and a different work history that included jobsites never previously divulged in the tort case. *See id.* at 10-11. Mr. Gonzalez also executed a document to at least one trust certifying exposures that directly contradicted sworn deposition testimony. *See id.* at 12. These inconsistencies in the twenty-three trust claims – ten of which were submitted a mere *seven days* after the

conclusion of trial – prompted defendant CertainTeed to seek sanctions against the Law Offices of Peter G. Angelos. *See id.* at 10.

Plaintiffs' counsel defended the trust submissions on the grounds that twenty-two of the twenty-three claims "were never paid and never will be paid" and "submitted in the unlikely event that additional evidence would come to light." Plaintiffs' Opposition to Motion of Defendant CertainTeed Corporation for Sanctions, *Beverage v. AC&S, Inc.*, No. 24X08000439, Consolidated Case No. 24X11000785 (Md. Cir. Ct. Baltimore City Sept. 23, 2013), at 2. Plaintiffs' counsel asserted that ultimately no additional evidence was ever adduced. *See id.* This necessarily means that plaintiffs' counsel submitted these claims against the trusts absent *any* evidence. The claims were also not withdrawn until September 2013 – nearly four years later – when plaintiffs' counsel was facing a motion for sanctions. *See id.* at 3. Further, plaintiffs' counsel acknowledged that it did not provide the bankruptcy claims forms to CertainTeed until December 2012, over three years after the defense verdict in the case, even though an appeal and eventual retrial were pending. *See id.* at 9.

B. Delaware: *Montgomery v. Foster-Wheeler*

The Delaware case *Montgomery v. Foster Wheeler*, C.A. No.: 09C-11-217-ASB (Del. Super. Ct.), is similarly emblematic of the gamesmanship plaguing Maryland asbestos litigation. In this case, although the court had a standing order requiring plaintiffs to disclose all bankruptcy trust claims materials, and the defendants specifically requested this information in interrogatories, nowhere did the plaintiffs identify over twenty entities to whom bankruptcy claims were submitted by the plaintiffs. *See* Letter to Judge Ableman Requesting Sanctions, *Montgomery v. Foster Wheeler*, C.A. No.: 09C-11-217-ASB (Del. Super. Ct. Nov. 6, 2011).[4]

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[4] *See also* Asbestos Claims Transparency, Hearing Before The Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 113th Cong. (Mar. 13, 2013) (statement of Hon. Peggy L. Ableman), *at* 2013 WLNR 7440143 (discussing *Montgomery v. Foster Wheeler* case).

Instead, plaintiffs claimed the decedent was exposed to asbestos solely through laundering her husband's work clothes throughout his career as an electrician, and instead reported to the court and the sole remaining defendant, Foster Wheeler, that no bankruptcy submissions had been made and no monies had been received. *See id.* On the eve of trial, however, plaintiff's counsel emailed defense counsel to report that his client had already received two bankruptcy trust settlements – a disclosure that was "directly inconsistent with the unequivocal representations [by plaintiff's counsel] to the Court" and to defense counsel at the pretrial conference. *Id.*

By late afternoon of the following day, the day before trial, Foster Wheeler learned that a total of *twenty* bankruptcy trust claims had been submitted. *See id.* The prejudice to the defense was significant and obvious: despite prior claims by the plaintiff that his only exposure was to the defendant's product, the eleventh hour admissions (for the first time) revealed "the existence of admitted exposure to asbestos including, apparently, exposure to products that [had not] been the focus of discovery." *Id.* Defendants were provided no opportunity to explore key defenses, such as alternative causation theories.

C. Ohio: *Kananian v. Lorillard Tobacco Co.*

Other cases have demonstrated discrepancies between claims submitted with trusts and those made in civil lawsuits involving the same plaintiff. For example, in the first widely-reported example of trust submission abuse, *Kananian v. Lorillard Tobacco Co.*, No. CV-442750 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 17, 2007), Cleveland Judge Harry Hanna barred a prominent California asbestos plaintiffs' firm from his court after he found that the firm and one of its partners failed to abide by the rules of the court proscribing dishonesty, fraud, deceit, and misrepresentation. An Ohio Court of Appeals and the Ohio Supreme Court let Judge Hanna's ruling stand.[5] Judge Hanna said later, "In my 45 years of practicing law, I never expected to see lawyers lie like this." James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit,*

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[5] *See Kananian v. Lorillard Tobacco Co.*, No. 89448 (Ohio Ct. App. Feb. 21, 2007) (dismissing appeal as moot, sua sponte), *review denied*, 878 N.E.2d 34 (Ohio 2007).

Cleveland Plain Dealer, Jan. 25, 2007, at B1. Judge Hanna added, "It was lies upon lies upon lies." *Id.*

Judge Hanna's ruling received national attention for exposing "one of the darker corners of tort abuse" in asbestos litigation: inconsistencies between allegations made in open court and those submitted to trusts set up by bankrupt companies to pay asbestos-related claims. Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14. As the *Cleveland Plain Dealer* reported, Judge Hanna's decision ordering the plaintiff to produce proof of claim forms "effectively opened a Pandora's box of deceit." McCarty, *supra*, at B1. Emails and other documents from the plaintiff's attorneys showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was "completely fabricated." Daniel Fisher, *Double-Dippers*, Forbes, Sept. 4, 2006, at 136, 137. The *Wall Street Journal* editorialized that Judge Hanna's opinion should be "required reading for other judges" to assist in providing "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts." *Cuyahoga Comeuppance*, *supra*, at A14.

D. Oklahoma: *Bacon v. Ametek, Inc.*

In an Oklahoma case, *Bacon v. Ametek, Inc.*, No. CJ-08-328 (Okla. Dist. Ct. Dec. 2011), defendant CertainTeed Corp. (CertainTeed) learned at pretrial hearing that the plaintiff failed to produce nineteen asbestos bankruptcy trust claims and eleven signed affidavits from product identification witnesses that were submitted with the claims. The trust claim submissions and co-worker affidavits disclosed exposures to many asbestos products that were never identified during discovery. *See* Memorandum in Support of Defendant CertainTeed Corporation's Motion to Strike the Testimony of Jasper Hubbard and for Sanctions Due to Plaintiff's Discovery Abuse, *Bacon v. Ametek, Inc.*, No. CJ-08-328 (Okla. Dist. Ct. Dec. 21, 2011), at 1. The plaintiff had also been paid approximately $185,000 from five trusts, but "deferred" fourteen other claims worth at least $313,000. *See id.*

E. New Jersey: *Barnes and Crisafi v. Georgia Pacific*

In a New Jersey case, *Barnes and Crisafi v. Georgia Pacific*, Nos. MID-L-5018-08 (AS) & MID-L-316-09 (AS) (N.J. Super. Ct. Middlesex County June 12, 2012) (Pre-Trial Conf. Trans.), plaintiff's counsel reported the existence of bankruptcy trust claim submissions during the pre-trial conference – but only *after* defense counsel independently reached out to a representative of the Johns-Manville Trust who confirmed that a claim had been made on behalf of one of the plaintiffs. *See id.* at 126. Counsel for plaintiff subsequently informed the defendant about the existence of multiple other trust filings, and attempted to explain the lack of earlier disclosure on the grounds that the filings were "deferred claims" intended to preserve the trust statute of limitations and seek compensation at a later time, and were filed by another law firm. *See id.* at 128-29.

In response, the court stated that no such distinction in the type of trust claims filed was expressed in the court's discovery order and that the plaintiffs clearly had an obligation to identify and produce this information. *See id.* The court admonished plaintiff's counsel for violating its order, saying, "You cannot be blind, deaf and dumb," and reminded counsel, "You're an officer of The Court." *Id.* at 129-30. The court went on to repeatedly state that this failure to produce the trust submissions constituted "a major problem," questioning: "How can I try this case now?" *Id.* at 133-134.

F. Texas: *Stoeckler v. American Oil Co.* and *Brassfield v. Alcoa, Inc.*

In a Texas case, *Stoeckler v. American Oil Co.*, No. 23,451 (Tex. Angelina County Dist. Ct. Jan. 28, 2004) (Trial Trans.), plaintiff's counsel waited until the third day of trial to produce the existence of additional bankruptcy trust claims submissions. Within a few hours of the disclosure, after the defendants had an opportunity to review the trust submissions while the trial continued, defense counsel moved for a mistrial. *See id.* at 63. The trust claims submissions revealed exposures to asbestos products over a longer period of time, starting with the year of the plaintiff's birth, and to a broader range of asbestos products. *See id.* at 63-65. Counsel for defendant Dana Corp. explained to the court that "[o]ur trial strategy, our pretrial strategy, which was fixed weeks ago, is now thrown up in the air," and "[n]ot only are our experts not prepared and we have to do

more discovery, I think we now need to go back and depose [the plaintiff]." *Id.* at 19, 66. Defense counsel continued:

> It is too late. There is nothing I can do. I cannot – I don't get to open again tomorrow and say, ladies and gentlemen of the jury, I just found out some stuff yesterday that I didn't know before, and now let me tell you what the evidence is going to be. My credibility, my client's credibility is at risk with this jury, and there is no cure for that.

Id. In addition, the court took issue with the discrepancies between the trust submissions and statements made in the plaintiff's multiple depositions that no additional asbestos exposures existed. *See id.* at 74. Plaintiff's counsel attempted to defend these discrepancies on the grounds that the plaintiff had never seen the trust submission documents because they were submitted by counsel; an explanation to which the court replied: "you know where this goes, to the Code of Professional Ethics." *Id.*

Another Texas case, *Brassfield v. Alcoa, Inc.*, No. 2005-61841 (Tex. Harris County Dist. Ct. Nov. 22, 2006) (Trans. of Motions Hearing), demonstrates another type of delay tactic in what appears to be a purposeful disconnect or willful blindness on the part some plaintiff's attorneys in tracking claims submitted to the trusts and within the tort system. During a cross-examination of plaintiff's counsel Edward Moody at a motion's hearing, Mr. Moody stated that his law practice was set up in a manner in which neither he nor any single individual could verify for the purposes of discovery what claims were pending with which asbestos trusts. Rather, Mr. Moody testified that his computer system could only verify trust claims that had been paid. Mr. Moody also stated that he was not certified to submit claims to any trust, and that all trust submissions were handled in a separate law office by a team of paralegals, each responsible for submissions to a specific trust, such that no individual could readily provide a complete record of every trust submission. *See id.* at 9-10.

Mr. Moody further testified that there was no communication regarding bankruptcy trust submissions with another plaintiffs' firm retained in the case. *See id.* at 12. In response to this lack of coordination, the presiding judge found that Mr. Moody had not made a good faith effort to comply with discovery. *See id.* at 41. The judge went

on to say, "I am frankly ashamed to be part of a process that allows [Mr. Moody] to collect a fee for things that somebody else does that he is not authorized to do, and then he gets a fee on the work [in the tort action]." *Id.* This judge's clear expression of frustration with the non-responsiveness of plaintiffs' counsel is yet another example of the need for greater appellate court review and support for district court judges who are struggling to rein in discovery abuses by asbestos plaintiffs.

G. Virginia: *Dunford v. Honeywell Corp.*

In a Virginia case, *Dunford v. Honeywell Corp.*, No. CL-25113 (Va. Cir. Ct. Loudoun County Dec. 10, 2003), the plaintiff's assertion that his asbestos-related illness was due to exposure only to friction products was contradicted by three defendant automakers who showed that the plaintiff had made multiple trust claims certifying exposure to products made by other asbestos defendants. *See* Asbestos Claims Legislation, Hearing Before The Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, 112th Cong. (May 10, 2012) (statement of Leigh Ann Schell), *at* 2012 WLNR 9840045. The plaintiff also reportedly filed a separate tort action against these asbestos defendants. *See id.* Presiding Judge Thomas Home described the case as the "worst deception" used in discovery that he had seen in his twenty-two years on the bench. *Id.*[6]

More recently, the *Wall Street Journal* reviewed trust claims and court cases of roughly 850,000 persons who filed claims against the Manville Trust since the late 1980s until as recently as 2012. *See* Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1, A14. "The analysis found

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[6] Plaintiff's counsel, meanwhile, claimed that the fact "counsel has filed proofs of claim with other bankrupt entities does not mean that Plaintiff – as of this date – has demonstrated any exposure to products manufactured by those bankrupt entities." Plaintiff's Memorandum In Opposition to Certain Defendants' Omnibus Motions in Limine, *Dunford v. Honeywell Corp.*, No. CL-25113 (Va. Cir. Ct. Loudoun County Nov. 25, 2003), at 2-3. Counsel further claimed they were "completely unaware that bankruptcy claims had been filed." Transcript of Hearing on Motion for Sanctions, *Dunford v. Honeywell Corp.*, No. CL-25113 (Va. Cir. Ct. Loudoun County Dec. 10, 2003), at 38-39.

numerous apparent anomalies: More than 2,000 applicants to the Manville trust said they were exposed to asbestos working in industrial jobs before they were 12 years old." *Id.* at A14. "Hundreds of others claimed to have the most-severe form of asbestos-related cancer in paperwork filed to Manville but said they had lesser cancers to other trusts or in court cases." *Id.*

As further evidence of trust claiming practices comes to light, it is increasingly apparent that these cases are not isolated instances, but rather are more likely to represent just the tip of the iceberg with respect to tactics designed to give plaintiffs an unfair litigation advantage. These examples also show that abuse and gamesmanship in asbestos litigation may arise in different ways, ranging from delayed revelation of trust submissions to purposeful suppression of trust filings. But in either case, the effect is to unjustly manipulate the litigation system.

II. THIS CASE DEMONSTRATES THE IMPORTANCE OF TRUST TRANSPARENCY REQUIREMENTS AND THE NEED TO PROPERLY SANCTION DISCOVERY VIOLATIONS

In response to the documented examples of gamesmanship in asbestos litigation, many courts have increasingly required the timely production of trust claims information to civil defendants. *See* Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1, 16-20 (2012) (discussing "recent, major development" of asbestos bankruptcy trusts and efforts to promote greater transparency between the trust and tort systems). This Court, in *Bullinger*, 350 Md. at 466, 713 A.2d at 969, provided early precedent in this regard, finding that bankruptcy trust settlement agreements are generally discoverable.[7] The Court later affirmed that ruling in *Scapa*, 418 Md. at 530, 16 A.3d at 179.

Underlying the Court's decisions was an apparent appreciation that a fully informed jury can better mete out justice. *See Bullinger*, 350 Md. at 466, 713 A.2d at 969

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[7] The Court reached this decision, in part, due to "persuasive authority from other jurisdictions." *Bullinger*, 350 Md. at 466, 713 A.2d at 969.

(stating reasons for defendant's "need to inspect" trust settlement agreement). Requirements that improve bankruptcy trust transparency provide tort defendants a tool to: (1) identify fraudulent or exaggerated exposure claims; (2) establish that a debtor company was partly or entirely responsible for the plaintiff's harm; and (3) allow judgment defendants to potentially obtain set-off credits for trust claim payments received by the plaintiff.

Trust claims materials also provide other benefits of practical importance for tort defendants. By the time an asbestos tort action is filed and the parties begin discovery, plaintiffs may be deceased or unable to recall with precision all past exposures to asbestos-containing products, particularly if those exposures took place decades prior. Obtaining copies of bankruptcy trust proof of claim forms and other submitted materials can allow defendants to discover information that may not otherwise be available. In addition, discovery of information submitted to an asbestos bankruptcy trust can help to correct any misinformation provided to a defendant, such as from a deposition.[8]

Further, required exchange of trust claims information reduces the burden and expense on defendants of subpoenaing third parties, including the trusts themselves, for information relevant to the plaintiff's work and exposure history or medical condition. Required disclosure also spares judicial and trust resources in such situations.

Some courts have determined that production of asbestos bankruptcy trust claims information is so critically important to civil defendants that they have required plaintiffs' counsel to state any "potential"[9] or "anticipated"[10] trust claims that may be filed. Other

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[8] One study of claiming activity in Philadelphia from 1991 to 2010 found that "the number of peripheral and new defendants positively identified during plaintiff deposition has increased significantly while the number of Reorganized Defendants identified has declined." Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27:17 Mealey's Litig. Rep.: Asbestos 1, 4 (Oct. 10, 2012).

[9] *In re Asbestos Personal Injury Litig.*, Master File Civil Action No. 03-C-9600, § 22 (W. Va. Cir. Ct. Kanawha County Mar. 3, 2010) (Amended Case Management Order).

courts go even further and compel the filing of any trust claims before trial so that defendants are able to seek discovery of all available trust claims information.[11] Another trend is for state legislatures to enact legislation requiring plaintiffs to produce trust claims materials and to compel the filing of trust claims before trial.[12]

Although this Court appears to have understood the importance of trust transparency in permitting discovery of trust information in *Bullinger* and *Scapa*, it has not had the opportunity to examine how courts should respond to the type of gamesmanship in asbestos litigation presented by this case. Here, the facts strongly suggest that Plaintiffs sought to "hide the ball" from Union Carbide for as long as possible with regard to twenty-two bankruptcy trust claims submitted over the span of a decade (approximately 2000 to 2009). It was not until October 26, 2010 – ten working days before trial – that Union Carbide learned of the claims. This clearly violated the spirit if not the letter of this Court's precedent, and ultimately prejudiced Union Carbide in mounting a fair defense.

For instance, the untimely disclosure as trial preparations were already underway impaired Union Carbide's ability to explore inconsistencies in statements made by Plaintiffs or their attorneys in any depositions or answers to interrogatories throughout the litigation. It also effectively hindered Union Carbide from following up on any inconsistencies it did discover in the limited time before trial. Further, any delay in the

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10 *In re Asbestos Litig.*, MDL No. 2004-03964, § IV (Tex. Harris County Dist. Ct. Apr. 5, 2007) (Third Amended Case Management Order) (incorporating Master Discovery to All Plaintiffs, July 29, 2004).

11 *See In re New York City Asbestos Litig.*, No. 40000/88, § XV(E)(2)(l) (N.Y. Sup. Ct. N.Y. County May 26, 2011) (Amended Case Management Order) (requiring all known bankruptcy claims to be filed within 10 days of trial); *In re Massachusetts State Court Asbestos Litig.*, Amended Pre-Trial Order No. 9, ¶ XIII(C)(7)(o) (Mass. Super. Ct. Middlesex County June 27, 2012) (Case Management Order entered for all asbestos personal injury litigation in Massachusetts) (requiring all known bankruptcy claims to be filed within 30 days of trial); *Thibeault v. Allis Chalmers Corp. Prod. Liab. Trust.*, No. 07-27545, ¶ 10 (Pa. Ct. Cm. Pl. Montgomery County Feb. 22, 2010) (requiring all known bankruptcy claims to be filed within 120 days of trial).

12 *See* Ohio Rev. Code §§ 2307.951 to 2307.954; Okla. S.B. 404 (2013).

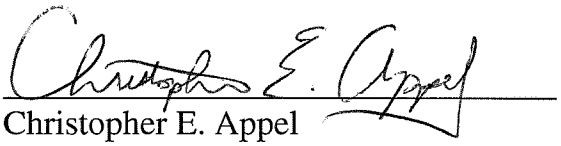
scheduled trial would have likely resulted in the unfair imposition of additional defense costs on Union Carbide. Complicating matters is that Union Carbide additionally lacked the ability to know the full extent of the information ultimately disclosed on the eve of trial to make a fully informed decision of how to best proceed. Such information, in addition to directly impairing Union Carbide's ability to defend itself, might also have changed Union Carbide's valuation of the case in that it did not know about any potential set-offs for monies collected from a trust. In sum, Union Carbide was put in between a rock and a hard place in multiple ways due entirely to Plaintiffs' failure to disclose information that was sought in Union Carbide's initial interrogatories.

This Court should not condone such tactics. The Court should, instead, use this case as an opportunity to address and admonish this type of gamesmanship in asbestos litigation.

CONCLUSION

For these reasons, this Court should grant review.

Respectfully submitted,



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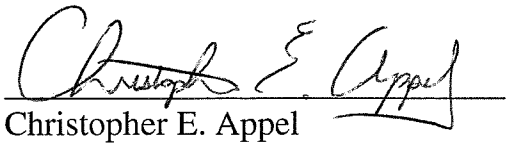
Counsel for Amici Curiae

Dated: November 20, 2013

STATEMENT OF RULE 8-504 COMPLIANCE

Pursuant to Rule 8-504(a)(8), I certify that the foregoing memorandum is in Times New Roman font with a 13-point typeface.



Christopher E. Appel

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing were sent by first class U.S. mail, postage prepaid, on November 20, 2013, to the following:

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