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FAQ: ASBESTOS – THE AWFUL TRUTH

For most of 20th century and through to the present day, the asbestos and insurance industries have worked to alter, misrepresent and suppress knowledge about the hazards of asbestos exposure, leading to the deaths of millions of Americans (with more deaths each year). This FAQ explores the following questions:

- Some have called the actions of the asbestos and insurance industries “perhaps the greatest corporate mass murder in history.” What exactly did they do?
- While the asbestos industry’s role is well known, the insurance industry’s role is not. What did insurance companies do precisely?
- While these industries may have engaged in horrendous conduct years ago, isn’t asbestos an old problem?
- Aren’t a lot of people just gaming the system, filing lawsuits when they really aren’t sick, or when smoking or obesity is really causing their illness?
- While it’s unfortunate that people are sick and dying, isn’t asbestos litigation forcing companies into bankruptcy, costing people jobs?
- Some solvent companies who are sued today never actually made asbestos products. Is it fair to sue them?
- Aren’t asbestos lawyers greedy and just out for money?
- What about the *Garlock* case, which the industry says was an unfair lawsuit in which plaintiff lawyers engaged in fraud?
- Many states are now considering “Asbestos Claims Transparency” bills, which are written and shopped around the country by national industry lobbyists. Despite their name, what are these bills really about?

Some have called the actions of the asbestos and insurance industries “perhaps the greatest corporate mass murder in history.”¹ What exactly did they do?

In the early 1900s, these industries began a deliberate campaign to suppress knowledge about asbestos hazards and asbestos disease. Elements of this cover-up included – and still include – concealing insurance and asbestos industry practices, settlements and research, as well as advocating for laws to provide litigation shields and devices to cheat victims. In the 20th century, this cover-up was primarily to keep information from sick and dying workers who might have claims. In 1933, asbestos industry leader Johns-Manville settled 11 asbestosis cases with a demand that the employees’ attorney not sue the company again. The cover-up continued, which, among other things, led to the poisoning of millions of unsuspecting people including over four million World War II shipyard workers. Indeed, in the 1940s and 1950s, the asbestos industry had evidence that 20 percent of its workforce had developed asbestos disease but it became corporate policy not to tell sick workers the nature of their health problems. By 1956, they knew that asbestos disease was not just affecting workers; those living near factories were also at risk. By the 1980s, when this massive cover-up was unearthed through painstaking litigation brought by trial lawyers, the actions of these industries had amounted to what author Paul Brodeur called “corporate malfeasance and inhumanity to man which is unparalleled in the annals of the private-enterprise system.”²

Moreover, asbestos sicknesses and deaths have not stopped since the cover-up was revealed. That is not only because of the latent nature of asbestos disease: once inhaled, asbestos dust continues to react within the lungs for a lifetime, causing disease sometimes decades after exposure. It is also because the asbestos and insurance industries continue to lobby and litigate to prevent an asbestos ban in the United States – a ban that exists in most of the industrialized world.³ Further, despite the fact that asbestos remains a life-threatening health hazard, companies still refuse to make public where asbestos is present, where it was used and where it is imported. Moreover, since 1975, the asbestos and insurance industries have tried and often succeeded in getting Congress or state lawmakers to immunize them or bail them out, most recently under the guise of ironically-named “transparency” bills. (More explanation follows.)

While the asbestos industry’s role is well known, the insurance industry’s role is not. What did insurance companies do precisely?

Throughout history, the insurance industry actively conspired with asbestos companies to suppress knowledge about asbestos hazards, and to limit their liability to pay compensation to sick and dying workers. Complicit insurance companies include many household names like Travelers, Aetna and MetLife.⁴ They have all largely avoided accountability for their role.

The insurance industry suppressed knowledge about asbestos hazards.

As far back as 1918, U.S. and Canadian insurance companies like Prudential (the nation’s wealthiest life insurer) stopped issuing life insurance policies to asbestos workers because

they were dying at such high rates. By 1928, other life insurers (Penn Mutual, John Hancock) were charging asbestos workers extra premiums because their mortality rate was 50 percent higher than everyone else's.⁵

At least 10 studies showing the relationship between asbestos exposure and asbestosis were conducted during the 1920s and 1930s. Among them was a 1929 survey of asbestos workers conducted by MetLife's physician, who found large numbers of workers developing incurable lung disease. Before publication, MetLife allowed asbestos industry lawyers to water down and delete unfavorable passages about the relationship between asbestos and asbestos disease. In one 1935 publication, which reported that the insurance industry had known about the asbestos hazard since 1928, the president of a North Carolina asbestos company attacked the story in a letter to the editor, calling it "unconfirmed dramatized tommyrot."⁶

The insurance industry lobbied for laws to block litigation and cheat workers.

In the 1920s and 1930s, insurance companies began looking for ways to limit their liability and prevent asbestos litigation. They found a perfect tool in the workers' compensation system, which allowed them to cheat sick and dying workers and protect insurers from litigation (workers compensation laws strip workers of their right to sue), ensuring that the massive asbestos cover-up would never come to light.⁷

In 1927, as workers in factories were developing pulmonary asbestosis, the first workman's comp disability claim for asbestosis was paid. By 1935, industry lobbyists were working hard to amend existing compensation statutes to include silicosis and asbestosis while severely limiting worker benefits, as well as the number of workers who would be eligible to collect them. In addition, instead of being a no-fault system, asbestos claims were routinely fought by insurers within the workers' comp system. And even when forced to pay, companies benefitted by delaying payment to sick or dying workers. Because workers' comp is an exclusive remedy, these laws eliminated all possibility that the legal system could provide any sort of financial incentive for asbestos companies to clean up their workplaces, allowing millions of additional workers to be exposed over decades.⁸

Between 1950 and 1961, before trial lawyers first began aggressively trying to break through the workers' compensation immunity shield to help these workers, insurance companies paid some workers' compensation claims. But relatively few cases of asbestosis were compensated in the nation compared to the millions of workers who had been exposed. For asbestos companies, it was less expensive to keep workers working in poor conditions and ultimately pay cheap workers' compensation benefits than to provide a safe and healthy workplace. Not until the 1970s were trial lawyers able to uncover evidence of this massive fraud and file lawsuits. By then, millions of unsuspecting American workers had been poisoned.⁹

The insurance industry continues lobbying for laws to block litigation and cheat victims.

Today, the insurance industry remains at the forefront of lobbying for asbestos industry bills. These include so-called “transparency” bills – the state “Asbestos Claims Transparency Act” as well as the federal “Furthering Asbestos Claims Transparency Act” (H.R. 906, later tacked onto H.R. 985), which is “an attempt to change the rules of the tort system to provide defendants with an advantage, using the existence of the trusts and [allegations about] a lack of ‘transparency’ as a subterfuge.”¹⁰ These bills do nothing to prevent defendants in asbestos cases, including insurers, from continuing to demand confidentiality from victims on their terms, a practice in which they have engaged for eight decades. Transparency is not the goal of either state or federal bills. They are about delaying claims payments to dying victims for as long as possible, essentially until they die. (See later explanation of the state “Asbestos Claims Transparency Act” bills.)

According to federal lobbying reports, insurance giants like Hartford, Travelers and Nationwide are among the top lobbyists for H.R. 906.¹¹ Some companies have begun publicly lobbying for state bills as well.

While these industries may have engaged in horrendous conduct years ago, isn’t asbestos an old problem?

No. Thousands still die each year of asbestos disease including younger victims, and common products still contain asbestos. The current federal government is expected to take no steps to improve the situation.

Asbestos still causes life-threatening diseases.

Asbestosis is an incurable and suffocating lung disease where scar tissue slowly replaces healthy tissue, and mesothelioma, the most lethal asbestos disease, causes a painful death within 4 to 18 months of diagnosis. According to the Centers for Disease Control and Prevention (CDC), over 3,000 people still die annually from asbestosis or mesothelioma, and mesothelioma deaths are on the rise, increasing from 2,479 deaths in 1999 to 2,597 in 2015. CDC says that “the annual number of malignant mesothelioma deaths remains substantial. Contrary to past projections, the number of malignant mesothelioma deaths has been increasing. The continuing occurrence of mesothelioma deaths, particularly among younger populations, underscores the need for maintaining efforts to prevent exposure and for ongoing surveillance to monitor temporal trends.”¹²

Asbestos is not banned in the United States.

While most of the industrialized world has banned asbestos¹³ (Canada will do so this year),¹⁴ asbestos is banned only in a limited number of products in the United States.¹⁵ For example, asbestos has never been banned in the manufacture, distribution, use or importation of clothing, vinyl floor tiles, cement pipes or car parts. That includes automatic transmission components, clutch facings, friction materials, disk brake pads, drum brake linings, brake blocks and gaskets.¹⁶ Between 1996 and 2006, there was an 83

percent rise in imported brakes with asbestos, “raising renewed concerns for the health of the nation’s auto mechanics.”¹⁷

Whereas in 2016, President Obama’s Environmental Protection Agency had included asbestos as one of the first 10 chemicals it would have evaluated under the new Frank R. Lautenberg Chemical Safety for the 21st Century Act,¹⁸ President Trump had said that asbestos is “safe,” anti-asbestos laws are “stupid” and the “anti-asbestos movement is tainted by organized crime.” He also once “offered a bewildering tweet saying: ‘If we didn’t remove incredibly powerful fire retardant asbestos & replace it with junk that doesn’t work, the World Trade Center would never have burned down.’”¹⁹ Expect asbestos-related disease and death to be a continuing problem for years to come in the United States.

Yes, but aren’t a lot of people just gaming the system, filing lawsuits when they really aren’t sick, or when smoking or obesity is really causing their illness?

No. Once inhaled, asbestos fibers are indestructible and continue to react within the lungs for a lifetime, causing fatal disease years later. It’s been said that asbestos exposure turns people into walking time bombs. Because someone can still breathe does not mean they are “not sick.” And one cannot get asbestosis or mesothelioma by smoking or being fat. These diseases have only one cause – asbestos exposure.

The asbestos industry tried to use the “smoking” defense for years until science – and facts like factory guard dogs who clearly weren’t smokers were also dying – proved them wrong. Specifically, while asbestos exposure without smoking increases the risk of lung cancer 5.2 times and smoking (one pack a day) without exposure increases the risk 10.9 times, smoking while working with asbestos creates 53.2 times the risk of developing lung cancer over a non-smoking, non-exposed person (and about 90 times if smoking more than one pack). In other words, the risk with both is synergistic, or multiplicative at more than 50 times.²⁰

It should also be noted that many asbestos victims are veterans, who are disproportionately harmed by asbestos disease. In fact, “While veterans represent 8% of the nation’s population, they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country.”²¹

While it’s unfortunate that people are sick and dying, isn’t asbestos litigation forcing companies into bankruptcy, costing people jobs?

No. The asbestos industry received special protection from Congress just so this would not happen, *i.e.*, companies would not be put out of business. In 1994, the U.S. Congress passed special legislation just for the asbestos industry (Section 524(g) of the Bankruptcy Code), which allows companies with asbestos liabilities to set up trusts to compensate victims and families, and at the same time reorganize under the bankruptcy laws, allowing them to operate profitably while preserving jobs and pensions.²² Indeed,

some might consider it remarkable that Congress allowed these companies to stay healthy and profitable given their past conduct, which some equate to mass murder.

Also notably, it is this bankruptcy trust system that resolves the vast majority of asbestos claims today, not litigation. Trusts are settlement vehicles. If a company has set up a bankruptcy trust, it has already conceded liability for what it did to asbestos victims.²³ Yet it is also true that trusts are extremely underfunded. The RAND Institute for Civil Justice found, “Most trusts do not have sufficient funds to pay every claim in full and ... the median of the payment percentage is 25 percent.”²⁴

Some solvent companies who are sued today never actually made asbestos products. Is it fair to sue them?

Yes. Defendants in these cases include corporate giants like Koch Industries, Halliburton, Crown Cork & Seal and Raytech. Honeywell, for example, became successor to The Bendix Corporation, which used asbestos in brakes – in some cases until 2001.²⁵ When these wealthy companies bought asbestos companies, they also agreed to handle the claims of sick and dying workers. That’s because we have a doctrine in this country called “successor liability.” Under this doctrine, when one company buys another, they typically contract to purchase not just a company’s assets but also their liabilities. That is their choice. But there are important public policy reasons for this. Otherwise, companies that harm or kill people could sell a company simply to get away with it, *i.e.*, to escape liability and leave victims with no recourse.

That said, once in court, these giant companies continue try to game the system and escape their responsibility. For example, one industry litigation strategy, which has been sharpened recently, is to dispute that chrysotile asbestos causes asbestos disease. There is no dispute in the credible scientific world that every type of asbestos causes asbestos disease, including chrysotile.²⁶ Yet Georgia-Pacific, owned by Koch Industries, recently funded fake studies to say otherwise. This led a federal judge to the conclusion that Georgia-Pacific may have been engaged in fraud in order to evade responsibility to asbestos victims.²⁷ Apparently, the cruel and callous attitude that asbestos companies have always had towards their victims has been adopted by their successors.

Aren’t asbestos lawyers greedy and just out for money?

That type of characterization certainly does not reflect the experience or views of clients or victims. For example, Susan Vento, widow of the late Minnesota Congressman Bruce F. Vento who died of mesothelioma in 2000, says, “I have been witness to attempts by many who have tried to impugn the integrity of mesothelioma patients and their families, and the reputations of trial lawyers who represent them. No words can express the gratitude I have to these men and women for the extraordinary work they do to ensure justice for our loved ones. What is ironic is that those who criticize the trial lawyers who provide a voice for the patients and families never note how much is spent on corporate attorneys who hide industry conduct, to avoid the justice system, and to grind the legal process to a halt as well as to pass state and federal legislation.”

Historically, the role of trial lawyers has been absolutely critical to unearthing the vast industry conspiracy used to cover up the link between asbestos and disease. Through at least the mid-1960s, the actions of the asbestos industry, insurance companies, their law firms, lobbyists and their paid-for doctors had hard-wired into the system a massive conspiracy to suppress knowledge about of asbestos exposure, disease and death. Workers' compensation provided companies with a convenient tool for compensating victims at bargain rates and with no risk of public litigation or exposure. However, because so many sick workers were being cheated by this system, a few determined attorneys tried to ascertain if they could help workers by somehow breaking the workers' compensation shield and getting a case into court.²⁸

They realized that manufacturers could be at fault under products liability laws, so in the 1970s, they began to try that theory in court. At the time, these lawyers had no idea what the industry knew about the link between asbestos exposure and diseases like cancer. Without such evidence, trial lawyers lost many cases at these early stages, failing to even get before juries, getting paid nothing and going into debt. But they kept digging, "groping their way through unfamiliar territory and pooling their discovery resources."²⁹ After nearly a decade of difficult discovery, which the industry fought at every step, and investigative work on their own (such as painstakingly excavating information from old workers' comp files), these attorneys were finally able to piece together a record. As we now know, this record told a story of shocking corporate misconduct going back five decades.

What about the *Garlock* case, which the industry says was an unfair lawsuit in which plaintiff lawyers engaged in fraud?

Garlock Sealing Technologies was an early player in the asbestos industry, participating in the founding of the Asbestos Textile Institute in 1944. During this period, the industry was actively conspiring to suppress knowledge about the hazards of asbestos exposure. When 4,000 Navy service members and other victims who had or would die from mesothelioma sued Garlock a few years back, the company did what others in the industry did: it filed under the special section of the Bankruptcy Code, keeping the company viable while viciously fighting victims in court.

In court, Garlock employed a new litigation strategy: intimidating victims' lawyers by accusing them of suppressing evidence to the point of "racketeering" (*i.e.*, Garlock filed Racketeer Influenced and Corrupt Organizations Act, or "RICO," lawsuits against these firms seeking triple damages) while denying that the kind of asbestos in its gaskets – chrysotile – was harmful. This was contrary to all credible scientific opinion³⁰ and Garlock's own documents.³¹ Moreover, the "evidence" that the victims' attorneys were alleged to have "suppressed" was already in Garlock's possession. Further, to believe such an allegation, one would also have to imagine that victims, many of whom were veterans who served their country, knowingly misled the courts.

A judge³² – in his first and only asbestos case – ruled against these vets in a 2014 decision, contradicting credible scientists, impartial scientific research groups, judges and juries in thousands of other asbestos cases³³ and even Garlock’s own past litigation record (including losing before juries and settling thousands of claims). After the decision, victim representatives filed a brutal brief with new evidence showing how Garlock “violated [the judges’] discovery orders, hid evidence from the bankruptcy court and presented false testimony” and “committed a fraud upon the court.”³⁴ Garlock’s case then essentially crashed and burned. Garlock and its parent, EnPro, agreed to settle the case by paying victims almost four times as much as the judge had ordered.³⁵ And it dismissed “with prejudice” all charges against these firms, with zero dollars being paid.

Many states are now considering “Asbestos Claims Transparency” bills, which are written and shopped around the country by national industry lobbyists. Despite their name, what are these bills really about?

Industry lobbyists pitch these bills as needed to solve a victim “transparency” problem, but such a problem does not exist. In reality, these bills are about delaying claims payments to dying victims for as long as possible, essentially until they die.³⁶

For example, this legislation forces dying victims to waste precious time and resources filing all possible trust claims before they can even proceed with a court case against a defendant company. These trust claims, which victims are forced to file at a defendant’s behest, may be invalid or illegitimate. They may be based on insufficient information. They may be for *de minimis* amounts, which will do nothing to help their family. It does not matter.³⁷ As others have pointed out,³⁸ the process laid out in these bills is “intended to drag out a case until after a sick victim dies – an especially pointed concern given that asbestos cancer victims usually die within a year after being diagnosed. Families often don’t continue litigation after the victim dies, and juries change their assessment of the case.” To put it another way, “delay matters to someone who is sick and dying from mesothelioma. ... Delay is a weapon for asbestos defendants.”³⁹

It should be no surprise that the legislation was written by corporate lobbyists participating in the American Legislative Exchange Council (ALEC), the secretive group run and funded by large corporate donors including many leading asbestos companies and their insurers.⁴⁰ In deciding on which bills to support and push around the country, ALEC lobbyists and state lawmakers meet behind closed doors, bar any and all outside observers, listen only to themselves and vote.⁴¹ That is how “Asbestos Claims Transparency Act” legislation came about.

Date: January 31, 2018. (For more information, contact Joanne Doroshow, Executive Director, Center for Justice & Democracy, joanned@centerjd.org.)

Notes

¹ See Paul Brodeur, “Annals of Law: The Asbestos Industry on Trial, Part 1 – A Failure to Warn,” “Part 2 – Discovery,” “Part 3 – Judgement” and “Part IV – Bankruptcy,” *New Yorker Magazine* (1985).

² Ibid.

³ International Ban Asbestos Secretariat, “Current Asbestos Bans,”

http://www.ibasecretariat.org/alpha_ban_list.php; Matt Mauney, “Canada will Ban Asbestos by 2018,”

Asbestos.com, <https://www.asbestos.com/news/2017/01/04/canada-ban-asbestos-2018/>

⁴ See Paul Brodeur, “Annals of Law: The Asbestos Industry on Trial, Part 1 – A Failure to Warn,” “Part 2 – Discovery,” “Part 3 – Judgement” and “Part IV – Bankruptcy,” *New Yorker Magazine* (1985).

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ U.S. House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law. Hearing on H.R. 982, the “Furthering Asbestos Claim Transparency (FACT) Act of 2013,” March 13, 2013 (statement of Elihu Inselbuch, Caplin & Drysdale), <http://docs.house.gov/meetings/JU/JU05/20130313/100449/HHRG-113-JU05-Wstate-InselbuchE-20130313.pdf>

¹¹ See Center for Responsive Politics, “Clients lobbying on H.R.906: Furthering Asbestos Claim Transparency (FACT) Act of 2017,” *OpenSecrets.org*, <https://www.opensecrets.org/lobby/billsum.php?id=hr906-115>

¹² Jacek M. Mazurek et al., “Malignant Mesothelioma Mortality – United States, 1999–2015,” *MMWR Morb Mortal Wkly Rep*, March 3, 2017, <https://www.cdc.gov/mmwr/volumes/66/wr/mm6608a3.htm>

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¹⁵ U.S. Environmental Protection Agency, “U.S. Federal Bans on Asbestos,” <https://www.epa.gov/asbestos/us-federal-bans-asbestos>

¹⁶ Ibid.

¹⁷ Andrew Schneider, “Brakes using asbestos raise fresh concerns,” *Baltimore Sun*, May 4, 2006,

http://articles.baltimoresun.com/2006-05-04/news/0605040031_1_asbestos-brakes-mechanics

¹⁸ Environmental Working Group, “Under New Safety Law, EPA Picks First 10 Chemicals for Review,” December 7, 2016, <https://www.ewg.org/research/under-new-safety-law-epa-picks-first-10-chemicals-review#.WnDW7JM-foQ>

¹⁹ Bruce Kaufman, “Trump Seen as Supportive of Business-Backed Litigation Bills,” *Bloomberg/BNA*, March 2, 2017, <https://www.bna.com/trump-seen-supportive-n57982084705/>

²⁰ *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace: A Report of the Surgeon General* (1985) at 218.

²¹ “Asbestos Illness Related to Military Service,” *Military.com*, <https://www.military.com/benefits/veteran-benefits/asbestos-and-the-military-history-exposure-assistance.html>

²² Elihu Inselbuch et al., “The Effrontery of the Asbestos Trust Transparency Legislation Efforts,” 28:2 *Mealey’s Litigation Report Asbestos* 1 (February 20, 2013), http://www.capedale.com/files/8122_ASB022013cm.pdf

²³ U.S. House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Hearing on H.R. 982, the “Furthering Asbestos Claim Transparency (FACT) Act of 2013,” March 13, 2013 (responses of Elihu Inselbuch, Caplin & Drysdale, to questions for the record),

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- ²⁷ *In re New York City Asbestos Litigation*, 109 A.D.3d 7, 966 N.Y.S.2d 420, 423 (June 6, 2013).
- ²⁸ See Paul Brodeur, “Annals of Law: The Asbestos Industry on Trial, Part 1 – A Failure to Warn,” “Part 2 – Discovery,” “Part 3 – Judgement” and “Part 4 – Bankruptcy,” *New Yorker Magazine* (1985).
- ²⁹ *Ibid.*
- ³⁰ See, e.g., Occupational Safety and Health Administration, U.S. Department of Labor, *Asbestos*, <https://www.osha.gov/SLTC/asbestos/>; World Health Organization and International Agency for Research on Cancer, *IARC: Arsenic, Metals, Fibers, and Dusts, Volume 100C, A Review of Human Carcinogens* (2009), <http://monographs.iarc.fr/ENG/Monographs/vol100C/mono100C.pdf>
- ³¹ See, e.g., Garlock’s Material Safety Data Sheets (required by the Occupational Safety & Health Administration).
- ³² The judge in this case, Judge George Hodges, retired as a bankruptcy judge in 2011. He was recalled for one year during which time he ruled in the Garlock case. http://judgepedia.org/George_R._Hodges
- ³³ See, e.g., *In re Specialty Products Holding Corp.*, BR 10-11780-JKF, 2013 WL 2177694 (Bankr. D. Del. May 20, 2013); *In re Pittsburgh Corning Corp.*, BR 00-22876 JKF, 2013 WL 2299620 (Bankr. W.D. Pa. May 24, 2013) *clarified on denial of reconsideration*, 00-22876-TPA, 2013 WL 5994979 (Bankr. W.D. Pa. Nov. 12, 2013); *In re W.R. Grace & Co.*, 386 B.R. 17 (Bankr. D. Del. 2008); *In re Mid-Valley, Inc. (Halliburton)*, 305 B.R. 425, 427 (Bankr. W.D. Pa. 2004); *In re USG Corp.*, 290 B.R. 223, 224 (Bankr. D. Del. 2003); *In re N. Am. Refractories Co.*, 02-20198, 2007 WL 7645287 (Bankr. W.D. Pa. Nov. 13, 2007); *In re Quigley Co., Inc.*, 04-15739(SMB), 2008 WL 2097016 (Bankr. S.D.N.Y. May 15, 2008) *rev’d*, 449 B.R. 196 (S.D.N.Y. 2011) *aff’d*, 676 F.3d 45 (2d Cir. 2012).
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