16-1078

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: Motions Seeking Access to 2019 Statements	Case No. 16-1078 (LPS)

On Appeal from the
United States Bankruptcy Court Order
Protecting Appellees' Information in 2019 Statements

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

Raeann Warner
(Del. Bar # 4931)
JACOBS & CRUMPLAR, P.A.
750 Shipyard Dr., Suite 200
Wilmington, DE 19801
Phone: (302) 656-5445
Fax: (302) 656-5875
raeann@jcdelaw.com

Robert S. Peck
Pro Hac Vice
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
50 Riverside Blvd., Suite 12A
New York, NY 10069
Phone: (202) 944-2874
Fax: (202) 625-7312
robert.peck@cclfirm.com

Attorneys for Amicus Curiae The American Association for Justice

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. Bankr. P. 8012, Amicus Curiae hereby provides the following disclosure statement:

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns ten percent or more of this entity's stock.

Respectfully submitted this 8th day of August, 2017.

/s/ Raeann Warner
Raeann Warner
(Del. Bar # 4931)
JACOBS & CRUMPLAR, P.A.
750 Shipyard Dr., Suite 200
Wilmington, DE 19801
Phone: (302) 656-5445
Fax: (302) 656-5875
raeann@jcdelaw.com

and

Robert S. Peck
Pro Hac Vice

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available at:
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Government Accounting Office,
GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*
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Deborah R. Hensler,
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Available at:
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Restatement (Second) of Torts § 431 cmt. a 14

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U.S. Dep't of Labor, OSHA,
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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ"),[1] formerly the Association of Trial Lawyers of America, is a voluntary national bar association whose trial lawyer members primarily represent victims in civil suits and personal injury actions, including asbestos-injury actions. AAJ members practice law in the state and federal courts of every state of the Union, including Delaware, as well as the District of Columbia and each of the U.S. territories. Throughout its history, AAJ has served as a leading advocate of the right to trial by jury, as well as for access to the courts for the preservation of protections enjoyed by ordinary citizens that are afforded by the common law and state tort law.

In serving that purpose, AAJ represents the interests of its members' clients in matters before federal and state courts, Congress, and the Executive Branch. To that end, AAJ regularly files amicus

[1] Undersigned counsel for Amicus Curiae affirms, pursuant to Fed. R. Bankr. P. 8017(c), that no counsel for a party authored this brief in whole or in part, and no person or entity other than AAJ, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

briefs in cases that raise issues of vital concern to its members' clients. This case is of acute interest to AAJ and its members because the devastating effects of asbestos exposure still plague American workers and their families, generally result from exposure to multiple asbestos-containing products over the course of a victim's working lifetime, and a fundamental principal of American tort law is that victims may recover from every defendant that victims prove substantially contributed to their illness or injury.

Because a number of asbestos corporations created trusts to step into their shoes and pay their victims, plaintiffs properly seek compensation from the trusts under the rules those trusts established and may appropriately still seek compensation from other non-trust tortfeasors. This Court has received briefs that distort the process plaintiffs employ, and that fractured version of reality demands correction, as AAJ's proposed brief seeks to do.

Honeywell and Ford Motor Company facing significant potential liability for injuries caused by their asbestos products took advantage of Section 524(g) of the Bankruptcy Code to avoid full payment of those liabilities by funding special trusts to pay a percentage of the value of

the claims of present and future claimants who prove injury due to exposure to the company's asbestos products.

In the bankruptcy court, Honeywell and Ford Motor Company moved for access to statements and exhibits documenting the claims of exposure and injury submitted to the trust, along with claim amounts and medical records. The companies stated they would use the documents to ferret out fraud, as well as sought to use the documentation *for lobbying purposes*.

The bankruptcy court granted access to the statements and exhibits for investigation of possible fraud, but not for lobbying purposes; precluded sharing the information with third parties; and required Honeywell and Ford to destroy the documents after three months. Honeywell and Ford appealed.

The Washington Legal Foundation (WLF) filed an amicus brief arguing that unrestricted access to claimant information was needed to combat "a disturbing nationwide trend in which plaintiffs' attorneys—either through errors of omission or otherwise—have manipulated the civil-justice system to gain an unfair advantage."

This AAJ amicus brief addresses these inaccurate policy-based assertions.

INTRODUCTION

The amicus curiae brief of the Washington Legal Foundation (WLF) (hereinafter, "WLF Br.") provides this Court with a gravely distorted view of asbestos litigation, falsely portraying it as a bonanza for the many people whose lives were taken or devastated by exposure to asbestos. The reality is a far cry from the picture WLF paints, a picture that is designed to advance a political agenda with little relevance to the legal questions before this Court. Nonetheless, the outlandish assertions deserve a response.

From its repeated characterizations that dub the pennies on the dollar received by successful plaintiffs as "lucrative recoveries," WLF Br. 2 & 6, to unfounded assertions that defendants are prevented from obtaining information that would offset their proven liabilities, resulting in imaginary claims of double-dipping, WLF Br. 8, the WLF skews reality to serve the policy objectives of its patrons and supporters, but ill serves a fair resolution of legitimate asbestos claims.

Instead, the court below made a legally sound decision that allowed defendants access to discovery appropriate for the instant litigation, while also appropriately prohibiting its use for political and other purposes outside the litigation. It generously, though unnecessarily, expanded that access by allowing a non-party, Honeywell, limited-purpose access to investigate alleged fraudulent claiming. In seeking to discard the limitations in order to pursue litigation advantages through use of its legislative clout, Honeywell, with support from the WLF and others, broadly claims a right of unfettered access to discovery in cases in which it is not a party.

The parties have well briefed the poverty of that position under relevant bankruptcy law and rules. The American Association for Justice adds further support for the parties' position that Honeywell has no right it may assert to the product of compulsory process based on traditional rules governing discovery. It is well established that discovery is properly used for purposes of the litigation before a court and not to obtain otherwise relevant information for purposes that have no bearing on the case. When the purpose of a request is for use

outside the pending lawsuit, the motion is properly denied, as it was here. The decision below should be affirmed.

ARGUMENT

I. USE OF ASBESTOS HAD DEVASTATING CONSEQUENCES TO WORKERS AND THEIR FAMILIES FOR WHICH AVAILABLE COMPENSATION IS LIMITED.

A. Plaintiffs Have Suffered Real Injuries that Require Real Compensation.

Once touted as a miracle fiber for its flame-retardant and insulating properties and used ubiquitously in as varied a set of products as adhesives, insulation, roofing shingles, ceiling and floor tiles, paper products, and automobile clutch, brake and transmission parts, asbestos is now simply described by the government as a "health hazard." U.S. Dep't of Labor, OSHA, *Safety and Health Topics: Asbestos, Overview*, available at https://www.osha.gov/SLTC/asbestos/.

Exposure to asbestos can convey mesothelioma, a fatal form of cancer that almost never occurs as a result of any other cause, *see* Anita Bernstein, *Asbestos Achievements,* 37 Sw. U. L. Rev. 691, 703 (2008), and is not dose-related or cumulative. Jane Stapleton, *Two Causal Fictions at the Heart of U.S. Asbestos Doctrine,* 122 L.Q. Rev. 189, 189-90 (2006). Asbestos can also cause a number of other

sometimes fatal but always devastating cancers, a variety of non-malignant respiratory diseases, as well as lung scarring. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System,* 12 Conn. Ins. L.J. 255, 256-57 (2006).

The resulting cancers – the legally cognizable injuries from exposure – appear only after long latency periods have passed, sometimes as long as 40 years. *Norfolk & W. Ry. Co. v. Ayers,* 538 U.S. 135, 168 (2003) (Kennedy, J., concurring in part, dissenting in part). The "cancers inflict excruciating pain and distress - pain more severe than that associated with asbestosis, distress more harrowing than the fear of developing a future illness." *Id.* For example, mesothelioma causes "agonizing, unremitting pain in the lungs, which spreads throughout the thoracic cavity as tumors expand and metastasize," with increasing severity over time and "with death the only prospect for relief." *Id.*

Despite the severity of these injuries, when claimants seek compensation from the asbestos trusts, they often receive only "pennies on the dollar." Stephen J. Carroll *et al.,* RAND Inst. for Civil

Justice, *Asbestos Litigation* 102 (2005), available at http://www.rand.org/pubs/monographs/MG162.[2] Despite that small proportionate compensation, solvent co-defendants are credited, generally according to the apportionment regime of the state in which the case is brought, and often the state schemes regard trust payments as if the trusts paid full compensation. The result is a consistent undercompensation of claimants.

Given this, as well as the fact that in a typical claim a number of tortfeasors bear responsibility for a causing a victim's illness, it is little wonder that counsel properly seeks compensation from other liable parties. After all, attorneys have an ethical obligation to pursue their clients' interests zealously within the law and the standards of professional conduct. *See Nix v. Whiteside,* 475 U.S. 157, 168 (1986). *See also, e.g.,* Delaware Lawyers' Rules of Professional Conduct 1.3,

[2] The payment percentages are formally adopted by the trusts to preserve funds for future claimants and are revised periodically to reflect claiming projections. A government study found the percentage can be as low as 1.1 percent of the scheduled compensation, just a tenth of a cent more than a penny on the dollar. Government Accounting Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 21 (Sept. 2011). The recoveries from trusts are self-evidently not the "lucrative recoveries" the WLF asserts they are. *See* WLF Br. 2 & 6.

cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

Multiple defendants logically have responsibility. Asbestos exposures often take place over the course of a long career with exposures occurring at different worksites. Some workers handled asbestos as it came out of its packaging, some worked on asbestos removal when identification of whose product it was is likely minimal, and still others suffered from airborne fibers of unknown origin. Some may have worked in all three capacities. In any event, attempting to recall product names some 40 years later that had no significance to the worker at the time of exposure asks a great deal of a claimant – and the inability to convincingly identify brand and dosage often forms the entire defense a company undertakes. *See, e.g.,* Deposition testimony of Robert Brittingham, *Brittingham v. Union Carbide Corp.,* No. 23-C-13-000812, 138:14-140:3 (Md. Cir. Ct., Jan. 9, 2013) (used in CLEs to exemplify good cross-examination where defense counsel shows plaintiff cannot recall the brand of nails and screws he

recently bought but still claims he can identify the joint compound he used at work decades earlier).[3]

B. The Value of Trust Claim Information is Highly Limited, While Defendants Have Significant Access to Better Information.

In cases brought by a worker's estate, there is no plaintiff to attempt the task of recollection. Instead, both plaintiff and defense counsel must reconstruct the likely exposures from work history, expert testimony, other documentary evidence, and witnesses such as co-workers because the injured party is no longer available. These methods of constructing an evidentiary record remain available and are frequently employed, even when the worker is still alive. That is why one defense firm has published a primer that advises defendants that "every case requires expert evidence." *See* Hermes Netburn, *Asbestos Litigation: A Defense Primer for Motor Vehicle Manufacturers*.[4]

[3] Available at: http://docplayer.net/1029844-Fraudulent-product-identification-in-asbestos-litigation.html

[4] Available at: http://www.hermesnetburn.com/E40D62/assets/files/News/Asbestos%20Litigation-%20Defense%20Primer%20for%20Motor%20Vehicle%20Manufacturers.pdf

At this mature point in the litigation, defendants know the likely exposures based on a claimant's work history, which the expert evidence establishes.

In fact, the trusts publish their settlement grids, making it easy to determine likely settlement amounts based on job assignment and location. *See* Mark Davidson, *et al., Asbestos Bankruptcy Trusts and their Impact on the Tort System,* 7 J.L. Econ. & Pol'y 281, 289 (2010). Thus, regardless of whether a plaintiff ever files a claim with a trust and regardless of any amount that a trust may pay in settlement, defendants are in a position to deflect some of their liability on trusts when the case is in a several jurisdiction. All they need to do is have an expert testify about likely other exposures based on work history.

Thus, defendants have the means to assure that they are not assessed excess liability – and may even have the means to diminish what appropriately should be assessed against them, regardless of whether claims are made or not. The filing of claims simply has limited significance on the ultimate apportionment of damages. And the 1900 Statements, which are attorney statements concerning who they represent, do contribute to the claims-identification process that WLF

asserts. The filing of claims simply has limited significance on the ultimate apportionment of damages.

Of course, different law firms, plaintiff and defense, use different methodologies and different experts to develop that evidence and often will come to different conclusions about exposure because of those differences.

Moreover, as RAND observed, even when undisclosed claims occur,

> Failure to disclose trust claims is not necessarily intentional. In some cases, trust claims are filed by a referring (or intake) law firm but the discovery responses coordinated by the litigating firm. The litigating firm might be unaware of whether the referring firm has filed claims.

Lloyd Dixon and Geoffrey McGovern, RAND Institute for Civil Justice, *Asbestos Bankruptcy Trusts and Tort Compensation* 69 n.27 (2011), available at https://www.rand.org/pubs/monographs/MG1104.html.

It is also true that different causation regimes are applied to different cases, requiring counsel to make certain strategic decisions on where to expend litigation resources first or at all, leading counsel to forego certain trusts or to order claims applications in a certain way. Some bankruptcy trusts have limited causation requirements, simply

requiring an appropriate medical diagnosis and perhaps occupational and job location information.[5] Certainly, none require the standard of proof applicable to a civil tort case.

On the other hand, many asbestos exposures occurred in shipyards, where maritime law has much stricter causation requirements than do cases tried under ordinary tort. *See, e.g., Lindstrom v. A-C Prod. Liab. Trust,* 424 F.3d 488, 492 (6th Cir. 2005) (requiring "product was a *substantial* factor in causing the injury he suffered.") (emphasis added). As a result, one might qualify for compensation from a bankruptcy trust, even if the bankrupt party's liability would be insufficient to affect the liability of solvent parties.

This means that the fact that a claim was filed with a trust may have no bearing on the extent of the liability of a solvent maritime-case defendant. The maritime case also must be distinguished from tort cases, which use a more familiar causation standard. *See, e.g., Tragarz v. Keene Corp.,* 980 F.2d 411, 417 (7th Cir. 1992) (plaintiff

[5] Each trust develops its own criteria for evaluating claims. Often, there are two tracks: expedited and individual, imposing different requirements, though requirements that are less detailed than necessary to prove a tort case. *See* GAO-11-819, *Asbestos Injury Compensation*, at 17-18. The process is nonadversarial. *Id.* at 27.

must put forth evidence that supports an inference of probable exposure to the defendant's asbestos product). Some exposures are so de minimis that they are not part of the calculation of contributing causes. The Restatement (Second) of Torts § 431 cmt. a, for example, instructs that a "but-for" cause that is trivial should be ignored for apportionment purposes. Thus, a shipyard worker who later worked for a short time as an auto mechanic may need only focus on the shipyard exposure.

C. Applicable Apportionment Regimes Also Lower the Value of Trust Claiming Information.

The distinction between trusts, tort cases, and maritime cases also matters with respect to the apportionment regime in place. Under joint and several liability, payment by a trust that utilizes a different standard to qualify for payment does not have significant meaning for a solvent defendant's total liability. It may be equally irrelevant under several liability. Thus, while defendants assert that they might pay more than they would have if a bankrupt party's liability is fully developed, it still is likely less than their fair share under the law given the limited compensation available from the trusts. Thus, beyond the facts of this case, where the information in dispute

provides no information about actual claiming and compensation, the information theorized as available from the trusts provide little basis for reducing a defendant's liability.

To illustrate, consider this example, using round numbers to make the illustration understandable. Three trusts, X, Y, and Z, settle for a total of $100,000, and P takes A Corp to trial, winning a verdict of $200,000, with the jury assessing A's liability at 75% of that amount. Even in a joint and several jurisdiction, with full acknowledgement of the settlement, A can only claim a setoff of $50,000 for P's receipt of $100,000 from X, Y, and Z. Of course, that assumes that A proved that X, Y, and Z were liable for the remaining 25 percent. The "extra" $50,000 received from the trusts, which cannot be regarded as a windfall for P, may reflect X, Y, and Z's miscalculation of their total liability or their willingness to buy peace at a higher price. On the other hand, A's "enhanced" liability may be the result of stronger proof at trial.

If P had not applied to X, Y, and Z for a settlement payment, A's maximum contribution from the trusts would have remained $50,000 – and P may still have been eligible for the additional $50,000 that the

hypothetical set out above. This is the reason why A has incentives to assert that others have liability, whether solvent or bankrupt, regardless of whether the plaintiff thinks so and regardless of whether the plaintiff has pursued that liability. Information from the plaintiff about work history and types of jobs provides all the information a defendant needs to develop that argument.

Yet, more typically, X, Y, and Z might settle for a total of $25,000, rather than $100,000. Even then, assuming X, Y, and Z are assessed 25 percent of the liability, A will still receive credit for $50,000 from the above hypothetical. That means, the plaintiff, whose compensation should have been higher, absorbs the loss of $25,000 determined to be the plaintiff's fair compensation in a trial, even in a joint and several jurisdiction. If the trust payment does not precede trial and judgment, it will be the solvent defendant, only in a joint and several jurisdiction, who must absorb that $25,000, though with a right of contribution. The adoption of joint and several holds this to be fair because the solvent defendant is still responsible for an indivisible injury. *See Best v. Taylor Machine Works,* 689 N.E.2d 1057, 1084 (Ill. 1997) ("The common law doctrine of joint and several liability provides, in general,

that when two or more defendants tortiously contribute to the same, indivisible injury, each defendant may be held jointly and severally liable for the entire injury."). In several jurisdictions, even in this last fact pattern, the innocent injured party absorbs the uncollectible $25,000.

Moreover, under California and New York law, jurisdictions with substantial asbestos litigation, there are specific limits to a defendant's claim to a setoff, thereby reducing the value to defendants of a plaintiff's pretrial disclosure of such exposure. Dixon & McGovern 2011, at 22 & 7 n.18. Nonetheless, it is common practice to include all alleged tortfeasors in the apportionment question posed to the jury, including nonparties who may include unknown tortfeasors and persons alleged to be negligent but not liable in damages because of immunity or some other reason. *See, e.g., Scott v. Cnty. of Los Angeles,* 32 Cal. Rptr. 2d 643, 647 (Cal. App. 1994).

In yet other states, Texas, for example, plaintiffs must produce defendant-specific evidence showing the "approximate" doses to which the plaintiff was exposed and that that dose was a "substantial factor" in causing the injury. *Borg-Warner Corp. v. Flores,* 232 S.W.3d 765,

771-72 (Tex. 2007). Evidence that a plaintiff had "some" exposure is legally insufficient. *Id.* at 772. In *Flores,* an auto brake mechanic testified that his asbestosis was caused by exposure to asbestos from brake pads and that he performed 20 brake jobs a week for more than 30 years. The most frequent brand involved in six or seven of the 20 weekly brake jobs, he said, was Borg-Warner brake pads. He won a jury verdict assessing Borg-Warner 37 percent of the liability, but the Texas Supreme Court overturned it because the plaintiff's testimony did not specify dosage and relied on a claim of generalized exposure to respirable asbestos fibers. *Id.* at 774. The Court further stated that valid, admissible epidemiological studies must show "a doubling of the risk" to constitute evidence of causation. *Id.* at 772. The same standards are applied in mesothelioma cases. *Georgia-Pac. Corp. v. Stephens,* 239 S.W.3d 304 (Tex. App. 2007).[6]

These challenges warrant strategic considerations on the part of plaintiff's counsel that affect the order and willingness to pursue

[6] Nevada, Virginia and Maryland have specifically rejected the Texas *Flores* test and instead apply the test from *Lohrmann v. Pittsburgh Corning Corp.,* 782 F.2d 1156 (4th Cir. 1986) ("frequency, regularity, proximity") for causation in mesothelioma cases.

certain defendants. Still, regardless of whether the state is a joint and several one or a several liability one and the causation regime it applies, it is important to understand that defendants always seek to put liability on other possible defendants, including those from whom the plaintiff might never successfully seek compensation. A successful attempt to do so always lowers the liability of the named defendants.

It is equally important to understand that, to seek contribution, defendants are not limited to exposures developed before trusts or at trial. After all, if a defendant is seeking contribution from a non-settling absent party,[7] solvent or bankrupt, the subsequent lawsuit over contribution will be the absent party's first opportunity to disclaim liability or limit its own responsibility for damages. What happened at the plaintiff's trial won't be binding on the absent party.

Take, for example, one case in the Third Circuit, where no liability was found because the defendant successfully suggested that

[7] In a typical tort case, joint tortfeasors and indemnitors are generally not required parties. *See* Fed. R. Civ. P. 19, advisory committee note ("[A] tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability."); *Temple v. Synthes Corp., Ltd.,* 498 U.S. 5, 7 (1990) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.").

Raybestos, rather than Bendix, was the source of the asbestos. The Court stated:

> While co-worker affidavits showed that [Plaintiff-decedent] had been exposed to asbestos products, none of the witnesses clarified the proximity of the products to the deceased or were able to establish that the defendants had manufactured or supplied the products used.

Robertson v. Allied Signal, Inc., 914 F.2d 360, 367 (3d Cir. 1990). In giving examples of the testimony that failed to establish liability, the Court noted that multiple fellow workers testified that pneumatic brakes with asbestos-containing linings were used on truck-tire building machines during the period from 1946 to 1976, that the brake housings were impressed with the word "Bendix," that "Bendix" shipping slips accompanied replacement assemblies, and that the plaintiff was present during brake repairs at least 25 times between 1975 and 1980. Still, no one was able to identify the manufacturer of the brake linings. The defendant successor to Bendix claimed that records showed that substantially all of the brake linings used in the plant were manufactured by Raybestos–Manhattan. In addition, the Defendant asserted the fact that "Bendix" was stamped on brake housings did not establish that Bendix had been the manufacturer of

the brake linings contained therein. The rebuttal evidence was deemed sufficient to overcome testimony for the plaintiff and demonstrates the steep climb a plaintiff must make to prove asbestos liability.

While these cases demonstrate the various interests at play in asbestos litigation, this Court should give no weight to the cherry-picked and fractured versions that WLF offers of what might have occurred in a handful of cases out of the hundreds of thousands in the system. They do little to inform this Court regarding the proper application of long-standing legal principles, just as the Third Circuit's decision a few years ago to revive a fraud action against BASF and its law firm, Cahill Gordon, for allegedly destroying evidence about asbestos-containing products that sickened thousands provides no basis to revise these same principles when applied to defendants. *Williams v. BASF Catalysts LLC*, 765 F.3d 306 (3d Cir. 2014). Legal principles should instead guide this Court.

II. THERE IS NO RIGHT TO BROADER USE OF DISCOVERY FROM THESE CASES, AND THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE USE OF THAT DISCOVERY.

Amicus AAJ will not reiterate the discussion of the applicable bankruptcy law and rules that has already been well briefed in Appellees/Cross-Appellees Opening Brief (Doc. 22). Instead, AAJ offers these unassailable principles that govern the use of discovery, which entirely support the trusts' position that the Bankruptcy Court's restrictions on disclosure and use of the discovery are well taken and even more generous than the law requires.

As a fundamental concept, the purpose of discovery is to assure "[m]utual knowledge of all the relevant facts gathered by both parties" and its existence serves as a mechanism "essential to proper litigation," *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Still, "discovery, like all matters of procedure, has ultimate and necessary boundaries." *Id.*

In its current iteration, the Federal Rules of Civil Procedure establish that the scope of discovery is limited to information

> relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the

> issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). The rule leaves no room for forcing disclosure for purposes unrelated to the claims or defense at issue in the specific proceeding for which it was sought. It further mandates that a "court must limit" any proposed discovery "outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C)(iii).

Thus, under the terms of Rule 26, the compulsory process that discovery utilizes is decidedly not available to obtain otherwise relevant information for purposes that have no bearing on issues in the case. *See also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978). The Supreme Court has explained that "when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery is denied." *Id.* at 352 n.17. To make the point even more emphatically, the Court held that, "[i]n deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information." *Id.*

As in *Oppenheimer Fund*, Honeywell "do[es] not seek this information for any bearing that it might have on issues in the case[s]" before this Court. *Id.* The District Court's order, therefore, should not be reversed to permit Honeywell's further uses of the information obtained by the parties in discovery because the Bankruptcy Court's denial of their request "satisfy[ied the court's] Rule 26 obligation to ensure that the scope of discovery is limited to issues actually relevant to the litigation." *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 995–96 (D.C. Cir. 2014). On the other hand, permitting a non-party's access to the information for any purpose, including the purposes Honeywell specifically stated, would have abused the court's authority to assure that discovery is limited to its proper scope.

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CONCLUSION

For the foregoing reasons, the Bankruptcy Court was well within its authority to limit the use of discovered material and its order should not be expanded.

Dated: August 8, 2017

Robert S. Peck
Pro Hac Vice
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
50 Riverside Blvd., Suite 12A
New York, NY 10069
Phone: (202) 944-2874
Fax: (202) 625-7312
Robert.Peck@cclfirm.com

/s/ Raeann Warner
Raeann Warner
(Del. Bar # 4931)
JACOBS & CRUMPLAR, P.A.
750 Shipyard Dr., Suite 200
Wilmington, DE 19801
Phone: (302) 656-5445
Fax: (302) 656-5875
raeann@jcdelaw.com

Attorneys for Amicus Curiae The American Association for Justice

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Fed. R. Bankr. P. 8015(a)(7)(C) because this brief contains 4,586 words, excluding the parts of the brief exempted by Fed. R. Bankr. P. 8015(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements and the type style requirements of Fed. R. Bankr. P. 8015(a)(5) and (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook type style.

Dated: August 8, 2017

Robert S. Peck
Pro Hac Vic

/s/ Raeann Warner
Raeann Warner
(Del. Bar # 4931)

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Notice of Appearance was served upon all counsel of record via the United States District Court for the District of Delaware's ECF Document Filing System and via electronic mail upon the parties listed below on August 8, 2017.

<table>
<tr>
<td>Anthony M. Sacculo
Thomas H. Kovach
A.M. SACCULLO LEGAL, LLC
27 Crimson King Drive
Bear, DE 19701
ams@sacculloleгal.com
kovach@sacculloleгal.com

Elihu Inselbuch
CAPLIN & DRYSDALE, CHARTERED
600 Lexington Avenue, 21st Floor
New York, NY 10022
einselbuch@capdale.com</td>
<td>Ann C. McMillan
Kevin C. Maclay
Todd E. Phillips
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
amcmillan@capdale.com
kmaclay@capdale.com
tphillips@capdale.com</td>
</tr>
<tr>
<td colspan="2">Counsel for Appellee North American Refractories Company Asbestos Personal Injury Settlement Trust Advisory Committee</td>
</tr>
<tr>
<td colspan="2">Joseph D. Frank
Reed Heiligman
FRANK GECKER LLP
325 North LaSalle Street, Suite 625
Chicago, IL 60654
jfrank@fgllp.com
rheiligman@fgllp.com

Counsel for Appellee The Trust Advisory Committee of the Combustion Engineering 524(g) Asbestos Trust</td>
</tr>
</table>

James L. Patton, Jr.
Edwin J. Harron
Sharon M. Zieg
YOUNG CONWAY STARGATT & TAYLOR, LLP
1000 North King Street
Wilmington, DE 19801
jpatton@ycst.com
eharron@ycst.com
szieg@ycst.com

Counsel for Appellees James J. McMonagle, the Future Claimants' Representative for the Flintkote Asbestos Trust, and Lawrence Fitzpatrick, the Future Claimants' Representative for the North American Refractories Company Asbestos Personal Injury Settlement Trust

Justin K. Edelson
POLSINELLI PC
222 Delaware Avenue, Suite 1101
Wilmington, DE 19801
jedelson@polsinelli.com

Peter John Sacripanti
John J. Calandra
Darren Azman
MCDERMOTT WILL & EMERY LLP
340 Madison Avenue
New York, NY 10173
psacripanti@mwe.com
jcalandra@mwe.com
dazman@mwe.com

Counsel to Appellant Honeywell International Inc.

Christian Singewald
WHITE & WILLIAMS LLP
600 N. King Street, Suite 800
Wilmington, DE 19801
singewaldc@whiteandwilliams.com

K. Elizabeth Sieg
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
bsieg@mcguirewoods.com

Counsel to Appellant Ford Motor Company

Dated August 8, 2017.

Robert S. Peck
Pro hac vice

/s/ Raeann Warner .
Raeann Warner
(Del. Bar # 4931)