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FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2013

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

H.R. 982

MARCH 13, 2013

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FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2013

WEDNESDAY, MARCH 13, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 3:37 p.m., in room 2141, Rayburn Office Building, the Honorable Spencer Bachus, (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Farenthold, Marino, Holding, Collins, Rothfus, Cohen, Johnson, DelBene, and Garcia.

Staff present: (Majority) John Hilton, Counsel; Ashley Lewis, Subcommittee Clerk; (Minority) James Park, Minority Counsel; Susan Jensen-Lachmann, Counsel.

Mr. BACHUS. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time, and that may not be necessary now, hopefully.

I apologize for the delay in the hearing, but the President visited the Republican conference, and that is always good when the two sides are talking.

We welcome all our witnesses today.

Let me begin by thanking Vice Blake Chairman Farenthold of Texas and Congressman Jim Matheson of Utah for introducing this important bipartisan legislation, the Furthering Asbestos Claim Transparency Act of 2013, or the FACT Act for short.

Let me say this. We are here for one purpose and one purpose only, and that is to protect those victims of asbestos exposure. That is our only motivation. We are not here to protect companies, we are not here to protect the defense bar, plaintiffs' bar. We are here for the victims, and we are here to protect their rights and to ensure that justice is served. We are not here to protect those who are not victims.

Having said that, the Subcommittee on Courts, Commercial and Administrative Law held a hearing on this bill's predecessor, H.R. 4369, in the last Congress, and the Committee reported that bill favorably to the full House. It is important to have a workable sys-

tem that provides appropriate compensation to individuals whose health has been harmed by asbestos exposure.

Congress became directly involved in this matter during the early 1990's in the midst of what the Supreme Court described as an asbestos litigation crisis. As a result of this crisis, many companies facing potentially massive liability claims began to file for bankruptcy. This was not a good situation for asbestos victims seeking assistance, or for companies and their employees. No benefits can be paid by a company that has gone broke or shut down. The same thing is true of a trust that has been depleted.

In 1994, Congress amended the bankruptcy code to allow companies in Chapter 11 to create and fund asbestos trusts which would be responsible for asbestos victims' claims after the companies were reorganized. The trust system was meant to ensure that current and future asbestos victims would be compensated, while allowing companies to continue operations.

By 2011, 60 trusts have been founded, with over $36 billion in assets earmarked for asbestos victims. At this point, half of that money has been paid out in claims.

The enemy of any just compensation system is fraud and abuse. Fraud and abuse takes money away from real victims who desperately need help. This is an especially important issue with regard to the asbestos trust funds, which still face huge future claims and where every penny counts.

The Wall Street Journal reported on Monday that nearly half of all trusts have reduced payments to new victims at least once since 2011 partially in an effort to preserve assets for future victims. That same Wall Street Journal article raised serious questions about waste and fraud in the current system. It disclosed that after virtually no examination, a $26,500 claim was awarded to a person who did not exist. The article also said that according to a review of claims made to the Manville trust, more than 2,000—I think the number is closer to 2,700—applicants could not have been older than 12 years of age at the time they said they were exposed to asbestos in an industrial job.

One attorney quoted in the report suggested that preventing fraud is too expensive and would leave less money to pay claims. Let me say that I could not disagree with that more strongly. My experience is that if you do not stop fraud, it only gets more egregious and more costly.

The trust system is an efficient way to handle asbestos. Companies who have been the biggest defendants in these cases have been able to fund these trusts and remain in business. It is very disturbing that we are increasingly seeing attorneys aggressively pursue claims outside this process, effectively establishing a system of double compensation.

Many lawsuits have been filed against small businesses whose connections to asbestos products in question may be tenuous at best and who are least able to afford protracted litigation. That has serious ramifications for our overall economy.

The trust funds were created with a process designed to prevent this kind of costly and unproductive legal free-for-all. The best way to combat fraud and abuse is to increase transparency and accountability. The FACT Act sets out several commonsense steps to en-

sure that consistent, verifiable claims are made in the trust system and civil litigation. Through better information sharing, it will improve the evaluation of claims and help ensure that funds from the trust are spent on the deserving. This can be done while fully respecting privacy, which we all know is very important when personal health is involved.

America is a caring country. We help deserving people when they are in need. In the case of asbestos exposure, a system has been specifically put in place to compensate individuals whose health has been harmed. Fraud, abuse, and inconsistent claims that drain trusts prevent money from going where it properly should go, to those with true and demonstrable health needs.

In conclusion, thank you all for coming today, and thanks especially to the witnesses for sharing their time and expertise. This promises to be an informative and illuminating hearing.

[The bill, H.R. 982, follows:]

113TH CONGRESS
1ST SESSION

H. R. 982

To amend title 11 of the United States Code to require the public disclosure by trusts established under section 524(g) of such title, of quarterly reports that contain detailed information regarding the receipt and disposition of claims for injuries based on exposure to asbestos; and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 6, 2013

Mr. FARENTHOLD (for himself and Mr. MATHESON) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 11 of the United States Code to require the public disclosure by trusts established under section 524(g) of such title, of quarterly reports that contain detailed information regarding the receipt and disposition of claims for injuries based on exposure to asbestos; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Furthering Asbestos Claim Transparency (FACT) Act of 2013".

SEC. 2. AMENDMENTS.

Section 524(g) of title 11, United States Code, is amended by adding at the end the following:

"(8) A trust described in paragraph (2) shall, subject to section 107—

"(A) file with the bankruptcy court, not later than 60 days after the end of every quarter, a report that shall be made available on the court's public docket and with respect to such quarter—

"(i) describes each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant; and

"(ii) does not include any confidential medical record or the claimant's full social security number; and

"(B) upon written request, and subject to payment (demanded at the option of the trust) for any reasonable cost incurred by the trust to comply with such request, provide in a timely manner any information related to payment from, and demands for payment from, such trust, subject to appropriate protective orders, to any party to any action in law or equity if the subject of such action concerns liability for asbestos exposure.".

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—The amendments made by this Act shall apply with respect to cases commenced under title 11 of the United States Code before, on, or after the date of the enactment of this Act.

○

Mr. BACHUS. At this time, I recognize the gentlelady from Oregon? From Washington. I keep saying Oregon.

Ms. DELBENE. We are close.

Mr. BACHUS. That is right.

Ms. DELBENE. Thank you, Mr. Chairman. I would like to ask unanimous consent for the Ranking Member's opening statement, Mr. Cohen's opening statement, to be submitted to the record.

Mr. BACHUS. Absolutely.

[The prepared statement of Mr. Cohen follows:]

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

The debate over the necessity to fully compensate victims of asbestos exposure is very personal to me. One of my best friends was Warren Zevon, the great singer and songwriter. Warren died of mesothelioma—a cancer of the chest and abdominal lining that often results from asbestos exposure—almost a decade ago. So, I come at today's discussion of H.R. 982, the "Furthering Asbestos Claim Transparency Act of 2013" or "FACT Act," with a bit of a prejudice—one on the side of asbestos victims.

At first blush, the FACT Act seems reasonable enough. Yet as I learned about the FACT Act during a hearing on and markup of a substantially identical bill last Congress, the more readily I came to conclude that this legislation may be a solution in search of a problem.

More problematically, it could end up hurting asbestos victims by denying them full compensation for the harms that they have suffered as a result of the product that many asbestos manufacturers peddled for decades knowing that they were dangerous.

H.R. 982 would impose a number of new reporting and other information-sharing requirements on trusts that have been established under section 524(g) of the Bankruptcy Code. These trusts are designed to compensate current and future victims of asbestos exposure by ensuring that those asbestos manufacturers and other related defendants that have filed for bankruptcy cannot escape their responsibility for the harm they have caused.

The bill would require 524(g) trusts to file quarterly reports with the Bankruptcy Court and the United States Trustee describing each demand for payment from a claimant, including the claimant's name and exposure history, and the basis for any payment made. The Court must make this report part of its public docket.

The bill also would require trusts to provide information regarding payments and demands for payments to any party in an asbestos-exposure related civil action upon that party's written request.

Under section 524(g), asbestos defendants can re-organize under bankruptcy protection and shift their liability for asbestos exposure to these trusts in exchange for agreeing to fund the trusts.

In turn, these trusts pay claimants who seek compensation for harm caused by the bankrupt defendant's actions. Importantly, the trusts owe a fiduciary duty to all beneficiaries to ensure that only proper claims are paid in light of the universe of current and anticipated future claimants.

While not perfect, the trusts have worked reasonably well.

Yet H.R. 982's proponents assert that its additional reporting and information-sharing requirements for 524(g) trusts are needed to prevent fraud by asbestos victims and to eliminate the risk that such victims will be over-compensated. Proponents claim that asbestos victims engage in fraud by "double dipping"—that is, presenting claims to a 524(g) trust and, simultaneously, seeking relief against another asbestos defendant by filing a state-court civil action.

In weighing this assertion, the most objective source that I could find was a study of 524(g) trusts conducted by the Government Accountability Office at former Judiciary Committee Chairman Lamar Smith's request.

The GAO was not able to find any instances of overt fraud. Moreover, GAO found that trusts take appropriate steps to ensure that fraudulent claims are not paid.

But even accepting that fraud by asbestos victims is a real problem with respect to asbestos trusts, I fear that H.R. 982's additional requirements on trusts will raise their administrative costs significantly.

Even with its provision that a party requesting information from a trust could be required to pay "any reasonable cost" of the trust for complying with an information request, the cost burden on a trust may not be relieved.

For instance, the bill does not define what a "reasonable" cost is, nor does it specify who would make such determination, thus opening the door to litigation over these issues and less-than-full payment of costs.

Money used to pay these costs ultimately means less money to compensate asbestos victims.

In light of this risk, I would like to know from H.R. 982's proponents why defendants who are concerned about potential fraud by asbestos victims could not simply seek trust payment information using procedures allowed under existing discovery rules.

Defendants can already obtain the information they want, without undermining compensation for legitimate claims.

Finally, the reporting requirement in H.R. 982 raises privacy concerns.

While I recognize that the bill specifically prohibits trusts from making public any medical records or full Social Security numbers, the bill still would require trusts to make public a claimant's name and exposure history.

Once out in public, such information can be used for any purpose. Potential employers, insurance companies, lenders, and even those who may seek to harm an asbestos victim in some way can have access to this information without the victim's permission or knowledge.

For these reasons, I remain opposed to the FACT Act and I urge my colleagues to oppose this misguided bill.

Ms. DELBENE. I would also like to acknowledge the presence of three asbestos victims in the audience today: Susan Vento, widow of the late Congressman Bruce Vento; Judy Vann Ness; and Genevieve Bosilevac, and ask that their letters to the Committee in opposition to H.R. 982 be entered into the record.

Mr. BACHUS. Thank you. So be it.

We extend our welcome to you and, Ms. Vento, to Bruce.

Ms. DELBENE. And I would also like to ask that the letters of two additional asbestos victims, Bill Cawlfield and Julie Gundlach, in opposition to H.R. 982 also be entered into the record.

Mr. BACHUS. Absolutely.

[The information referred to follows:]

March 13, 2013

The Honorable Spencer Bachus, Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen, Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Re: Opposition to H.R. 982, the Furthering Asbestos Claim Transparency Act (FACT Act)

Dear Chairman Bachus and Ranking Member Cohen:

My name is Susan Vento, and I'm writing to express my strong opposition to H.R. 982 called the Furthering Asbestos Claim Transparency Act (FACT Act). My husband was the late Congressman Bruce F. Vento who served for more than 24 years in the House of Representatives representing Minnesota's Fourth Congressional District. He died from mesothelioma in 2000 within eight months of being diagnosed.

Mesothelioma is an aggressive cancer caused by asbestos exposure. Bruce was exposed through his work as a laborer years before we met or became involved in public life. He told his constituency about his diagnosis in early February 2000 when he announced why he would not run for re-election. On February 14, he had his lung surgically removed and then began an aggressive regimen of chemotherapy and radiation at the Mayo Clinic.

It was not enough. My husband died three days after his 60th birthday in October. With his death, our country lost a dedicated and humble public servant years before his time. I lost so much more.

Bruce dedicated himself as a tireless and effective advocate for the environment, for working people and for the disadvantaged. During his time in Congress, he was well respected by members of all parties. He served as chairman of the Natural Resources Subcommittee on National Parks, Forests and Public Lands and also served on the House Banking Committee.

The FACT Act directly contracts the decades of work my husband invested in helping those who could not help themselves. If this bill passed, it would be a serious step back for the important work he achieved as your colleague. As the FACT Act is currently written, it is one-sided, unfair and unnecessary. It touts "transparency" yet will delay and in some cases deny justice to people suffering from debilitating asbestos-related diseases like mesothelioma.

I thank you for your consideration and hope you will stand with me in support of Bruce's memory and in opposition of this bill.

Sincerely,
Susan Vento

March 13, 2013

The Honorable Spencer Bachus, Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen, Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Re: Opposition to H.R. 982, the Furthering Asbestos Claim Transparency Act (FACT Act)

Dear Chairman Bachus and Ranking Member Cohen:

My name is Judy Van Ness and I'm writing to voice my strong opposition to H.R. 982, the Furthering Asbestos Claim Transparency Act (FACT Act). This past August, my husband Dickie passed away from mesothelioma, a terminal cancer caused by asbestos exposure. He was only 63 years old. We'd been married for 25 years and have one son named Anthony.

In August 2011, we realized Dickie was getting sick when he started having trouble breathing. Dickie was very active and shouldn't have had trouble catching his breath. He was an avid, professional tennis player even after he retired from his job as a pipefitter in 2008. He'd go play at our local club sometimes 5 or 6 times a week after work with Anthony. A doctor visit revealed he had fluid on his lungs and within a month we learned he had mesothelioma. After his diagnosis, Anthony decided to continue school locally to spend time with his dad. Despite undergoing chemotherapy, Dick passed away on August 30.

During Dickie's last year, I was with him constantly for the majority of his medical visits. However, we didn't socialize because he was in so much pain, was losing weight and didn't have the strength to talk to people. People didn't know he was sick because we go visiting anymore. Our only social visit was our weekly trip to the interventional radiology center at the hospital where he would visit with the nurses who made over him. The cancer was hard on all of us. It just stopped his life. Dickie may have been the one with cancer, but we were all living it with him. When one member of a family gets cancer, you all get it.

Dickie was exposed to asbestos through his service in the Navy as a machinist mate. Then later, he worked as a union pipefitter for 35 years in our hometown of Richmond, Virginia. He finally retired on September 2009 after working hard all his life. It took me a while to convince him to retire, but he was always glad I had. He had been retired for only two years when they found the cancer. We should have had so many more years together.

I want to hold the companies who knowingly used asbestos accountable for their decisions. They are the one who did wrong, not Dickie. Yet, it's him and his loves ones who are paying the highest cost.

Please join me in my opposition to the FACT Act. It harms those of us who have lived with mesothelioma and we have already lost so much.

Thank you for your consideration of my views.

Judy Van Ness

March 13, 2013

The Honorable Spencer Bachus, Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen, Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Re: Opposition to H.R. 982, the Furthering Asbestos Claim Transparency Act (FACT Act)

Dear Chairman Bachus and Ranking Member Cohen:

My name is Genevieve Bosilevac, and I was diagnosed with mesothelioma in 2009 a few days before my 48th birthday. I am strongly opposed to H.R. 982, the "Furthering Asbestos Claims Transparence" Act of 2013. It is important for you to understand how awful this bill would be for people like me. Please don't make it into a law.

I have two little boys. They're twins and they just turned six years on Feb. 23. I thank God every day for them and for my husband, Michael. Without them, I could not be writing to you today. They are the reason I continue to fight but every day is hard. It's a fight.

Mesothelioma is the worst kind of cancer you can get. What makes it so bad is that I shouldn't have it. I was diagnosed because someone else decided to use asbestos in their automotive products – gaskets, brakes, clutches. I just did what I was supposed to. I worked in my family's business. It is an automotive painting business. It was my job to make deliveries to our clients, the mechanics and auto body shops and the like. They say that's how I was exposed to asbestos. That, and the remodeling work my parents did on our family home.

What we didn't know was that those products contained asbestos and could cause my cancer. Now, these asbestos companies are asking you to pass a bill that will make it harder for people like me to get justice. Please don't let that happen. I ask you to please stand up for cancer victims and vote against the FACT Act of 2013.

Thank you for your consideration of my views.

Sincerely,

Genevieve Bosilevac

March 13, 2013

The Honorable Spencer Bachus, Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen, Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Re: Opposition to H.R. 982, the Furthering Asbestos Claim Transparency Act (FACT Act)

Dear Chairman Bachus and Ranking Member Cohen:

I am strongly against H.R. 982, the Furthering Asbestos Claim Transparency Act. Thank you for allowing me to tell you why the FACT Act is not in the best interest of the people whom you serve.

I cannot tell you how much I oppose the FACT Act. If passed, it would be a slap in the face for people like me who have been diagnosed with mesothelioma through our exposures to asbestos. I did not ask for this. It was not my fault. Yet, the companies who are responsible for my asbestos exposure seek to further harm me and my family through this thinly veiled attempt at so-called transparency.

I was born in Pueblo, Colorado in 1939 in an old farmhouse my family owned since 1900 and still owns today. Growing up, I played and did my chores surrounded by asbestos dust generated by my family's remodeling projects. Farm homes are always under construction. Yet, I have to wonder what my dad would think if he knew the improvements he was making would someday be responsible for taking my life.

He would be disappointed and angry that no one had warned him. As am I. WR Grace knew their insulation contained asbestos. Yet, they have never been held responsible for those reckless actions because they're still in bankruptcy. Where was their transparency when they sold asbestos insulation?

My history with asbestos doesn't stop there. Since I was young, I've always been fascinated with radios, which became popular during my youth. It was a magical invention that opened a window to new places I could never have dreamed of as a Colorado farm boy. It was what motivated me to attend the University of Colorado at Boulder to study electrical engineering and later to enter the Radio, Television, Recording and Electronics Industry.

Over the past thirty years, I have worked on over 1,000 radios from pre-World War II. I repaired their cabinets made of Bakelite which contained asbestos. I cut and worked with a radio part

called resistant line chord that was wrapped in asbestos. This hobby, which added joy to my life, will someday take it.

I can't go back and change the past. Even if I could, I wouldn't. I have lived a good life. However, that does not excuse the companies who used asbestos in their products. They are responsible for denying me the rest of my life. My diagnosis is a direct result of the WR Grace and other companies' decisions to use asbestos despite knowing the dangers. WR Grace has yet to reemerge from bankruptcy originally filed in 2001. This made it impossible for me to hold this company accountable for its wrong-doing. However, I have been able to take action against the other companies responsible for my additional asbestos exposures.

If the FACT Act of 2013 were passed, mesothelioma victims like me would be forced to wait until WR Grace emerged from bankruptcy before filing my other claims. In effect, the bill would allow companies that poisoned hard-working Americans with asbestos to again dodge their liability by casting blame on the victims and the asbestos trusts created to help them.

Please join me in opposition of the FACT Act of 2013. It only serves to delay justice to cancer victims like myself who live one day at a time.

Sincerely,

Bill Cawlfield

March 13, 2013

The Honorable Spencer Bachus, Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen, Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Re: Opposition to H.R. 982, the Furthering Asbestos Claim Transparency Act (FACT Act)

Dear Chairman Bachus and Ranking Member Cohen:

I am writing to express my strong opposition to H.R. 982, the "Furthering Asbestos Claim Transparency Act" (FACT Act). Thank you for allowing me the opportunity to tell you about my experience with mesothelioma. I hope it will help you understand why it's important for you to vote against the FACT Act of 2013.

I was only 35 when my doctor told me I had mesothelioma. My daughter was 3. My oncologist wanted to start chemotherapy right away, but made it clear the treatment was to prolong my prognosis – not to cure me. I was told to see a lawyer and to get my affairs in order. There is nothing so devastating than to be told that. While my doctors didn't say, 'You will die,' the implication was clear.

I went home in a fog, trying to cope. It was hard to function. I looked at my daughter and be overcome with grief for the times in her life I would surely miss. I didn't know what mesothelioma meant. Searching the Internet did nothing to alleviate my fears. I learned that mesothelioma is a rare cancer caused by asbestos exposure. Everything I found about its prognosis was terrifying: it has a six to twelve month survival rate; it's often fatal; and it's characterized by a painful physical decline that inevitably ends in death.

Luckily, I also learned about the Mesothelioma Applied Research Foundation, which hosts an annual conference for patients, caregivers and researchers. It was there I found my mesothelioma specialist. I decided on an aggressive treatment that could give me a chance of seeing my little girl grow into a beautiful young woman.

I traveled from St. Louis to New York to start my treatment in 2007. It consisted of two surgeries with a heated chemotherapy wash. Then, three times a month for the next four months, I traveled to New York for more chemotherapy. My last surgery was in 2008.

It's been hard, but it's much better than putting your affairs in order.

My asbestos exposure came from many places. My father worked as an electrician. He brought the fibers home on his clothes. He also changed his car brakes. My parents also built their own home. Asbestos was in the walls, the floors and the insulation. I was a kid in the early 1970s. It was everywhere.

No one knew of the dangers. No one except the companies who made it. But they didn't disclose that information. Making asbestos trusts compile a list of names of mesothelioma victims like me is not going to address any allegations of fraud. Instead, it's going to delay victims' claims and help those who have already committed an even greater fraud that has cost tens of thousands of lives.

My daughter still has her mother, but what about all the other mothers and fathers, brothers and sisters, husbands and wives who have lost someone because of the negligence of asbestos companies?

I hope when it comes time to vote on the FACT Act of 2013 you will remember my story. Remember that the legal system is the only avenue thousands of Americans like me have to redress the wrong that has been done to us. Please stand with us and oppose the FACT Act.

Thank you for your consideration of my views.

Sincerely,

Julie Gundlach

Ms. DELBENE. Thank you, Mr. Chair.

Mr. BACHUS. Thank you.

Is there anyone on the Democratic side who wishes to be heard?

If not, we will go to Mr. Farenthold for an opening statement, 5 minutes.

Mr. FARENTHOLD. Thank you very much, Mr. Chairman. My service on this Committee and on the Committee on Government Oversight and Reform are dedicated to eliminating waste, fraud and abuse in our government, and to that end I have introduced H.R. 982, the "Furthering Asbestos Claims Transparency Act of 2013." The victims of asbestos-related diseases deserve full compensation for their injuries, and I am extremely sympathetic to these claims.

However, the trusts set up to provide justice are shrouded in secrecy and are frequently abused by claimants and, more accurately, their lawyers wasting money intended for mesothelioma and other asbestos-related injury sufferers. Unfortunately, these trusts are not limitless, bottomless pits of money.

The problem with fraud in the asbestos compensation system has been well documented over the past several decades. Often, fraud is committed when plaintiffs and their attorneys rely on one set of facts in state court and another set of facts in the bankruptcy court. This type of abuse can take place when the system provides no transparency with payouts.

Therefore, this legislation would amend section 524(g) of the bankruptcy code to require asbestos trusts to file quarterly reports with the bankruptcy court detailing the claimant's name and the amount paid to each claimant, the basis for each payment. We specifically narrowed this bill to protect the privacy of plaintiffs to the greatest extent possible.

This legislation is fair to all parties and has bipartisan support. I co-introduced it with Mr. Matheson of Utah.

It is absolutely imperative that we make sure that those who truly have claims are taken care of, but we have also got to make sure that we stop the waste, fraud and abuse, and make sure that there is money there to pay all the claims. Congress must act to cut back abuse of this system.

Thank you very much, and I will yield back.

Mr. BACHUS. Thank you.

Are there other Members wishing to make an opening statement?

Thank you. At this time, we will welcome our witnesses.

Professor Steven Todd Brown teaches at the SUNY Buffalo Law School—That is the State University of New York, that is what SUNY stands for—where he also serves as director of the school's Center for the Study of Business Transactions. Professor Brown's research and teaching draws on his experience managing a small business and in private practice. His recent academic work focuses on the constitutional limits and institutional dynamics of aggregate litigation, including bankruptcy and procedural devices for consolidating mass tort cases.

Professor Brown received his J.D. from the Columbia School of Law and his LLM from the Beasley School of Law at Temple Uni-

versity. He earned his undergraduate degree from Loyola University in New Orleans.

Do you know the Pope? Have you been following that?

Mr. BROWN. I have.

Mr. BACHUS. You know we have a new Pope?

Mr. BROWN. I just became aware of that.

Mr. BACHUS. Yes. But we thank you for your testimony, professor.

Judge Ableman is special counsel at McCarter and English LLP in Wilmington, Delaware. Before joining McCarter and English, Judge Ableman spent over 29 years as a state trial judge, first in the Delaware Family Court and then on the Delaware Superior Court, where she presided for 2 years over the asbestos litigation docket. She has authored thousands of judicial opinions that have helped shape Delaware law for the past three decades.

Judge Ableman received her B.A. with distinction from Simmons College in Boston and her J.D. from the Emory University School of Law, where she was Notes and Comments Editor of the Emory Law Journal.

Thank you, Your Honor, for your testimony today.

Our third witness is Mr. Elihu Inselbuch. How do you say that? Okay. He practices law at Caplin and Drysdale's New York City office. His practice focuses on complex litigation, including extensive asbestos creditors' rights litigation and commercial and securities fraud litigation.

He is past president of the Princeton University Alumni Association, where he received his A.B., holds an LLP from Columbia University Law School and an LLM from New York University School of Law.

I thank you for your testimony.

Our final witness is Mr. Marc Scarcella. Mr. Scarcella is a manager at Bates White, an economic consulting firm in Washington, D.C. He specializes in quantitative methods and their application in dispute resolution, settlement negotiations, and litigation management and strategy. Prior to joining Bates White, Mr. Scarcella was managing director at an analysis and research planning corporation, where he provided economic analysis and consultative services in 524(g) Chapter 11 bankruptcy reorganization in the areas of asbestos liability estimation and insurance allocation.

He has an M.A. in financial economics from American University and a B.A. degree in economics and public affairs, also from American University.

Thank you for your testimony today.

Professor Brown, we will start with your testimony, but let me say this. Each of the witness' written statements will be entered into the record in their entirety. I ask that each witness summarize his or her testimony in approximately 5 minutes. I am not going to read this about the yellow light and the green light and the yellow light. We will turn them on, but I don't want you to stop in mid-sentence.

TESTIMONY OF S. TODD BROWN, SUNY BUFFALO LAW SCHOOL

Mr. BROWN. Thank you, Chairman Bachus and Members of the Committee. I appreciate the opportunity to discuss the FACT Act

with you today. I will begin by discussing trust performance data and then turn to a discussion of the fraud question.

Bankruptcy trusts are established as limited funds for paying all current and future asbestos-related claims of the debtor. The idea here is that it is equitable to bind absent future claimants, notwithstanding the fact that they are not present and cannot ensure the loyalty of those who represent them in the process, as long as their claims will be valued and paid in substantially the same manner as similar current claimants who can speak for themselves.

Since it is a limited fund, if a trust overpays initial claims in number, in value, or both, the amount left for future victims is necessarily lower. When that happens, trusts reduce payment percentages. The percentage of a claim's settled value is actually paid for all claims going forward. A low payment percentage may reflect that a trust is and always was underfunded. But the sheer volume of reductions since 2010, approximately half of all active trusts, tells us something more.

First, malignancy and other claims continue to exceed even relatively recent projections. Second, past claimants have been overcompensated relative to current and future claimants.

As other defendants leave the tort system and establish their own trusts, which appear likely to follow the same pattern, should we really expect future victims to fare better than plaintiffs who are already grossly underfunded and undercompensated?

Why are there so many more claims than are projected?

The further criteria get away from testing the intrinsic merit of claims, the more volumes are based on client recruiting decisions, which are exceptionally difficult to predict. This becomes more difficult as practices target claim standards.

This brings me to the question of fraud. If we are talking about fraud, we need to understand what exactly we are talking about. Are we talking about civil or criminal fraud in the legal sense? If so, we are talking about something that is very narrow and very difficult to prove, even in the best of circumstances. Legal fraud is hard to distinguish from honest mistakes. That makes it hard to prosecute.

I think what we are focusing on when people say fraud in this area is not legal fraud. They are talking about the popular use of the term, the idea that the claims appear so specious that they contradict themselves internally or they contradict something that has been said elsewhere that many would look at them and wonder how did that claim even get paid. It is a normative assessment of the likely merit of the claim and goes to the policy question more than whether some lawyer or professional has committed a crime.

Notwithstanding the limited empirical evidence, a survey of trust terms indicates that they will accept a broader range of claims than in the tort system, and also probably accept claims that a lot of us would look at and scratch our heads over.

So even if we cannot demonstrate legal fraud in a case, we still may reasonably infer that those who make such mistakes frequently are not merely making mistakes, but they have set up their procedures so that these happy accidents occur with some regularity. In the alternative, we might infer that some are just

careless, with the cost of this carelessness being shifted to the trust and ultimately to future victims.

Suspicious patterns are often the first clue that something like this is happening. Such patterns led the judge in the silica MDL to authorize additional discovery, discovery that unveiled the depths of dubious claim development patterns and practices in that litigation. Many of these practices were borrowed from asbestos litigation. Many of the professionals involved were also very active in asbestos litigation.

Although trusts at the time had far more data at their disposal, they either did not discover or were effectively prevented from investigating these practices to a sufficient level to fully understand and counter them. Prior to the close of the silica MDL, witnesses testifying on the FAIR Act and discussing the act elsewhere told us that there was nothing to see there, claims of fraud were anecdotal, that everything was just fine.

The problem from my perspective really doesn't go to protecting defendants. It goes to protecting the integrity of the bankruptcy process that established the trust. It goes to protecting the integrity of the state courts that manage asbestos tort litigation and ask for this information. And it goes to whether the compensation frameworks that will be available should my loved ones or yours need to resort to them 5, 10, or 20 years from now, if they do, heaven forbid, that they will be adequate.

I believe that greater transparency can lead to a better system. I respect that others may disagree, but I welcome the fact that we are having this dialogue, and I thank you for inviting me.

[The prepared statement of Mr. Brown follows:]

WRITTEN STATEMENT OF PROFESSOR S. TODD BROWN

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HEARING ON THE FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2013

HOUSE JUDICIARY COMMITTEE:
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

March 13, 2013

Chairman Bachus, Ranking Member Cohen, and members of the Subcommittee, thank you for this opportunity to testify concerning H.R. 982, the Furthering Asbestos Claim Transparency (FACT) Act of 2013 [hereinafter, the FACT Act or the Act].

I am Todd Brown, Associate Professor of Law and Director of the Center for the Study of Business Transactions at SUNY Buffalo Law School, where I teach Bankruptcy, Torts, Mass Torts and related courses. My research focuses on the intersection of mass torts and bankruptcy law, with an emphasis on identifying and preventing practices that undermine the integrity of the judicial process and the operations of global settlement funds. Prior to becoming a law professor, I worked with the Business Restructuring and Reorganization practice at Jones Day from 1999 to 2003, where I served primarily as debtor's counsel in several large corporate chapter 11 cases. I subsequently worked at Wilmer Cutler Pickering Hale & Dorr from 2003 to 2007, where, among other things, I represented individuals, corporations, banks and insurers in bankruptcy and class action matters.

The views offered here are mine alone and are not those of my current or former employers or clients. I am not being compensated for my testimony today, and I do not accept any personal or professional compensation or funding from any party that is involved in asbestos personal injury or asbestos bankruptcy litigation or legislation.

Introduction

The FACT Act would amend title 11 of the United States Code to require asbestos bankruptcy trusts to file quarterly claim-level reports on the applicable

bankruptcy court's docket. Under the Act, trusts must report (a) the name and exposure history of each party submitting a proof of claim and (b) the basis for any payment made to each claimant during the quarter. The Act expressly excludes "any confidential medical record" and "the claimant's full social security number" from the mandatory quarterly reporting requirement. The Act further requires trusts to comply with certain requests for information concerning claim submissions and payments, subject to appropriate protective orders, and authorizes the trusts to charge fees to cover the reasonable costs of complying with such requests.

In my written statement and testimony concerning the Furthering Asbestos Claim Transparency Act of 2012,[1] I surveyed the history of asbestos personal injury litigation, the evolution of the asbestos bankruptcy trust system, and the relationship between state tort litigation and bankruptcy trusts. In the time since, I have completed one phase of my study of the bankruptcy trust system's operations and summarize some of the findings below. In addition, this written statement outlines some basic features that are common at bankruptcy trusts and discusses some potential concerns with the FACT Act.

Asbestos Personal Injury and Bankruptcy

Less than a decade after *Borel v. Fibreboard Paper Products Corp.*[2] ushered in modern asbestos personal injury litigation, the largest asbestos producer in the United States, Johns-Manville, petitioned for relief under Chapter 11 of the

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[1] *See* FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2012, HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, H.R. 4369, No. 112-120, at 24-50 & 175-182 (May 10, 2012) [hereinafter, the 2012 Hearing Report].

[2] 493 F.2d 1076, 1083-85 (5th Cir. 1973).

Bankruptcy Code. Just as *Borel* provided an early roadmap for asbestos personal injury victims to pursue recovery against asbestos manufacturers, the Manville Chapter 11 plan provided a roadmap for defendants seeking to resolve that liability. Under this model, which was codified at Section 524(g) of the Bankruptcy Code in 1994, the defendant establishes and funds a bankruptcy trust, and the district court enters an injunction channeling all of the defendant's current and future asbestos liability to this trust upon the satisfaction of certain conditions. Once established, the trusts process and pay claims according to their respective trust distribution procedures, which establish both the criteria that must be satisfied to qualify for payment and the default value of different types of claims that satisfy these criteria.

Although bankruptcy has become a viable option for companies seeking relief from asbestos liability, it also tends to increase the liability share of defendants who remain in the tort system. Manville's departure from the tort system "shifted liability to the remaining solvent defendants in such a way as to increase the chances that those firms, too, eventually would seek protection in bankruptcy."[3] These subsequent bankruptcies, in turn, increased the liability shares of still other defendants.[4] This cycle continues to this day.[5] To date, approximately

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[3] RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 167 (2007).
[4] *See* S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 852 (2008).
[5] *Id.*

60 asbestos bankruptcy trust funds have been established or are in the process of being established.[6]

As the number of active trusts grew (and number of key defendants in the tort system declined) during the last decade, the trust system's collective payments also grew. From 2006 through 2011, bankruptcy trusts paid more than $13.5 billion to asbestos personal injury claimants,[7] leaving approximately $18 billion in assets[8] to satisfy claims that may continue to be filed through 2050.[9] And though new trusts are expected to control more than $12 billion in assets, they appear likely to follow similar payment patterns.

Trust Performance and Future Claims

Given the substantial surge in claim payments during the last decade, several trusts have reduced payment percentages[10] to preserve assets. In its 2010 report

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[6] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3 (2011)[hereinafter GAO REPORT]. Roughly forty of these trusts are active and routinely process and pay claims.

[7] Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, MEALEY'S ASBESTOS BANKR. REP. 1, 2 (June 2012). The payments made during 2012 have not been reported by several trusts to date and, accordingly, have not been included in these figures.

[8] *Id.*

[9] *See* AM. ACAD. ACTUARIES, CURRENT ISSUES IN ASBESTOS LITIGATION, at 2 (Feb. 2006)("Although occupational exposure to asbestos was significantly reduced following the establishment of Occupational Safety and Health Administration (OSHA) requirements in the early 1970s, asbestos diseases are expected to manifest at least through 2050 in the United States, and longer in several other countries where high exposure levels continued longer."); ERIC STALLARD ET AL., FORECASTING PRODUCT LIABILITY CLAIMS (2005)(projecting asbestos personal injury claims will continue through 2050).

[10] The "payment percentage" is the percentage of the value assigned to a claim that will actually be paid to a claimant. Thus, a claim that is assigned a value of $100,000 by a trust applying a 30% payment percentage will be paid $30,000. Trusts

on asbestos bankruptcy trusts, RAND Corporation found that only one of the 29 trust-claim-class combinations it analyzed, the T.H. Agriculture & Nutrition Trust (THAN Trust), applied a 100% payment percentage, and that trust had not yet finished processing its initial claims.[11] The median payment percentage was 25 percent, with no trust other than THAN paying more than 60 percent of the settled claim value.[12]

As reflected in Figure 1, twenty trusts have reduced their payment percentages since the 2010 RAND Report. Two others – Combustion Engineering and DII – appear to be in the process of reducing their payment percentages.[13] During this time, per-claim compensation at these trusts declined between 9% and 93.33%.[14] In fact, the THAN Trust reduced its percentage from 100% to 30% shortly after the RAND report; thus, a mesothelioma claimant who stood to receive $150,000 from the trust in 2010 would receive $45,000 today. Similarly, a mesothelioma claim submitted and settled at the scheduled value under the Lummus TDP today will receive $2,500; a mere 10% of the $25,000 the same claim

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frequently reduce payment percentages once they conclude that continuing payments at existing levels is unsustainable.

[11] Lloyd Dixon, Geoffrey McGovern & Amy Coombe, ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 36-38 (2010) (range from 1.1% to 100%, with a median payment percentage of approximately 25%). The THAN Trust subsequently reduced its payment percentage to 30% in 2011. http://www.thanasbestostrust.com/Files/20110321_THAN_Payment_Percentage_Notice.PDF.

[12] *Id.* at xv.

[13] *See* discussion infra at note 17.

[14] *See* Figure 1.

would have received in early 2011.[15] In light of these reductions, payment percentages range from .5% to 70%.

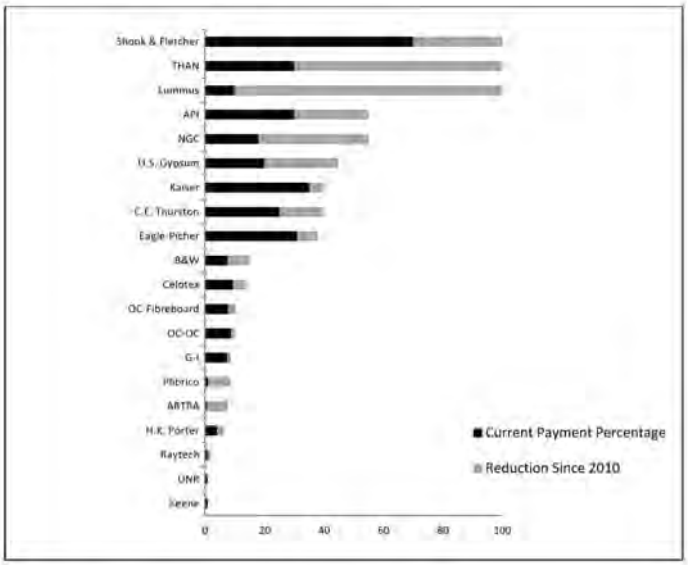

Figure 1: Payment Percentage Reductions Since 2010[16]

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[15] This reduction was attributed to the fact that "more cancer claims have been filed with the Trust in its first three years of operations than were forecast during the bankruptcy case to be filed over the 40 year life of the Trust." *See* Letter to Holders of TDP Determined Lummus Asbestos PI Trust Claims, dated June 13, 2011, at 1 http://www.abblummustrust.org/Files/20110616_Lummus_Letter_To_TDP_Claim_Holders.pdf.

[16] This figure does not include trusts that are actively reconsidering their payment percentages, notwithstanding any likelihood that such reconsiderations will result in payment percentage reductions. *See* DII Industries, LLC Asbestos PI Trust Notice of Payment Percentage Reconsideration (Feb. 22, 2013), *available online at:* http://www.diiasbestostrust.org/files/20130222%20Notice%20of%20Payment%20Percentage%20Reconsideration.pdf ("This re-evaluation will likely result in a reduction of the percentage.").

Similarly, this figure does not include the trustees' proposed reduction of the Combustion Engineering 524(g) Asbestos PI Trust payment percentage to 44% in May of last year, which was to be effective June 18, 2012. *See* Notice to Holders of Combustion Engineering TDP Claims (May 17, 2012), *available online at:* http://www.cetrust.org/docs/20120517_CE_Payment_Percentage_Notice.pdf. The

Bankruptcy trusts have taken other steps to limit claim payments. For example, in January 2012, the Manville Trust adopted a "Maximum Annual Payment," or MAP, which places an aggregate cap on the trust's payments to claimants according to its projected assets and liabilities for the year. Once the MAP is reached, the trust will make no further claim payments during the year, and all unpaid pending claims will carry over into the following year. The MAP for 2012 was $132 million, and the trust reported that it deferred approximately $17.7 million in claims until January 2013.[17] Thus, although the Manville Trust payment percentage remains at 7.5%, its approved claims in 2012 appear to have exceeded projections by a wide margin.[18]

This recent history suggests that after a quarter century of experience in processing and paying asbestos claims, many bankruptcy trusts continue to underestimate future liabilities and, accordingly, pay claims at unsustainable rates

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plaintiff-controlled Trust Advisory Committee for this trust informed the trustees that it was withholding its consent to the reduction, as is allowed under the TDP for the trust, and this dispute does not appear to have been resolved as of the preparation of this written statement. *Id.* Accordingly, this reduction does not appear to have gone into effect, and all claims paid in the interim have been paid under the old payment percentage (48.33%).

[17] *See* Manville Personal Injury Settlement Trust, Special-Purpose Consolidated Financial Statements for Dec. 31, 2012 and 2011, at 10.

[18] Similarly, the Combustion Engineering 524(g) Asbestos PI Trust employs a MAP (currently set at $75 million) and a Claims Payment Ratio, which allocates 87% ($65,250,000) of the MAP to malignancy claims and 13% ($9,750,000) to non-malignant claims. *See* Combustion Engineering 524(g) Asbestos PI Trust 2013 Maximum Annual Payment, Claims Payment Ratio notice, *available online at:* http://www.cetrust.org/docs/CE_2013_MAP_Notice.pdf. The trust's non-malignancy MAP for 2013 was exhausted in January of this year. *Id.* The trust paid all approved malignancy claims in 2012 – $89,282,678, an amount that exceeds the malignancy portion of the MAP by more than $34 million (or 36.8%) – due to a "carryover" from years earlier. Combustion Engineering 524(g) Asbestos PI Trust Annual Report for the Fiscal Year Ended December 31, 2011, at 4.

before ultimately reducing payments as old estimates prove woefully inadequate. Some trusts repeat this process several times.[19] New trusts go online – employing largely identical claim criteria and quality control measures – and, for many, the pattern continues. Regardless of whether they become inactive or simply continue reducing payments, few of the trusts operating today appear likely to "value, and be in a financial position to pay" initial claims and future demands that involve similar claims "in substantially the same manner."[20]

Understanding the Pattern

Even as their payments became a far larger component of overall asbestos personal injury compensation, many trusts became less transparent and more aggressive in challenging efforts to investigate their operations.[21] During this time, the TDPs of newly established trusts included confidentiality and "sole benefit" language that preclude public disclosure of any claim-level information and may delay or effectively prevent[22] private discovery of claim-level information, and the

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[19] For example, the USG Trust has reduced its payment percentage three times since 2010, for a net reduction from 45% to 20%. *See* Letter to Counsel for Claimants Regarding the USG Payment Percentage dated April 20, 2010 (reducing the percentage from 45% to 35%); Notice From Trustees Regarding USG Payment Percentage dated Jan. 6, 2011 (reducing the percentage to 30%); Notice of Payment Percentage Change dated Sept. 28, 2012 (reducing the percentage to 20%). All notices are available online at: http://www.usgasbestostrust.com/.

[20] 11 U.S.C. § 524(g)(2)(B)(ii)(V).

[21] Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, MEALEY'S ASBESTOS BANKR. REP. 1, 9 (June 2012).

[22] Even in jurisdictions that require disclosure of trust forms to other parties in state tort litigation, plaintiffs may avoid this disclosure by simply waiting to file trust claims until after the litigation is over. Lloyd Dixon & Geoffrey McGovern, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION (2011) (noting that some lawyers file all trust claims early in a case, while others elect to wait until after the litigation

TDPs of some trusts that were confirmed years earlier were amended to include virtually identical provisions. Although most trusts file annual reports, many of these reports are no longer accessible through PACER because the judge overseeing the cases ordered them closed. Some trusts have never provided substantial public information concerning their operations, and others have placed annual reports, notices and other information concerning their activities behind password-protected walls.

Given the pattern of trust depletion, growing secrecy concerning trust operations, and anecdotal accounts of specious claiming practices in the trust system, it is perhaps inevitable that much of the discussion to date has centered on the fraud question.[23] As I noted in my prior testimony, however, "In the absence of transparency, nobody with an interest in this debate – litigants, legal representatives, trust officials or judges – has access to sufficient information across trusts to reach the extreme conclusions that are commonly advanced – that fraud is nonexistent, on the one hand, or rampant, on the other – as an empirical matter."[24]

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concludes). Some jurisdictions require plaintiffs to file all trust claims before trial, and others are considering similar requirements. As I noted in my prior testimony, however, these provisions are under attack and may be difficult to enforce. *See* 2012 Hearing Report, *supra* note 1, at 182.

[23] *See, e.g.*, Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J., March 11, 2013, at A1; Editorial, *Busting the Trust Fraud*, WALL ST. J., Dec. 12, 2012, at A18; Daniel Fisher, *Double-Dippers*, FORBES, Sept. 4, 2006, at 136 ("Even as states crack down on frivolous lawsuits by people with no symptoms at all, trusts established by bankrupt asbestos manufacturers are paying tens of thousands of claims each year based on inflated or downright false stories of how people were exposed to their products.").

[24] 2012 Hearing Report, *supra* note 1, at 179.

Unless and until the fraud question can be addressed empirically, this cloud is likely to continue to hang over the bankruptcy trust system.

Likewise, the different layers of "double-dipping"[25] asserted by state tort defendants are also difficult to evaluate empirically. Limited transparency may create opportunities for plaintiffs to obtain more from tort defendants and trusts in the aggregate than the damages they are found to have suffered at trial. Beyond these circumstances, defendants also appear to use the term to refer to the possibility that plaintiffs are exploiting the information asymmetries created by the lack of transparency to obtain higher settlement values in tort than they would receive otherwise. Allowing the former, narrower scenario is difficult to justify as a normative matter given that such plaintiffs would, in fact, receive more than appropriate to make them whole due solely to the lack of transparency.

Even without widespread fraud, the design of Section 524(g), the manner in which asbestos bankruptcies are administered, and the management structure and criteria at established trusts continue to work against the goal of ensuring equitable compensation for future victims. These factors are discussed below.

[25] The term "double-dipping" generally refers to the concept of receiving more than one recovery for the same injury. This broad understanding of the term as applied to asbestos personal injury recoveries, however, may be misleading because any one plaintiff may not be made whole by the total recoveries he or she receives from bankruptcy trusts and tort defendants. To the extent that I refer to the term in my work, I use it only to refer to those cases in which a plaintiff has received full recovery on a judgment in the tort system and receives additional recovery from one or more bankruptcy trusts.

A. Tort Claims, Section 524(g) and Asbestos Bankruptcies

Some basic features of asbestos bankruptcies contribute to the pattern. First, although the claims allowance and estimation procedures typically employed in Chapter 11 ordinarily provide bankruptcy courts with considerable discretion in limiting the influence of weak claims in the case, tort claims receive special treatment pursuant to Title 28. Under 28 U.S.C. § 157(b)(2)(B), bankruptcy judges are not authorized to allow or disallow personal injury tort and wrongful death claims against the estate.[26] This section further provides that individual claims cannot be estimated for allowance purposes.[27] In the absence of provisions authorizing consideration of claim-level information necessary to distinguish strong and weak claims, bankruptcy courts lack a basic mechanism for ensuring that those who vote on the plan are, in fact, legitimate stakeholders in the debtor's case.

Moreover, those who control these untested claims may exercise considerable influence in shaping the ultimate design of the trusts and TDPs. Although it is frequently necessary to employ the cram-down (or the threat of a cram-down) to confirm a Chapter 11 plan in non-asbestos cases, it is not possible to cram down a channeling injunction; the 75% vote requirement of Section 524(g) is mandatory.[28] Thus, to get sufficient votes to issue the channeling injunction, the

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[26] Under 28 U.S.C. § 157(b)(2)(B), bankruptcy courts may not oversee the "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11." Rather, these matters may be heard in the district court in which the bankruptcy case is pending or in which the claim arose. 28 U.S.C. § 157(b)(5).

[27] *Id.*

[28] Century Indem. Co. v. Congoleum Corp. (*In re* Congoleum Corp.), 426 F.3d 675, 680 n.4 (3d Cir. 2005) ("Pre-packaged bankruptcies employing a channeling

TDP must pay enough to appeal to those advancing high value claims and have sufficiently generous qualification criteria to appeal to those advancing claims that may be poorly documented or otherwise stand little chance of success in state court. These demands for both expansive qualification criteria and high default settlement values are consistent with the lawyers' duties to their respective clients and grounded in a clear recognition of the leverage they enjoy due to the design of Section 524(g). At the same time, lawyers and their clients likewise have strong interests in minimizing quality control and audit procedures that may require them to incur additional costs and delay payment of their claims.

Although Section 524(g) requires the appointment of a legal representative for future victims prior to the issuance of a channeling injunction, the current framework for doing so has drawn considerable criticism.[29] By definition, unknown and unknowable future victims are unable to participate in the case and ensure loyal representation by their court-appointed representative.[30] These legal representatives are frequently repeat players and are often selected by the debtor in

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injunction are not eligible for the "cram down" provision contained in 11 U.S.C. § 1129(b)(1) which allows the bankruptcy court to confirm a plan of reorganization over creditors' objections in certain circumstances.").

[29] *See, e.g.*, Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NORTHWESTERN L. REV. 1435, 1438 & 1439 (2004) (concluding that "future claimants are not adequately represented in bankruptcy negotiations" and the risk that the trusts will be inadequate to pay claimants fairly "is borne primarily by future claimants"); Frances McGovern, *Asbestos Legislation II: Section 524(g) without Bankruptcy*, 31 PEPP. L. REV. 233, 248 (2004) ("The selection of the futures representative is problematic because having a weak futures representative is in the interests of both the debtor and the current claimants."); Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 60 (2000).

[30] Listokin & Ayotte, *supra* note 28, at 1438; Tung, *supra* note 28, at 60.

consultation with lead plaintiffs' firms, which appears to have a punch-pulling effect during bankruptcy negotiations.[31] Moreover, the appointed legal representative does not vote on the plan and may not have sufficient leverage to demand changes to TDP's where current and future claimants' interests differ. And given these factors and the secrecy that surrounds asbestos bankruptcy negotiations, it seems unlikely that dissatisfied future victims will ultimately be in position to hold even apathetic legal representatives accountable when the resulting trusts ultimately fail to protect their interests. As Professor Tung observed, the use of legal representatives in this context may suggest "not so much a concern for otherwise unrepresented claimants, but instead a need to provide due process cover in order to bind future claimants to a reorganization plan."[32]

B. Bankruptcy Trust Management, TDP Criteria and Expansion of the Compensable Claim Pool

The resulting bankruptcy trusts employ claim qualification criteria that are easier to satisfy than comparable standards in the tort system. Among other things, bankruptcy trusts:[33]

- Apply exposure criteria that are lower, and may be substantially lower, than applicable causation standards in the tort system;[34]

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[31] Brown, *supra* note 4, at 900 (noting that future claimants' representatives are often repeat players and "have strong global incentives against taking positions in any one case that may alienate" lead plaintiffs' lawyers); RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 177 (2007).

[32] Tung, *supra* note 28, at 64.

[33] Many of these points are outlined in greater detail in the appendices and text of my working paper, *Bankruptcy Trusts and Future Claims*, which is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225519.

[34] *See* Panel Discussion, *Asbestos Bankruptcy Trusts and Their Impact on the Tort System*, 7 J. L., ECON. & POL'Y 281 (2010) ("A lot of bankruptcy trusts, particularly the newer ones for mesothelioma claims, all they say that there has to be meaningful

- Do not expressly provide for consideration of some other likely causes of lung cancers and other non-signature diseases or have avenues for testing representations concerning other likely causes (i.e., the claimant's smoking history);
- Do not typically employ medical professionals to test the veracity of medical evidence submitted with claims that are not audited;[35]
- Depending on the specific audit plan in place, may not consult independent medical experts with respect to audited claims;
- Pay certain non-malignant claims that are unlikely to be compensated due to substantive and procedural modifications in the applicable state tort system;[36] and
- Do not typically employ the sort of targeted and random audit procedures that are more likely to uncover unreliable claim submission patterns and practices, including practices similar to those uncovered by Judge Jack in the Silica MDL.

Collectively, these factors suggest that so many trusts' projections fall short of actual claim payments because (a) the default qualification criteria may treat many claims that are not likely to be compensable in the tort system as compensable and (b) certain trusts are not employing quality control measures that would identify and deter the submission of claims based on erroneous or misleading representations.

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and credible evidence of exposure; but that can be just a site list. That can be working at a site where somebody is; it could be the equivalent of the guy who was at the place where the auto parts were three buildings over. I would argue that doesn't prove causation, and while that may be admissible to prove something, it's not the same thing as the type of proof that would get you to a jury, or get you past a directed verdict motion on the defense's cross claim against another defendant.") (Comments of Nathan Finch).

[35] Indeed, different medical professionals may review the same tests and data and reach different conclusions concerning a claimant's diagnosis (i.e., with one opining that the patient has mesothelioma and the other opining that he or she has some other form of cancer).

[36] Several states, for example, have enacted medical criteria laws that require evidence of actual physical impairment rather than mere physiological markers of exposure to qualify for compensation. Moreover, several jurisdictions place non-malignancy claims on deferred dockets that effectively preclude recovery to those who cannot demonstrate a physical impairment.

Any administrative settlement fund must balance the cost of paying dubious claims against the cost of identifying and challenging fraudulent or otherwise specious claims. The presumption at most trusts today appears to be "that thorough fraud prevention systems would be too costly and would leave less money to pay claims."[37] Yet this presumption remains untested given the limits of publicly available information and the trusts' apparently limited audit plans.[38] More pointedly, focusing on fraud rather than the broader question for limited fund settlements – whether the fund strikes an appropriate balance between distinguishing claims that have intrinsic merit from those that do not in a cost-effective manner – unduly confuses the issue.

Even at a trust that is experiencing more claim submissions than projections suggest are possible, altering claim criteria and quality controls may prove difficult. TDPs provide the plaintiffs' lawyers who sit on trust advisory committees with veto power over key decisions – including any proposed amendments to TDP standards and criteria and proposed audit plans – that may effectively undermine the efforts of even the most diligent trustee or future claimants' representative. Indeed, the Manville Trust's experience with its efforts to audit claims in the late 1990's and the

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[37] Searcey & Barry, *supra* note 23 (citing comments from Joe Rice, who serves on the trust advisory committees for several trusts).

[38] Moreover, even if claim audits reveal inconsistencies or other questionable factual representations, they may be dismissed as mere errors. *See id.* As I noted in an analysis of specious claims in global settlements last year, it can be extremely difficult to distinguish intentionally fraudulent submissions from those that are the product of mistakes in the claim development and submission processes. *See* S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEMPH. L. REV. 559 (2012).

stern rebuke it received as a result of this effort,[39] suggests that fiduciaries that take their duties too seriously may find more resistance than support for their efforts.

Asbestos Bankruptcy Trusts and Transparency

Transparency has been a critical component of reforms aimed at unwinding and preventing abuse; allowing creditors, the United States Trustee, courts, other parties in interest and, ultimately, Congress to identify and address these shortcomings and preserve the integrity of the bankruptcy process. The absence of comparable transparency in asbestos bankruptcy proceedings and trust administration necessarily raises concerns about whether these funds are, in practice, administered in a manner consistent with the objectives of Section 524(g).[40]

In this context, greater disclosure of claim-level data holds considerable promise. If trusts are unwilling or unable to incur the costs of more comprehensive claim review, such disclosures will provide those who are willing to incur those costs access to sufficient information to do so independently. As such transparency increases the prospects that suspicious patterns and practices will be discovered,

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[39] Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 128-37 (2003) (discussing the Manville Trust audit, mobilization of the plaintiffs' bar against the audit, the resulting litigation and rebuke from the district court). Professor Brickman also suggests that this failure emboldened lawyers and screening companies, and thus contributed to the surge in specious claim filings against bankruptcy trusts in the early part of the last decade. *Id.*, at 135.

[40] As the Third Circuit recently observed, "the trusts place the authority to adjudicate claims in private rather than public hands, a difference that has at times given us and others pause, since it endows potentially interested parties with considerable authority." *In re* Federal-Mogul Global, 684 F.3d 355, 362 (3d Cir. 2012).

those who intentionally submit specious claims and others who simply employ poor claim development and submission quality controls will have greater incentives to modify their practices. And just as the Silica MDL provided certain trust fiduciaries with the information and leverage necessary to address dubious nonmalignant claims within their trusts, any such discoveries with respect to the current generation of asbestos claims may likewise increase the prospects for addressing similarly undesirable patterns and practices going forward.

Notwithstanding the potential benefits of enhanced trust transparency, critics are understandably concerned that the FACT Act unduly impinges on: (i) state interests in controlling discovery in state tort litigation; and (ii) the legitimate privacy interests of asbestos personal injury victims. I will discuss these concerns in turn.

A. Is the FACT Act an Appropriate Exercise of Congressional Authority?

The vision of asbestos bankruptcy trusts as beyond bankruptcy oversight conflates and thereby confuses the means of organizing asbestos trusts with their function in the asbestos bankruptcy process. Any trust established to fulfill the objectives of Section 524(g), just like a reorganized debtor incorporated as a new entity under the terms of a plan, will be organized under state law. But this necessity is merely a product of the fact that the specific steps of corporate or trust formation are left to state law; it does not obviate the need for these entities to

comply with their obligations under the plan, the Bankruptcy Code or other applicable federal law.[41]

The Bankruptcy Code's recognition of the distinction between state law organization and the obligations that arise under federal bankruptcy law is consistent with even the most restrictive conception of the Bankruptcy Power. Although the precise reach of this power remains poorly defined, it is well settled that it applies to questions concerning the restructuring of a debtor's relations with its creditors.[42] When trusts are established under Section 524(g), they assign critical aspects of this power to private entities going forward, but this assignment does not strip Congress of its power to regulate these entities to ensure that they are acting in a manner consistent with the objectives they are established to advance.

B. Balancing Transparency against Claimants' Privacy Interests

Accountability may require transparency, but the public disclosure of previously confidential information may unduly embarrass private citizens or be misused by confidence artists or others attempting to exploit victims. Of course, these risks must be balanced against the objectives of the transparency proposal at issue and potential restrictions on the proposed disclosures.

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[41] Indeed, section 1142(a) of the Code recognizes that "the debtor and *any entity organized or to be organized for the purpose of carrying out the plan* shall carry out the plan and shall comply with any orders of the court."

[42] *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (characterizing "the restructuring of debtor-creditor relations" as being "at the core of the federal bankruptcy power").

1. Claimants' Reasonable Expectations of Privacy

Although personal injury victims may have an interest in keeping their injuries private, the decision to pursue compensation for those injuries typically involves waiving that interest. As the federal district court in Delaware recently suggested, individuals who hire a lawyer to pursue potential asbestos-related claims should expect that some level of information about their claims must be disclosed in asbestos-related litigation.[43] Indeed, some courts place more consolidated information concerning asbestos claimants and their injuries than required by the FACT Act on the Internet with little or no fanfare.[44]

Filing a claim form with a trust – just like the filing of a complaint in civil litigation[45] or a proof of claim in bankruptcy – is the assertion of a legal right and requires representations under penalty of perjury. Debtors provide information about their creditors' claims and payments made to their creditors in the year preceding the bankruptcy filing under Section 521. Official Form B10 (the proof of claim) requires creditors to disclose their names, addresses, email addresses, telephone numbers, the legal and factual foundations for their claims, and "copies of any documents that support the claim[s]" – including previously non-public documents – and other personal information. Although debtors and asbestos

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[43] Opinion, *In re* Motions for Access of Garlock Sealing Technologies LLC, Civ. No. 11-1130-LPS, Dkt. No. 64, at 28 (D. Del. March 1, 2013).

[44] For example, the New York City Asbestos Litigation website frequently posts lists of pending asbestos personal injury cases – including plaintiffs' full names, counsel, injuries asserted and other information – apparently without objection by plaintiffs or their counsel.

[45] *See, e.g.*, Ferguson v. Lorillard Tobacco Co., 2011 U.S. Dist. LEXIS 135183 (E.D. Pa. Nov. 22, 2011) ("a claim submitted to a bankruptcy trust is more akin to a complaint than to an offer of compromise") (citing cases).

plaintiffs have structured asbestos bankruptcy cases to avoid proof of claim filings – apparently to avoid potential objections to individual asbestos claims under Section 502 of the Bankruptcy Code[46] – this information is readily produced by most creditors in bankruptcy.[47]

Likewise, settlement amounts may also be subject to disclosure notwithstanding any confidentiality provision in the settlement agreement. Settlement offers and counter-offers are generally entitled to confidential treatment in bankruptcy claim disputes, but final settlement terms must be disclosed and approved by the court. Likewise, in many asbestos tort cases that go to judgment, prior settlement amounts are frequently disclosed for the purpose of molding the judgment.

2. Striking the Appropriate Balance

Courts routinely balance the public and private interests in transparency against its potential risks to innocent parties. This question is rarely limited to the extremes: full public disclosure, on the one hand, and no disclosure, on the other. The question here is whether disclosure of some information is warranted and whether that disclosure can be tailored – or access to the disclosed information controlled – to limit potential misuse of the information. This balancing of interests

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[46] See S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841 (2008).

[47] That said, the bankruptcy schedule identifying all known asbestos claimants (and their respective counsel) in at least one bankruptcy case is readily available to anyone with access to Google. In addition, the API Trust already discloses the information required under the FACT Act available in its annual reports. Annual Report of the Trustee, 2011, API, Inc. Asbestos Settlement Trust, No. 05-30073, Dkt. No. 611 (Bankr. D. Minn. Apr. 23, 2012).

is necessary to ensure that objections that are ostensibly grounded in individual privacy interests are not used to block legitimate but unwanted inquiry.

The Bankruptcy Code and Federal Rules of Bankruptcy Procedure contain numerous provisions requiring disclosure of private and, at times, personal information, but they also empower courts to fashion appropriate orders for protecting those who comply with these provisions. Under Section 107(b)(2) of the Bankruptcy Code, bankruptcy courts have the power to "protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title." Likewise, Section 107(c) authorizes the court to limit access to information that "would create undue risk of identity theft or other unlawful injury to the individual or the individual's property." Moreover, courts have not been hesitant to employ these tools where requested and necessary, especially in the asbestos bankruptcy context.[48]

Conclusion

Thank you again for the invitation to appear today. I hope this summary has been useful, and I am happy to address any questions.

[48] *See* Opinion, *In re* Motions for Access of Garlock Sealing Technologies LLC, Civ. No. 11-1130-LPS, Dkt. No. 64 (D. Del. March 1, 2013) (discussing the numerous steps taken by Bankruptcy Judge Fitzgerald to limit public access to information in asbestos bankruptcy cases).

Mr. BACHUS. Thank you, Mr. Brown.
Judge Ableman.

TESTIMONY OF THE HONORABLE PEGGY L. ABLEMAN, McCARTER & ENGLISH, LLP;

Judge ABLEMAN. Thank you, Chairman Bachus and Members of the Subcommittee, for the opportunity to address you this afternoon. Prior to my retirement last December, I served for more than 29 years as a trial judge in the Delaware state court system. During the last few years of my term on the Delaware Superior Court, I was solely responsible for the asbestos litigation docket, which comprised approximately 500 to 600 pending cases filed by plaintiffs from all over the United States, and even by foreign nationals.

My experience in one particular case gave me a unique insight into the inherent unfairness associated with a system that permits plaintiffs' filings of bankruptcy trust claims to remain secret and undisclosed while a plaintiff is also actively engaged in tort litigation. What transpired in that case is illustrative of the problems that occur when transparency is compromised.

In April 2009, June Montgomery was diagnosed with mesothelioma. Her son, Brian Montgomery, retained the law offices of Brent Coon. Brian expressly understood that the Brent Coon firm would assist his parents in finding counsel in Florida, where they lived. Ultimately, they hired Florida attorneys. In November of that year, a lawsuit was filed by Delaware counsel on behalf of Florida counsel in the Superior Court in Delaware on behalf of June and Arthur Montgomery against 22 defendants alleging that June's mesothelioma was caused by exposure to asbestos from products or conduct of the named defendants.

Asbestos-related suits in Delaware are governed by a standing order which sets forth mandatory disclosure obligations related to bankruptcy trust claims. Despite this order and specific interrogatories directed to plaintiffs requesting this information, from the outset of this case and up until the week before trial, nowhere did plaintiffs identify exposure through any of the 20 entities to whom bankruptcy claims were submitted. Instead, plaintiffs claimed that Mrs. Montgomery was exposed to asbestos solely through the laundering of her husband's work clothing throughout his career, as opposed to any work she performed herself with or around products outside of the home.

The impression garnered from the complaint, the answers to written discovery, and Mr. Montgomery's sworn testimony in his deposition was that the bulk of his exposure occurred when he worked as an electrician during a short period at the Everglades power plant. Under Florida law, jurors are permitted to allocate fault to parties not present at trial, including bankrupt entities.

The defendant in my case filed a motion in advance of trial requesting that the court order disclosure of all pretrial settlements, including monies received from bankruptcy trusts. Counsel for plaintiff emphatically reported to me at the pretrial conference that no bankruptcy trust submissions had been made and no monies had been received. Two days before a 2-week trial in this case was scheduled to begin, plaintiff's counsel advised that his client had

received two bankruptcy settlements of which he was previously unaware.

This disclosure was directly inconsistent with his unequivocal representations to the court and to opposing counsel at the pretrial conference.

By late afternoon the following day, the day before trial was to begin, counsel for the defendant learned that a total of 20 bankruptcy trust claims had been submitted. Although the defendant had been led to believe that Mrs. Montgomery's exposure was solely the result of take-home fibers on her husband's clothing, at this late point in the litigation it became obvious that one or more of plaintiff's attorneys had been claiming exposure through Mrs. Montgomery's own employment. That is, she worked with and around these products herself.

In essence, the representations to the bankruptcy trust painted a much broader picture of exposure to asbestos than either plaintiff or plaintiff's attorneys had acknowledged during the entire course of the litigation in Delaware.

On the first day of the scheduled trial, with the jury already selected and waiting to serve, the court learned of plaintiff's failure to disclose the trust submissions. This circumstance dramatically affected the entire litigation, including a lengthy discovery process and trial preparation which had been conducted without knowledge of the true facts, not to mention the waste of the court's time and resources.

In my opinion, transparency of the bankruptcy filings goes to the very core of what this litigation is about. The crux of the Montgomery case, as in virtually all asbestos litigation, was a determination of responsibility for Mrs. Montgomery's exposure. Where 20 manufacturers of asbestos and asbestos-containing products are removed from the equation, a true determination of fault cannot occur.

In the final analysis, there can be no real justice or fairness if the law imposes any obstacles to ascertaining and determining the complete truth. From my perspective as a judge, it is not simply the sheer waste of resources that occurs when one conducts discovery or trials without knowledge of all the facts. What is most significant is the fact that the very foundation and integrity of the judicial process is compromised by the withholding of information that is critical to the ultimate goal of all litigation, a search for and discovery of the truth.

[The prepared statement of Judge Ableman follows:]

Testimony of Judge Peggy L. Ableman (ret.)

Furthering Asbestos Claim Transparency (FACT) Act of 2013

March 13, 2013

Prior to my retirement in December 2012, I served for more than 29 years as a Trial Judge in the Delaware State Court system. During the last few years of my term on the Delaware Superior Court I was solely responsible for the asbestos litigation docket, which comprised approximately 500 to 600 pending cases filed by plaintiffs from all over the United States and even by foreign nationals.

My experience in one particular case gave me a unique insight into the inherent unfairness associated with a system that permits plaintiffs' filings of bankruptcy claims to remain secret and undisclosed while a plaintiff is also actively engaged in asbestos tort litigation.

Unquestionably, asbestos-related diseases, and particularly mesothelioma, are gruesome and frequently deadly and no amount of compensation can ever take the place of a loved one who succumbs to these diseases. I wholeheartedly agree that every defendant that has exposed an individual to asbestos should bear its share of responsibility. The problem that I came to recognize, however, is far more serious because it goes to the very heart and integrity of this litigation. Absent full disclosure,

the defendants cannot be informed of the full extent of an individual's exposure. They are therefore often led to believe- erroneously-that their products were far more responsible for the plaintiff's disease than what may have been the case, because they have no way of knowing the substance of an individual plaintiff's claims.

The irony of my encountering this problem in Delaware is that we actually impose a requirement in our state, by Standing Order, that within 30 days of the filing of an asbestos action plaintiffs are required to serve upon the Defense Coordinating Counsel "all claim forms and related materials related to any claims made by a Plaintiff to any...trust, entity, or person related to or in any way involved with asbestos claims." This is further defined to include specifically, "claims made to trusts for bankrupt asbestos litigation defendants." These disclosure requirements are ongoing under the Delaware Order and require plaintiffs to supplement the information up to the time of trial. Yet, even in a state where there is an express requirement of full disclosure of these claims early on in the litigation, deception can still occur, often resulting in irreversible prejudice to one or more defendants.

What transpired in the case before me is illustrative of the highly prejudicial effect upon defendants of any system where one or more defendants are not made aware of the full scope of a particular plaintiff's claims of exposure. A brief discussion of the case of *Montgomery v. A.W. Chesterton Co. Del. Super. Civil Action No. 09C-11-217 ASB,*

underscores the problem.

On April 3, 2009, June Montgomery was diagnosed with pleural mesothelioma. Her son, Brian Montgomery, a sheriff's deputy in Broward County, Florida, assisted his mother and father, Arthur Montgomery, to find an attorney shortly after she was diagnosed. Brian retained the Law Offices of Brent Coon several weeks later. He expressly understood that the Brent Coon firm would assist his parents in finding counsel in Florida where his parents lived. Ultimately, they hired Florida attorneys, Levin, Papantonio, Thomas, Echsner & Proctor, P.A. While Brian claimed at his deposition that no other law firms were involved, in fact he had both Delaware counsel when the decision was made to file in Delaware, and Virginia counsel was retained to perform the videotaped trial examination of plaintiff's proffered expert, Jacques Legier, M.D.

On November 25, 2009, Delaware counsel filed a lawsuit in the Superior Court in New Castle County, Delaware on behalf of June and Arthur Montgomery against 22 defendants, alleging that June's malignant mesothelioma was caused by exposure to asbestos from the products and/or conduct of the named defendants, the case was assigned to me in my capacity as the asbestos docket judge.

Delaware has already remedied the problem that this legislation seeks to address. Asbestos related suits in Delaware are governed by Standing Order No. 1, which sets forth mandatory disclosure obligations related to bankruptcy trust claims. Despite this

Order and specific interrogatories directed to plaintiffs requesting this information, from the outset of this case and up until the weekend before trial, nowhere did plaintiffs identify exposure through any of the twenty entities to whom bankruptcy claims were submitted. Instead, in their responses to interrogatories propounded by defendants, Plaintiffs claimed that Mrs Montgomery was exposed to asbestos solely through laundering of her husband's work clothing throughout his career, as opposed to any work she performed herself with or around products outside of the home. Specifically, Plaintiffs asserted that Mr. Montgomery brought home asbestos-containing dust on his clothing from his work as an electrician at the Everglades Power Plant. In response to an interrogatory asking Plaintiffs to identify all entities who were not defendants, but with whose asbestos-containing products June came into contact, Plaintiffs identified no additional entities.

Mrs. Montgomery died on April 3, 2010 and her son Brian, as Personal Representative of the Estate, was substituted as Plaintiff by Amended Complaint filed on October 21, 2010. The allegations of exposure to asbestos remained largely unchanged from the original complaint.

Arthur Montgomery was deposed on June 8, 2011. Although he had spent his entire career working as an electrician, with and around a wide variety of products and materials, at multiple locations throughout Florida, the impression garnered from the

Complaint, answers to written discovery, and Mr. Montgomery's sworn testimony was that the bulk of his work around asbestos occurred only during a short period at the Everglades Power Plant.

During discovery, Plaintiffs specifically denied submitting claims to Owens-Corning, United States Gypsum, Armstrong World Industries, Babcock & Wilcox, Plibrico, and ASARCO even though their state-of-the-art expert, Barry Castleman, addresses the conduct of many of these companies in his book, "Asbestos Medical and Legal Aspects" Fifth Ed. (2004). Nor did Plaintiffs' proffered causation expert, Dr. Jacques Legier, during his videotaped deposition, address exposures to many of the products manufactured by the entities that established the bankruptcy trusts, and from whom Plaintiffs made claims.

The parties had agreed that Florida law was applicable to the case. It permits jurors to allocate fault to parties not present at trial, including bankrupt entities. Because Foster Wheeler was aware of other cases where lawyers representing asbestos claimants had submitted conflicting work histories to multiple trusts, it filed a motion in advance of trial requesting that the Court order disclosure of all pretrial settlements, including monies received from bankruptcy trusts. Counsel for Plaintiff emphatically reported to me at the pretrial conference that no bankruptcy submissions had been made and no monies had been received.

On Saturday, November 5, 2011, two days before a two-week trial in this case was scheduled to begin, Plaintiff's counsel advised that his client had received two bankruptcy settlements of which he was previously unaware. This disclosure was directly inconsistent with his unequivocal representations to the Court and to opposing counsel at the pretrial conference. By late afternoon the following day - the day before trial was to commence- counsel for Foster Wheeler learned that a total of twenty bankruptcy trust claims had been submitted. Although Foster Wheeler had been led to believe that Mrs. Montgomery's exposure was solely the result of take-home fibers on her husband's clothing, at this late point in the litigation, it became obvious that one or more of Plaintiff's attorneys had been claiming exposure through Mrs. Montgomery's own employment. That is, she worked with and around these products herself. In essence, the representations to the bankruptcy trusts painted a much broader picture of exposure to asbestos than either Plaintiff or any of Plaintiff's attorneys had acknowledged during the entire course of the litigation in Delaware. Plaintiff's failure to disclose and produce the trust claims precluded Foster Wheeler from investigating Mrs. Montgomery's exposure to asbestos from those additional entities, or identifying additional exposures from products that were not developed in the Delaware litigation - which was severely prejudicial to Foster Wheeler.

On the first day of the scheduled trial, November 7, 2011, in preparation for which

the Court had devoted a huge amount of time and resources, with a jury already selected and waiting to serve, the Court learned of Plaintiff's failure to disclose the trust submissions. This circumstance dramatically affected the entire litigation, including the lengthy discovery process and trial preparation, which had been conducted without knowledge of the true facts, not to mention the waste of the Court's time and limited resources. Since I was understandably upset, I called counsel to a chambers conference room, because the withholding of critical information went to the very heart of the defense:

> This isn't something I could possibly fix after the trial is over. This deals with the verdict sheet. It deals with the way they present their defense. It deals with what information they have. It deals with how they cross-examine the witnesses. They have not been able to do any cross-examination or any discovery on the other aspects of disclosure that are listed in this letter because they were not made aware that there were these claims that were made. I just think that it's in such bad faith that I don't know that I can possibly remedy it any other way.

By the time of trial Foster Wheeler was the sole remaining defendant in the case, as all remaining 22 defendants had either settled or been dismissed. Plaintiff had litigated the case as though Foster Wheeler had predominant responsibility for Mrs. Montgomery's asbestos exposure. Literally on the eve of trial, however, twenty new entities surfaced that had neither been named nor disclosed. Had these claims been

timely disclosed by Plaintiff, Foster Wheeler would have taken steps towards developing discovery and defenses to explore these exposures at the depositions of Arthur Montgomery and of Plaintiff's experts. Foster Wheeler would have also retained its own experts to address these exposures but it was never given that opportunity.

In my opinion, the bankruptcy filings go to the core of what this litigation is about. The very crux of the Montgomery case, as in virtually all asbestos litigation, was a determination of responsibility for Mrs. Montgomery's exposure. I noted this emphatically at the conference where I determined that the trial could not go forward, noting that, in asbestos litigation:

> The most important thing is that a Plaintiff disclose what they think caused their disease. And if they don't disclose honestly when they're asking for money from another company and don't even let the defendant know about that, that's so dishonest. It is just so dishonest.

Where twenty manufacturers of asbestos and asbestos-containing products are removed from the equation, a true allocation of fault cannot occur. More importantly, the fact that Plaintiff denied exposures in this case, and yet submitted claims for exposures and accepted money for those claims, went directly to the issue of credibility.

In the final analysis, there can be no real justice or fairness if the law imposes any obstacles to ascertaining and determining the complete truth. From my perspective as a judge, it is not simply the sheer waste of resources that occurs when one conducts

discovery or trials without knowledge of all the facts, although that circumstance is indeed unfortunate and one that courts can ill afford in this day and age. What is most significant is the fact that the very foundation and integrity of the judicial process is compromised by the withholding of information that is critical to the ultimate goal of all litigation — a search for, and discovery of, the truth.

Mr. BACHUS. Thank you.
Mr. Inselbuch.

TESTIMONY OF ELIHU INSELBUCH, MEMBER, CAPLIN & DRYSDALE, CHARTERED

Mr. INSELBUCH. Thank you, Mr. Chairman. I would like to thank the Subcommittee for the opportunity to testify here today. My name is Elihu Inselbuch. I'm a member of the firm of Caplin and Drysdale. I was first retained by the Asbestos Creditors Committee

in the Manville reorganization in 1985, and since then I have been active in the asbestos bankruptcies and in the formation of these trusts and in the operation of these trusts. I have some experience with how they do operate.

Mr. Scarcella says that if this bill is enacted it will cost nothing, relatively speaking, and be quite easy for the trusts to comply with its provisions. I was in Wilmington yesterday and I met with the senior managers of the Delaware claims processing facility, which actually does the trust processing for five or six of the largest bankruptcy trusts, asbestos trusts. And it ain't as simple as Mr. Scarcella would suggest.

This bill would require that each claim be looked at and a narrative be prepared describing who the claimant is, his exposure history, and the basis for payment. But even if Mr. Scarcella is correct and it took no more than 5 minutes for the trusts to do this work, and a reviewer could do 80 a day, that is about equal to the number of claims that these trusts get every day. So you would need one full-time employee working all the time just to respond to Part A of this provision.

Now, the Chairman has told us that every penny counts, and I couldn't agree more. If it took 10 minutes, you would need two employees to do that. Section B of the proposed bill would require that in response to a request, a trust would have to provide the same information for all the claims basically it has on file.

Well, take any one of the current trusts. They have 400,000 claims on file. If someone could do 80 a day, that would require 5,000 person days. If there were 250 workdays in a year, that would take 20 years for one person to do. If you wanted to do it in a year to comply with the statute, you would have to hire 20 people. So this is not cost free, even on Mr. Scarcella's assumption that it will take only minutes to get it done.

And what will this do with the trust? It will create delay. At the very least, it will create delay. What does delay matter? Most of us think about delay in terms of interest rates, and interest rates are pretty low today. But delay really matters to someone who is sick and dying from mesothelioma.

We ran a test some years ago. We made a proposal that we would pay a claimant $50 now and $50 3 years from now, or rather $70 now. And overwhelmingly, the sick and dying people who would like to organize their lives would take the $70. So every day of delay is a weapon that the defendants have to drive the settlement prices down.

Why do we have this legislation? What is transparency seeking to find? In any court that I know of in the United States, all the defendant has to do is serve a subpoena on the plaintiff, and the plaintiff is responsible to produce all the material that the plaintiff filed with the trusts in response to that subpoena.

Are there lawyers who may misbehave? I'm sure there are. I'm sure there are some. In 50 years of practice, I haven't seen many, but I am sure there are some that misbehave either as plaintiffs or defendants.

But Judge Ableman will catch them. That is the proof that when abuse occurs, the court system, the state court system around the country is perfectly able to find the abuse.

Fraud? Everybody talks about fraud and abuse. This Committee, this Committee asked the GAO to investigate whether or not there was fraud in the trust system, and the GAO did a long study, and they did an investigation, and they filed a report, and they said they couldn't find any fraud. The Wall Street Journal found discrepancies in something less than four-tenths of a percent of the filings at the Manville trust over a 20- or 30-year period. This is not proof of fraud.

Transparency. It strikes me as outrageous that this industry wants to talk about transparency. This is an industry that not only hid the facts of asbestos exposure but positively concealed it for 40 years, so that we now have hundreds of thousands of people dying from exposure to asbestos, and they want to talk about trust transparency. Who is the sheep? Who is the wolf?

Thank you.

[The prepared statement of Mr. Inselbuch follows:]

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Hearing: March 13, 2013
H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013"

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

I would like to thank Subcommittee Chairman Bachus, Ranking Member Cohen and the members of this Subcommittee for the opportunity to testify on H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013." My name is Elihu Inselbuch. I am a member of the firm of Caplin & Drysdale, Chartered in New York, and much of my work over the last 25 years involved representing victims' rights in asbestos bankruptcy proceedings. Specifically, and most relevant for purposes of this hearing, I was first retained to act for the Asbestos Claimants' Committee in the Manville reorganization, and I have extensive experience in asbestos creditors' rights litigation. I've represented the interests of claimants in a number of large bankruptcies and class actions, including Johns Manville, Jim Walter Corp., Raytech Corporation, Babcock & Wilcox, Pittsburgh Corning, Armstrong World Industries, G-I Holdings, and W.R. Grace. As a result of this work, I've become intimately familiar with the horrors of the asbestos-disease epidemic and this country's systematic attempts to grapple with how to compensate such large numbers of victims over decades of disease.

I. Summary

H.R. 982, the FACT Act of 2013, is the latest, but not the first, attempt by asbestos defendants to minimize and ultimately extinguish their liability in the tort system. These defendants — which are the only beneficiaries of this bill—are the same asbestos companies who have already been determined liable for recklessly exposing their workers and their workers' families to their deadly products. Had these companies shared the information they knew about the dangers of asbestos, or at the very least, provided adequate safety gear, countless lives would have been saved and I would not be sitting before you here today.

What many people do not realize is that the asbestos-disease epidemic is the longest-running public health epidemic in our history that kills thousands of Americans every year and will continue to do so for many decades to come. For more than eighty years, corporations that produced and distributed asbestos-containing products — and their insurance companies — have attempted to avoid responsibility for the deaths and injuries of millions of American workers and consumers caused by those products. Since before 1930, these corporations have hidden the dangers of asbestos and lied about their knowledge of those dangers, lobbied to make it harder for workers to sue for their injuries, fought to weaken protective legislation, and to this day continue to deny responsibility.

The FACT Act is yet another example of their tactics, designed only to delay payments to victims and deny accountability. The bill is predicated on a fundamental misunderstanding of why the asbestos trust mechanism was created and how it works.

II. Asbestos Disease And Litigation

a. General Background

Asbestos is a naturally occurring mineral that was widely used during the twentieth century for industrial, commercial, and residential purposes.[1] Because of its tensile strength, flexibility, durability, and acid- and fire-resistant capacities, asbestos was used extensively in industrial

settings and in a wide range of manufactured goods.[ii] Diseases caused by exposure to asbestos kill thousands of Americans every year because asbestos is inherently dangerous. Whenever materials containing asbestos are damaged or disturbed, microscopic fibers become airborne, and can be inhaled into the lungs and cause disease.[iii] The most serious asbestos-related disease is mesothelioma, a virulent cancer of the lining of the lungs that can be caused by even a short period of exposure, and is inevitably painfully fatal, often within months of diagnosis.[iv] Other illnesses caused by asbestos include lung cancer, asbestosis, and pleural diseases.[v] The bulk of asbestos liabilities are for mesothelioma and other asbestos-related cancers.

Tens of millions of American workers have been exposed to asbestos; more than 27 million people were occupationally exposed between 1940 and 1979.[vi] Millions of those exposed have fallen ill, or will fall ill in the future; many have died and many more will die as a result of their exposure. Manufacturers — but not workers — were for decades well aware of the significant health hazards posed by asbestos, but production and distribution of new asbestos-containing products continued virtually unabated until the 1970s,[vii] and in some cases until 2000.[viii] Asbestos diseases have long latency periods; a person exposed while working may not fall ill for forty years or fifty years, or even longer.[ix] Thus, even though asbestos production and use has declined, the epidemic of asbestos-related illnesses is expected to continue for decades into the future.

By the early 1900s, medical scientists and researchers had uncovered "persuasive evidence of the health hazards associated with asbestos."[x] Manufacturers and insurers knew this, and even as evidence mounted they continued to hide these findings and deny responsibility. In 1918, a Prudential Insurance Company report revealed excess deaths from pulmonary disease among asbestos workers, and noted that life insurance companies generally declined to cover asbestos workers because of the "assumed health-injurious conditions of the industry."[xi] For decades, asbestos manufacturers were well aware of the dangers of asbestos, and deliberately did not protect their workers or the end-users of their products. In a thorough discussion of the history of asbestos use and litigation in the United States, District Judge Jack Weinstein noted:

> Reports concerning the occupational risks of asbestos, including the incidence of asbestosis and lung cancer among exposed workers, have been substantial in number and publicly available in medical, engineering, legal and general information publications since the early 1930s. There is compelling evidence that asbestos manufacturers and distributors who were aware of the growing knowledge of the dangers of asbestos sought to conceal this information from workers and the general public.[xii]

As workers and others who had been exposed to asbestos began to get sick in large numbers, litigation began in the 1960s. Of particular importance was evidence uncovered by plaintiffs' attorneys — "[t]hrough persistence, vigorous discovery and creative efforts" — establishing that "manufacturers . . . knew that asbestos posed potentially life-threatening hazards and [chose] to keep that information from workers and others who might be exposed."[xiii] Angered by evidence that information about the dangers of asbestos had been suppressed, juries began awarding large punitive damages.[xiv] As a result of the plaintiffs' success in asbestos suits in the tort system, and the overwhelming number of claims, the point was reached long ago where most workers who

fall ill from exposure to asbestos "recover substantial sums through settlement or jury awards."[xv]

b. Evolution Of Filings In The Tort System

Asbestos personal injury litigation began in earnest in 1973 after the Fifth Circuit's decision in the benchmark case of *Borel v. Fibreboard Paper Products Corp.*[xvi] *Borel* established that manufacturers and distributors of asbestos products are liable to persons injured as a result of using their products because of their failure to warn regarding the danger of those products.[xvii] Recognizing that many persons have been exposed to a variety of asbestos products made by a large number of manufacturers, under circumstances that make it impossible to ascribe resulting disease to one particular product or exposure, the *Borel* court found that each and every exposure to asbestos could constitute a substantial contributing factor in causing asbestos diseases, and that each and every defendant who contributed to the plaintiff's aggregate asbestos exposure is legally responsible for the plaintiff's asbestos-related injuries.[xviii] The overwhelming majority of courts throughout the country have accepted the legal principles set out in *Borel*.[xix]

With this development in the law, the thousands of people killed and maimed by exposure to asbestos and asbestos-containing products began to sue the manufacturers and distributors of those products. So many people had been injured or killed by asbestos that twenty-five thousand lawsuits were commenced in the next decade,[xx] and the number of lawsuits continued to rise dramatically through the 1990s.[xxi]

III. The Creation Of The Asbestos Trust System

Epidemiology makes clear that thousands of people each year for decades to come will fall ill as a result of asbestos exposure, and experience teaches us that most will seek compensation from the manufacturers of the asbestos products that caused their injuries. Attempts to achieve settlements that would provide for the treatment and payment of these future claims are hampered by the difficulty of ensuring that any such settlement agreements would "provide for all future claimants who come forward, so that all who are eligible for compensation are properly compensated and all who are required to pay compensation have taken into account this responsibility in their business planning."[xxii] The overwhelming numbers of people who have been made sick and who are dead or dying from asbestos exposure and the large numbers of future claims have led dozens of asbestos manufacturers to choose bankruptcy to deal with these claims. Asbestos personal injury trusts were created during these bankruptcies to ensure that the tens of thousands of people who are currently sick and dying and the tens of thousands more who science tells us will sicken and die in the future as a result of their asbestos exposure can receive some compensation for their injuries.

a. Manville

The Johns-Manville Corporation was the largest manufacturer and distributor of asbestos products in the twentieth century. Manville officers and directors knew of the dangers of asbestos since at least 1934, and kept this knowledge secret to prevent workers from learning that their exposure to asbestos could kill them. As evidence of Manville's responsibility became

known, it was faced with tens of thousands of lawsuits, and, to deal with this liability, filed its Chapter 11 petition for reorganization in August of 1982.[xxiii] To solve the problem of future claims, the Manville plan of reorganization pioneered the use of a trust dedicated to the resolution and payment of asbestos claims. The Manville Trust assumed the debtors' present and future asbestos liabilities, and all asbestos claims against the debtors (including those in the future) were directed to the Trust by an injunction — a "cornerstone" of the plan[xxiv] — channeling all asbestos claims from the reorganized Manville Corporation to the Manville Trust. The channeling injunction was issued pursuant to the bankruptcy court's general equitable powers.[xxv]

b. Congress Acts

A substantial portion of the assets conveyed to the Manville Trust from which it would pay claims were equity and debt interests in the reorganized Manville Corporation, which, shorn of its asbestos liabilities, was a profitable forest products and industrial company. The public markets were skeptical about the validity of the channeling injunction, depressing the value of the Trust's holdings. To alleviate concerns about the *Manville* injunction, and to foster reorganization of asbestos debtors, in 1994 Congress enacted Bankruptcy Code Section 524(g), which statutorily validates the trust and channeling injunction mechanisms pioneered in the *Manville* case.[xxvi] As Senator Brown explained, "[w]ithout a clear statement in the code of a court's authority to issue such injunctions, the financial markets tend to discount the securities of the reorganized debtor. This in turn diminishes the trust's assets and its resources to pay victims."[xxvii]

Section 524(g) obviates due process concerns with respect to future claimants by providing for appointment of a legal representative to protect their interests.[xxviii] The statute gives a debtor the right to propose and have confirmed a plan that will create a trust to which all of the debtor's present and future asbestos personal injury liabilities will be transferred, or channeled, for post-confirmation claims evaluation and resolution.[xxix] The debtor is freed of asbestos claims, in return for funding the trust, and present and future asbestos claimants have recourse to the assets of the trust.

There were not many other asbestos-driven bankruptcies of note in the 1990s — the largest was likely the bankruptcy of the Celotex Corporation and Carey Canada Incorporated (a subsidiary that had been engaged in the mining, milling, and processing of asbestos fiber), which filed for bankruptcy protection in 1990. The Celotex Asbestos Settlement Trust was formed in 1998.

This changed in the next decade, however. In 2000, there were sixteen asbestos personal injury trusts; by 2011, there were nearly sixty, with trusts formed by many large asbestos defendants, including Armstrong World Industries, the Babcock & Wilcox Company, Halliburton (Dresser Industries), Owens Corning, and United States Gypsum.[xxx]

IV. Asbestos Trusts And Victim Compensation Today

According to the GAO, as of 2011, there were sixty asbestos personal injury trusts.[xxxi] Most of these trusts work the same way. Pursuant to the mandate of 11 U.S.C. § 524(g), an asbestos trust must treat all similar claimants in substantially the same manner.[xxxii] When it is formed, therefore, a trust will project the number of claims it expects to receive and determine the historic settlement value of those claims — what its predecessor would have paid to settle the claims had they been brought in the tort system.[xxxiii] The trust has fixed assets that will be insufficient to pay the full historic settlement value of all claims; it therefore sets a payment percentage, and each present and future claimant is paid the liquidated value of his or her claim discounted by the payment percentage.[xxxiv] The functioning of the trusts approximates the process through which lawsuits in the tort system are settled.

An asbestos trust is governed by its trust agreement and the trust agreement exhibits, which include a document containing a series of trust distribution procedures ("TDP"), approved by the bankruptcy court when confirming a plan of reorganization providing for creation of the trust.[xxxv] The TDP sets forth procedures for the administration of the trust and establishes a process for assessing and paying valid claims. The TDP also includes the settlement amounts that the trust will offer a claimant with an asbestos-related disease who meets the exposure and medical criteria set out in the TDP, and thus can presumptively establish the trust's liability.[xxxvi] Claimants who believe that they are entitled to a larger payment from a trust because, for example, they have higher than normal damages, or manifested illness at an early age, can reject the standard settlement and seek "individual review" of their claims, which may or may not result in a higher settlement.[xxxvii] In either case, the trust is designed to value claims at the tort-system settlement share of its debtor — not the joint and several total value of the claim against all responsible parties that would be fixed by a jury.

For a claimant to recover from an asbestos trust, he or she must provide medical evidence demonstrating that the claimant has an asbestos-related disease, and evidence satisfactory to the trust that it has responsibility for the claimant's injuries.[xxxviii] The evidence required depends on the nature of the claimant's disease. A claimant with mesothelioma, for example, must provide a diagnosis of that disease by a physician who physically examined the claimant, or a diagnosis by a board-certified pathologist or a pathology report prepared at or on behalf of an accredited hospital, as well as appropriate evidence of product identification as noted above.[xxxix]

These criteria are combined with audit programs to ensure that the trusts do not pay fraudulent claims.[xl] The trusts do not pay every claim that is filed, but routinely reject those that are deficient.[xli] And while there is no guaranteed method to completely prevent attempts to abuse the trust system, there is simply no evidence that such practices are widespread. Moreover, the simple fact that a claimant sues a solvent defendant while filing claims against (and potentially receiving payment from) multiple trusts is not significant. Most asbestos victims were exposed to asbestos-containing products from multiple defendants and, unless there is an adjudication of liability and award and payment of damages, each defendant or trust remains responsible.

The asbestos personal injury trusts replace insolvent defendants, and are a settlement vehicle. The trusts are not tort defendants; rather, they settle claims created by the liability of their

insolvent predecessors. Unlike solvent defendants, a trust does not contest liability when a plaintiff proves exposure to products for which the trust is responsible.

Given the fact that the trusts pay a percentage of the settlement value of a claim, the amounts being paid to claimants vary widely from trust to trust, but are low compared to results in the tort system. The GAO survey found the median payment percentage across trusts is 25%.[xlii] The scheduled values for a claim, which reflect each defendant's historical settlement averages, vary widely as well, reflecting the share of total settlements paid by each defendant in the tort system. The following table shows some of these results.

TABLE 1 — Sample Trust Recoveries[xliii]

Trust	Payment %	Scheduled Value — Mesothelioma	Paid to Claimant
AWI	20%	$110,000	$22,000
Burns & Roe	25%	$60,000	$15,000
B&W	7.5%	$90,000	$6,750
Fibreboard	7.6%	$135,000	$10,260
Kaiser	35%	$70,000	$24,500
Manville	7.5%	$350,000	$26,250
OC	8.8%	$215,000	$18,920
USG	20%	$155,000	$31,000

As shown, the trusts do not have the funds to pay the full scheduled value to all present and future claimants, and most recoveries are quite small. For example, recovering from all of the trusts listed above would yield a claimant roughly $155,000, a very small portion of the damages routinely awarded by juries to mesothelioma victims.

V. Myths And Facts About Asbestos: What Asbestos Companies Want You To Believe

a. The Myths

Most recently, these asbestos litigation defendants have created a myth of plaintiff wrongdoing — which they call "double-dipping" — as a pretext for so-called settlement trust "transparency" legislation. This is not what it pretends to be — an effort to make the tort system more responsive — but merely their latest affirmative effort to evade responsibility for their own malfeasance.

It is a fundamental principle of American tort law that an injured person can recover damages from every entity that has harmed him, and as litigation progresses can settle his claim against one or another of the wrongdoers as both parties may agree. His compensation for his injury is, then, the sum of all the settlements reached. Only in the very rare case that goes to verdict, judgment, and payment (where the payment amount is reduced by an amount determined by the relevant state law to account for payments by settling co-defendants or bankruptcy trusts), is the victim's claim fully satisfied. Only if after verdict, judgment, and payment were a plaintiff to recover from a bankruptcy trust could he be overcompensated and be said to have "double-

dipped." Out of the millions of trust claims filed and considered by trusts since 1988, defendants have identified just one case where a trust claim was filed by a plaintiff after judgment and paid by a trust. In that case the judgment was on appeal and had not yet been paid when the trust claim was filed. Thus, despite asbestos companies' claims, there is no "double-dipping" problem that needs to be fixed.

To fix this non-problem, front organizations for asbestos defendants have proposed "transparency" laws and regulations at both the federal and state levels. One such law was recently adopted in Ohio. While these proposals masquerade as mechanisms designed to advance evenhanded justice, they are, in fact, obvious efforts by asbestos litigation defendants to do an end-run around uniform rules of discovery in the tort system and reverse principles of tort law established hundreds of years ago, including the principle that the plaintiff is the master of his case and may choose which of multiple wrongdoers to sue and with which to settle.

These front organizations include the American Legislative Exchange Council ("ALEC") and the U.S. Chamber of Commerce Institute for Legal Reform. ALEC is funded by a variety of corporations, including those facing liability for injuries and deaths caused by their asbestos-containing products. ALEC is also busy advancing the interests of the tobacco industry, health insurance companies, and private prisons — the latter particularly through legislation requiring expanded incarceration of immigrants. While ALEC purports to be a nonprofit, it is little more than a group of corporate lobbyists who write model legislation and then fund free trips for state legislators to luxury resorts, seeking to have them introduce model anti-civil justice legislation in their home legislatures.[xliv] Outrageously, ALEC is funded as a tax-exempt charity, although the IRS has recently received formal complaints challenging the group's nonprofit tax status on the basis that ALEC's primary purpose is to provide a vehicle for its corporate members to lobby state legislators and to deduct the costs of such efforts as charitable contributions.[xlv] In addition, ALEC coordinated the state effort through introduction of the "Asbestos Claims Transparency Act," which seeks to further limit the ability of victims to recover.[xlvi]

b. The Facts

The supposed "transparency" sought by asbestos defendants is centered on claims plaintiffs make against trusts established to compensate asbestos victims. These asbestos personal injury trusts were created to resolve the bankruptcies of asbestos defendants overwhelmed by their provable tort liabilities to the people they injured. The trusts are crafted to distribute settlement payments to individuals injured by their bankrupt predecessors' products in amounts reflecting the historic tort system settlement share paid by the relevant predecessor. Because of the hopeless insolvency of their predecessors, the trusts are only able to pay a small percentage of that historical settlement share to each harmed claimant, present and future.

i. There Is No "Double Dipping"

Supporters of these recent proposals claim that "transparency" is necessary to prevent "double-dipping" on the part of plaintiffs — that is, fraudulent multiple recoveries for the same injury, through lawsuits against remaining solvent defendants and trust claims. This assertion is deliberately misleading. Because of the ubiquitous presence of asbestos in industry, multiple

companies are almost always at fault for asbestos-related diseases and deaths. Think of the shipyard worker, for example, assisting in the repair of countless U.S. Navy warships. The asbestos-containing products which were causes of his injury included boilers, pipe and thermal insulation, gaskets, and many others. A person so injured can legally recover from every company responsible, including both those he sues in the tort system and the trusts that stand in the shoes of bankrupt defendants. The current efforts by ALEC and its members are nothing more than an attempt to shift solvent defendants' share of responsibility to the insolvent defendants and leave the innocent victims with the resulting shortfall in recovery.

ii. Asbestos Defendants Can Already Receive Relevant Information From The Trusts

It is important to note that asbestos trusts are created under state law as private trusts as part of the resolution of a bankruptcy. Their funding reflects an overall settlement among the debtor, the debtor's other creditors and shareholders and the asbestos claimants of the debtor's present and future asbestos liabilities, negotiated and sometimes litigated pursuant to the rules of Chapter 11. The trusts are funded entirely with private funds provided by the relevant debtor and, in many cases, the debtor's insurers; no government funds are involved. Following their formation, the asbestos trusts operate in the same manner as a company that is reorganized as part of a bankruptcy. They are governed by applicable state law and their trust agreements, which are public documents approved by a federal bankruptcy judge. Solvent asbestos defendants remaining in the tort system are currently able to learn all information relevant to a claim against them, including information about a victim's trust claims, under state discovery rules.

The pretextual nature of these bills is particularly clear when one considers that the information that "transparency" legislation seeks to make public is already available to defendants who need it. Asbestos personal injury litigation has been going on for more than thirty years. Many of the same lawyers are still involved; those that represent defendants have witnessed all the discovery that plaintiffs — hundreds of thousands of plaintiffs — have produced, and have been at the trials. It is highly likely that there are very few job sites for which defendants do not have a library of data demonstrating which other defendants' products were present.

Often, this information does not come from plaintiffs. An individual plaintiff rarely knows what corporation provided the asbestos products present at a site where he worked. He is usually a sick or dying worker, or the widow of such a person, and he (or his widow) will only know where he worked and the kinds of materials he worked with, though not necessarily the materials his co-workers worked with. Proof of the identity of the supplier of the asbestos at those locations usually comes through discovery of suppliers and sales records, and depositions of co-workers, not the plaintiffs' memories. And the evidence is widely available. Without it, plaintiffs' lawyers would not have proved liability so many times that corporations worth billions of dollars had to file for bankruptcy protection.

For defendants to claim that transparent claim filings would solve a problem, therefore, is false. Should a defendant wish to lay off liability on an absent insolvent tortfeasor, the tort system allows it to do so. In addition to their institutional knowledge, the remaining defendants in the

tort system have the same discovery devices available to them as plaintiffs do, and can prove the fault of the absent insolvent tortfeasors as easily as plaintiffs originally could. Defendants can obtain, for example, the plaintiffs' work history, employer records, and depositions of the plaintiffs and co-workers to determine the asbestos-containing products to which the plaintiffs were exposed. Defendants can also consult the trusts' websites, which generally contain searchable lists of sites where the products for which the trusts have responsibility were concededly used, and which are easily compared to a plaintiff's work history.[xlvii]

iii. Asbestos Defendants Are Not Made To Pay More Than Their Fair Share

States have different tort liability regimes, a situation not caused by or related to the existence of asbestos trusts. The principal difference between so-called several-only and joint-and-several jurisdictions is whether the plaintiff or defendant bears the risk of another responsible tortfeasor's inability to pay. An individual defendant's share of the liability for an injury is its "several" liability. In states that apply several-only liability rules, when a responsible defendant cannot pay, the plaintiff cannot recover that defendant's liability share from co-defendants; the plaintiff bears the loss.[xlviii] With joint-and-several liability, each defendant the jury finds at fault can be required to pay the entire judgment and then seek contribution from others jointly responsible, whether another tort system defendant or a trust, bearing the risk that one or more of those jointly responsible cannot pay. The nature of each state's regime is a public policy choice of its legislature.

Underlying all of these systems is the fact that each defendant is assigned a share of liability. When verdicts are molded, courts typically reduce the verdict amount before entering judgment so as to reflect settlement payments a plaintiff has recovered from other tort system defendants and trusts.[xlix]

VI. H.R. 982, The "FACT Act": A Solution In Search Of A Problem

The FACT Act's provisions have no intended consequences other than to grant solvent asbestos defendants new rights and advantages to be used against asbestos victims in state court and to add new time-consuming burdens to the trusts. Further, the bill is intended to help defendants skirt state laws regarding rules of discovery and joint and several liability. H.R. 982 would require the trusts to publically disclose extensive, individual and personal claim information, including information about a victim's exposure and work history, and would allow asbestos defendants to demand any additional information from the trusts at any time and for virtually any reason.

Under Section 2 of the bill, Sections 8(A) and 8(B) operate together to put burdensome and unnecessary reporting requirements on the trusts, giving asbestos defendants informational advantages while also slowing down the ability of trusts to pay claims. Section 8(A) of the bill would force trusts to publicly report highly personal, individual claimant data. According to the bill, this would include "the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant." And, if the information reported pursuant to this

provision were not enough for asbestos defendants to use to deny liability, section 8(B) requires the trusts to "provide in a timely manner *any* information related to payment from, and demands for payment from, such a trust, subject to appropriate protective orders, to *any party to any action* in law or equity if the subject of such action concerns liability for asbestos exposure." (Emphasis added.) Section 3 of the bill makes the bill's provisions retroactive and would force every trust to look at and report on every claim it ever paid.

First, the bill would slow down the trust process such that many victims could die before receiving compensation since victims of mesothelioma typically only live for 4 to 18 months after their diagnosis.[1] The bill's new burdens will require the trusts to spend time and resources complying with these requirements, causing trust recoveries to be delayed.

In addition, the bill overrides state law regarding discovery/disclosure of information. State discovery rules currently govern disclosure of a trust claimant's work and exposure history. If such information is relevant to a state law claim, a defendant can seek and get that information from the plaintiff according to the rules of a state court. What a defendant cannot do, and what this bill would allow, is engage in fishing expeditions for irrelevant information that has no use other than to delay a claim for as long as possible.

It is also important to note that the bill only changes what the trust must report with respect to an asbestos victim; the bill says nothing of the right of asbestos defendants to demand confidentiality. A typical asbestos defendant who settles a case in the tort system demands confidentiality as a condition of settlement in order to ensure that other victims do not learn how much the defendant paid. Trust payments represent settlements of former asbestos defendants. The remaining asbestos defendants now want the trusts to disclose specific settlement amounts and other information that they themselves do not provide and that the bankrupt asbestos defendants who created the trusts did not provide when they were defendants in the tort system.

Furthermore, the bill seemingly ignores the fact that much trust information is already public. Trusts already disclose far more information than solvent defendants do about their settlement practices and amounts – the settlement criteria used by a trust and the offer the trust will make if the criteria are met are publicly available in the Trust Distribution Procedures for that trust. Trusts also file annual reports with the Bankruptcy courts and often publish lists of the products for which they have assumed responsibility. Ironically, then, the trusts are already far more "transparent" than the solvent defendants who now seek to transform the trusts into discovery clearinghouses for the benefit of those defendants.

Lastly, the bill also ignores the fact that despite trying to find instances of widespread fraud and abuse, there is none. Defendants have no evidence to support their assertions of fraud by plaintiffs. The *Kananian* case, on which they so heavily rely, was an isolated incident, remedied by a state court, involving inconsistent trust claims with respect to a single claimant, one of the millions who have filed claims with asbestos trusts.

VII. Asbestos Trust Transparency Legislation Efforts Around the Country — Unnecessary And Unfair

Asbestos defendants and insurance companies, under the guise of creating increased "transparency," are introducing proposed legislation in state legislatures to grant solvent asbestos defendants new rights and advantages to be used against asbestos victims in court. Some of these bills would also burden the asbestos trusts with unnecessary reporting requirements, slowing their ability to pay claims, and further draining them of the resources needed to make their already diminished payments. In general, the bills are an attempt to change the rules of the tort system to provide defendants with an advantage, using the existence of the trusts and claims of a lack of "transparency" as a subterfuge.

In Ohio, the legislature recently enacted Ohio H.B. 380 (originally drafted by ALEC), which shifts control of key elements of the plaintiff's case to defendants while simultaneously shifting significant burdens to the plaintiff. This new Ohio law requires plaintiffs to identify all trust claims and material pertaining to those claims, and update those identifications when new claims are made.[li] Defendants can delay trial and force plaintiffs to make claims against other trusts.[lii] Then, trust claims are presumed to be relevant and discoverable and can be introduced to prove causation and allocate responsibility.[liii]

With a law like Ohio's H.B. 380, defendants shift their burden — to prove fault on the part of other entities — to plaintiffs, while simultaneously lessening plaintiffs' control of their own lawsuits. The plaintiff now has to make claims at a defendant's behest, and then produce claims forms and supporting materials to that defendant, who may be able to use it to get insolvent entities on the verdict sheet. This reduces both the work required by the defendant to acquire evidence and the amount of that evidence it needs to limit its liability. It has nothing to do with reducing fraud; instead, it is a gift to the asbestos industry, which continues to try and avoid accountability and decrease compensation to the victims of its past wrongs — wrongs that it successfully hid for decades, causing years of unwitting worker exposure.

So, in addition to delay — which is always helpful to defendants — the Ohio bill allows a defendant to force the plaintiff to file trust claims, even with limited information. The defendant can use those filed claims as evidence that the plaintiff was exposed to other sources of asbestos — *even if the trusts deny the claims* — and potentially reduce the defendant's share of liability.[liv] And, as Ohio has a hybrid system of liability, even if each trust claim reduces a defendant's liability incrementally, the defendant can limit the plaintiff's recovery by at least those amounts and, if its liability falls below 50%, significantly.

Whether a solvent defendant found liable for a victim's injuries is liable for the shares of other tortfeasors is a question of public policy. So if a state's legislature wants to have open debate and change a fundamental rule of public policy, it can, of course, do so. Trust "transparency" subverts that process. Rather than making an informed decision, the Ohio legislature has changed public policy under the guise of so-called transparency, on the basis of largely anecdotal and unproven allegations only for asbestos plaintiffs. It is an effort to facilitate the defense against asbestos claims by forcing plaintiffs to assist in the defendant's efforts to shift responsibility to other entities.

VIII. Conclusions

Under the rubric of arguing that "transparency" is necessary to prevent supposed fraud, asbestos companies continue their efforts to change the laws at a state and federal level to receive whatever benefits they can from the existence of the trusts. These laws that seek to enforce disclosure, regulate timing of trust claims, and put additional burdens on these trusts, such as the FACT Act, are unjust and unfair to asbestos victims. These laws were never designed — nor intended — to address fraud in the trust system. Indeed, there is not a scintilla of evidence of any such problem. The real purpose of these laws is to allow solvent defendants to take advantage of the bankruptcies of their co-tortfeasors by shifting to plaintiffs the burdens of the shortfalls caused by the bankruptcies, as well as the burdens of discovery and proof of the bankrupt tortfeasors' responsibility. These laws are simply the latest stratagem by corporations that produced and distributed asbestos-containing products to avoid responsibility for the deaths and injuries of millions of Americans caused by those products. Legislators should not allow public policy to be hijacked by special interests, and should be vigilant to protect the rights of injured workers and their families.

Endnotes

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[i]. U.S. Government Accountability Office, GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 6 (September 23, 2011) ("GAO Report").

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[iii]. EPA, *Learn About Asbestos*, http://www.epa.gov/asbestos (last visited Jan. 8, 2013).

[iv]. National Cancer Institute, NIH, *Malignant Mesothelioma*, http://www.cancer.gov/cancertopics/types/malignantmesothelioma (last visited Jan. 11, 2013).

[v]. *See* Antti Tossavainen et al., *Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution*, 23 Scandinavian Journal of Work Environment & Health 313 (1997) ("All 4 major histological types [of lung cancer] (squamous, adeno-, large-cell and small-cell carcinoma) can be related to asbestos."); World Health Organization, Elimination of Asbestos-Related Diseases 1-2 (2006) ("All types of asbestos cause cancer in humans . . . . No threshold has been identified for the carcinogenic risk of chrysotile."). *See also* American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Disease Related to Asbestos*, 170 American Journal of Respiratory and Critical Care Medicine 692, 697 (2004).

[vi]. *See* William J. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality — 1980-2030*, 3 American Journal of Industrial Medicine 259, 259 (1982); *see also* American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 American Review of Respiratory Disease 363, 363 (1986).

[vii]. *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 737-38 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993) ("Manville I").

[viii]. *See* Enpro Industries Inc. Form 10-K (Mar. 3, 2009) at 84.

[ix]. Muriel L. Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 British Journal of Industrial Medicine 261, 265 (1965) (latency period can be as long as 55 years); C. Bianchi et al., *Latency Periods In Asbestos-Related Mesothelioma of the Pleura*, 6 European Journal of Cancer Prevention 162, 162 (1997) (the latency period in one case was 72 years).

[x]. *Manville I*, 129 B.R. at 737.

[xi]. Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 5-6 (Aspen Pub. 5th ed. 2005). *See also Manville I*, 129 B.R. at 737 (internal citation omitted).

[xii]. *Manville I*, 129 B.R. at 737-38 (internal citation omitted). *See also id.* at 739 (noting that reports of mesothelioma among asbestos workers had emerged in journals of industrial medicine and hygiene in the late-1940's).

[xiii]. *Id.* at 743 (citing Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985) ("Brodeur").

[xiv]. *Id.* at 745-46.

[xv]. *Id.* at 749.

[xvi]. *Borel v. Fibreboard Paper Prods. Corp*, 493 F.2d 1076 (5th Cir. 1973).

[xvii]. *See id.* at 1089.

[xviii]. *See id.* at 1095.

[xix]. *See, e.g.*, *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214 (Cal. 1997) (plaintiff may meet the burden of proving exposure to defendant's product caused lung cancer by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer); *Jones v. John Crane, Inc.*, 350 Cal. Rptr. 3d 144, 151 (Ct. App. 2005) ("The testimony of the experts provided substantial evidence that Jones's lung cancer was caused by cumulative exposure, with each of many separate exposures having constituted substantial factors contributing to his risk of injury."); *John Crane, Inc. v. Linkus*, 988 A.2d 511, 531 (Md. Ct. Spec. App. 2010) ("We conclude that lay testimony describing the amount of dust created by handling the products in question, coupled with expert testimony describing the dose response relationship and the lack of a safe threshold of exposure (above ambient air levels), was sufficient to create a jury question [as to whether the plaintiff's mesothelioma was caused by defendant's asbestos-containing products]."); *John Crane, Inc. v. Wommack*, 489 S.E.2d 527, 532 (Ga. Ct. App. 1997) ("Expert testimony showed that it is universally agreed that asbestos fibers are intrinsically dangerous and that the respiration of each fiber is cumulatively harmful . . . ."); *Blancha v. Keene Corp.*, Civ. A. No. 87-6443, 1991 WL 224573, at *6 (E.D. Pa. Oct. 24, 1991) (*every* occupational exposure to asbestos "is a substantial factor in bringing about mesothelioma"); *Held v. Avondale Indus., Inc.*, 672 So. 2d 1106, 1109 (La. Ct. App. 1996) (medical evidence showed "no known level of asbestos [exposure] which would be considered safe . . . any [asbestos] exposure, even slight exposures, to asbestos . . . [found to be] a significant contributing cause of the [decedent's] malignant pleural mesothelioma"); *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684 (Wash. Ct. App. 1997) (any

exposure to asbestos above background contributes to development of mesothelioma); *Kurak v. A.P. Green Refractories Co.*, 689 A.2d 757, 766 (N.J. Super. Ct. App. Div. 1997) ("Where there is competent evidence that one or a *de minimis* number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff's injury."); *ACandS, Inc. v. Abate*, 710 A.2d 944, 989 (Md. Ct. Spec. App. 1998), *abrogated by*, *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002) (expert medical witness testified that "each and every [asbestos] exposure that [the decedent] had was a substantial contributing factor in the causation of his disease"); *Caruolo v. ACandS, Inc.*, No. 93 Civ. 3752 9RWS, 1999 WL 147740, at *9 (S.D.N.Y. Mar. 18, 1999) *aff'd in part*, *vacated in part*, 226 F.3d 46 (2d Cir. 2000) (expert medical witness testimony that "[T]here is no way one can say [each asbestos exposure] didn't contribute. To the contrary. All of his exposures contributed to his mesothelioma, including this one.").

[xx]. Brodeur at 73.

[xxi]. Jennifer L. Biggs et al., American Academy of Actuaries, *Overview of Asbestos Claims Issues and Trends*, Mass Tort Subcommittee at 3 (Aug. 2007) *available at* http://www.actuary.org/pdf/casualty/asbestos _aug07.pdf.

[xxii]. Stephen J. Carroll et al., RAND Institute for Civil Justice, *Asbestos Litigation* 46 (2005) ("RAND Asbestos Litigation Study").

[xxiii]. *See In re Johns-Manville Corp.*, 68 B.R. 618, 620 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 636 (2d Cir. 1988).

[xxiv]. *See id.* at 624.

[xxv]. *See id.*

[xxvi]. *See, e.g.*, *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 235 n.47 (3d. Cir. 2004). *See also* H.R. Rep. No. 103-835 at 3 (1994) (explaining that Section 524(g) is intended to emulate the "creative solution to help protect the future asbestos claimants, in the form of a trust into which would be placed stock of the emerging debtor company and a portion of future profits, along with contributions from [the debtor's] insurers" devised in the *Manville* case). Section 524(h), which was enacted at the same time, makes clear that the channeling injunction in *Manville* is deemed retroactively to comply with Section 524(g), and thus is valid.

[xxvii]. Bankruptcy Amendments Act of 1993, Amendment No. 1633, 140th Cong. (2d Sess. 1994) (*amending* 11 U.S.C. § 524).

[xxviii]. *See* 11 U.S.C. § 524(g)(4)(B)(i).

[xxix]. *See id.*

[xxx]. GAO Report at 3.

[xxxi]. GAO Report at 3. This number may not be accurate, as some trusts are dormant and other bankruptcy cases which were expected to lead to new trusts are still active.

[xxxii]. *See* 11 U.S.C. § 524(g)(2)(B)(i)(III).

[xxxiii]. *See, e.g.*, *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 722 (D. Del. 2005); *see also* United States Gypsum Asbestos Personal Injury Settlement Trust, Trust Distribution Procedures §§ 2.3, 4.2 (revised Mar 29, 2010), http://www.usgasbestostrust.com/files/USGTDP.pdf ("USG TDP").

[xxxiv]. *See* USG TDP §§ 2.3 and 4.2; see also *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 114, 136 (D. Del. 2006).

[xxxv]. *See, e.g.*, *In re Burns & Roe Enters., Inc.*, 08-4191(GEB), 2009 WL 438694, at *32, *37 (D.N.J. Feb. 23, 2009).

[xxxvi]. *See, e.g.*, USG TDP § 5.3(a).

[xxxvii]. *See, e.g.*, *id.* § 5.3(b).

[xxxviii]. *See, e.g.*, *id.* §§ 5.3(a)(3); 5.7(a), (b).

[xxxix]. *See, e.g.*, *id.*

[xl]. GAO Report at 29.

[xli]. GAO Report at 19.

[xlii]. GAO Report at 21.

[xliii]. *See* Manville Personal Injury Settlement Trust, *2002 Trust Distribution Process* § D (Jan. 2012 Revision), http://www.claimsres.com/documents/MT/2002%20TDPJanuary%202012%20 Revision.pdf; Manville Personal Injury Settlement Trust, *FAQs* § A.2 (Mar. 2012), http://www.claimsres.com/documents/MT/FAQS.pdf; *Amended and Restated Armstrong World Industries, Inc. Asbestos Personal Industry Settlement Trust Distribution Procedures* § 5.3(b)(4), armstrongworldasbestostrust.com (updated July 14, 2010), http://www.armstrongworld asbestostrust.com/files/Conformed%20AWI%20TDP%20as%20of%207_14_10.PDF; *Frequently Asked Questions*, armstrongworldasbestostrust.com, http://www.armstrongworldasbestostrust. com/page_25.asp (last visited Jan. 4, 2012); *Asbestos PI Settlement Trust Distribution Procedures* § 5.3(b)(3), bwasbestostrust.com (revised Oct. 27, 2011), http://www.bwasbestostrust.com/files/ B%20W %20CLEAN %20TDP%2010_27_11%20P0219676.pdf; *Frequently Asked Questions*, bwasbestostrust.com, http://www.bwasbestostrust.com/page_25.asp (last visited Jan. 4, 2012); *Third Amended Trust Distribution Procedures* § 5.3(b)(3), kaiserasbestostrust.com (Nov. 20, 2007), http://www.kaiser asbestostrust.com/Files/Third%20Amended%20Trust%20Distribution%20 Procedures%2000013238.pdf; *Notice of Payment Percentage Adjustment*, kaiserasbestostrust.com (May 13, 2011), http://www.kaiserasbestostrust.com /Files/20110513_KACC_Payment_Percentage _Notice.pdf; *Trust Distribution Procedures* §§ 2.3, 5.3(b)(4), burnsandroetrust.com (Nov. 10, 2008), http://www. burnsandroetrust.com/Files/ 20081110_BurnsAndRoe_TDP.PDF; *Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures* (Revised Feb. 2, 2010) §5.3(b)(4); http://www.ocfbasbestostrust.com/faq_popup.asp?fid=38 (last visited Feb. 13, 2013); *United States Gypsum Asbestos Personal Injury Settlement Trust Distribution Procedures* (Revised March 29, 2010) §5.3(b)(3); http://www.usgasbestostrust.com/faq_popup.asp?fid=40 (last visited Feb. 13, 2013).

[xliv]. Am. Ass'n for Justice, *ALEC: Ghostwriting the Law for Corporate America* 3 (May 2010), http://www.justice.org/cps/rde/xbcr/justice/ALEC_Report.pdf.

[xlv]. Letter from Marcus S. Owens, Clergy VOICE, to Douglas Shulman, Comm'r. of the IRS, Regarding Violations of the Internal Revenue Laws by the Am. Legis. Exch. Council (EIN: 52-0140979), (June 18, 2012), http://www.scribd.com/doc/98828514/ALEC-IRS-Complaint; Submission to the Internal Revenue Service Under the Tax Whistleblower Act, 26 U.S.C. § 7623(b) Regarding Underreporting of Lobbying and Operation in Furtherance of Private Corporate Interests in Contravention of 26 U.S.C. § 501(c)(3) Tax-Exempt Charitable Status, Common Cause (Apr. 20, 2012), http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/ALEC_FINAL_SUBMISSION_IRS_WHISTLEBLOWER.PDF.

[xlvi]. The Asbestos Claims Transparency Act has been introduced in Louisiana, Ohio, Oklahoma, Texas, and West Virginia. H.B. 477, 2012 Leg., 38th Reg. Sess. (La. 2012); Amended Substitute H.B. 380, 129th Gen. Assem., 2012 Sess. (Ohio 2012); S.B. 1792, 53d Leg., 2d Reg. Sess. (Okla. 2011); H.B. 2034, 82d Leg. (Tex. 2011); S.B. 1202, 82d Leg. (Tex. 2011); S.B. 43 & 56, 80th Leg., Reg. Sess. (W.Va. 2011). The Ohio bill is the only one to have been enacted and is discussed later in this paper.

[xlvii]. *See, e.g.*, *USG Approved Site List*, usgasbestostrust.com (updated June 7, 2012), http://www.usgasbestostrust.com/files/USG%20Site%20List%206-7-12.xls.

[xlviii]. *See Bondex Int'l v. Ott*, 774 N.E.2d 82, 86-87 (Ind. Ct. App. 2002); *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 172 P.3d 410, 413 (Ariz. 2007).

[xlix]. *See* Paul D. Kheingold, *Litigating Mass Tort Cases* § 10:65 (2012).
[1] Mesothelioma Applied Research Foundation, *Mesothelioma Information: Disease Development and Progression*, available at: http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.4023387/k.643A/Mesothelioma_Information.htm#whatismesothelioma

[li]. Amended Substitute H.B. 380 § 1 (amending § 2307.952(A)(1)(a)).

[lii]. *Id.* (amending § 2307.953(A)).

[liii]. *Id.* (amending § 2307.954(B)).

[liv]. Amended Substitute H.B. No. 380 § 4(I).

Mr. BACHUS. Thank you.
Mr. Scarcella.

TESTIMONY OF MARC SCARCELLA, BATES WHITE, LLC

Mr. SCARCELLA. Chairman Bachus, Members of the Subcommittee, thank you for holding today's hearing on the FACT Act

and allowing me the opportunity to provide testimony in support of this bipartisan, commonsense legislation.

I also want to thank Mr. Inselbuch for prompting me to change my oral testimony at the last moment. But I think it's important to address some of the concerns Mr. Inselbuch raised.

When I spoke in May of 2012 on the FACT Act, I intended that the quarterly reporting requirements of the FACT Act to provide data disclosing who has filed a claim and under what allegations of exposure they are seeking payment, and I made comments of how little time and effort it would take to produce this information, I believe Mr. Inselbuch has misunderstood me. I did not mean to intend that it would take minutes to produce per claim. I meant it would take minutes to produce for all claims.

There is a simple fact that people need to understand about discovery on trust data. As a former statistician of the Manville Asbestos Trust, I can tell you that this data is available. Asbestos facilities in trust receive data, process data, and pay claims through electronic databases and processing systems. These databases allow pertinent information to be parsed out about each claim.

It is very easy for anybody with a general competency on database and programming skill that all these trust and claim facilities have at their disposal to write a simple code that allows them to generate a disclosure of every claimant, when they file the claim, and their allegations of exposure asserting payment for their claims, without disclosing any personal information, private medical information, home addresses, or any other privacy concerns that Mr. Inselbuch or the plaintiff attorneys have shared in the past. This is a very simple procedure.

So when I say it would take minutes and be a minimal cost to produce the quarterly reporting requirements of the FACT Act, I mean for all claims, not just one claim per time. And this is based on my experience as not only the statistician of the Manville trust, but over 7 years of experience working in bankruptcy reorganizations for legal representatives of asbestos claimants, as well as with the trust once they were confirmed.

I consulted on issues of data management and report generation, and I know how these data systems work. That is why I am confident in my previous statements, and I am very confident that the requirements proposed by the FACT Act will not bear a huge cost burden on the trust, if any at all. In fact, the recent markup of the FACT Act since I last spoke on it in May 2012 allows provisions for the trust and their facilities to charge third parties who are requesting information reasonable fees in order for the trust to concur and comply with those requests.

This is a cost shift that will help relieve burden on the trust and help preserve money in the funds for victims.

Now, I have gotten a little bit off script because I felt it was necessary to address some of those issues, but I just want to talk about a few other items that I think are also important to know.

Mr. Inselbuch spoke in his oral testimony, as well as his written testimony, about this idea that in order to respond to the reporting requirements of the FACT Act, this is going to take so much resources away from the trust and their facilities that claimants are going to experience a delay in claim payments.

This is a myth. This has been spoken about for quite some time, dating back to last year's hearing in May of 2012. When I was the statistician for the Manville trust, I was responsible for handling data requests both internally and externally. My work and the items that I had to produce both internally and externally had no bearing on the professionals employed by the trust in the facility who were responsible for reviewing, processing, and paying claims. So any reporting requirements that I would have had to have dealt with in no way would delay the processing and payment of claims to the people who deserve it most.

Ultimately, one of the issues I wanted to get across here today is that transparency helps trusts. It is difficult to detect fraud or inconsistent claiming when you operate in a vacuum, as most trusts do. They do not share information with each other. Trust transparency will allow trusts to actually have auto procedures that can compare claim allegations made across multiple trusts. This will cut down on inconsistent claiming, and that will preserve money for the victims who deserve it the most.

Thank you very much.

[The prepared statement of Mr. Scarcella follows:]

United States House of Representatives

Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Testimony of Marc Scarcella
Bates White, LLC
1300 Eye Street, NW
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Hearing on H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013"

March 13, 2013

Executive Summary

Chairman Goodlatte, Ranking Member Cohen, and members of the subcommittee, thank you for holding today's hearing on H.R. 982 -- the Furthering Asbestos Claims Transparency (FACT) Act of 2013. My name is Marc Scarcella, and I appreciate the opportunity to provide testimony in support of the FACT Act. As an economist who has been studying trends in asbestos claim filings and compensation for over ten years, I believe that transparency between the asbestos civil tort and bankruptcy trust systems is critical for the proper allocation of indemnification to asbestos claimants, and necessary for ensuring accountability in claiming behavior as a deterrent to potential specious claiming practices.

During the past decade, I have had the opportunity to work with both defendants and insurers who are actively litigating cases in the asbestos civil tort, as well as with legal representatives for asbestos claimants and trustee boards to some of the largest asbestos bankruptcy trusts. It is from this balanced experience of seeing the world from both the tort and trust systems, and working for both defendants and claimants, that I've gained a great deal of knowledge about how these two compensation systems interact with one another, or in many instances, fail to interact with one another.

My prior testimony in support of the FACT Act in May 2012, focused on two key issues; (i) effectiveness, and (ii) cost.[1] I will focus on the same issues again today.

The FACT Act will advance transparency within the asbestos bankruptcy trust system

On the issue of effectiveness, I believe that the FACT Act will serve as an effective step towards bridging the transparency gap between the asbestos bankruptcy trust and the civil tort systems. It is rare to find an asbestos plaintiff whose injuries have been caused by the actions of just one asbestos defendant. Rather most asbestos lawsuits pursue compensation from dozens of defendants.[2] This places a great deal of importance on the allocation of fault and compensation shares across culpable parties. Under the

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[1] Testimony of Marc Scarcella, esq., Hearing testimony on H.R. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012", U.S. House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law, May 2012

[2] Scarcella, Marc C., Peter R. Kelso, and Joseph Cagnoli, Jr. "The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010." Mealey's Asbestos Litigation Report 27, no. 19 (2012), Exhibit 1

current asbestos trust system billions of dollars in claim payments are made each year, representing shares of the litigation's most culpable defendants that have exited the tort system through bankruptcy reorganization. In the absence of trust transparency, this substantial source of plaintiff compensation cannot properly be integrated into the allocation of shares against defendants in the civil tort system.

The trust claim disclosures the FACT Act are seeking through quarterly reporting requirements are akin to what is currently publically available for civil tort claims. When an asbestos lawsuit is filed in the tort system, a public complaint discloses the identity of the plaintiffs, and all the defendants named in the lawsuit for which the plaintiffs are seeking compensation. In addition, these complaints typically provide general allegations of exposure, and in some cases they will include a very detailed account of the victim's work and exposure history. Furthermore, publically available case dockets will typically provide status information on each defendant named in the lawsuit. In sum, the FACT Act can bridge the trust and tort transparency gap through the quarterly reporting requirements that simply look to disclose the same level of information on trust filings as is already available to the public on tort filings.

In addition to promoting the proper allocation of plaintiff indemnification in the tort system, the quarterly reporting requirements of the FACT Act provide an effective level of public accountability that will act as a deterrent to inconsistent, specious, or potentially fraudulent claiming activity against the trusts. Currently, billions of dollars in claim payments are distributed by the asbestos bankruptcy trusts each year, with virtually no external oversight or public accountability.[3] Individual trusts operate in vacuums, so not only are the claimant demands made across trusts not publically available to solvent defendants in the civil tort system, but also not available to other trusts. The quarterly reporting requirements of the FACT Act will allow trusts to cross-reference exposure and medical allegations with claims made against other trusts. This level of transparency will allow trusts to proactively identify inconsistent claiming behavior.

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[3] Scarcella, Marc C. and Peter R. Kelso. "Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance." Mealey's Asbestos Bankruptcy Report 11, no. 11 (2012), Exhibit 2

The FACT Act will advance trust transparency in an efficient and cost-effective manner

On the issue of cost, I believe that any expense the trusts incur in complying with the reporting and disclosure requirements of the FACT Act will be minimal. Asbestos bankruptcy trusts receive and collect claim level data electronically, store and process claim level data electronically, and track claim status and payment information electronically. As a result, extracting quarterly summary tables at the claim level or responding to third party data requests is an efficient and cost-effective process for the trusts. Based on my extensive experience working for and with claim processing facilities on issues of data management and reporting, I can say with confidence that the trusts and facilities are well equipped to produce these quarterly reports at minimal cost. Moreover, the FACT Act would allow trusts to require any third party that requests trust claim information to pay the reasonable costs incurred to comply with the request.

Opponents of the FACT Act will argue that discovery procedures governed by the state courts are sufficient for bridging the gap between tort and trust compensation, but ultimately these current avenues prove to be inefficient and costly to both defendants, plaintiffs, and the trusts themselves.[4] During her testimony on the FACT Act in May 2012, Ms. Leigh Ann Schell identified numerous examples of defendant discovery requests on trust disclosures in the tort system being met with fierce opposition from both plaintiff counsel and the trust themselves, resulting in even more costly litigation for all sides involved.[5] In fact, a 2011 report on asbestos trusts produced by the Government Accountability Office (GAO) cited an example where one trust had incurred $1 million in attorneys' fees in order to respond to a discovery request.[6] This example is exactly the type of costly and burdensome discovery request the FACT Act will limit in the future through standardized reporting requirements and cost-shifting provisions that will ultimately result in significant cost-savings for the trusts.

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[4] Release of Information and Documents Pursuant to the 2002 Manville Trust TDP http://www.claimsres.com/documents/MT/INFO.pdf

[5] Testimony of Leigh Ann Schell, esq., Hearing testimony on H.R. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012", U.S. House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law, May 2012, pg. 5-10.

[6] Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts, Government Accountability Office, September 2011, pg. 30.

Opponents of the FACT Act claim that the trusts already deter inconsistent and fraudulent claiming behavior through audit procedures, thus making the FACT Act unnecessary. However, many of the trust audit procedures tend to focus on reviewing the medical data and supporting documentation that has been submitted, rather than comparing exposure allegations made across multiple trust and tort claims where inconsistencies and fraudulent claiming practices can be identified.[7] Currently, for every dollar paid to claimants, trusts will spend as little as two-cents to review and process claims.[8] While this cost model allows the trusts to administer claim payments in a cost-effective manner, it leaves few resources to perform appropriate audits. In fact, many trusts have adopted language in their Trust Distribution Procedures explicitly stating that they are not concerned with inconsistent exposure assertions between the trust and tort systems.[9]

So it is not surprising that, when the GAO interviewed eleven trusts regarding audit procedures during their 2011 study, the trusts asserted that their audits had never uncovered a single case of fraud.[10] However, I believe this perceived, self-reported record of accurate claiming is less a function of a lack of fraud, than a function of the trusts' inability to identify inconsistent claiming patterns in a cost-effective way. On the other hand, the FACT Act solves this problem by serving as a cost-effective deterrent to inconsistent claiming across the trusts and tort system by promoting claim transparency.

The FACT Act successfully addresses a critical need for trust transparency

In sum, The FACT Act seeks a reasonable level of bankruptcy trust claim transparency, and proposes to do so in an extremely cost-effective and efficient manner. The FACT Act will promote equitable allocation of fault and compensation in the civil tort system, and help prevent trust funds from being depleted by erroneous payments, thus preserving funds for those asbestos victims who are most deserving.

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7 Amended and Restated Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures, Section 5.8, November 19, 2012

8 *Supra* 3.

9 The Babcock & Wilcox Company Asbestos PI Settlement Trust Distribution Procedures, Section 5.7(b)(3), Revised October 27, 2011

10 *Supra* 6, pg. 23

Background

Currently, I am an economic consultant with the Environmental and Product Liability practice of Bates White, LLC. I've been with Bates White for nearly four years, and during that time I have been retained by defendants and insurers as an expert on the governance, procedures, processing systems, and compensation criteria of asbestos personal injury trusts established under section 524(g) of the U.S. Bankruptcy Code. Prior to joining Bates White, I spent seven years with Analysis Research Planning Corporation ("ARPC") as an asbestos liability estimation consultant for legal representatives and trustee boards associated with high profile 524(g) bankruptcy reorganizations and resulting bankruptcy trusts. Prior to that time, I was the data analyst and statistician for Claims Resolution Management Corporation ("CRMC"), a wholly owned subsidiary of the Manville Personal Injury Settlement Trust ("Manville") established to process and resolve asbestos claims against the trust.

Experience specific to asbestos bankruptcy trusts and claim processing systems[11]

During my time with CRMC, the facility was in the process of developing an electronic claim filing system ("E-Claims™") to allow claim filers to not only submit individual claim forms electronically, but also to upload thousands of claim forms at one time. Similar technology has since been adopted by other claim processing facilities.[12] These technologies have been designed to be compatible with the electronic claim databases that claimant law firms may have developed for internal

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[11] The information in my testimony is based on: (i) publically available information and general experience gained during my employment at both Claims Resolution Management Corporation ("CRMC") and ARPC; and (ii) general industry knowledge with respect to the construction and functionality of electronic claim databases, and the ability to query and extract subsets of those databases. Information about the claims management and processing services provided by ARPC can be found at http://arpc.com/solutions/product-liability-and-environmental-consulting/claims-management-processing

[12] *See for example:* DCPF Requirements and Instructions for Bulk Upload Tool http://www.armstrongworldasbestostrust.com/files/Trust%20Online%20Bulk%20Upload%20Tool.pdf
See for example: Verus Asbestos PI Trust Online Filing User's Guide http://www.cetrust.org/docs/Online_Filing_User__Guide.pdf
See for example: Western Asbestos Settlement Trust Claim Filing Instructions and Electronic Claim Template *http://wastrust.com/claims-packet*

use, thus minimizing the administrative cost and burden of transferring claim and claimant data to the facility.[13]

The system used by CRMC, as well as other similar systems are designed to not only receive and maintain an electronic database of claim and claimant information, but to also allow for the ability to efficiently extract and analyze data as needed. For example, during my time with the CRMC, I maintained a monthly data extract of individual claim filing, processing, and settlement data that was produced for internal analytical and claim management tasks. Additionally, upon third party requests for data, CRMC would provide a similar extract for minimal cost, including expansive medical and exposure data extracts.[14]

During my tenure with ARPC the firm was retained as advisor to a number of future claim representatives or trustee boards of asbestos personal injury and property damage trusts ("Trusts"), including all of the trusts currently processing and resolving claims at the Delaware Claims Processing Facility ("DCPF") and its predecessor, the Celotex Asbestos Settlement Trust ("Celotex"), as well as certain Trusts currently processing and resolving claims at Verus Claims Services ("Verus"), the Claims Processing Facility, Inc. ("CPF"), Trust Services, Inc. ("TSI"), MFR Claims Processing ("MFR"), and the Western Asbestos Settlement Trust ("WAST") facility.[15] In addition to the firm's role as advisor to

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[13] *See for example:* Sample Excel file for Electronic Filing offered by Verus
http://www.kaiserasbestostrust.com/Files/KACC%20Sample%20Excel%20Files.zip

[14] Such an extract is still available today on a limited basis
Reference: Distribution of Manville Trust Data for Use Solely by Other Trusts
http://www.claimsres.com/documents/MT/DataPolicy.pdf
Reference: Manville Trust Single Use Data License Agreement
http://www.claimsres.com/documents/MT/DataAgreement.pdf

[15] In most cases, to the extent that any of these engagements were performed during the pending bankruptcy confirmation of a trust, any time records detailing the work performed by myself or other employees of ARPC would be publically available as fee applications in the bankruptcy case docket, along with any formal retention applications filed with the court.

In most cases, to the extent that any of these engagements were performed following the bankruptcy confirmation of a trust, the retention of ARPC and the general nature of the retention (e.g. Executive Director to the trust, claims administration consultant, liability estimation consultant, etc.) is disclosed in trust annual reports filed with the bankruptcy court and publically available on the case docket.

Trusts and future claim representatives, ARPC was also retained by Celotex, DCPF, CPF, and the WAST facilities to help develop new, or enhance existing, electronic claim processing systems.[16]

Need for asbestos bankruptcy trust transparency

The issue of asbestos bankruptcy trust transparency that sits at the heart of the FACT Act has been the focus of academic, judicial, and legislative debate across the country in recent years. Even though asbestos bankruptcies and resulting bankruptcy trusts have been around for decades, it's only been in the past few years that the trust system as a whole has become a substantial source of plaintiff compensation. Until 2000, there were only a handful of confirmed trusts actively processing and paying claims.

Then beginning in 2000 and extending through 2003, there was a wave of asbestos bankruptcy filings that included dozens of primary asbestos defendants such as Owens Corning, Fibreboard, Babcock & Wilcox, Armstrong World Industries, and United States Gypsum, to name just a few. As these primary asbestos defendants were going through the bankruptcy reorganization process, an automatic stay was placed on claims that prevented plaintiffs from pursuing civil action against them in the tort system. As a result, these bankruptcy defendants had effectively exited the tort system, and with them went a substantial source of plaintiff compensation.

As one can imagine, this marked a significant shift in the asbestos litigation as plaintiff attorneys were faced with having to fill the massive void in compensation left behind by these bankruptcy

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To the extent that a particular client cited in my testimony is not publically disclosed in any of the above mentioned sources, each of the ARPC clients referenced in my testimony are also referenced in the "Application For Order Authorizing The Proposed Future Claimants' Representative To Retain And Employ Analysis, Research, And Planning Corporation As Claims Evaluation Consultants" filed on October 11, 2010 in re: Specialty Products Holding Corp., et al In The United States Bankruptcy Court For The District Of Delaware (case no. 10-11780). This document is available for public download from the bankruptcy court docket.

[16] *See for example:* First Annual Report And Accounting Of Western Asbestos Settlement Trust, filed May 16, 2005 with the United States Bankruptcy Court Northern District Of California Oakland Division (Case No. 02-46284-T), pg. 12, line 10:
"Analysis Research Planning Corporation ("ARPC"): Consulting firm hired to help the Trust to develop a claims manual and claims processing procedures. Also hired to create a system to process claims after it was discovered that no existing vendor would be able to meet the requirements of the Matrix and TDP in a timely manner. Also offer ongoing advice concerning improvements to the system."

defendants. Plaintiff attorneys had to refocus their litigation strategy, and begin pursuing more actively those solvent defendants whom to that point had been peripheral sources of plaintiff compensation. In addition to peripheral defendants, plaintiff attorneys also began developing exposure cases against new defendants that had rarely, if ever, been named in the tort system prior to 2000.[17] As a result, these peripheral and new defendants experienced a dramatic increase in both the number lawsuits in which they were named, and the overall settlement demands that plaintiff attorneys were seeking as new sources of compensation. This is a key component to the current issues of asbestos bankruptcy trust transparency that the FACT Act is addressing. Joint and several liability rules and allocation of liability to "empty chair" defendants such as 524(g) trusts are designed to ensure that plaintiffs and victims can still be fully compensated for their injuries even when certain culpable defendants are insolvent or otherwise unavailable to pay their share.

This raises the question of whether the peripheral and new defendants did in fact pick up the liability share(s) of companies who have entered reorganization. Certain experts claim that the average award a mesothelioma victim receives from defendants in an asbestos tort action has stayed the same or gone up marginally since 2000. You will hear other experts and professionals claim that average compensation has increased by multiples. It is rare that you will hear anyone, if ever, say that average claim compensation has gone down. What that tells me as an economist viewing this litigation as a whole is that the joint and several liability and allocation systems worked just as they were designed to. Even with the traditional sources of significant plaintiff compensation leaving the tort system in the early part of the 2000s, asbestos plaintiffs were still being paid as they were before the increase in bankruptcies; that's because the peripheral and new co-defendants that remained in the asbestos tort system were forced to stand in the shoes of those defendants who sought bankruptcy reorganization.

What's happened in recent years, however, is that many of the bankruptcy reorganizations filed in the early 2000s have been confirmed and trusts have been created to pay current and future claims. Under section 524(g), trusts are established to assume the legal responsibility of the debtor's asbestos-

[17] *Supra* 2, pg. 6

related liability post-confirmation. Since 2006 nearly 30 trusts have been created through bankruptcy reorganization, funding the trust system with an additional $20 billion in assets to pay present and future qualifying claimants. Even after distributing over $14 billion in claim payments between 2006 and 2011, confirmed trusts still maintained over $18 billion in assets, with an additional $11 to 12 billion in proposed trust assets currently pending bankruptcy confirmation.[18] To show how fast the trust compensation system has grown, as of yearend 2005, the entire trust system only had $8 billion in assets.

Part of the reason why payments have been so large since 2007 is because the recently confirmed trusts had to clear out claim inventories, some of which dated back to the late 1990s prior to filing for bankruptcy. Taking that fact into consideration if you total up all the trust claim payments beginning in 2000, claimants have been paid a total of $17 billion as of yearend 2011. When you add the $5.5 billion from the bankruptcy negotiated settlements it totals over $22 billion in payments, all of which occurred outside the tort system.[19] That's an annual average of $1.9 billion in aggregate claim payments over that twelve year span. Now, you may hear that individual trusts only pay cents on the dollar to individual claims, but with billions being paid out each year, it's hard to believe that individuals aren't receiving substantial compensation in addition to what they receive in the tort system.

In summary, the number of confirmed asbestos bankruptcy trusts and level of trust claim payments has increased significantly over the past five years, creating an alternative compensation system to the civil tort system where solvent defendants continue to indemnify claimants in full. Asbestos bankruptcy trust transparency is not about determining how much money a victim of an asbestos-related injury should receive, but rather determining the appropriate amount that each culpable party should pay, including the bankruptcy trusts. As an economist I believe that, by and large, more transparency

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[18] Estimated present value of proposed funding based on bankruptcy disclosures from W.R. Grace, Pittsburgh Corning, North American Refractories, Flintkote, Congoleum, Quigley, Plant Insulation, A.P. Green, and Durabla. There are other pending 524(g) bankruptcy reorganizations currently active but no estimates of proposed trust funding has been disclosed in publically available bankruptcy documents that I've been able to find.

[19] Settlements paid pre-confirmation as part of pre-packaged bankruptcy reorganizations for North American Refractories, Dresser Industries, Quigley, and Combustion Engineering.

regarding the exposure to the products of reorganized defendants will result in more appropriate and just outcomes in the civil tort system and deter any future attempts at fraudulent claiming against trusts.

Assessment of the FACT Act

After reviewing the provisions outlined in the FACT Act, I believe that it will serve as an effective step towards bridging the transparency gap between the asbestos trust and civil tort systems, and will do so in an efficient and cost-effective manner. The reporting requirements of the bill will also serve as a deterrent to fraudulent claiming across bankruptcy trusts. This opinion is based on my experience and general industry knowledge with respect to the construction and functionality of electronic claim databases, and the ability to query and extract subsets of those databases.

The FACT Act will advance transparency within the asbestos bankruptcy trust system

Currently, the asbestos civil tort system provides a level of claiming and resolution transparency that the asbestos bankruptcy trust system lacks. Each lawsuit that is filed in the tort system includes a publically available complaint that identifies the plaintiff and each defendant from which compensation is sought. In most cases, the complaint also provides general exposure allegations that resulted in the alleged asbestos-related injury and, in some cases, a detail work history and alleged exposure sites. Furthermore, as the case progresses, publically available dockets track the status of each named defendant, including dispositions such as dismissals with and without prejudice, and orders granting summary judgments.

In contrast, the asbestos bankruptcy trust system provides no public disclosure on individual claimants seeking compensation, or the corresponding alleged exposures. In fact, each individual trust operates in a vacuum, which eliminates the ability for claim comparisons across trusts. Currently, the only trust I have been able to identify that has provided a public disclosure of claim filings and payments

is the API, Inc. Asbestos Settlement Trust.[20] With tens of thousands of claims being paid each year that lead to billions of dollars in claimant compensation, it's surprising that there is virtually no public accountability or oversight beyond the trustees and advisors who were selected as part of bankruptcy reorganization by the same plaintiffs' attorneys that are currently receiving trust payments on behalf of their clients. The FACT Act would require trusts to provide a level of transparency akin to the tort system, and a degree of public accountability that will deter inconsistent and possibly fraudulent claiming across trusts.

The FACT Act will act as a deterrent to potential fraudulent claiming across trusts

The primary purpose of asbestos bankruptcy trusts confirmed under 524(g) is to efficiently process and pay qualifying claims for individuals who suffer from asbestos related diseases. Trusts are designed to pay claims expeditiously and with minimal administrative and transactional costs. To accomplish this, most trusts have established presumptive medical and exposure criteria to quickly determine if a claim qualifies for payment. The resolution procedures developed to govern this process are often standardized across trusts allowing plaintiff attorneys to utilize the same claims material for multiple trust submissions, thus minimizing their filing costs per claim. To further expedite the process of filing claims, many trusts and claim facilities have utilized electronic filing and processing systems that provide claimant law firms that ability to file thousands of claims *en masse*.[21]

The efficient manner in which trusts are able to receive, process, and pay claims has produced over $14 billion in payments to hundreds of thousands of claimants between 2006 and 2011.[22] Not surprisingly, this level of compensation has incentivized an increased level of claimant solicitation through focused advertising campaigns that utilize television commercials and internet marketing to cull

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[20] API, Inc. Asbestos Settlement Trust 2011 Annual Report of the Trustee, filed April 23, 2012 (case no. 05-30073)

[21] *See for example:* Sample Excel file for Electronic Filing offered by Verus http://www.kaiserasbestostrust.com/Files/KACC%20Sample%20Excel%20Files.zip

[22] *Supra* 3.

potential claimants.[23] In fact, in recent years internet advertising studies have found phrases such as "mesothelioma" and "asbestos law firm" to be among the most expensive internet search terms.[24] Given the resources plaintiff law firms dedicate to finding new clients through advertising, and the sheer volume of claims being brought across multiple trusts each year, most reasonable people would expect there to be some level of inconsistent or even fraudulent claiming.

As mentioned previously, individual bankruptcy trusts operate in a vacuum, so not only are the claimant demands made across trusts not publically available to solvent defendants in the civil tort, but also not available to other trusts. And while many trusts have claim audit procedures, these procedures tend to focus on reviewing the medical data and supporting documentation that has been submitted, rather than comparing exposure allegations made across multiple trust and tort claims where inconsistencies and fraudulent claiming practices can be identified. Section 5.8 of the Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures provides an example of the types of medical audits the trust will conduct.

> *"**Claims Audit Program.** The PI Trust with the consent of the TAC and the Future Claimants' Representative may develop methods for auditing the reliability of medical evidence, including additional reading of X-rays, CT scans and verification of pulmonary function tests, as well as the reliability of evidence of exposure to asbestos, including exposure to AWI Products/Operations prior to December 31, 1982. In the event that the PI Trust reasonably determines that any individual or entity has engaged in a pattern or practice of providing unreliable medical evidence to the PI Trust, it may decline to accept additional evidence from such provider in the future."* [25]

In fact, many trusts have adopted procedural language explicitly stating that they are not concerned with inconsistent claiming behavior. For example, Section 5.7(b)(3) of the Babcock & Wilcox Company Asbestos PI Settlement Trust Distribution Procedures includes the following language;

> *"Evidence submitted to establish proof of exposure to B&W products is for the sole benefit of the PI Trust, not third parties or defendants in the tort system. The PI Trust has no need for, and therefore claimants are not required to furnish the PI Trust with evidence of, exposure to specific asbestos products other than those for which B&W has legal responsibility, except to the extent such evidence is required elsewhere in this TDP. Similarly, failure to identify B&W*

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[23] *See* Exhibit A for examples of plaintiff counsel advertising

[24] *Search Engine Optimizer (SEO): What Are the Most Expensive Keywords in Adwords?* (2009,2010), http://www.quora.com/Search-Engine-Optimization-SEO/What-are-the-most-expensive-keywords-in-AdWords; http://www.bukisa.com/articles/357118_top-30-highest-paying-google-adsense-keywords-2010

[25] *Supra* 7.

> *products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of this TDP."*[26]

Based on these procedures, it seems that while the trusts may do a sufficient job identifying potential medical fraud, they are severely lacking processes for identifying inconsistent and potentially fraudulent exposure allegations across multiple trust and tort claims. In the 2011 GAO report on asbestos trusts, the GAO interviewed eleven trusts regarding audit procedures and each of the eleven trusts asserted that their audits had never uncovered a single case of fraud.[27] However, I believe this perceived, self-reported record of accurate claiming is less a function of a lack of fraud, but more a function of the inability for trusts under the current procedures to identify inconsistent claiming patterns in a cost-effective way. Currently, for every dollar paid to claimants, trusts spend as little as two-cents to review and process claims.[28] While this cost model allows the trusts to administer claim payments in a cost-effective manner, it leaves few resources to perform appropriate audits.

In the absence of a mechanism that will allow trusts to cross-reference the claiming allegations made to other trusts, inconsistent and specious claiming will go unchecked. By establishing transparency across trusts as it relates to the demands and corresponding exposure allegations supporting those claims, the FACT Act will offer a necessary check and balance to the bankruptcy system and ensure that inconsistent claiming across trusts does not occur, thereby preserving trust assets for legitimate asbestos claimants. Moreover, it will do so in a cost-effective manner as to not drain funds for claimant compensation.

The quarterly reporting requirements of the FACT Act will not result in overly burdensome efforts or costs to the trusts

In the same 2011 GAO report referenced above, it was noted that officials from one of the trusts interviewed by the GAO said that the trust had incurred $1 million in attorneys' fees over a request to

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[26] *Supra* 9.
[27] *Supra* 10.
[28] *Supra* 3.

disclose every document on every claimant, as the trust attorneys had to review each document to delete confidential information not germane to the subpoena.[29] This example is exactly the type of costly and burdensome discovery request the FACT Act may prevent or limit in the future, resulting in significant cost-savings by the trusts. Page 30 of the GAO report reads:

> *"Such costs may include the legal fees associated with their duty to preserve the confidentiality of claim forms as well as the costs of finding, producing, and reviewing the information sought in a valid discovery request. According to officials for 2 of the 11 trusts whom we interviewed, paying these costs would deplete trust assets, which exist solely for the purpose of compensating asbestos claimants. For example, officials for one of the trusts we interviewed said the trust incurred $1 million in attorneys' fees over a request to disclose every document on every claimant, as the trust attorneys had to review each document to delete confidential information not germane to the subpoena."*[30]

The quarterly reporting requirements of the FACT Act will not require any document review or document redaction. In fact, the entire process eliminates any costs associated with attorney fees. The bill simply requires that the trusts use elementary computer programs to extract basic claim information that is akin to the information publically available on asbestos lawsuits in the civil tort. Asbestos bankruptcy trust claim processing systems store individual claim data for hundreds of thousands of claimants. As I described above, asbestos bankruptcy trusts receive, store, process, and pay these individual claims electronically through systems designed to both import and export claim and aggregate level data efficiently and with relative ease. For example, the Manville trust maintains a data extract of individual claim filing, processing, and settlement data that is available for license to approved third parties at a minimal cost of $1,000.[31] Extracting quarterly summary tables at the claim level from these

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[29] *Supra* 6.

[30] Ibid.

[31] The Manville trust has made claim level data, which contains over 800,000 claim records and dozens of fields of information, available to select* third parties since 2009, and prior to that it was available to anyone willing to pay a $10,000 user licensing fee. Prior to 2002 the data could be purchased outright for $10,000. However, these price points do not necessarily represent the actual cost of producing the data, as it is likely far less. In fact, based on my own experience as the quantitative data analyst and statistician for the Manville trust claims processing facility during 2001 and 2002, I was able to respond to third party requests and produce data extracts in a matter of hours if not minutes depending on the scope of the request. The efficiency trusts have achieved by developing electronic claim database systems makes creating data extracts an inexpensive and expedited process.

**currently the Manville Trust only considers distribution of individual claims data to professionals engaged by another trust exclusively for aggregate analyses for the other trust and to professionals who have been retained to estimate asbestos liabilities in a court proceeding involving a bankruptcy plan.*

types of data extracts is an exercise that is well within the average competencies of database programmers already employed or contracted with by the trusts and claim processing facilities.

The information the FACT Act requires in the quarterly reports are maintained by the trusts in electronic databases as independent fields of data that are distinct from other fields of data that may contain any sensitive medical, personal, or any other data that is confidential in nature. As a result, any computer program used to create these quarterly summary tables can easily avoid the production of any privileged medical information or disclosure of any proprietary trade secrets or confidential information belonging to the Claim Facilities.[32] Thus, making it is easy and cost effective for trusts to produce reports disclosing (i) who has filed a claim against the trust (e.g. claimant name); and (ii) what exposures have been alleged in each claim (e.g. alleged sites of exposure, dates of exposure, and occupation/industry of exposure) without disclosing more sensitive material such as social security number, home address, or certain medical information not germane to the asbestos claim.

The third party disclosure requirements of the FACT Act will not result in overly burdensome efforts or costs to the trusts.

In addition to quarterly reporting requirements, the FACT Act will also standardize across trusts the process in which they respond to third party requests for claim information under appropriate protective orders. Currently, some trusts already respond to third party requests by searching their claims database for individual claimants and providing information as to whether or not a claim on behalf of the individual has been made. I've seen trusts charge minimal fees for this type of claimant search suggesting that it is not a burdensome process. For example, the API, Inc. Asbestos Settlement Trust charges a fee of $18.50 per individual claim search, and the Third Party Disclosure Policy of the Western Asbestos Settlement Trust does not appear to charge for individual claim searches when the results are limited to

[32] While at CRMC, I provided third-parties with Manville Trust data extracts without revealing any proprietary trade secrets, nor did I ever receive any proprietary trade secrets when provided with data extracts from claim processing facilities for my analysis work at ARPC.

whether or not a claim has been filed.[33] Once the search has been conducted, producing the additional claim information that may be required under the FACT Act would require little additional effort. Moreover, the bill currently has provisions requiring that the requesting third party pay reasonable costs for producing the information.

To the extent that trust procedures and protocols require that they serve notice on claimants prior to releasing certain information to third parties, this can also be done efficiently and at minimal cost. In my experience working with trust facilities and processing systems, the overwhelming majority of claimants are represented by attorneys, with whom claim processing facilities routinely correspond regarding claim resolution (e.g. claim deficiency notices, requests for additional supporting information, etc.), and settlement matters. Therefore the process of notifying these attorneys of third party data requests does not represent a significant burden outside the standard operations of the Claim Facilities.

Conclusion

As an economist who has been studying trends in asbestos claim filings and compensation for over ten years, I believe that transparency between the asbestos civil tort and bankruptcy trust systems is critical for the proper allocation of claimant compensation, and necessary for ensuring accountability in claiming behavior as a deterrent to potential specious claiming practices. The FACT Act is seeking a reasonable level of bankruptcy trust claim transparency, and proposes to do so in an extremely cost-effective and efficient manner. The FACT Act will promote a more equitable allocation of fault and compensation in the civil tort system, and help prevent trust funds from being depleted by erroneous payments, thus preserving funds for those asbestos victims who are most deserving.

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[33] API, Inc. Asbestos Settlement Trust Instructions for Requesting Claim Searches
http://apiincasbestossettlementtrust.com/disclosurePolicy.html
Western Asbestos Settlement Trust Third Party Disclosure Policies
http://wastrust.com/third-party-disclosure

ATTACHMENT

EXHIBIT A

United States House of Representatives

Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Testimony of Marc Scarcella
Bates White, LLC
1300 Eye Street, NW
Suite 600
Washington, D.C. 2005

Hearing on H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013"

March 13, 2013

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"My husband worked in paper years ago and he is beginning to have the symptoms of mesothelioma. We are looking for help to find out what to do." - Mac Young, Delaware

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1. See if you qualify for financial compensation. U.S. Compensation Trust Funds have been set aside, with initial funding of 30 Billion dollars, to financially assist individuals with lung cancer. Call 1-800-352-2416 to find out more.

2. Become an advocate for the early detection of lung cancer. Encourage others to have regular check-ups. Lung cancer is not just a concern for smokers; between 22,000 and 32,000 non-smoking Americans are diagnosed each year

with lung cancer. If you want to get involved join me, and my friends at the Bonnie J. Addario Lung Cancer Foundation, in our efforts to eradicate lung cancer.

Thanks for taking a stand; together we can make a difference.

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Asbestos Bankruptcy Trusts

Some of the companies responsible for exposing workers to asbestos have filed for bankruptcy under Chapter 11 of the US Bankruptcy Code. This is a different kind of bankruptcy than is commonly thought of in the rest of the world; it is not a liquidation of assets where the company goes out of business, but is a reorganization of debts so that the company continues on in a modified form.

This is sometimes referred to as a reorganization bankruptcy. As required under Chapter 11, companies must submit plans outlining their reorganization to creditors and the courts; as part of this plan, most companies set up trusts to benefit asbestos victims harmed by their processes or products.

Asbestos Bankruptcy Claims

These trusts are designed to provide payments for all present and future asbestos injury claims. Payments usually equal only a small portion of their true value. Because of our knowledge and experience, GPW's asbestos attorneys are able to efficiently and effectively establish the rights of our clients to the money that has been put into asbestos trusts for victims of mesothelioma and other asbestos related diseases. We fight for every dollar owed our clients by the asbestos trusts.

We are able to so effectively process asbestos bankruptcy claims because of our specialized knowledge and dedicated staff. Many of our asbestos lawyers volunteer on the committees that help manage these trusts, so we know exactly what needs to be done to maximize the payments to our clients. Assisting our attorneys is our large,

Do you qualify?

Contact us and find out. If you have lung cancer, mesothelioma, or another asbestos-related injury, contact us and we can quickly determine if you are eligible for compendation from asbestos bankruptcy trust funds. There is no obligation or fee to find out. D lay, contact us today!

Companies & Trusts Paying Claims

These asbestos companies and/or Bankruptcy Trusts are currently receiving and paying claims:

- Celotex,
- Eagle Picher,
- HK Porter,
- Babcock & Wilcox,
- Pibrico,
- K
- Combustion Engineering,
- K
- Harbison Walk
- Halliburton,
- United States Gypsum,
- Armstrong World Industries,

Mesothelioma Center
Information on mesotheliomas and other asbestos diseases for patients and families

Nursing Home Abuse
Protect your loved ones from nursing home abuse and neglect

Medical Malpractice
Have you sustained injuries as a result of inadequate care from a medical professional?

[site map]

dedicated asbestos bankruptcy department of more than 10 experienced staff members. As a result of our size, we can quickly and efficiently complete and file claims against the many companies that have filed for bankruptcy.

When will my asbestos bankruptcy claims be paid?

The time it takes companies to plan, establish, and begin asbestos payouts from their trusts can be anywhere from several months to several years. While no firm can avoid these delays to payments, the hard work and experience of our dedicated asbestos attorneys and bankruptcy staff means that our clients receive their settlements as fast as possible.

Having filed **over 75,000 individual bankruptcy claims** with **twelve different bankruptcy trusts** means our staff is intimately familiar with the differing processes, requirements, and formats required by each trust. Our experience allows us to cut out delays caused by missing or incomplete information, delays not uncommon among others with less familiarity with asbestos bankruptcy trust procedures or lacking a dedicated asbestos bankruptcy department.

Questions?

If you have questions regarding asbestos bankruptcy, asbestos injuries, or bankruptcy trust payments, please contact us today.

- Fibreboard,
- M ile,
- O las, and
- National Gypsum

No Trust Established

The following asbestos companies are presently "bankrupt" and Bankruptcy Trusts to pay claims have **not yet been created**:

- AC&S,
- W.R. Grace,
- Pittsburgh Corning Corporation,
- Federal M l,
- NARCO,
- AP Green Industries,
- Pfizer,
- Quigley,
- GAF,
- Hercules,
- and a few others.

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Mr. BACHUS. Thank you.

Mr. Cohen, did you want to give an opening statement? I will accord you that opportunity, if you would like.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. BACHUS. I will tell you that I served with Bruce Vento. He died. He and I were on the Financial Services Committee around 2000. He was suffering from mesothelioma at the time.

She is here. She is one of three victims.

Mr. COHEN. I see. Thank you.

This is a very personal issue for me because Warren Zevon was one of my closest of friends, and he was a great singer-songwriter and, unfortunately, a victim of mesothelioma, dying in the year 2003. Some decades before he had exposure to asbestos, and exactly how it happened, we are not sure. So I come certainly with a feeling that the victims of asbestos need a voice.

The FACT Act at first blush has certain characteristics that make you think it is reasonable. Yet, I learned about the FACT Act during a previous hearing that we had in the previous Congress and the markup of a substantially similar bill in this Congress, the more readily you come to conclude that this legislation may be a solution in search of a problem.

More problematically, it could end up hurting asbestos victims by denying them full compensation for the harms that they have suffered as a result of the product that many asbestos manufacturers sold for decades, knowing that they were dangerous.

H.R. 982 would impose a number of new reporting and other information-sharing requirements on trusts that have been established under Section 524 of the bankruptcy code, trusts designed to compensate current and future victims of asbestos exposure by ensuring that those asbestos manufacturers and other related defendants that have filed for bankruptcy cannot escape the responsibility for the harm they have caused.

The bill would require those trusts to file quarterly reports describing each demand for payment per claimant, including the claimant's name and exposure history as part of its public docket. It would also require the trusts to provide information regarding payments and demands for payments to any party in an asbestos exposure-related civil action upon the parties' written request.

Under this bill, the asbestos defendants can reorganize under bankruptcy protection and shift their liability for asbestos exposure to these trusts in exchange for agreeing to fund the trusts. In turn, these trusts pay claimants who seek compensation for harm caused by the bankrupt defendant's actions. Importantly, the trusts owe a fiduciary responsibility to all beneficiaries to ensure that only proper claims are paid in light of the universe of the current and anticipated future claimants.

While not perfect, the trusts have worked reasonably well, and H.R. 982's proponents assert that additional reporting and information-sharing requirements be put on these trusts in order to prevent fraud and eliminate risk to such victims of being overcompensated. Proponents claim that there could be double dipping.

In weighing this assertion, the most objective source I could find was a study of 524(g) trusts was conducted by the Government Accountability Office at the request of the former Chairman of this

Committee, the Honorable Lamar Smith. The GAO was not able to find any instances of fraud. Moreover, the GAO found that trusts take appropriate steps to ensure that fraudulent claims are not paid.

But even accepting that fraud by asbestos victims could be a real problem with respect to asbestos trusts, I fear that H.R. 982's additional requirements of the trusts will raise their administrative costs considerably as well. Even with the provision that a party requesting information could be required to pay a reasonable cost of a trust for complying, the cost burden could not be relieved.

For instance, the bill does not define what reasonable is or specify who would make such determinations, opening the door to litigation over that issue and others. Any money used to pay the cost means less money to compensate victims.

In light of this risk and others, I would like to know from the proponents and hope they did explain why defendants who are concerned about potential fraud by asbestos victims cannot simply seek trust payment information, easing procedures around our existing discovery rules. I believe it has been testified by the Judge that she had seen one case of fraud, but she had seen hundreds and hundreds and hundreds of cases, and I presume that in most of those, there is no fraud. One case does not make all 600 bad.

Defendants can already obtain the information they want without undermining compensation for the others, and a reporting requirement raises privacy concerns. While I recognize the bill specifically prohibits trusts from making public any medical records or full Social Security numbers, the bill still would require trusts to make public the name and the exposure history. Once out, that information can be used for other purposes, by potential employers, insurance companies, lenders, and even those who may not seek to harm asbestos victims who may use the information without the victim's permission or knowledge.

For these reasons, I remain opposed to the FACT Act and urge my colleagues to oppose this bill.

I would like to take a moment to say that at the last hearing we had on this bill, Mr. Chairman, I made an unfortunate statement concerning an attorney who had tried to contact my friend, Warren Zevon. It was a passionate statement because of the friendship that I had for him, but it certainly should not have been seen as certain activists from the Chamber of Commerce crowd and others took it, and they have republished that statement in tweets.

To this day, about every third day, I get some tweet, and I sometimes look at where it comes from, and it comes from India, or it comes from Indonesia, or it comes from Hushpuckenny. Most of them are outside the country.

I wish they would stop. It is long enough that it makes the Chamber look really ridiculous and simplistic, and it looks like they take advantage of a simple statement that you made a mistake on. It doesn't reflect my feeling for trial lawyers, and it doesn't need to be repeated with Warren Zevon's name attached to it. So I would ask the Chamber to clean up their act, because they are obviously behind it.

With that, I yield back the balance of my time.

Mr. BACHUS. Thank you.

At this time, we will proceed under the 5-minute rule with questions for the witnesses.

Mr. Inselbuch, you were saying that GAO found no fraud, basically?

Mr. INSELBUCH. That's what they said.

Mr. BACHUS. How do you account for the Wall Street Journal that put two reporters on an investigation for four or 5 months, and they came up with 2,700 people who claimed to be injured by asbestos injuries while working in shipbuilding mainly, or chemical plants, but their ages, they were 12 years of age or under?

Mr. INSELBUCH. Well, first of all, the Wall Street Journal itself didn't say that any of these filings were fraudulent. They found what they said were discrepancies, and they found them, out of 850,000 claim files, they found them in such a small number that it is almost not measurable.

Mr. BACHUS. Well, of course, I would say 2,700 claims by people that were 12 years or under——

Mr. INSELBUCH. That just could mean that the individual working at the Manville trust keyed in the wrong number in the computer.

Mr. BACHUS. That is incredibly sloppy, isn't it? You worked for that trust.

Mr. INSELBUCH. Well, it happened, Mr. Chairman, in less than four-tenths of a percent of the cases.

Mr. BACHUS. Well, okay. I did hear that. That means just 1 out of every 200.

Mr. INSELBUCH. I understand that.

Mr. BACHUS. Okay. Now, let's take that, 1 out of every 200, and that is your testimony, of course. I am sure that Mr. Scarcella would say——

Mr. INSELBUCH. Those are the Wall Street Journal's numbers.

Mr. BACHUS. But let's take yours, 1 out of every 200. Let me just say I agree with you. That is one every two-and-a-half days, because you said 80 a day.

Mr. INSELBUCH. No. That is 80 a day to do the report here.

Mr. BACHUS. But you said that 80 claims come in a day.

Mr. INSELBUCH. That is right.

Mr. BACHUS. Okay. So——

Mr. INSELBUCH. Eighty come in a day. Yes, sir.

Mr. BACHUS. Okay, 80 come in a day. So two-and-a-half days, 200 come in. One of those is fraudulent.

Mr. INSELBUCH. No, it is not fraudulent. There may be something wrong with it, but that doesn't mean it is fraudulent.

Mr. BACHUS. Well, okay, there is something wrong with it.

Mr. INSELBUCH. It may well be picked up by the trust.

Mr. BACHUS. It may be that the claimant claims to be under 12 years of age, and we won't know why. But let's say that is what it does say.

Mr. INSELBUCH. Well, we can hypothesize what we want.

Mr. BACHUS. Well, let's just say they file a claim and their birthdate says they are 12 or under. To me, that is pretty serious. And then your average claim for mesothelioma is $17,500, just in one trust. So if every 2 days you pay out a claim for $17,500, over a year that is $2 million. Now, this is using your figures.

Mr. INSELBUCH. No. You are using your assumption that there was something wrong with the filing.

Mr. BACHUS. Well, I am using your testimony that 1 out of every 200 claims——

Mr. INSELBUCH. There was a discrepancy.

Mr. BACHUS. Let's just call it a discrepancy.

Mr. INSELBUCH. But a discrepancy——

Mr. BACHUS. They actually found cases where a person never existed.

Mr. INSELBUCH. Yes, there was one of those.

Mr. BACHUS. But these are just two reporters.

Mr. INSELBUCH. And how would this act fix that? I don't see how it would make any difference.

Mr. BACHUS. They would report. It would have them go over and review that and report.

Mr. INSELBUCH. But it wouldn't say what year they were born.

Mr. BACHUS. You had 300 people just on one trust that claimed they had mesothelioma when actually, publicly, what they had was lung cancer. Now, that is a difference of $12,000. Would you admit——

Mr. INSELBUCH. Again, Mr. Chairman, even the Wall Street Journal didn't assume that these were errors made deliberately by the claimant.

Mr. BACHUS. I am not saying that——

Mr. INSELBUCH. All of these could have been errors made by the Manville trust.

Mr. BACHUS. Well, yes. But let me say this, let's just call them errors; okay?

Mr. INSELBUCH. All right.

Mr. BACHUS. Payments were made based on errors. Now, that is money, whether it is based on an error, whether it is based on a clerical mistake——

Mr. INSELBUCH. Yes.

Mr. BACHUS [continuing]. Whether it is based on fraud, you're talking about $17,500 that——

Mr. INSELBUCH. Then you should have this bill expanded so that you will require every bit of data that is filed with the trust to be supplied somewhere in a public record.

Mr. BACHUS. Well, you know, let me ask you this. You also say, wait, they can get it with a subpoena anyway.

Mr. INSELBUCH. Yes, sir.

Mr. BACHUS. They don't even need this bill.

Mr. INSELBUCH. That is correct.

Mr. BACHUS. Why would you be arguing against a bill that they already have every legal right to get the information?

Mr. INSELBUCH. Because the burden is being placed on the trust to do something. The second part of this bill——

Mr. BACHUS. Well, the burden——

Mr. INSELBUCH [continuing]. Provides a reference library to these defendants in the tort system. They call it transparency. They don't provide any transparency. Why don't you require the defendants in the tort system to divulge what they have paid to settle other cases, or where their products are when they were there when they were killing people?

Mr. BACHUS. Well, you know, you argued——

Mr. INSELBUCH. If you want transparency, have transparency.

Mr. BACHUS. Let me say this. You argued, hey, these folks, the companies, were guilty of fraud. But that is——

Mr. INSELBUCH. No, they were not guilty of fraud. They were guilty of murder.

Mr. BACHUS. Murder. Okay. Genocide, okay? Let's call it genocide. Now, does that mean that people that don't have a right to recovery have a right to recovery?

Mr. INSELBUCH. No, sir.

Mr. BACHUS. So two wrongs don't make a right, do they?

Mr. INSELBUCH. This was not two wrongs.

Mr. BACHUS. So your argument really doesn't—it is one of those two wrongs make a right.

Mr. INSELBUCH. Not to me, sir.

Mr. BACHUS. Oh. You mean you think because a company that is no longer in existence, bankrupt—and let me say this, not all of them committed fraud, because I can tell you a company in Birmingham only built two liberty ships in 1943 and in 1985. Because they built two liberty ships for the government and put asbestos in it, they went bankrupt and put 120 people out of business. So let's not stereotype all these companies.

Mr. INSELBUCH. I am sorry, but how many people in the holds of those ships were exposed to asbestos and died?

Mr. BACHUS. Every one of them. And would you blame the company when the U.S. Government told them to build a ship, and in 1943 no one knew that it was harmful? Would you blame that company?

Mr. INSELBUCH. Everybody knew it was harmful in the industry.

Mr. BACHUS. In 1943?

Mr. INSELBUCH. Absolutely. They had meetings in the 1930's in Saranac Lake where they discussed how to conceal it.

Mr. BACHUS. Why did the U.S. Government allow ships to be built? That is a question——

Mr. INSELBUCH. That is a very good question, and it is a very good question why the United States Government hasn't stepped up to its own responsibility to pay these bills.

Mr. BACHUS. Well, let me say this.

Mr. INSELBUCH. But the United States Government argued sovereign immunity.

Mr. BACHUS. Okay. You know, I am interested in that. Let me say this. I am a former member of the American Trial Lawyers Association. I had the largest jury verdict in the state of Georgia in a wrongful death case. So I am not one that stereotypes plaintiffs' lawyers, defense lawyers, or companies. They are not all alike.

But I would love to see some of that testimony, and I don't doubt it. But this is a first, the first time I have heard it.

Mr. INSELBUCH. I would come and testify for that legislation.

Mr. BACHUS. I really would like to explore that with you, because just take Bruce Vento. I have never met a nicer gentleman in my life, and it is something that we need to know. The Wall Street Journal needs to do an article and go back. I applaud them. They found something that apparently the GAO couldn't find, just two reporters. It is kind of amazing.

Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair.

I have been pleased with our staff, but I found some troubling numbers that I saw today, Mr. Chairman. Their statistics suggest this woman graduated law school in 1975. I think that is a mistake. How did they come up with that year?

I mean, were you born in 1975, Judge?

Judge ABLEMAN. I love you. You could be my friend for life. [Laughter.]

Mr. BACHUS. Well, I will actually tell you that as I read how long she had been on the bench, it made no sense whatsoever.

Judge ABLEMAN. I have great genes.

Mr. BACHUS. But I have a wife that everybody keeps saying she had to be somebody I married in old age, and she and I are the same age. So we sometimes——

Mr. COHEN. Well, I will excuse the staff, but it did seem uncharacteristically errant of them.

Let me ask you, did you know Alan Lubell at Emory law School?

Judge ABLEMAN. Pardon me?

Mr. COHEN. Alan Lubell?

Judge ABLEMAN. Yes.

Mr. COHEN. Well, then you did go to Emory that year. That is good.

Judge ABLEMAN. I swear, I should have brought my diploma.

Mr. COHEN. Yes. I will ask him. I will check you out.

Let me ask you about this. You said you had all these cases, and I missed your testimony. I apologize for that. But there was one particularly bad case. But in most of the cases, were most of the cases, in your opinion, legitimate cases?

Judge ABLEMAN. Well, I don't know, because most of the cases don't end up going to trial and to verdict. So I don't know what goes on in the settlement process, and I don't know what information is or is not available to all of the litigants while the discovery process is going on and while the settlement negotiations are going on.

So my concern about the lack of transparency is that I think it is anathema to any judge not to have a fair playing field and not to have justice depend upon the full truth. The problem is that there are missing parts that will never be detected if the cases never get to trial.

This one happened to be ready for trial, and it just so happened that we discovered the inequities and the dishonesty that occurred. I could have just as easily tried that case without ever having discovered it.

But most of the cases, I don't even get to that point. So I don't have any control over what is going on.

Mr. COHEN. But you don't have any knowledge of fraud in those other cases?

Judge ABLEMAN. No, but I think that there is an incentive, when there is nobody there to catch you, there is an incentive to do things like delaying claims to the trust, to be able to make a case a little bit different from what it really is. I am not sure that that does not occur more often than not. I hate to say it, but I don't feel real comfortable saying it was a one-time situation.

Mr. COHEN. Are there parts of this bill that you think are not necessary and are bad?

Judge ABLEMAN. No. I think the bill is very fair, and I don't think——

Mr. COHEN. You endorse it 100 percent?

Judge ABLEMAN. Well, if you changed it, I would be willing to let you know what my opinion is too. I mean, I am sure there could be modifications to it.

I think that the confidentiality issue is a little bit of a red herring because there is no confidentiality in any of these tort cases. I mean, once you file a lawsuit, there is no confidentiality. So if these same defendants were not in bankruptcy, they would be sued in a court of law and they would not be entitled, the plaintiffs would not be entitled to——

Mr. COHEN. Mr. Inselbuch, let me ask you this. I thought your facts were wrong too, because you were practicing law in the 1950's, which seems hard to comprehend as well. That was my other concern. But where would you——

Mr. INSELBUCH. I am older than I look.

Mr. COHEN. Obviously, obviously. You have had quite a spectacular career.

Where would you suggest to the Honorable Judge that this bill should be changed, or scuttled?

Mr. INSELBUCH. For starters, I would scrap the whole bill because it seeks information that, to the extent it is legitimately useful to defendants, they can get anyway. It creates burdens, notwithstanding what Mr. Scarcella has told the Committee. I spoke to the people who would have to do it, and they told me how difficult it might be, that there is no button to push and no program to do. You are creating burdens. You are creating costs. You are creating delay.

The justification for it is what Judge Ableman and others would call transparency. On the other hand, there is no transparency that comes from the other side.

The trust process is the settlement process. If these trust forebears had been still in the tort system and they settled a case with a plaintiff, the other defendants would not get that information. They would not get any information that was exchanged in the settlement process. Nowadays, the same defendants won't exchange any of their settlement information with anybody else, nor will they voluntarily tell anybody where their products were.

To the extent that the court may not have the true picture, it may not be getting the true picture from either side because in our tort system it is the burden of the plaintiff to get the facts from the defendant, and it is the burden of the defendant to get the facts from the plaintiff, and that is how we have an adversarial system that gets the materials to the court.

This would like to change that adversary system. This would, in effect, change the way discovery would be done by defendants in the tort system in 50 states of the United States. I don't see any need for it or any purpose to it.

Mr. COHEN. Thank you. I yield back the balance of my time.

Mr. FARENTHOLD [presiding]. Thank you, Mr. Cohen. I will now yield myself 5 minutes for questioning.

Mr. Inselbuch, I am an attorney as well, and I am overall troubled by your general assertion that getting to the truth and doing what is right is too burdensome and too expensive. I understand the need for getting the settlement money to the victims in as reasonably a prompt fashion as possible, but the trusts also have a fiduciary duty, do they not, to as yet undiscovered victims to not pay out fraudulent claims?

Mr. INSELBUCH. Absolutely, and they do a pretty good job of that. I observe how those trusts operate. Indeed, the trusts have paid less than 50 percent of the claims that have been filed with them up to now. This is not a revolving door for claimants. I have seen how these trusts have done audits, how they have uncovered discrepancies, far more interesting discrepancies than the Wall Street Journal found, how they investigated those, how they audited the law firms that were involved in those discrepancies, and I don't see any need for a filing place or for this Congress to interfere in what is a working system that is working very efficiently and very inexpensively, as opposed to the tort system.

Mr. FARENTHOLD. Having filed this bill, I am going to disagree that it is working. One of the things we look at consistently is making information available. Again, I am a strong believer in the truth will set you free, and I was concerned—and I guess Mr. Scarcella addressed the fact of how burdensome it would be to create these reports. I can't believe, certainly on an ongoing basis—I assume these things are filed electronically. You just have the lawyers requesting the claim put in a summary of the case, and you review it.

To me it seems like it could all be done, and Mr. Scarcella agrees with me, this is all just a data function that for the most part is already in place and wouldn't be that burdensome. I just want to make sure the record is clear on that. Is that not correct, Mr. Scarcella?

Mr. SCARCELLA. Yes. I think the important distinction here is to understand that the picture that is being painted by Mr. Inselbuch is this idea that attorneys for the trust and paralegals and claim reviewers are going to have to sit in rooms with stacks of documents redacting information before it is turned over, and that is why it would take so long.

Mr. FARENTHOLD. They are not the Federal Government. They actually have computers that work?

Mr. SCARCELLA. Yes, it is not that way. The professionals he speaks about that he has met with recently at the claims processing facilities, I used to work with these people as an outside consultant, and I used to have to analyze their data for doing future claim projections, which is one of the backbones of a bankruptcy trust and how they distribute their money, both currently and in the future. And in my experience, whenever I needed to request data, far more extensive data than what the FACT Act is proposing here, I was able to get it in virtually no time at all. It took no time, maybe a day lag for them to produce to me a data set far more robust than what the FACT Act is seeking here, so I could do my analysis to try to help the trust figure out how they should pay claims in the future.

Mr. FARENTHOLD. We could probably spend the rest of the afternoon going into the details of this, but I do want to talk about the bill in particular. I want to ask Judge Ableman, as we produced this bill, do you think it strikes a fair balance between addressing the needs of those who suffer from asbestos-related diseases now and need to get their claims paid promptly and the need for protecting those in the future?

Judge ABLEMAN. I absolutely do think that it does. I don't see how you can argue against openness and transparency, because that just makes the judicial process what it is supposed to be, which is a fair process where both sides are playing on a level playing field. I think the bill protects the rights of the victims who have succumbed to this dreadful disease, but I also think that it probably provides more protection in terms of confidentiality of their records than the legal system is able to do.

Mr. FARENTHOLD. Great. I want to ask Professor Brown, again just setting up the record for this, could you expand on your testimony on the FACT Act? Is it an appropriate exercise of congressional authority given that the Section 524(g) trusts are authorized by the bankruptcy code but authorized under state law?

Mr. BROWN. Of course. I find it kind of interesting that that is even a question. In the course of my research last year, one of the lead firms in New York came in and argued that the state courts should not be demanding this information in discovery and otherwise because it was a violation of the sovereignty—excuse me—the supremacy clause.

But when we look at it from just a matter of the bankruptcy power, any conception of the bankruptcy power, even the narrowest conception, is a restructuring of the debtor's affairs with its creditors, and any act related to that falls under the bankruptcy clause. I don't think that is even seriously in question here.

Mr. FARENTHOLD. All right. I just wanted to make sure we got that on the record. Thank you, Professor Brown.

Thank you to the rest of our panel.

We will now go to the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you.

Mr. COHEN. If I could interrupt for 1 minute, I would like to ask for unanimous consent to introduce letters from the trust of future claimants' representatives opposing this for the record, and also I think Mr. Conyers' opening statement for the record.

Mr. FARENTHOLD. Without objection, so ordered.

[The information referred to follows:]

March 11, 2013

The Honorable Bob Goodlatte, Chairman
House Judiciary Committee
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
House Judiciary Committee
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Spencer Bachus, Chairman
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
2246 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
2404 Rayburn House Office Building
Washington, DC 20515

Re: Opposition to H.R. 982, the Furthering Asbestos Claim Transparency Act of 2013

Dear Congressmen:

We are the below-listed legal representatives for future asbestos personal injury claimants ("Future Claimants' Representatives" or "FCRs") with respect to certain asbestos personal injury settlement trusts that have been established under reorganization plans pursuant to 11 U.S.C. § 524(g). We respectfully submit this letter in opposition to H.R. 982, the Furthering Asbestos Claim Transparency ("FACT") Act of 2013, which was introduced on March 6, 2013. We understand the Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law will hold a hearing on the FACT Act on March 13, 2013. For the reasons set forth below, we respectfully request that the Committee and Subcommittee reject the FACT Act.

I. Overview of the FACT Act Proposed in 2013

The FACT Act proposes to amend 11 U.S.C. § 524(g) by adding a new subsection (8) to impose certain disclosure requirements on each asbestos settlement trust created under a reorganization plan pursuant to Section 524(g). Specifically, the FACT Act would require a trust (1) to file with the bankruptcy court quarterly reports that "describ[e] each demand the trust

received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant"; and (2) "upon written request" to timely provide "any information related to payment from, and demands for payment from, such trust . . . to any party to any action in law or equity if the subject of such action concerns liability for asbestos exposure."

We understand that the intent of FACT Act is to cure alleged deficiencies in the fairness and transparency of the trusts that some persons allege are overpaying or paying fraudulent claims. The FCRs' experience with the trusts demonstrates otherwise. In fact, the trust system has proven to be an effective means for companies to resolve asbestos liability while alleviating the tremendous burden asbestos litigation has inflicted upon the judicial system.[1]

The FACT Act would harm asbestos personal injury claimants, especially the future claimants. Compliance with the Act's unnecessary and unreasonable reporting and discovery obligations would divert resources from the trusts' limited funds, which were specifically created to pay the claims of individuals stricken with asbestos-related diseases, for the benefit of third party defendants in non-bankruptcy, asbestos-tort litigation. Moreover, the Act would serve no bankruptcy or trust purpose and unnecessarily usurp the existing federal and state laws that govern the discovery of information in litigation. Additionally, the Act would require disclosure

[1] *See, e.g., In re Federal-Mogul Global Inc.*, 684 F.3d at 362 (3d Cir. May 1, 2012) ("[T]he trusts appear to have fulfilled Congress's expectation that they would serve the interests of both current and future asbestos claimants and corporations saddled with asbestos liability. In particular, observers have noted the trusts' effectiveness in remedying some of the intractable pathologies of asbestos litigation, especially given the continued lack of a viable alternative providing a just and comprehensive resolution."); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200-201 (3d Cir. 2004) ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits. For reasons well known to observers, a just and efficient resolution of these claims has often eluded our standard legal process - where an injured person with a legitimate claim (where liability and injury can be proven) obtains appropriate compensation without undue cost and undue delay.").

of the identity of every person who files a claim with a trust and the amount paid by a trust with respect to every valid claim, resulting in the wholesale abridgment of the privacy rights of hundreds of thousands of individuals who did nothing except seek compensation from a trust.[2] Accordingly, the FACT Act should be rejected.

II. Background on Section 524(g) and the Role of Future Claimants' Representatives

In 1994, Congress enacted Section 524(g) to codify the trust and channeling-injunction mechanism used in the Johns-Manville and UNR bankruptcy cases. Section 524(g) was created to serve the dual purposes of preserving the assets of companies facing mass asbestos liability and protecting the claims of pending and future asbestos personal injury victims. Subject to the specific requirements of Section 524(g), a debtor can obtain relief from its asbestos liability by establishing a trust that will assume, and to which an injunction will channel, the debtor's liability for present and future asbestos claims.

Bankruptcy reorganizations under Section 524(g) have resulted in the creation of more than 60 asbestos settlement trusts, including those formed by household-name companies like Armstrong World Industries, Babcock & Wilcox, Celotex, Johns Manville, and Owens Corning. The trusts provide an efficient way to resolve and pay the claims of asbestos victims outside of the over-burdened judicial system. Under Section 524(g) and the trust system, many reorganized

[2] The quarterly reports would be subject to 11 U.S.C. § 107, the default rule of which renders papers filed with a bankruptcy court "public records and open to examination by an entity at reasonable times without charge." While a party in interest may request, and the court may order, the protection of certain information (including information likely to result in identity theft or other injury), the incorporation of Section 107 does little to assuage the privacy or burden issues posed by the Act because it will require the affirmative action of a party in interest and/or the court to establish the protections. Any such protections issued would appear to run counter to the disclosure objectives of the Act and would inevitably result in disputes concerning the conditions upon which such protections may be lifted to accommodate a request for access by a member of the public, including asbestos defendants.

companies have been able to continue their business operations, providing a source of funding for the trusts and preserving jobs that otherwise would be lost in a liquidation.[3]

As evident in Section 524(g), Congress recognized the need for an independent person to represent the interests of future claimants. Section 524(g) requires that a trust be structured in a manner that provides reasonable assurance that future claimants will be treated similarly to present claimants, that sufficient resources will be available to fund their claims, and that they will be treated fairly and equitably.

It is important to note that Section 524(g) does not create or otherwise govern an asbestos settlement trust. The trusts are established and regulated under state law pursuant to trust agreements approved in a debtor's bankruptcy case. Moreover, Section 524(g) nowhere requires post-confirmation reporting by an asbestos settlement trust or that a trust assist the discovery efforts of any party in non-bankruptcy litigation.

As Future Claimants' Representatives, we represent those individuals who have been exposed to asbestos and have not yet brought claims for asbestos personal injury, but will assert such claims when their injuries manifest ("Future Claimants"). We offer a unique perspective on the FACT Act because we are court-appointed, non-partisan participants with respect to asbestos bankruptcy proceedings and trusts. Many of us have dedicated decades of our careers to the fair resolution of asbestos claims. We are former judges, practicing lawyers, law professors, mediators, and administrators of claims-resolution organizations. None of us, however, has ever directly brought a claim based on an asbestos personal injury, and we have no personal stake in

[3] *See Federal-Mogul*, 684 F.3d 355, 359 fn.8 ("As one senator described it, § 524(g) 'affirm[s] what Chapter 11 reorganization is supposed to be about: allowing an otherwise viable business to quantify, consolidate, and manage its debt so that it can satisfy its creditors to the maximum extent feasible, but without threatening its continued existence and the thousands of jobs that it provides.'") (quoting 140 Cong. Rec. 28,358 (1994) (statement of Sen. Brown)).

the outcome of any asbestos litigation or legislation. Through experience, we have become intimately familiar with the economic, administrative, and logistical issues that arise in creating a limited fund to satisfy the claims of an unknown number of Future Claimants.

A primary objective of any Future Claimants' Representative is to ensure that the trust is funded with and maintains sufficient assets to provide for fair and equitable recoveries by Future Claimants. This is no small challenge because it is difficult to predict how many Future Claimants will file valid claims, how serious their diseases will be, and how the trust's assets will fare over time. Meeting this challenge requires the creation and oversight of adequate administrative and procedural safeguards to minimize the risk that a trust will prematurely exhaust its funds. It also requires that a trust be structured and operated in a manner that ensures the trust properly compensates asbestos personal injury victims and does not pay frivolous or fraudulent claims. These are matters to which we devote careful attention, diligent research, and zealous advocacy.

The FACT Act is the latest of numerous attempts by defendants of asbestos claims to alter the system of asbestos settlement trusts to their advantage. In 2010, the United States Chamber of Commerce's Institute for Legal Reform proposed a new Federal Rule of Bankruptcy Procedure that would have imposed similar disclosure requirements on asbestos settlement trusts.[4] That measure was rejected by a subcommittee of the Judiciary Conference.[5] Likewise, the

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[4] *See* Bankruptcy Rule Suggestion 10-Bk-H, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Suggestions%202010/10-BK-H-Suggestion%20Harold%20Kim.pdf.

[5] After receiving objections from several trusts and FCRs and holding a hearing on the matter, the Judiciary Conference's Advisory Committee on Bankruptcy Rules declined the proposal. *See* Dec. 12, 2011 Memo. Report from Advisory Committee on Bankruptcy Rules to Committee on Rules of Practice and Procedure at 10-11, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/BK12-2011.pdf, Sept.26-27, 2011 Minutes of Advisory Committee on Bankruptcy Rules, Report of Subcommittee on

FACT Act should be rejected because its proposal to amend Section 524(g) to require trust disclosures is flawed, is not warranted by any legitimate justification, and will not achieve the goals that the Act purports to further. Initiatives to address the disclosure and discovery of information in the tort system are more appropriately addressed at the state level.

The FACT Act would further none of the purposes underlying Section 524(g) and would harm, not help, the trusts' claimants, particularly the Future Claimants. The Act would require a trust to disclose information that would benefit only third parties - to whom the trust owes no duty - to the serious detriment of the trust's intended beneficiaries and fiduciaries. Solvent defendants in the tort system would not be likewise subject to the same disclosure obligation, giving them an advantage that cannot reasonably be deemed to increase the fairness of asbestos claims or litigation.

III. The FACT Act is Unnecessary Because the Trusts Have Sufficient Structural Features to Deter Fraud and Abuse

The FACT Act is a resolution in search of a problem. With respect to the trust system, there is no evidence indicating that there is insufficient transparency, that there is a problem of fraudulent and abusive claims significant enough to justify the costs of required disclosures, or how disclosures would actually remedy such a problem, to the extent it even exists.

Among the myriad of claims filed since the first asbestos settlement trust began processing claims, proponents of schemes like the FACT Act point only to a few isolated incidences of inconsistent claims as support for the assertion that greater transparency is needed.

Business Issues, at 10-11, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/BK09-2011-min.pdf; Sept. 19, 2011 Subcommittee on Business Issues Memo. to Advisory Committee on Bankruptcy Rules, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Bankruptcy/BK2011-09%20Addendum.pdf.

Defendants of asbestos claims in the tort system and their insurers routinely and unabashedly impugn the trusts as being plagued with multiple, duplicative, and fraudulent claims. To be clear, these are serious issues that the Future Claimants' Representatives do not view lightly. And while there is no surefire method to completely prevent attempts to abuse the trust system, there is simply no evidence that such practices are rampant or widespread. Indeed, the Government Accountability Office recently studied the trusts and criticisms levied at them, but found no pervasive problem of fraud or impropriety.[6]

Moreover, the simple fact that a claimant submits claims to, and receives payment from, multiple trusts does not mean the claimant is abusing the system. Assertions that claimants are "gaming the system" or obtaining double recoveries by receiving payment from multiple trusts and in the tort system are based on the faulty premise that a claimant simply has to file a claim to recover payment. The trusts do not settle and pay every claim that is filed, but routinely reject those that are deficient. To succeed on a trust claim or in the tort system, a claimant must establish, *inter alia*, exposure to the products of the company allegedly liable for the claimant's asbestos-related injury.

Multiple trusts or defendants can in fact be responsible for a claimant's asbestos-related injury. Asbestos was prevalent in several industries, which means a tradesman could be exposed to the asbestos-containing products of multiple defendants throughout his career. Unless (and

[6] U.S. Gov't Accountability Office, GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts at 23 (Sept. 2011) ("GAO Report") ("According to the officials we interviewed at all 11 trusts we selected, each trust is committed to ensuring that no fraudulent claims are paid by the trust, which aligns with their goals of preserving assets for future claimants. Although the possibility exists that a claimant could file the same medical evidence and altered work histories with different trusts, each trust's focus is to ensure that each claim meets the criteria defined in its TDP, meaning the claimant has met the requisite medical and exposure histories to the satisfaction of the trustees. Of the trust officials that we interviewed that conducted audits, none indicated that these audits had identified cases of fraud.").

until) there is an adjudication of liability and apportionment of damages, each defendant is liable for its joint and several share. On the other hand, each trust pays only its respective several share of liability.

A claimant is not necessarily able to recover fully for his damages. Trust payments are based on "scheduled values" for specified disease claims. Most trusts lack sufficient funds to pay the full value of claims and thus pay only a percentage of their respective several share of liability.

The Fact Act is unnecessary because the asbestos trusts established through Section 524(g) plans of reorganization generally include features that provide for transparency, and prevent the payment of fraudulent, duplicative, or multiple claims. Any tort-system litigant can seek claim information through the normal discovery channels. Moreover, the trusts are structured to deter abusive claims practices.

Each trust's governing documents are publicly available and describe the procedures the trust will use to process and resolve claims, the medical and exposure criteria required to establish a valid claim, and the scheduled, average, and maximum values that a trust will pay for a claim by disease level. Additionally, a trust's governing documents typically require the trust to file an annual report with the bankruptcy court that sets forth the number and type of claims resolved and paid, as well as the trust's expenditures, during the reporting period.

The trusts' governing documents also authorize the trusts to establish audit and other mechanisms to verify the credibility of claims. The trusts can require additional information from claimants, decline to accept claims from any individual or entity that engages in improper practices, and penalize a claimant or claimant attorney in a variety of ways, including denying a

claim, initiating fraud litigation, or seeking sanctions from the bankruptcy court.[7] Also, the trusts typically require that claims filed with the trusts must be signed by the claimant or the claimant's representative subject to the penalties of perjury.

Structurally, the trusts are governed by one or more trustees who have fiduciary duties to the trust's present and future beneficiaries. A trustee's duties require him to ensure that trust resources are safeguarded and preserved for all beneficiaries and that claims are fairly and equitably resolved. Moreover, the trustees generally are highly qualified individuals with substantial experience in the field of asbestos claims and are thus knowledgeable about asbestos claims, both credible and meritless.

The Future Claimants' Representatives also have a vested interest in ensuring that only valid claims are paid by their respective trusts. A Future Claimants' Representative has a fiduciary duty to protect the interests of Future Claimants and ensure that trust resources are preserved so that Future Claimants can be treated and paid fairly, equitably, and similarly to current claimants. Both the trustees and the Future Claimants' Representatives have access to the information that would be subject to disclosure under the FACT Act and are under fiduciary duties to ensure that the trusts' assets are not wasted on the improper payment of multiple, duplicative, or fraudulent claims.

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[7] *See* GAO Report at 21 ("If a trust has any concerns about a claim, the trust may request the claimant provide additional documentation, such as other independent medical records. Officials we interviewed at 5 of the 11 trusts told us they also track public information and court filings to determine if questions are raised in the tort system about the authenticity of information and claims filed by a particular lawyer or claimant. In cases where questions are raised about the validity of claims from particular individuals, trusts [sic] officials stated that they will further inspect such claims.").

IV. The FACT Act Serves No Bankruptcy Purpose and Does Nothing to Advance the Purposes of the Trusts

The FACT Act serves no bankruptcy purpose. On the contrary, the only purpose that would be served by such legislation is that of aiding defendants of asbestos claims in non-bankruptcy litigation in both federal and state courts. There is no legitimate bankruptcy-related justification to require the post-confirmation disclosures the FACT Act would impose or to render the bankruptcy courts depositories for such non-bankruptcy-related information. The trusts are not created or established under 11 U.S.C. § 524(g). Rather, following confirmation of the bankruptcy plans of the entities whose asbestos liability they assume, the trusts are created, organized, and regulated under state law. They are funded entirely by private sources, usually with equity and other assets of the debtor and proceeds from the debtor's insurance policies.

While many of the trusts submit annual reports and accountings to the bankruptcy courts that approved the plans under which the trusts were established, that reporting is not required by Section 524(g) or any other bankruptcy law. Rather, the trusts submit annual reports and accountings pursuant to the terms of the plans that authorized the creation of the trusts and approved the trusts' governing documents, which require the reporting and accounting for tax purposes to maintain the trusts' status as qualified settlement funds. The bankruptcy courts' jurisdiction to receive and approve the reports arises from requirements invented and imposed by parties in the bankruptcy case and reflected in the plans and trust-governing documents. In contrast, the detailed, quarterly disclosures the FACT Act would require have no relation to the implementation and administration of the plans or the trusts created under them.

Moreover, the Fact Act would exceed the scope of the Bankruptcy Code by purporting to regulate discovery in non-bankruptcy cases, particularly state-court cases that are not subject to federal jurisdiction. The disclosure and discovery of asbestos claims and exposure histories of

tort-system plaintiffs are issues properly reserved for resolution at the state level. Indeed, the states are addressing such issues through legislation[8] and court-mandated disclosures[9] that impose obligations on the parties to the tort litigation, negating the need for Congress to act on these issues or impose additional burdens on the trusts.

The FACT Act would serve no interest of the trusts or trust claimants, least of all Future Claimants. A trust would derive no benefit from other trusts' disclosing information under the Act. The only potential beneficiaries of the disclosures required under the Act are third party defendants of asbestos claims in the tort system and insurance companies whose policies cover such defendants. Moreover, the resolution of a claim by a trust is a settlement between the trust and claimant. Settlement amounts generally are not disclosed or discoverable, except after a

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[8] In several states, legislation entitled the Asbestos Claims Transparency Act has been enacted or introduced to (a) require tort-system plaintiffs to disclose their trust claims and payments and provide those materials directly to the defendants they sue for asbestos-related injuries, and (b) create a presumption that the plaintiff's trust claims are relevant to and discoverable in a tort action. *See e.g.*, H.B. 130, 129th Gen. Assembly (Ohio 2012) (enacted at Ohio Rev. Code § 2307.951 *et seq.* (2013)); H.B. 153, 98th Gen. Assembly, Reg. Sess. (Ill. 2012); H.B. 529 and S.B. 2373, 2013 Reg. Sess. (Miss. 2013) (rejected in committees).

[9] *See, e.g.*, *In re Asbestos Litigation*, C.A. No. 77C-ASB-2, Standing Order No. 1 – Amended on April 29, 2011 at 5 (Del. Super. Apr. 29, 2011) (requiring plaintiff to serve defense counsel within 30 days of filing complaint with "[c]opies of all claim forms and related materials related to any claims made by plaintiff to any . . . trust, entity or person related to or in any way involved with asbestos claims. This shall include, but is not limited to, copies of all materials related to . . . claims made to trusts for bankrupt asbestos litigation defendants."); *In re All Asbestos Litigation Filed in Madison County*, Standing Case Management Order for All Asbestos Personal Injury Cases, Standard Asbestos Interrogatories Directed to Plaintiffs ¶ 26 (Ill. Cir. Ct. Jan. 2011) ("Have you ever filed suit or made a claim against any person or entity, including but not limited to any bankruptcy trust, for recovery of damages allegedly caused by an exposure to asbestos . . . .?"; requesting details of any such claim); *In re Asbestos Litigation*, Master Case Management Order for Asbestos-Related Personal Injury Claims (Pa. Ct. Common Pleas, Phila. Cnty. Dec. 2, 2010) at 3 (requiring plaintiffs to "serve answers to Defendants' Master Interrogatories and Requests for Production Directed to Plaintiffs, including information relating to Bankruptcy Trust Filings"); *In re Asbestos Litigation*, Cause No. 94-02380, Standing Order (Tex. Dist. Ct. Jan. 18, 2006).

verdict as necessary to prevent a double recovery. Absent the FACT Act, the amount paid to a claimant would not be public information in the tort system.

Additionally, while the claims submitted to the trusts are not publicly filed, they are discoverable in the tort system under the protection of the applicable rules of civil procedure. The FACT Act, however, would shift the burden and costs of discovery from the tort-system litigants who purportedly need the information to the trusts.[10] The trusts are funded with limited resources that must cover the costs to process, resolve, and pay claims, as well as the trust's administrative and legal costs. Most trusts can afford to pay only a percentage of the full value of their respective several shares of claims. Requiring the trusts to prepare quarterly reports with detailed information on the tens of thousands of claims they receive each year will unreasonably divert the trusts' resources away from the resolution and payment of asbestos personal injury claims, the very *raison d'etre* of the trusts. Each trust would have to assign adequate staff to prepare the reports, increasing the trust's administrative costs and decreasing the staff available to process claims promptly, or requiring the trust to retain additional processing staff.

It is also significant that the FACT Act purports to require disclosures from every trust created from a reorganization pursuant to Section 524(g), since it would apply "to cases commenced under title 11 of the United States Code before, on, or after the date of the enactment of this Act." The disclosures contemplated by the FACT Act would impose new burden and expense on the trusts that were not considered in the negotiations that ultimately led to the

[10] The FACT Act would require a trust to timely provide certain payment information to a lawsuit party "upon written request, and subject to payment (demanded at the option of the trust) for any reasonable cost incurred by the trust to comply with such request." While that provision may reduce some of the financial burden the Act would impose with respect to complying with discovery requests, it provides little to no relief with respect to the costs of disruption to the trust's business that the Act will inflict and does nothing to assist with the costs of complying with the Act's other reporting requirements.

creation of the more than 60 existing trusts. The costs of staffing and other expenses needed to comply with the disclosures contemplated by the FACT Act would only detract from the trusts' resources and ability to serve the trust beneficiaries – all for no legitimate purpose.

There is simply no justification for requiring trusts to provide more information than would otherwise be available in the tort system or to shift the burden of discovery from party litigants to the non-party trusts. The substantial costs of requiring trusts to comply with the FACT Act vastly outweigh any potential benefit to tort-system defendants.

* * *

For the foregoing reasons, the Future Claimants' Representatives listed below respectfully request that the Committee reject the FACT Act.

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Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

H.R. 982, the Furthering Asbestos Claim Transparency Act, or FACT Act, burdens asbestos trusts while giving asbestos defendants new rights and advantages to be used against asbestos victims in state court.

This is particularly troubling given that asbestos defendants come to this issue with unclean hands. For instance, there is the well-documented harm caused by asbestos—including a form of cancer known as mesothelioma, as well as a debilitating clogging and scarring of the lungs known as asbestosis—and the history of asbestos manufacturers in concealing the dangers of their product from the public for many years.

And yet these very same manufacturers now want Congress to help them by passing H.R. 982.

This legislation is extremely problematic for several reasons.

To begin with, the bill's reporting and disclosure requirements are an assault against asbestos victims' privacy interests.

While the bill prohibits disclosure of an asbestos claimant's confidential medical records and full Social Security number, it also mandates that the trusts publically report the claimant's name and exposure history, as well as the basis of any payment that the trust made to the claimant.

Given the fact that all of this information would potentially be available on the internet, just imagine what insurers, potential employers, prospective lenders, and data collectors could do with this private information.

Essentially, this bill would allow asbestos victims to be re-victimized by exposing their health information to the public.

Another problem with the bill is that it is fundamentally inequitable.

This legislation demands that the trusts make these disclosures, but makes no comparable demands on the very companies that injured millions of Americans and concealed the dangers of their product for many years.

The bill essentially shifts some of the costs of discovery away from these defendants to asbestos bankruptcy trusts, which in turn diminishes the amount of funding available to compensate asbestos victims. In doing so, it provides an end-run by asbestos defendants around the discovery process available under non-bankruptcy law.

While not perfect, the trust system set up under Bankruptcy Code section 524(g) has generally proven to be beneficial to both asbestos victims and to corporations facing mass tort liability for causing asbestos injuries.

In exchange for agreeing to fund these trusts, companies are able to shed their massive asbestos tort liability and re-enter the business community on a competitive basis for the benefit of their creditors and those who they injured.

These trusts, in turn, owe a fiduciary duty to all beneficiaries to ensure that only proper claims are paid and that such payments are ratably equitable given the universe of known and anticipated future claimants.

But, H.R. 982 does nothing to improve the trusts or advance the interests of asbestos victims.

And, finally, there is absolutely no evidence of endemic fraud warranting such an invasive measure as H.R. 982.

That is not just my opinion. The Government Accountability Office reported that there is no empirical evidence of such fraud with respect to the trusts' claims processing system.

Sure, the Majority's witnesses will claim today that the system is rife with fraud based on isolated instances and anecdotes, and that asbestos bankruptcy trusts need to be more transparent to deter dishonest claims practices.

This argument is not persuasive. Existing discovery rules already require an extensive amount of disclosure with respect to compensation received by asbestos claimants.

These are just a few of the concerns that I have with this legislation. And I am not alone in having serious misgivings about this measure. With respect to a nearly identical bill considered in the last Congress, the following entities expressed strong opposition to the measure:

- the Asbestos Disease Awareness Organization, the Environmental Working Group,
- the Center for Justice and Democracy,
- and various legal representatives for future asbestos personal injury claimants with respect to asbestos bankruptcy trusts.

I thank our witnesses for being here and hope that they can adequately address my concerns.

Mr. COHEN. Thank you.

Mr. FARENTHOLD. Thank you, Hank.

Mr. JOHNSON. Yes, thank you.

Ms. Ableman, are you appearing today in your personal capacity?

Judge ABLEMAN. I am appearing in my capacity as a judge for 29 years and——

Mr. JOHNSON. And also a lawyer with a 400-lawyer law firm.

Judge ABLEMAN. I am, but I don't—I just started there, and they——

Mr. JOHNSON. They do a lot of——

Judge ABLEMAN [continuing]. Marching orders.

Mr. JOHNSON. They do a lot of asbestos litigation for that firm, do they not?

Judge ABLEMAN. They do.

Mr. JOHNSON. McCarter and English is the name?

Judge ABLEMAN. Yes.

Mr. JOHNSON. In fact, product liability is the largest practice area for that firm; correct?

Judge ABLEMAN. I think it—I am not really sure, but I think it may be. I thought it was bankruptcy.

Mr. JOHNSON. But it is a pretty large part, would you say?

Judge ABLEMAN. Yes.

Mr. JOHNSON. And, of course, asbestos and other toxic tort litigation comprises the bulk of the product liability litigation that the firm handles; is that correct?

Judge ABLEMAN. Yes.

Mr. JOHNSON. Now, your firm, does it currently represent the company Foster and Wheeler?

Judge ABLEMAN. No.

Mr. JOHNSON. Or any of its subsidiaries or associates?

Judge ABLEMAN. No. I don't believe so, no.

Mr. JOHNSON. Are you on the clock right now for your testimony?

Judge ABLEMAN. No.

Mr. JOHNSON. You are not making any money right now?

Judge ABLEMAN. No.

Mr. BACHUS. I think we are all on the clock up here. We are getting paid.

Mr. JOHNSON. We certainly are, but we are trying to get to the truth. I just want to make sure that our witnesses are credible in that regard as well, that they don't have a motive to testify in a biased way so as to create more business for the law firm.

But let me ask you, Mr. Scarcella, your firm——

Mr. BACHUS. A point of personal privilege.

Mr. JOHNSON. If it doesn't apply to my time, if we can stop that.

Mr. BACHUS. We will suspend the time.

Mr. FARENTHOLD. We will suspend the time.

Mr. BACHUS. I think it is the customary rules of the House not to impugn the witness' character.

Judge ABLEMAN. May I respond?

Mr. JOHNSON. Well, my response would be that this witness is appearing as an expert, and I think it is fair game to ask——

Mr. BACHUS. Well, all our witnesses appear as experts, and all of them——

Mr. JOHNSON. And all of them are subject to the same questioning to determine whether or not they have an interest or bias in the case.

Mr. BACHUS. Well, let me say this. I will close this by saying that Mr. Inselbuch also is employed, but I would never——

Mr. JOHNSON. And I was going to ask you——

Mr. BACHUS. I would never impugn his character or his interests.

Mr. JOHNSON. He is employed. He works on a——

Mr. BACHUS. I think he testified to the best of his ability, and that all of the witnesses testified truthfully.

Mr. JOHNSON. He works on a contingent fee basis, but the others work on probably an hourly basis. Certainly, one of your colleagues on the other side of the aisle is entitled—Mr. Inselbuch has been subjected to a thorough and sifting cross-examination thus far, and he still has four people that he has to go through.

Mr. BACHUS. I didn't impugn his character, his truthfulness, or his veracity.

Mr. JOHNSON. Well, it was a scathing type of cross-examination, I think, and I don't want to do that to the Honorable Judge Ableman, but I am just asking some questions to get at whether or not I can believe her testimony or not, or what weight I should give to it.

Mr. FARENTHOLD. We did stop the clock. We will go on. I would like to remind the Members that we should certainly be courteous to our witnesses who are appearing, while still looking for the truth.

We will continue your time. Thank you.

Mr. JOHNSON. Thank you.

Mr. FARENTHOLD. And I believe the judge would also—did you ask to respond? We won't start the clock.

Judge ABLEMAN. I want to just say simply that I was asked to do this before I even accepted employment by McCarter and English.

Mr. JOHNSON. You were asked by the Republicans to do this?

Judge ABLEMAN. I was—someone got hold of the transcript from my hearing after the debacle in that case.

Mr. FARENTHOLD. Okay, we will go ahead and start the clock back up now.

Mr. JOHNSON. Okay. All right. Now we are here talking about the FACT Act. Would any of your firm's clients benefit from the passage of that act?

Judge ABLEMAN. Well, I think everyone would benefit from it because it means that the judicial process is going to be more fair.

Mr. JOHNSON. Everyone would not benefit from a financial aspect of it, though; right?

Judge ABLEMAN. I think everyone benefits from having a fair and impartial judicial decision-making process.

Mr. JOHNSON. It should be fair and impartial, there is no doubt.

Judge ABLEMAN. Everyone benefits from the truth.

Mr. JOHNSON. This legislation, though, would impose, as we have heard from Mr. Inselbuch, it would impose hardship on claimants, people who have been injured, due to no fault of their own, as a result of unhealthy and unsafe products.

Mr. Inselbuch, you mentioned the fact that—and, by the way, you are plaintiffs' lawyer; correct?

Mr. INSELBUCH. Am I an attorney? Yes, I am an attorney.

Mr. JOHNSON. You are plaintiffs' lawyer?

Mr. INSELBUCH. No, I am not.

Mr. JOHNSON. You are not? You represent some——

Mr. INSELBUCH. I represent many of the committees in the bankruptcies, the committees that act for the plaintiffs that are injured. I represent trustee advisory committees that advise the trustees in the bankruptcy. But I don't do the tort cases, and I am paid by the hour, not on a contingency fee basis.

Mr. JOHNSON. And paid with monies from the Federal Treasury?

Mr. INSELBUCH. No, I don't get any money from the Federal Treasury.

Mr. JOHNSON. You don't get any money—who do you get money from?

Mr. INSELBUCH. My clients in a bankruptcy, the committee counsel are paid for—all committee counsel fees are paid by the debtor.

Mr. JOHNSON. I see. So you have actually been paid by the asbestos industry, or your fees are generated through your work, which is for plaintiffs and for defendants in the asbestos litigation.

Mr. INSELBUCH. I don't look at it quite that way, Congressman. I look at the fees of these bankruptcies basically are coming out of the asbestos victim's hide.

Mr. JOHNSON. Okay. So what I am saying, though, you are going to get paid regardless. The other witnesses here, including Mr. Scarcella—Mr. Scarcella, you are with a firm that serves as an expert witness in these asbestos-related cases; is that correct?

Mr. SCARCELLA. Yes, that is one of the things we do.

Mr. JOHNSON. And you can look forward to receiving more business as a result of your testimony today; isn't that correct?

Mr. SCARCELLA. I don't necessarily know if there is a direct correlation there. In this work that I do, testifying on issues of trust transparency, doesn't have a direct correlation to the work that we do on bankruptcy estimation and financial reporting, insurance allocation work.

Mr. JOHNSON. Okay. Now, I will tell you, Judge Ableman, you said today in your testimony or you have said in your written testimony, you have talked about the fact that you had this one episode where a plaintiff's counsel was held in contempt?

Judge ABLEMAN. No, I did not.

Mr. JOHNSON. You did not say that? Or something happened with the one plaintiff's lawyer that appeared before you in your many years of practice as a Federal court judge or, excuse me, a state court judge?

Mr. FARENTHOLD. The gentleman's time has expired. I apologize for being so quick with the gavel, but we are trying to get this hearing completed before votes go.

Mr. JOHNSON. All right.

Mr. FARENTHOLD. So we will move on to Mr. Marino.

He left, it looks like. So we will go down to Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate it.

Let's get back to the FACT Act instead of who you are here with and how you make your money, which is absolutely irrelevant to this conversation today.

One of the questions I have that comes up in this is dealing with transparency, and this is sort of an interesting act because it is not dealing overall. In a few of the jurisdictions, plaintiffs are required to make their trust submissions prior to trial—New York City, Montgomery County, Pennsylvania. There are several in that. Doesn't this delay the ability of the plaintiffs to delay their trust submissions until after—it is essentially a double dipping episode? I know there's probably disagreement here, but I would like to hear both accounts.

Mr. INSELBUCH. Is that addressed to me?

Mr. COLLINS. You can go first, and the Judge can go second.

Mr. INSELBUCH. Well, it is one of the principles of the tort system that a plaintiff gets to decide who the plaintiff sues, who the plaintiff settles with, and on what basis. When you move that into the trust system, the same theory should say that a plaintiff should be able to decide if and when the plaintiff will file a claim with the trust. To the extent that under state law settling with a trust would have a detrimental effect on the plaintiff's ability at verdict to collect from an existing solvent defendant, that choice under state law should be left to the plaintiff, because the issue really is who bears the shortfall.

Is the shortfall—in other words, the lack of ability of these insolvents to pay—should that shortfall be paid for by the other culpable co-defendants, or should it be paid for by the innocent plaintiff? That is a question of policy that is decided in 50 legislatures around the country.

Mr. COLLINS. I want to follow up here. Isn't it also a principle of judicial work also that disclosure and discovery are also elements of this as well? You made a comment earlier that I thought really oversimplified it, that the plaintiff's job was to get what they need, and the defendant get that, and you have made this sort of the case for the FACT Act at that point, just basically saying put into play what is available or what should be available in normal discovery.

Judge, the question I had for you is—and you made the comment that it should be handled at the judge level. Explain to this Committee how that is difficult from the judge's perspective in issues where there is a problem with discovery.

Judge ABLEMAN. Well, the problem isn't—first of all, we as judges, or as former judges, as a former judge I can tell you is very, very time-consuming to cite an attorney on a Rule 11 violation for not being honest with the court. It requires that you have hearings, it requires that you write an opinion, it requires you to detail with

great specific precision what it is this attorney has done or not done or should have done.

So judges are loath to take on that extra responsibility in addition to their caseload. It is not just, oh, you are in contempt, and that is the end of it. It becomes a big project and a very distracting project. So it is not done very often.

But more importantly, I don't think that the victims in these cases should not be fully compensated by every single entity that has caused exposure. My problem is that without full transparency, the facts that the case is based on are sometimes not the full facts.

Mr. COLLINS. And I agree completely, the compensation ought to be there.

There are some other issues around this, and I appreciate that I need to move to a couple of quick things. One, I want to ask this question because we are dealing with asbestos, and reporting and not reporting. The Asbestos Information Act of 1988, you may or may not be familiar with it, which requires manufacturers and processors of certain asbestos products to disclose the asbestos products they made, as well as the years of manufacture.

From my understanding, from what I have learned so far, this law is rarely complied with or enforced. Why is that?

Mr. INSELBUCH. You are asking me?

Mr. COLLINS. I will ask anybody who wants to answer the question. You have done well answering so far today. I appreciate your candor.

Mr. INSELBUCH. I can't say that I have any familiarity with that statute. But if what we are interested in is transparency, as Judge Ableman would say, then why don't we have reciprocal transparency? Why do we just assume that it is the plaintiffs' lawyers who don't disclose what should be disclosed in the discovery system? Why don't we have a system where the defendants are required to provide public information about where their products were so that we can check what their answers are in the discovery process?

Mr. COLLINS. Well, part of that, as an attorney, it's part of the legal process here. I mean, the plaintiff brought the case, and there is an issue here that they would have to describe on both sides to discovery, ask what they are looking for as well. Again, they brought the case. The burden is going to be on them to make their case. So that is an issue, and defendants are putting a different format.

One last question, Professor Brown. Do you believe that the information required under the FACT Act compares to—how does it compare to other information that is normally disclosed in bankruptcy or tort? Is this really requiring anything all that unique?

Mr. BROWN. I will refer to my written statement, where I go into that in great detail, but I don't believe that it really requires any additional information. In fact, if you were an individual tort claimant and trying to seek damages or seek recovery in a bankruptcy case, you may be required to file this, though the provisions that I also mention under 107, Section 107 of the bankruptcy code may be applied there, just as they could be to——

Mr. COLLINS. Thank you.

Mr. Chairman, I yield back.

Mr. FARENTHOLD. Thank you very much.

Mr. Cohen, you needed a second?

Mr. COHEN. Thank you. I have an asbestos victim's letter and a number of public interest groups opposed to the Act. I would ask that their letters and statements be made a part of the record.

Mr. FARENTHOLD. Without objection, so ordered.

[The information referred to follows:]

March 12, 2013

The Honorable Spencer Bachus, Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen, Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee
2142 Rayburn House Office Building
Washington, DC 20515

Re: **Opposition to H.R. 982, the Furthering Asbestos Claim Transparency Act (FACT Act)**

Dear Chairman Bachus and Ranking Member Cohen:

We are writing to express our strong opposition to H.R. 982, the "Furthering Asbestos Claim Transparency Act" (FACT Act). The so-called FACT Act will delay and, in some cases, deny justice to people suffering from debilitating asbestos-related diseases, including mesothelioma and other cancers. In the name of "transparency," the bill places lengthy and burdensome reporting requirements on claimants applying to asbestos trusts, but has no comparable requirements for the asbestos companies who were responsible for the harm. The legislation is one-sided, unfair and unnecessary.

Asbestos, a known human carcinogen that has killed millions of people over the last several decades, has not been banned in the United States. It remains a threat to Americans in our homes, schools, and at workplaces. Environmental disasters such as 9/11 and Hurricane Sandy exposed many more people to asbestos dangers. Meanwhile, experts estimate that about 10,000 people die in the U.S. every year as a result of exposure to asbestos.

In 1994, Congress passed special legislation applicable only to the asbestos industry that allowed asbestos companies to set up trusts to compensate asbestos victims and, at the same time, reorganize under the bankruptcy laws to enable the companies to continue operating. This protection has allowed most companies that have sought bankruptcy protection due to asbestos liabilities to recover and remain economically healthy.

While this law has protected the companies from going out of business, it has not provided full compensation for victims. A RAND study found that "(m)ost trusts do not have sufficient funds to pay every claim in full, and thus, set a payment percentage that is used to determine the actual payment a claimant will be offered" with a median payment of 25 percent and some as low as 1.1 percent of the value of the claim. The FACT Act will make that compensation even harder for victims to obtain, in some cases delaying the compensation beyond the life of the claimant.

Most asbestos victims were exposed to asbestos from a number of different companies' products. Therefore, asbestos victims usually bring claims against multiple companies, in an attempt to recover damages from every entity that has caused the harm. As the litigation progresses, the victims may settle the claim against one or another of the wrongdoers as the parties may agree. Some asbestos claims will be filed with asbestos trusts. Other claims, against solvent companies that have not set up trusts, must proceed in court and are governed by the applicable state law.

The FACT Act will grant asbestos companies the right to demand any information they choose from the asbestos trusts. Specifically, the bill will: 1) require the trusts to publicly disclose private, confidential claimant information such as individual and personal claim information, including the victim's exposure and work history; and 2) allow asbestos companies to demand any additional information from the trusts at any time and for virtually any reason. The bill will place unnecessary and costly burdens on asbestos trusts, delay badly-needed compensation for claimants, invade privacy rights of asbestos victims, and give solvent defendants in asbestos lawsuits special benefits not accorded to claimants.

While these proposals masquerade as mechanisms designed to advance evenhanded justice, they are, in fact, obvious efforts by asbestos litigation defendants to do an end- run around uniform rules of discovery in the civil justice system and reverse principles of tort law established hundreds of years ago.

The bill will also destroy the safeguards of state laws that govern disclosure of a trust claimant's work and exposure history. Currently, defendants can obtain that information if it is relevant to their defense, but they must abide by the rules of a state court. This is an important safety mechanism to provide a balance between information to be used for a company's defense and yet not allow for fishing expeditions into a plaintiff's personal history.

In addition, asbestos defendants often settle cases and demand confidentiality as a condition of settlement. Yet this bill demands that the asbestos trusts must disclose the amount of their specific payments. Wouldn't a bill that is designed to increase transparency require equal disclosure of all settlement amounts by defendants as well? The asbestos trusts already file annual reports with the Bankruptcy courts and publish lists of products involved in their work. Shouldn't this bill require asbestos defendants to disclose information about the history of exposures caused by their asbestos products?

The purported purpose of the Fact Act is to eliminate fraud in asbestos claims, yet studies show the incidence of fraud to be negligible at most. If fraud remains a problem, there are ways to address it without subverting justice for the hundreds of thousands of legitimate claims in the system. Supporters also claim that asbestos victims are "double-dipping," obtaining more compensation than they are due from both asbestos trusts and solvent defendants. But the RAND study shows that asbestos claimants are woefully undercompensated by asbestos trust funds. It is both appropriate and proper for asbestos victims to pursue compensation from all companies that caused their exposures.

Since at least the 1930's, asbestos companies and their insurers have been denying responsibility for the millions of deaths and injuries caused by this deadly product. The companies hid the dangers posed by asbestos exposure, lied about what they knew, fought against liability for the harms caused, tried to change the laws that held them responsible, and to this day, they still fight against banning asbestos in the U.S. The asbestos industry is not interested in transparency. This legislation is nothing but another attempt by the industry to avoid responsibility for the grave harms they have caused. We are asking you to stand with the cancer victims of the asbestos industry's wrongdoing and oppose the FACT Act.

Thank you for your consideration of our views.

Sincerely,

Individuals:

Bill Cawlfield, Asbestos & Mesothelioma Patient, Denver, CO

Courtney Davis, Daughter of Asbestos & Mesothelioma Victim, Raleigh, NC

Bob Guinn, Asbestos & Mesothelioma Patient, Ririe, ID

Julie Gundlach, Asbestos & Mesothelioma Patient, St. Louis, MO

Shelly Kozicki, Widow of Asbestos & Mesothelioma Victim, Detroit, MI

Mary Jane Williams, Asbestos & Mesothelioma Patient, Springfield, OH

Loring Williams, Spouse of Asbestos & Mesothelioma Patient, Springfield, OH

Forrest Wulf, Asbestos & Mesothelioma Patient, Alton, IL

Dan Young, Spouse of Asbestos & Mesothelioma Patient, St. Louis, MO

Susan Vento, Widow of Bruce Vento, Mesothelioma Victim and Former U.S. House Representative, St. Paul, MN

Organizations:

Nan Aron
Alliance for Justice

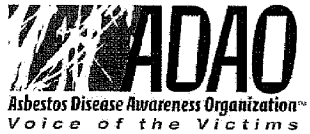
Joanne Doroshow
Center for Justice & Democracy

Thomas Cluderay
Environmental Working Group

Robert Kelley
Protect Missouri Workers

Robert Weissman
Public Citizen

Ed Mierzwinski
U.S. Public Interest Research Group



June 5, 2012

The Honorable Bob Goodlatte, Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr., Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Re: Opposition to the Furthering Asbestos Claim Transparency Act of 2013 (H.R. 982)

Dear Chairman Goodlatte and Ranking Member Conyers:

As a mesothelioma widow, I respectfully write to express my opposition to the Furthering Asbestos Claim Transparency Act of 2013 (FACT Act), H.R. 982. I oppose the bill because it is unfair and discriminatory toward asbestos cancer victims and sufferers. Ostensibly designed for transparency, by imposing lengthy reporting requirements on asbestos trusts and granting asbestos defendants new rights, the legislation would operate in a manner to only burden plaintiffs, asbestos victims, without justification.

Asbestos is a known human carcinogen that causes deadly cancerous diseases. Asbestos-related diseases kill at least 10,000 Americans every year. Yet, it remains a major public health hazard that severely affects too many American families. The 2012 USGS World Report confirmed that the U.S continues to import the asbestos, notwithstanding these lethal and fatal exposures to "meet manufacturing demands,"[1] notwithstanding the knowledge of asbestos' lethal nature.

I am disappointed when Congressional legislative efforts choose to focus on litigation instead of education and prevention. Americans need legislation that will stop the continued import of asbestos into our country, and prevent environmental and occupational asbestos-related diseases. As consumers and workers, Americans deserve transparency to prevent exposure to asbestos, not to penalize victims.

Accordingly, I am strongly opposed to the FACT Act, as it creates greater burdens for patients and families to overcome during an already extremely difficult time. Delayed or denied compensation would gravely impact patients' pursuit of medical care and justice. In addition, the bill would require extensive private,

[1] "The United States is dependent on [asbestos] imports to meet manufacturing needs." http://minerals.usgs.gov/minerals/pubs/commodity/asbestos/mcs-2012-asbes.pdf

personal information, including "the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant" be made publicly available. Not only would this unnecessarily expose families to potential identity thieves and abusive lenders, it could also subject Americans injured through no fault of their own to discriminatory insurance practices.

There is no justification to expose families to these additional burdens set forth in H.R. 982. Information needed to verify the health of the trusts is already publicly available in a way that protects the privacy of the victims of asbestos disease and their families. And trusts established by asbestos companies undergoing reorganization effectively compensate current and future asbestos victims while allowing business operations to continue. Trusts are designed to decrease litigation and costs; these reporting requirements work against these purposes. The FACT Act grants asbestos companies the right to require from the trusts any information they choose, at any time and for practically any reason. As proposed, the bill negatively affects all victims of asbestos exposure, and effectively limits the justice they deserve.

At the very least, the committee should allow the opportunity for victims of asbestos disease to be publicly heard. I attended the Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law's last scheduled markup of H.R. 982 on March 20th, 2013 and my understanding was that the markup was postponed in order to give families the right to speak in a public forum about the legislation. To date, that has not occurred. I welcome the opportunity to discuss the bill with committee members and encourage the committee to grant families impacted by asbestos disease with the same opportunity given to the asbestos industry.

More than 30 Americans die each day from a preventable asbestos-caused disease. On behalf of the American citizens, we urge you to take the time to hear from the victims of asbestos exposure and consider legislation that will protect public health, not legislation that aims to delay or deny justice for victims of asbestos exposure.

Sincerely,

Linda Reinstein

President and Co-Founder, Asbestos Disease Awareness Organization

Asbestos Disease Awareness Organization is a registered 501(c) (3) nonprofit volunteer organization
"United for Asbestos Disease Awareness, Education, Advocacy, Prevention, Support and a Cure"
1525 Aviation Boulevard, Suite 318 · Redondo Beach · California · 90278 · 310.437.3886
www.AsbestosDiseaseAwareness.org

April 9, 2013

The Honorable Spencer Bachus, Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bachus,

We are writing to express our extreme disappointment that we will not be invited to present testimony at a public hearing to express our opposition to H.R. 982, the "Furthering Asbestos Claim Transparency Act." We read the transcript of the March 20th subcommittee markup in which you said that we would be invited as witnesses to give our testimony at a hearing before the subcommittee members. But that is not what has occurred.

Instead, we have been invited to an informal "information session" that will be closed off to everyone except subcommittee members and their staffs. This closed door "conversation" will neither be transcribed nor recorded, nor become part of the official record of the legislation. This is insulting.

We may not be Washington insiders, but we know the difference between being official witnesses delivering testimony at a hearing, and being treated, once again, as invisible people who need to be hidden behind closed doors and then forgotten. We reject this offer because it is not a serious effort to ensure that the views of asbestos victims – who would be most affected by this one-sided industry-supported legislation – are considered before the subcommittee moves the bill forward.

At the March 13th hearing, we heard several members of the committee, including you, Mr. Chairman, describe how this legislation is about transparency and "what is right for the victims." The proposed process for a closed, off-the-record setting for us to share the stories of patients and their families is certainly not transparent nor is it "what is right for the victims."

We appreciate your offer to keep the hearing record open for an extended amount of time in order for us to submit written testimony. However, this was never about submitting additional written testimony. You already have written statements from us that were submitted for the record on the day of the hearing, which you claim to have read.

As we made clear in our March 19th letter to the committee, this was about being afforded the opportunity to speak with this committee in a public and open hearing about our opposition to this bill. This was about being afforded the same right to be heard as was given to the lawyers, consultants, and other representatives from the asbestos industry on multiple occasions.

We asked you to let us speak. We asked you to hold a hearing in which family members and patients who have been affected by the ravages of asbestos disease be given an opportunity to testify in public. We asked that before you allow the subcommittee to vote on this bill that you hear from the people you would be hurting. You already have our written testimony in hand. Now we would like to be heard.

We respectfully request that you reconsider this decision and allow us to express our views, just as the lawyers, consultants, and other representatives of the asbestos industry have done at the previous hearings on this legislation. Please afford us the same opportunity to speak openly and publicly about this issue.

Sincerely,

Susan Vento
Widow of Rep. Bruce Vento (D-MN), Mesothelioma Victim
Maplewood, Minnesota

Genevieve Casey Bosilevac
Mesothelioma Victim
Omaha, Nebraska

Judy Vann Ness
Widow of Dickie Vann Ness, Mesothelioma Victim
Richmond, Virginia

Cc: Hon. Bob Goodlatte
Hon. John Conyers, Jr.
Hon. Steve Cohen

1700 Grant Building
Pittsburgh, PA 15219-2399
Telephone: 412-261-0310
Facsimile: 412-261-5066

Douglas A. Campbell • dac@camlev.com

Campbell & Levine, LLC
Attorneys at Law

March 11, 2013

Via Electronic Mail

The Honorable Bob Goodlatte
Chair, House Judiciary Committee
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable Spencer Bachus
Chairman
Subcommittee on Courts, Commercial and Administrative Law
2446 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member
Subcommittee on Courts, Commercial and Administrative Law
2404 Rayburn House Office Building
Washington, DC 20515

Re: The Furthering Asbestos Claims Transparency Act of 2013

Dear Committee Members:

A bill has been introduced in the House of Representatives titled The Furthering Asbestos Claims Transparency Act of 2013, or H.R. 982, as an amendment to Section 524(g) of the Bankruptcy Code, which bill would impact the operation of asbestos settlement trusts established to facilitate the implementation of chapter 11 plans of reorganization that comply with the requirements of Section 524(g). The asbestos settlement trusts named hereafter, represented by our firm, understand that a subcommittee of the House Judiciary Committee is conducting hearings on the bill, and submit the following in support of their request that the bill be reported out unfavorably: the Owens Corning/Fibreboard Asbestos Personal Injury Trust; the United States Gypsum Asbestos Personal Injury Settlement Trust; the Babcock & Wilcox Company Asbestos Personal Injury Trust; and the Federal-Mogul Asbestos Personal Injury Trust.

I. Function of the Trusts

The single most positive development in the management of corporate asbestos liability and the payment of asbestos disease victims in the United States has been the utilization of settlement trusts in conjunction with the reorganization and discharge provisions of the Bankruptcy Code, specifically section 524(g). This development has allowed any number of

major American employers – including Owens Corning, United States Gypsum, Babcock & Wilcox, and Federal-Mogul – to establish and fund trusts for the benefit of asbestos disease victims, in exchange for a court-ordered discharge from any further liability for both present and future asbestos-related claims. The result has been not only the continuing employment of the tens of thousands of Americans employed by these companies as well as the continuing operation of them as solvent businesses, but also the free-market establishment of a privately funded, cost-efficient, expedited process for compensating American workers and their families, victimized by the disabling diseases – often fatal – that are caused by exposure to asbestos.

Contrary to a common misconception, asbestos settlement trusts are not created or established under the Bankruptcy Code. Asbestos settlement trusts, just like the reorganized companies that emerge from bankruptcy, are legal entities organized and regulated under state law,[1] and are governed by a well-established body of state law and procedure. The trusts are funded entirely by contributions from the reorganized business. No government funding is provided to them.

Moreover, the trusts can find themselves named as defendants in personal injury actions filed in the tort system. Notwithstanding the fact that the trusts' purpose is to pay qualified asbestos claims and treat the victims of exposure fairly, equitably and reasonably, the trusts' governing documents provide that a victim who is not satisfied with the outcome of non-binding arbitration with a trust retains the right to institute a lawsuit in the tort system against the trust in the victim's jurisdiction.

II. Historical Background

It is important to understand Section 524(g) in its historical context. The first asbestos trust was established through the Johns Manville Corporation reorganization in the 1980s. Manville filed for chapter 11 bankruptcy protection because of its overwhelming obligations for asbestos claims in the tort system. It needed to find a way to liquidate present and future claims, and to determine how much of the company's assets needed to be reserved to pay the asbestos-claimant constituency. A channeling injunction ultimately directed all asbestos-related claims to the Manville Trust, which assumed the liabilities of the debtor and was funded, in part, by stock of the reorganized company. Manville's stock turned out to be unmarketable, however, because of concerns in the market that, should the trust run out of funds, the channeling injunction could be successfully challenged by future claimants for a lack of "due process," and Manville therefore would again be subject to asbestos claims, and would again be insolvent.

Congress responded to that concern by enacting Section 524(g) of the Bankruptcy Code, which allows for a channeling injunction to issue and be enforceable against the holders of future claims, so long as certain requirements are met, including (i) the appointment of a representative

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[1] *See, e.g.*, United States Gypsum Asbestos Personal Injury Settlement Trust Agreement §1.1 (noting that the trust is created as a statutory trust under Chapter 38 of title 12 of the Delaware Code and referencing the filing of a Certificate of Trust with the Delaware Secretary of State). First Amended Chapter 11 Plan of Reorganization of USG Corporation and Its Debtor Subsidiaries, *In Re: USG Corporation*, Case No. 01-2094 (Bankr. D.Del. May 5, 2006), Dkt. No. 10810 (Exhibit I.A.18).

to protect the interests of holders of future claims, and (ii) the channeling of all asbestos claims to a trust, which must operate in a manner that provides reasonable assurance that similarly situated present and future claims will be treated in substantially the same manner. There is no requirement that the trust operate either for the benefit of solvent third-party defendants in the tort system or for the benefit of other trusts. The trusts operate solely for the benefit of their beneficiaries, the holders of asbestos claims against the trust.

III. The Bill Does Not Benefit the Trust's Beneficiaries

The bill does not, as its proponents claim, protect either the trusts or their beneficiaries. Rather, the bill merely changes the rules in the tort system so as to impose increased costs on the trusts' claimants. The litigation advantage that this bill provides to solvent asbestos defendants is its only practical purpose. While the trusts recognize the legislative attempt to address the direct costs to the trusts incurred by the bill, the trusts believe that the bill will unduly and unnecessarily increase the trust's administrative burdens and will inevitably lead to higher non-reimbursable costs and delays in the processing of claims and payment to holders of asbestos claims. Such a bill does not protect the trusts or their beneficiaries, it burdens them.

There is no bankruptcy-related justification for requiring the trusts to provide such post-confirmation reporting to either the Court or to third parties who have no beneficial interest in the trusts. The Bankruptcy Code and the Bankruptcy Court should not be used as a collateral source of judicial authority to increase the trust administrative obligations and thereby negatively impact on the trust claimants. Discovery in non-bankruptcy actions, which the bill would purport to govern, is not a bankruptcy issue and is entirely beyond the scope of the federal bankruptcy power.

IV. The Bill Falls Outside the Scope of Bankruptcy Jurisdiction and Violates Principles of Federalism

The bill does not concern practice or procedure in bankruptcy cases. It would apply only after a plan is confirmed, and would impose burdens upon the trusts solely to benefit third parties, not the beneficiaries of the trust. It purports to govern discovery in personal injury litigation brought in another court, a matter clearly unrelated to bankruptcy jurisdiction, and to the extent it purports to govern discovery in any state court, violates fundamental principles of federalism.

V. The Bill is Not Necessary; Information is Available Already

The plan documents in asbestos-related bankruptcy cases require that the trustees of the asbestos settlement trusts submit annual reports and account to the Bankruptcy Court that confirmed the plan. These reporting requirements are not mandated by Section 524(g) or any other provision of the Bankruptcy Code, but are included in the plan documents to ensure that the trusts remain subject to the continuing jurisdiction and supervision of the bankruptcy court, and

thus are qualified settlement funds for tax purposes.[2]

Accordingly, substantial information regarding the trusts is already published. The annual reports which the trusts file with their respective Bankruptcy Courts are available to the public online. The GAO found that each of the 47 asbestos trust annual financial reports for 2009 and 2010 that it reviewed included not only the total amount of payments made by the trusts, but also, in most cases, the total number of claims received and paid. The annual reports typically include audited financial statements and summaries of claim disposition. The summaries include: (i) the number of claims and dollar amounts paid; (ii) a breakout between malignant claims and non-malignant claims; and (iii) the trust's current payment percentage. Moreover, the trusts' websites not only contain their court-approved Trust Distribution Procedures, which disclose the scheduled values paid by disease category, but also contain in most cases an identification of the products and sites that they recognize as giving rise to bona-fide exposure evidence in support of claims against that trust. Thus, solvent defendants who obtain a work history from a plaintiff can easily use this information to determine whether that plaintiff would have a trust claim and, if so, its approximate value.

The trust documents approved by the District and Bankruptcy Courts for use by the asbestos trusts expressly provide that information about claims must be treated as confidential and not be released unless either: (i) the claimant consents or (ii) the trust is served with a valid subpoena. Such a confidentiality provision is not unusual; it mirrors the practice that is followed by solvent defendants in the tort system with regard to their own settlements and settlement negotiations. In any case, the GAO found in its most recent report that litigants in the tort system can readily obtain information from the trusts regarding claimants, such as their exposure to a particular company's asbestos-containing products, pursuant to a court-issued subpoena. Moreover, defendants can routinely obtain such information directly from the claimants themselves in discovery.

The trustees of the asbestos settlement trusts, each of whose appointments have been approved by a bankruptcy court, are fiduciaries who must at all times manage the trusts and their assets consistent with the purposes of the trust they serve, solely in the best interest of its beneficiaries. It is their responsibility to ensure that funds are paid only to legitimate beneficiaries. Each trust pays only for its several share of liability to its claimants. The amount that each trust pays reflects the fact that most claimants will have claims against a number of other tortfeasors – both other trusts and solvent defendants. And because the vast bulk of asbestos claims are settled, rather than tried to verdict, the total amount to which a claimant is entitled is never fixed.[3] Thus, even if each trust or solvent defendant in the tort system knew the settlements paid by other trusts or solvent defendants, without a trial and verdict it simply is not possible to establish that a claimant has obtained a full recovery of his damages.

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[2] *See* Treas. Reg. §1.468B-1 (1993).

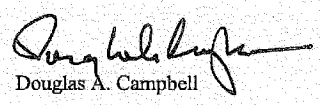
[3] As Judge Fitzgerald noted in the *Bondex* case, the value of a claim is not "fixed," other than by a verdict at trial that has become final and non-appealable. *See* Hearing Transcript at 26, *In re Specialty Prods. Holding Corp.*, No. 10-11780 (Bankr. D. Del. Dec. 13, 2010) ("[H]ow has the amount of the claim ever been fixed so that you could possibly know that the plaintiff has recovered a full share if it's pursuant to a settlement?").

VI. Conclusion

The bill serves no bankruptcy purpose, and violates principles of federalism. It is both unnecessary and bad policy. Rather than protecting the trusts and the victims of asbestos exposure, the bill burdens the victims with a loss of confidentiality and burdens the trusts with additional administrative obligations, solely for purposes which are well beyond the proper scope of the Bankruptcy Code.

Accordingly, our trust clients respectfully request that the Subcommittee report the bill out unfavorably.

Yours Very Truly,



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Campbell & Levine, LLC
Attorneys at Law

March 20, 2013

Via Electronic Mail

The Honorable Bob Goodlatte
Chair, House Judiciary Committee
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable Spencer Bachus
Chairman
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
2446 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
2404 Rayburn House Office Building
Washington, DC 20515

Re: The Furthering Asbestos Claims Transparency Act of 2013, H.R. 982 (the "Act")

Dear Committee Members:

In light of the testimony provided at the hearing on the Act on March 13, 2013 (the "Hearing"), we submit the following on behalf of the trusts we represent as a supplement to our prior letter submission dated March 11, 2013, and ask that it also be made part of the record of the Hearing.

Under Section 2 of the Act, a new Section 8(A) would be added to Section 524(g) of the Bankruptcy Code, which would require asbestos settlement trusts established under Section 524(g) of the Bankruptcy Code to publicly report certain information. During the Hearing, one of the topics discussed was the burden that this requirement would place on the trusts. To determine that burden, one must consider the language of the Act and the information that is available on the typical asbestos trust claim form.

Section 8(A) would require that each trust file with the bankruptcy court, not later than 60 days after the end of each quarter, a public report that "...with respect to such quarter – (i) describes each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant...." A trust could not provide such a report by providing only information taken from the claim form or pre-set data

fields as informed judgment (as opposed to simple electronic copying) would be required. Neither "exposure history" nor the "basis for payment" appears in pre-set data fields.

With respect to exposure, different trusts require different exposure details to be provided on the face of the claim form, and we are aware of no trust that requires a complete asbestos exposure history in order to qualify a claim for payment, since they are paying just a "several share" of the claimant's damages. In many cases, the relevant exposure information can only be gleaned from a review of the supporting documents submitted with the claim form, and if the trusts were to submit reports based simply on claim form fields, as one of the Hearing's witnesses suggested, the information contained in the reports would be incomplete and, in many cases, seem contradictory. In fact, supplemental information outside the claim form is frequently provided to the trusts after initial claim form filing. Approximately two-thirds of all claimants submit supporting documentation that is relevant to their exposure history. A report that only captures claim form information would not include the information that the claims reviewer obtains as a result of reviewing the supporting documentation or supplemental information, nor would the report be complete in terms of asbestos exposure. In some cases, the relevant exposure field may simply contain the words "See Attached." In order to comply with Section 8(A), the trusts would need to report exposure history based on both the face of the claim form and the supporting and supplemental documentation submitted with the claim form, and the burden on the trusts would be quite significant. An experienced claims reviewer would need to prepare a special analysis of the exposure history for submission with the report for each specific claim, and we estimate it would take, on average, no less than 15 minutes to prepare such an analysis.[1]

On the payment of claims issue, an experienced claims manager would need to prepare a statement as to the basis for payments on a claim-by-claim basis, because preparing a narrative for the basis for payment is not part of the normal claims processing system. We estimate it would take approximately 30 minutes for experienced management to prepare such a statement for each claimant assuming both the exposure and the medical basis for the payment is to be described, which is what the Act appears to contemplate. Assuming a trust received 10,000 claims per quarter on average and paid 5,000 claims per quarter on average, the preparation of this type of narrative and the preparation of the exposure reports described in the prior paragraph would necessitate experienced managers and claims reviewers spending an aggregate of 20,000 hours per year on these aspects of a trust's compliance with the Act. Under the provisions of the Act, the trusts would bear the ultimate economic burden associated with preparing these quarterly reports.

The Act would also add a new Section 8(B) to Section 524(g) of the Bankruptcy Code. The language of proposed Section 8(B) is so broad that we are unable to provide any estimate as to the cost and time associated with responding to requests under the provision. Clearly, each response would be formulated on a request-by-request basis and on a claimant-by-claimant basis. Section 8(B) provides that if any party to any action in law or equity concerning liability for

[1] The time estimates contained in this letter are based on discussions with the managers of a facility that processes trust claims.

asbestos exposure makes a written request to a trust, the trust must "...provide in a timely manner any information related to payment from, and demands for payment from, such trust...." This broadly drafted provision could arguably require a trust to provide information regarding every claim that it has ever received to multiple parties, with each request being unique in some manner, an unimaginable burden. This is especially likely where the requesting party is confronted with the issue of its own insolvency and requests the information in an effort to eliminate or minimize the amount of its own alleged liability. The preparation of such reports would necessitate substantial due diligence, and the issue of "reasonable cost" would surely become the subject of time-consuming material disputes, over and over again.[2]

For the additional reasons stated above, the trusts again respectfully request that the Subcommittee report H.R. 982 out unfavorably.

Yours Very Truly,

Douglas A. Campbell

DAC/mk

[2] Section 8(B) provides that a trust may request payment for any "reasonable costs" incurred by the trust in complying with a Section 8(B) information request.

Mr. COHEN. Thank you, sir.

Mr. FARENTHOLD. Without objection, Chairman Goodlatte's statement will also be admitted to the record. So ordered.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

The history of asbestos litigation is filled with human tragedy, culminating in what the Supreme Court described as an "asbestos litigation crisis" in the pivotal case of *Amchem v. Windsor.* As businesses were forced to declare bankruptcy as a last resort to manage their liability, the prospect of full compensation for asbestos victims—not to mention current employees' livelihoods—grew dimmer.

In 1994, Congress attempted to address the crisis through legislation. Section 524(g) was added to the Bankruptcy Code, to allow companies in Chapter 11 to form a trust that would become responsible for receiving, processing and paying all future claims by asbestos victims. This trust system was designed to relieve pressure on the courts, allow businesses to emerge from Chapter 11 and continue operations, and streamline the compensation process for asbestos victims.

Most of the largest and deepest-pocketed defendants have gone through bankruptcy and formed trusts under Section 524(g). So now plaintiffs' attorneys have moved on to suing secondary targets in courts while filing separate claims with the trusts—continuing the process that one plaintiff's lawyer described as the "endless search for a solvent bystander."

Unfortunately, there is evidence of fraud and abuse in the asbestos trust compensation system. The law provides that victims of tortious conduct should be made whole, and this is no less true for asbestos victims—they should receive 100% of the compensation they are due. But no one should be able to recover twice—or more than twice—by pleading one set of facts in court and then a different, perhaps contradictory, set of facts to an asbestos trust. Bringing greater transparency to the asbestos trust system will discourage this sort of conduct in the first place, and help to expose it when it happens.

The Subcommittee on the Constitution examined these matters in a September 2011 hearing. In addition, H.R. 4369, the "Furthering Asbestos Claim Transparency Act of 2012," or the FACT Act, was the subject of a legislative hearing before the Subcommittee on Courts, Commercial and Administrative Law in May 2012. That bill was ultimately ordered reported by the Full Committee with an amendment last June.

I am very pleased that Mr. Farenthold has reintroduced this important, bi-partisan legislation this Congress. H.R. 982, the FACT Act of 2013, will protect trust assets reserved for current and future victims by striking the proper balance between much-needed transparency and preserving the dignity and medical privacy of asbestos victims. I encourage all of my colleagues to support this legislation, and I look forward to hearing from the witnesses today.

Mr. FARENTHOLD. We now have 7 minutes and 44 seconds remaining in a vote on the Floor. I don't think we have any more Members looking to ask questions at this time.

But without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses, or additional material for the record.

With that, this concludes today's hearing, and we are adjourned.

[Whereupon, at 5:05 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Prepared Statement of the Honorable Blake Farenthold, a Representative in Congress from the State of Texas, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

March 13, 2013

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CONGRESSMAN FARENTHOLD OPENING STATEMENT

House Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on: H.R. 982, "Furthering Asbestos Claim Transparency (FACT) Act of 2013"

WASHINGTON—The following is the opening statement of Congressman Blake Farenthold (TX-27), as prepared for delivery in the March 13th Judiciary Subcommittee Hearing on H.R. 982, "Furthering Asbestos Claim Transparency (FACT) Act of 2013." Rep. Farenthold introduced the bill last week.

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I am dedicated to eliminating waste, fraud and abuse in our system of government and to that end I have introduced H.R. 982, the Furthering Asbestos Claim Transparency (FACT) Act of 2013.

Victims of asbestos-related diseases deserve full compensation for their injuries and I am extremely sympathetic to these claims. However, the trusts set up to provide justice are shrouded in secrecy and frequently abused by the claimants and their lawyers, wasting money intended for mesothelioma and other asbestos-related injury sufferers.

The problem of fraud in the asbestos compensation system has been well documented over the past several decades. Often, fraud is committed when plaintiffs rely on one set of facts when they bring a lawsuit against defendants in the state judicial system, and then another set facts when they file demands for payments from trusts formed in bankruptcy courts. This type of abuse can take place when the system provides no transparency with a large payout. Therefore, this legislation will amend Section 524(g) of the Bankruptcy Code to require asbestos trusts to file quarterly reports, with the bankruptcy court, detailing claimants' names, the amount paid to each claimant, and the basis for such payment. We have specifically narrowed this bill to protect the privacy of the plaintiffs to the extent possible.

This legislation is fair to all parties and protects the victims, the litigants and the companies. First, true asbestos victims deserve full compensation and this waste, fraud and abuse depletes

trust funds, depriving future victims of their fair share of the funds. Second, litigants need full transparency among trusts and between the trust system and civil tort system so defendants can correctly apportion liability among themselves. Third, the added forces of fraudulent claims move companies into bankruptcy, robbing the victims a chance to recover the full amount of their damages.

Congress must act to cut back the abuse of this system. The asbestos trusts have a finite amount of resources available to compensate victims and we must protect the rights of future claimants. However, as the Wall Street Journal noted in an article published on Monday, asbestos-related claims continue to rise even though the most serious asbestos-related diseases are waning, this is a warning sign something is wrong. There is not enough accountability in the system. This legislation adds accountability, protects future claimants, and reigns in fraud.

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Prepared Statement of the Honorable Hakeem S. Jeffries, a Representative in Congress from the State of New York, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hon. Hakeem S. Jeffries
United States House of Representatives
Statement and Questions for the Record

Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on H.R. 982, "Furthering Asbestos Claim Transparency (FACT) Act of 2013"

I would like to thank the Subcommittee for holding a hearing on the important issue of asbestos trust claims.

Asbestos trusts allow victims who are seriously harmed by the asbestos industry to receive compensation in a just and efficient way. I am concerned, however, that the FACT Act seeks to addresses a "fraud" problem that may not have a factual basis and, as a result, could reduce the compensation that asbestos victims both need and deserve. We need to hear more from the victims who have been affected by horrific diseases resulting from asbestos exposure in order to fully vet this legislation.

Those who advocate for the passage of the FACT Act allege that the bill increases transparency and accountability in the asbestos compensation system and reduces fraud. Yet there has been no indication of recent systemic fraud in asbestos trust claims. According to the Government Accountability Office, 98 percent of trusts require a claims audit program, which shows no indication of defectiveness.

Before voting on this Act in the Subcommittee, it would be helpful to receive answers from all the witnesses on the following items:

1. Whether systemic fraud does actually exist in asbestos trust claims.

2. Whether the information that trusts require for settlements has been reevaluated within the last three years to determine whether it is adequate for sufficient transparency.

3. An estimate of the funds and resources that would be required by trusts to create quarterly reports.

4. Information on the types of safeguards and best practices are already built into asbestos trusts to address concerns of fraud. Information on safeguards and best practices that are built into other types of trusts to address concerns of fraud.

In addition to receiving answers to the above-mentioned factual requests, we should also hear testimony from asbestos victims in order to better evaluate whether there remains a legitimate need for this legislation.

Thank you for the opportunity to explore this important issue. I look forward to receiving further information from the witnesses.

Response to Questions for the Record from S. Todd Brown, SUNY Buffalo Law School

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

Questions for the Record

Question from Subcommittee Member Suzan DelBene for Professor Brown

> *From the victims' statements I have read and the victims' advocates with whom I have met, I have not become aware of any victims who are suggesting that this legislation will advance the goal of ensuring a fair process that provides equitable compensation for victims of asbestos exposure. In what ways, if any, have your views on this legislation been shaped by consultation with victims or victims' advocates?*

I take victims' personal stories and perspectives into account but also talk to other researchers, medical and other experts, plaintiffs' lawyers, defense lawyers, judges and others in the course of my work. I have studied the publicly available information for every active and proposed bankruptcy trust as well as available source documents, transcripts and personal accounts relating to their evolution, day-to-day operations and payment patterns. Collectively, this work shapes my views on the trust system, the immediate and long-term prospects for victims to obtain equitable recoveries and proposals that seek to modify the trusts' operations.

As for the first part of this question, I doubt that any legislation that looks to preserve *future* victims' prospects for meaningful recoveries at this point would improve *current* victims' combined recoveries from the trust and tort systems. It is simply too late; the funds that might have been preserved by requiring enhanced oversight and greater deference to future victims' interests in Section 524(g) bankruptcies in the past were distributed long ago. Today's victims are understandably disappointed with the recoveries available from the bankruptcy trust system. Others raised some of the criticisms that I noted in my testimony and written statement years before many of today's claimants became aware of their injuries, but those criticisms were largely ignored outside the pages of law reviews and the occasional editorial. We were told then that nothing was wrong with the claims being approved and paid, that there was no pattern of abuse, and that legislative intervention was unnecessary.[1] We are told the same today, even as trusts reduce payment percentages and adopt other policies for delaying payments in an effort to stop the proverbial bleeding.

In sum, as much as past policy failures have impacted current victims' prospects for recovery, the ongoing rapid depletion of trusts today suggests that the recovery prospects for future victims will be worse.

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[1] Yet given what we now know about many of the nonmalignant claims, one author estimates that "the total payout for specious asbestos claims may exceed twenty-five billion dollars." Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1341 (2008).

Questions from Subcommittee Member Hakeem S. Jeffries for Professor Brown

Before voting on this Act in the Subcommittee, it would be helpful to receive answers from all the witnesses on the following items:

1. *Whether systemic fraud does actually exist in asbestos trust claims.*

No independent organization has conducted a review sufficient to address this question empirically, and it is not clear how any outside organization or the trusts that have opined on the projected costs of compliance with the bill[2] *could* identify and review a representative sample of claims sufficient to provide a meaningful answer to this question.

As an initial matter, in suggesting that the FACT Act would require substantial additional resources to track and report "exposure history" and "basis for payment," certain trusts have implicitly acknowledged that they do not track this information already.[3] If a trust finds one discrepancy in a specific claim, it may be readily dismissed as a typo, a trust coding error or some other accident. If the same accident occurs on a regular basis in the same firm's or doctor's submissions over time, however, these accidents appear much less like mistakes than the result of an abusive pattern or practice. Unless these data points are tracked in the aggregate and can be traced back to individual claims, further inquiry into the reasons for these discrepancies or ostensible mistakes will be hindered. Indeed, the specious claiming patterns in the Silica MDL only became obvious because the court and defendants were able to observe critical facts about the claims in the aggregate and focus further investigation on specific underlying claims and professionals.[4]

Although some imply that the GAO investigated and concluded that there is no fraud, the GAO ***did not opine on the presence or absence of fraud in the trust system***. The statement that forms the basis of this misrepresentation reads, in its entirety: "Of the trust officials that we interviewed that conducted audits, none indicated that these audits had identified cases of fraud."[5] Anecdotes, selective reporting of activities and practices, and conclusory representations concerning fraud are not reasonable substitutes for scientifically sound sampling and claim-level review. And unless the trusts have somehow avoided being targeted for fraud – unlike every other multi-

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[2] *See* Supplemental Letter from Douglas A. Campbell to House Subcommittee, dated March 20, 2013, on behalf of four bankruptcy trusts.

[3] Id. at 2 (stating that the trusts would require an additional 20,000 hours per year to track the exposure history and medical basis for payment for each claim).

[4] *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563 (2005); Stephen J. Carroll, *et al.*, THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA 8 (RAND Inst. Civ. Just. 2009) ("Judge Jack and the defense attorneys reviewed the fact sheets provided by plaintiffs and soon identified several patterns in the information that they thought suspicious.").

[5] U.S. GOV'T ACCOUNTABILITY OFFICE, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 23 (2011) [hereinafter GAO REPORT].

billion dollar public or private compensation system in recent history[6] – these representations say more about the relative weaknesses of certain of the trusts' audits than the intrinsic merit of claims across their respective claim pools.

Moreover, to the extent that one trust uncovers, in Mr. Inselbuch's words, "far more interesting discrepancies than the Wall Street Journal found" and ultimately denies the associated claims, the trust's confidentiality provisions may preclude the trust from sharing its findings with other trusts. Although trust administrators may carry their knowledge of dubious claim submissions into reviewing claims for other trusts they administer, I am aware of no suggestion to date that this information sharing occurs across trusts and across claims administrators in any sort of organized or structured manner. Indeed, the plain language of the sole benefit and confidentiality provisions found in many TDPs strongly suggests otherwise. And for much the same reason, only the most egregious and obvious examples of civil or criminal fraud may become public knowledge.

The claim that these audits have not uncovered fraud is not ultimately surprising. Nearly all of the distribution procedures for established trusts *authorize* a claims audit program, but such programs are expressly *mandatory* at only four of the thirty-two trusts included in my recent study of the trust system.[7] The precise form of any audit at most trusts remains open and subject to approval by the TACs.[8] Although all trusts surveyed by the GAO reported incorporating "quality assurance measures," only **two** stated that they "reviewed random and targeted samples of processed claims to ensure that claims were valid and supported."[9] Another trust reported conducting an external, random audit that included a review of medical evidence by an outside expert.[10] Whatever it is that the various trusts are doing when they process and audit claims, the foregoing suggests that few actually conduct the sort of stratified random audits used in other contexts to identify specious claiming patterns and practices.

2. *Whether the information that trusts require for settlements has been reevaluated within the last three years to determine whether it is adequate for sufficient transparency.*

If I understand the question correctly, the answer depends on the objectives of transparency. If the objective is rooting out conflicting representations across trusts and in tort litigation, defendants should be able to achieve this under the FACT Act and the other tools at their disposal if they are vigilant. If the objective is deterring civil or criminal fraud, success or failure

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[6] This, of course, seems highly implausible. There are good and bad apples on both sides of the aisle in asbestos litigation. Given the reach of client advertising today, however, even a few bad apples can generate and advance substantial numbers of claims.

[7] *See* S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 2002 BUFF. L. REV. ___, II.B.3 (forthcoming 2013) (noting that only four trusts provide for mandatory audits by their express terms, while twenty-four of the thirty-two studied require the advance consent of the TAC before any new plan may be adopted), available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225519.

[8] GAO REPORT, *supra* note 3, at 22-23.

[9] Id. at 23. The GAO did not opine on the merits of these trusts' underlying processes and methodologies.

[10] Id. The report does not indicate that this random audit was stratified, which is significant given the fact that claims submitted to a trust may be considerably heterogeneous. Indeed, even claims within a specific disease category may have several distinct, material differences that warrant categorizing claims into more homogenous sub-samples.

in any given case depends on the nature of the disclosures and whether those who are inclined to advance fraudulent claims believe that the information will be sufficient to bring the fraud to light. Even bad apples, however, do not want their cases to be the next *Kanamian* or *Montgomery*, and that risk is certainly heightened with greater claim-level transparency. If the objective is to understand claiming and payment patterns at the trusts – particularly in the immediate post-confirmation review process, where claim levels seem to consistently exceed projections – then the public reporting requirement alone should prove extremely valuable.

3. *An estimate of the funds and resources that would be required by trusts to create quarterly reports.*

As suggested previously, *if* the trusts are already attempting to track claim patterns and identify specious claiming practices, they should already collect the limited information required by the quarterly reports (and, of course, far more claim-level information) on an aggregate basis. For any resulting random stratified audit to be efficient (that is, avoid going through every claim file again to see if they fit into one of the strata), this tracking should also be readily tied back to specific claims. In sum, if the audit plans are designed to identify specious claiming patterns and practices through stratified sampling, this information should be readily available, and the costs of merely reporting this subset of the data should be marginal.

4. *Information on the types of safeguards and best practices are already built into asbestos trusts to address concerns of fraud. Information on safeguards and best practices that are built into other types of trusts to address concerns of fraud.*

Most bankruptcy trusts have tightened some medical criteria and excluded reports from certain doctors and screening companies in response to the Silica MDL. These are positive developments, but, as noted, the available information suggests that at least some of the trusts are not positioned to identify and address similarly abusive practices in the future.

Moreover, many experienced and reputable trustees and future claimants' representatives have been appointed to participate in the governance of bankruptcy trusts throughout the history of the trust system. Some are clearly more vigilant than others, and it remains unclear how any individual trust beneficiary could discover and hold those who are not vigilant accountable for approving specious claims today. Moreover, because all significant modifications to trust distribution procedures – including audit procedures, claim criteria and payment levels – are most often subject to the approval of the lawyer-controlled TACs, these officials may face considerable obstacles in pursuing more aggressive measures for protecting the interests of future victims.

With respect to the practices at other similar global settlements, I recently contrasted the trusts' public audit information against similar audits in three comparably large global settlements where defendants were not assured of finality and, accordingly, were likely to be faced with considerable additional financial costs if specious claims were accepted and paid.[11] In these

[11] Brown, *supra* note 7, at Part II.B.3.

settlements, the audit provisions were far more detailed and searching than found in bankruptcy trust distribution procedures. All expressly included mandatory audits of a fixed percentage of claims and provided for severe civil and criminal penalties for filing misleading or fraudulent claims. The Deepwater Horizon medical class settlement expressly contemplates targeted audits of claims based on indicia of potential abuse, and the Vioxx Master Settlement Agreement likewise expressly allowed for targeted audits of claims submitted by repeat players with a history of fraudulent or specious submissions.

Moreover, when claims exceed projections, some trusts appear to assume the problem lies with the projections rather than the underlying claims. When the Lummus Trust received more cancer claims "in its first three years of operations than were forecast during the bankruptcy case to be filed over the 40 year life of the Trust" and certain types of claims expected to account for only 19% of all claims "actually comprised 71% of the claims to date," for example, the trust responded by reducing its payment percentage from 100% to 10%.[12] Likewise, although the disparities between the THAN Trust's projections and actual claim payments appears to have been obvious prior to the effective date of its plan of reorganization, the trust paid all initial claims at a 100% payment percentage and then reduced payments to newly filed claims to 30%.[13] By contrast, when the Fen-Phen national settlement experienced similar disparities in its projections and actual claim submissions, it launched an aggressive audit plan and uncovered specious claim development practices underlying many of the claims submitted.[14]

Ultimately, the prevailing approaches at bankruptcy trusts and other public and private entities that administer claims differ in their core philosophies. Limiting administrative costs and facilitating the prompt resolution and payment of valid claims must be balanced against the risks associated with failing to adopt sufficient quality controls to uncover fraudulent, specious and otherwise abusive claiming practices. Bankruptcy trusts appear to draw the line far more in favor of the former at the expense of the latter. By contrast, defendants in open-ended settlements and officials who oversee government contracts, compensation systems and other programs frequently draw the line more toward identifying and deterring abusive claim patterns and practices. This is not because all who submit claims are untrustworthy; it is driven by the recognition that some, unfortunately, will exploit gaps in the process.

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[12] Notice to Holders of TDP Determined Lummus Asbestos PI Trust Claims, June 13, 2011, available at: http://www.abblummustrust.org/Files/20110616_Lummus_Letter_To_TDP_Claim_Holders.pdf.
[13] *See* Kirk T. Hartley, *et al.*, *Pre-packaged plan of inequity: the financial abuse of future claimants in the T H Agriculture & Nutrition 524(g) asbestos bankruptcy*, 11 MEALEY'S ASBESTOS BANKR. REPT. 1, 5 (Nov. 2011).
[14] *See* S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEMP. L. REV. 559, 583-86 (2012).

Response to Questions for the Record from the Honorable Peggy L. Ableman, McCarter & English, LLP

Responses of Judge Peggy L. Ableman to Questions from the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law Hearing on H.R. 982, the "Furthering Asbestos Transparency (FACT) Act of 2013"

Questions for the Record

Questions from Subcommittee Chairman Spencer Bachus for Judge Ableman

1. As a former state court judge, I'm interested in your perspective on the FACT Act's potential impact on state courts. Would the FACT Act have positively or negatively impacted the asbestos litigation you oversaw? Would the FACT Act have prevented you from applying Delaware's controlling law or rules of evidence?

Answer:

From my perspective as a former Superior Court Judge in the State of Delaware, the FACT Act would have had a positive effect upon the asbestos litigation in our state. The Act would not have prevented me in any way from applying Delaware law or rules of evidence. Indeed, the only way it may have affected our current practice would have been to relieve judges of the burden of having to monitor the disclosure of critical relevant information concerning the extent and sources of each plaintiff's exposure to asbestos. Judges will be able to rest assured of the fairness of the trial process because juries will be presented with all of the facts concerning all possible causes of a plaintiff's asbestos-related disease, including the ones that plaintiffs' attorneys would routinely withhold from disclosure by delaying the bankruptcy trust filings until after the litigation is complete.

Questions from Subcommittee Member Hank Johnson for Judge Ableman

Judge Ableman, you argued in your submitted testimony that defendants cannot be informed of the full extent of a claimant's exposure. I have deep concerns, however, with the FACT Act's approach that would violate their privacy by publicizing sensitive information about a claimant that is already discoverable if relevant to a claim or defense. Asbestos victims are an extremely vulnerable class of persons, making this a serious concern justified only by very serious needs.

1. Do federal or state rules of civil procedure prevent a defendant from gaining all relevant information about a claimant's exposure during discovery?

Answer:

Federal and state court rules of civil procedure ordinarily should not prevent any party from obtaining relevant information about a claimant's exposure. As a practical matter, however, under the current system in which there is no interface between the bankruptcy trust awards and the evidence presented at civil trials, plaintiffs' attorneys have the ability to keep evidence of alternate exposures to asbestos out of the trial record to maximize recovery against solvent nonsettling defendants. In reality, plaintiffs' attorneys deliberately delay the filing or application process to the bankruptcy trusts to avoid the requirement of certifying to the court the identify of "claims made." By delaying the filing of bankruptcy claims until after trial or settlement, claimants' attorneys are able to filter out all allegations of exposure to products manufactured by bankrupt companies – and base their entire case, and recovery, on only those solvent defendants pursued through litigation. In essence, the procedures as they now exist allow the manipulation of causation evidence to fit the specific defendants named in the complaint. After the litigation is concluded, and no further discovery obligation exists, the claims process can proceed in the bankruptcy courts, independent of anything that has occurred in the tort litigation.

2. Are defendants and claimants on equal footing during discovery, or any other state of litigation? Or is it more likely that defendants are corporations represented by experience, powerful litigators who have the knowledge and resources to handle discovery?

Answer:

It is a huge misconception to believe that plaintiffs in asbestos litigation are at a disadvantage because corporate defendants have access to and the means to retain experienced powerful litigators. Nothing could be further from the truth. As asbestos litigation has evolved over the past few decades, the vast majority, if not all, of plaintiffs in asbestos cases have been recruited by law firms specializing exclusively in this litigation and in pursuit of maximum

compensation for victims of asbestos-related disease. Plaintiffs' counsel are experienced, accomplished, and seasoned attorneys in this field of law. They are cognizant of the identities of every manufacturer, employer, or landowner who may, at any time, have been a potential source of asbestos exposure. They are also fully aware of the entities that have established bankruptcy trusts, the products with which these entities were associated, the manner in which maximum compensation can be achieved, the diseases that are most likely to maximize recovery, and the identity of manufacturers of any component part that may have been incorporated in the products to which a plaintiff may have been exposed. Sophisticated marketing models and litigation strategies have enabled plaintiffs' firms to file an increasing number of asbestos- related lawsuits against a pool of defendants that is ever expanding.

Plaintiffs' attorneys are specialists in the field and commonly represent individuals in suits filed all over the country. They are every bit as powerful and experienced in this litigation as those who represent the corporate defendants. In my experience, having presided over this litigation docket in Delaware, there is no misalignment of either resources or expertise.

Moreover, plaintiffs' attorneys have a very powerful incentive to put forth their best efforts and talent in their representation of asbestos clients. These cases are always undertaken by plaintiffs' counsel on a contingency fee basis and the fees paid on verdicts or settlement are often as high as forty percent of any recovery, irrespective of the amount of time or resources a plaintiffs' attorney has devoted to the case. Indeed, it is an extremely lucrative field of law for attorneys representing plaintiffs who have asbestos-related disease.

3. Even if both were on equal footing, how does a defendant's need for materials outside of discovery justify a major privacy intrusion on a vulnerable class of persons?

Answer:

There is no confidentiality or protection of a victim's privacy, medical records, or medical history in tort litigation in the court system so it does not make sense for a plaintiff to raise this concern with respect to bankruptcy filings. Once an individual files a lawsuit seeking damages for personal injury, that individual is deemed by law to have waived his or her privacy rights with respect to medical and employment records.

If the entities that have established trusts under Section 524 (g) of the United States Bankruptcy Code had remained solvent, any plaintiff who alleges an entitlement to damages for personal injuries sustained as a result of asbestos exposure attributable to that entity would have had no basis to insist upon confidentiality. There is no reason to expect the bankruptcy claims process to provide any greater protection.

The courts do not "publicize" sensitive or harmful information about any litigant. The courts in this country are constitutionally required to be open and transparent to the public as a means to ensure that they operate fairly. Absent extenuating circumstances, in my experience, I am not aware of any tort case, in asbestos or any other area, where the files, records, and proceedings were not fully open and accessible to the general public, and I know of no circumstance in my almost thirty years of experience where this openness caused additional harm. If tort cases in the court system are required to be conducted openly, plaintiff's filing of bankruptcy claims for the very same injuries, should not be entitled to any greater confidentiality than our courts afford.

Questions from Subcommittee Member Suzan DelBene for Judge Ableman

1. From the victims' statement I have read and the victims' advocated with whom I have met, I have not become aware of any victims who are suggesting that this legislation will advance the

goal of ensuring a fair process that provided equitable compensation for victims of asbestos exposure. In what ways, if any, have your views on this legislation been shaped by consultation with victims or victims' advocates?

Answer:

In my position as a Superior Court Judge, I was not free to consult with plaintiffs or victims nor was I able to discuss the cases with the defendants' representatives or their attorneys, except in the context of the litigation. I was constitutionally and ethically bound to remain neutral. My testimony was not presented either for or against plaintiffs or defendants. I was involved in a trial where I was faced with fraudulent behavior on the part of plaintiffs' attorneys made possible by the lack of transparency between the bankruptcy trust claims and the tort litigation. I was disturbed by the ability of plaintiffs' attorneys to totally conceal from defendants alternate sources of exposure by having a separate law firm independently pursue compensation from the trusts, thereby allowing defendants to defend their case in court with only half of the true exposure picture. I am also troubled by post-trial timing of claims submissions in order to avoid disclosing these other exposures in discovery.

As a result of what occurred in my case, I remain deeply concerned about a process that perpetuates this unfairness and interferes with the integrity of the judicial system. It is for that reason, and that reason only, that I support the FACT Act and felt compelled to testify in support of it.

Questions from Subcommittee Member Hakeem S. Jeffries for Judge Ableman

Before voting on this Act in the Subcommittee, it would be helpful to receive answers from all the witnesses on the following items:

1. Whether systemic fraud does actually exist in asbestos trust claims.

2. Whether the information that trusts require for settlement has been reevaluated within the last three years to determine whether it is adequate for sufficient transparency.

3. An estimate of the funds and resources that would be required by trusts to create quarterly reports.

4. Information on the types of safeguards and best practices are already built into asbestos trusts to address concerns of fraud. Information on safeguards and best practices that are built into other types of trusts to address concerns of fraud.

Answer:

As a former state trial court judge, I am not able to answer these questions because I am not familiar with the internal operations of the Section 524 (g) trusts.

Response to Questions for the Record from Elihu Inselbuch, Member, Caplin & Drysdale, Chartered

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

Mr. Inselbuch's Responses to Questions for the Record

Questions from Subcommittee Ranking Member Steve Cohen for Mr. Inselbuch

1. *During the hearing, the Majority's witnesses alleged that the submission of "inconsistent information" to trusts and in tort filings somehow suggested that the inconsistencies were widespread and submitted with fraudulent intent. Does the submission of inconsistent information to trusts and in tort filings constitute fraud? Why else might there be such inconsistencies?*

There has been no showing that there is any significant incidence of inconsistent information being submitted to trusts and in tort filings, and certainly no showing that this is a large-scale problem, let alone that there is any evidence of fraud. The argument that such inconsistencies exist and are equivalent to fraud is created out of whole cloth in Mr. Scarcella's written testimony, where he equates "inconsistent and fraudulent claiming behavior" (at 5), suggests that there is a problem because trusts cannot identify "inconsistent claiming patterns" (*id.*), expresses concern over "inconsistent and potentially fraudulent exposure allegations" (at 14), and argues that without the FACT Act "inconsistent and specious claiming will go unchecked" (*id.*).

Mr. Scarcella does not identify what he means by inconsistency, nor why he equates it with fraud. Nor does he quantify it with any evidence. To understand why there is not a problem, it is helpful to understand how the tort system and the trusts actually function in the real world.

Two types of "inconsistencies" are usually asserted. One is between the testimony of a plaintiff in the tort system and his trust claim filings. The other is among multiple trust filings by one claimant. The fact that there may be differences does not mean that there are questionable "inconsistencies."

A worker who is injured by exposure to asbestos and who brings a lawsuit against solvent defendants is required to answer questions in discovery about where he worked and what he did, and, if he has filed any trust claims, to produce copies to the defendants. Many plaintiffs are unlikely to be able to identify the manufacturers of all the asbestos-containing products to which they were exposed over the course of their careers, particularly if they were cutting into or removing products, previously installed, or working in an area where this was done.

As a result, in a tort lawsuit, the plaintiff's exposure to many defendants' products is most frequently proven through the testimony of other workers from his worksite, or through manufacturers' documents such as sales records or purchase orders.

When the plaintiff files a trust claim, in many situations his personal exposure does not have to be proven, as the trust, formed to resolve legitimate claims and not to resist them as do tort defendants, has already conceded that there are locations where people in certain occupations were exposed to products for which the trust bears responsibility. The plaintiff can rely on the trust's published site list and his own job history. So a plaintiff may not know that he was exposed to an X-Corporation product, and can therefore not identify X-Corporation in responses to interrogatories or in a deposition in the tort system, but can still make a claim to the X-Corporation trust.

It is this inability to personally identify the manufacturer of a product in tort system discovery while legitimately claiming against a trust that is being described as an "inconsistency." It is not.

Defendants, of course, have equal access to all this information. They have the plaintiff's work history and the site lists, and can depose him and ask whatever he remembers about exposure, and can obtain copies of any proof of claim forms he has filed.

Prior to a firm's bankruptcy, the plaintiff had the same burden of proving exposure to that firm's products as it does now against currently solvent defendants. Once a defendant is no longer in the tort system, the plaintiff's memory is still the same, but the trust which has replaced the defendant admits the liability. The plaintiff who does not remember the products can recover based on his occupation and his presence at a site where those products were. The individual plaintiff's inability to remember product names while still being able to recover from a trust are not inconsistent statements. And they are certainly not fraud.

As I explained in my written testimony, because of the ubiquitous presence of asbestos in industry, multiple companies are almost always at fault for asbestos-related diseases and deaths. Think of the shipyard worker, for example, assisting in the repair of countless U.S. Navy warships. The asbestos-containing products which were causes of his injury included boilers, pipe and thermal insulation, gaskets, and many others. A person so injured can properly recover from every company responsible, including both those he sues in the tort system and the trusts that stand in the shoes of bankrupt defendants.

Because the injured victim was typically exposed to multiple asbestos products at multiple job sites over a period of many years, he or she must file different claims, with different trusts, with different forms that request different information. The fact that the exposure information submitted to one trust *differs* from the exposure information submitted to another does not mean it is "inconsistent" – and certainly not specious or fraudulent. These exposure scenarios address different questions and therefore are not the same; but they are not, in any way, inconsistent. A trust compensates only exposures to the products for which it has been assigned or accepted responsibility, and each trust's requirements are different. For example, a WWII veteran exposed in a Navy shipyard to asbestos supplied by Manville would cite such early

exposures in seeking compensation from the Manville Trust. If such a veteran later worked in the construction industry as a pipefitter and was exposed to different manufacturers' asbestos products years later, his claims against the trusts responsible for the products he worked with in that job would reflect only his exposure history as a construction worker. These exposure scenarios are not inconsistent. And, the defendant in any case would be entitled to learn of all exposures during discovery.

There have been hundreds of thousands of claims filed with the asbestos trusts, and hundreds of thousands of lawsuits have been brought against solvent defendants. To the extent that there is ever a documented incident of an asbestos claimant or his attorney behaving somehow improperly – such as in the *single case* Judge Ableman encountered in her *twenty-nine years* on the Delaware bench – as she demonstrated, the state courts will be able to implement remedial measures using existing state law. It is simply unnecessary to invoke extraordinary federal intervention into state tort claims and trusts organized under state laws.

It should not be forgotten that these few isolated instances of claimed misconduct pale in comparison to the long history of corporate deceit by the proponents of this legislation with respect to the mining, manufacturing and marketing of asbestos products over many decades. This industry-wide indefensible corporate conduct resulted in tens of thousands of deaths of innocent workers.

2. *A March 11, 2013 Wall Street Journal article cited by some of my colleagues purports to identify several instances of fraudulent claims that were submitted to asbestos trusts. What is your response to this article in general and with respect to its assessment of the problem of false claims?*

In spite of searching for more than four months, with access to a database of more than 850,000 claims, the investigation published in the March 11, 2013 *Wall Street Journal* article was able to turn up but one case of supposed fraud – which the *Journal* itself admits is a "footnote in the history of the multi-billion-dollar asbestos litigation industry."[1] Indeed, all that the Journal's reporters found was this one case, a miniscule number of what it thought were anomalies among the claims received by the Manville Trust (2,000 of the 850,000 claims it has received, or roughly 0.2%), some other potential wrongdoing (as yet unproven, and some of which was discovered by the trusts themselves which were allegedly targeted), and one case in which the Manville Trust decided to compensate a victim's daughter based on a new diagnosis of an old claim. The *Journal* even acknowledges that the anomalies in the Manville filings could be clerical errors or, for cases in which the person exposed was a child killed by mesothelioma contracted from exposure to a parent's work clothes, simply the recording of the occupation of a parent who worked with asbestos.

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[1] Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J. (Mar. 11, 2013), http://online.wsj.com/article/SB10001424127887323864304578318611662911912.html.

Anecdotes are not data, and the authors were unable to come up with more than their own "worries" about fraud. The article certainly does not provide support for the FACT Act. Indeed, it found no unbiased observer concerned about "fraud" – instead, searching for legitimacy, it falsely attributed comments criticizing plaintiffs' conduct to a judge hearing asbestos cases rather than to a nameless "person familiar with the case"[2], and needed to print a retraction.[3]

3. *Your fellow witnesses have repeatedly asserted that more transparency is needed in the trust system and that asbestos companies need legislation to get information, currently being hidden from them, in order to litigate the claims. Can you explain what information solvent defendants that are defending their claims in court can request via available state discovery rules?*

Solvent defendants in the tort system can determine all other exposures a plaintiff has alleged in trust claims by various means in the normal course of discovery, including requesting the claim forms from plaintiffs directly or subpoenaing trusts.

Through discovery in an individual case, a defendant can usually obtain the following information from the plaintiff and, in some cases, from the trusts:

- If a plaintiff has made a claim to a trust;
- Any materials a plaintiff has submitted to a trust, including the proof of claim form and any attachments;
- If a plaintiff has exposure to a product that might be covered by a trust;
- Locations where a plaintiff worked and might have been exposed to asbestos;
- And, when appropriate (such as in certain situations after a verdict), if a trust has paid a claim to a plaintiff and the amount of that payment.

Discovery is a fundamental part of the legal system in the United States, implementing policies adopted state by state, and asbestos litigation should not be treated differently – there is no need for the federal government to blunder in and tip the scales across the board in favor of asbestos defendants.

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[2] *Corrections & Amplifications*, Wall St. J. (Mar. 22, 2013), http://online.wsj.com/article/SB10001424127887324557804578376330040722070.html.

[3] *Id.*

4. *We heard from your fellow witnesses that the FACT Act would not put any additional burdens on the trusts by way of additional costs to meet the reporting requirements and responding to information requests. What is your response to these assertions?*

The FACT Act will significantly increase the burdens and costs to the trusts. It will impose substantial administrative burdens, which, contrary to Mr. Scarcella's claims, the trusts are not equipped to handle. These administrative burdens would divert staff from processing claims while they respond to limitless demands for information and prepare required reports. Even with additional staff, the burden of responding to asbestos defendants' deliberate and unnecessary reporting demands will overwhelm the ability of the trusts to timely pay claims. Even with some of the costs reimbursed, the trusts will still incur significant overhead and other administrative costs to meet the requirements of the FACT Act, reducing the already meager sums available to pay claims. It is wasteful to use the already limited monies available in trusts to pay claims, to provide information already available through the state court discovery system.

Asbestos trusts expressed strong opposition to this legislation, in part because of the burdensome administrative costs that will reduce recoveries for future trust claimants.[4] In their initial letter to the Subcommittee, they stated that the bill "would impose burdens upon the trusts solely to benefit third parties, not the beneficiaries of the trust"[5] and noted that the bill "is both unnecessary and bad policy. Rather than protecting the trusts and the victims of asbestos exposure, the bill burdens the victims with a loss of confidentiality and burdens the trusts with additional administrative obligations, solely for purposes that are well beyond the proper scope of the Bankruptcy Code."[6]

After the Subcommittee's hearing on this bill, four substantial trusts – the Babcock & Wilcox Company Asbestos Personal Injury Trust, the Federal-Mogul Asbestos Personal Injury Trust, the Owens Corning/Fibreboard Asbestos Personal Injury Trust, and the United States Gypsum Asbestos Personal Injury Settlement Trust – submitted a supplemental letter on or about March 20, 2013 to the Subcommittee addressing the burden the Act would place on the trusts.[7]

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[4] *See* Letter from Douglas A. Campbell, Campbell & Levine, LLC, to Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary, Rep. Spencer Bachus, Chairman, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, and Rep. Steve Cohen, Ranking Member, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (Mar. 11, 2013) ("March 11, 2013 Campbell Letter").

[5] *Id.* at 2.

[6] *Id.* at 5.

[7] *See* Letter from Douglas A. Campbell, Campbell & Levine, LLC, to Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary, Rep. Spencer Bachus, Chairman, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, and Rep. Steve Cohen, Ranking Member, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (Mar. 20, 2013) ("March 20, 2013 Campbell Letter").

The four trusts estimated that a trust like one of them receiving 10,000 claims per quarter and paying 5,000 of them over time would require experienced managers and claim reviewers to spend an aggregate of 20,000 hours per year on that trust's compliance with the Act – the equivalent of ten new full-time employees.[8] Contradicting Mr. Scarcella's testimony before the Subcommittee, the four trusts explain that the data for "exposure history" and "basis for payment" required by the Act can not be collected using pre-set data or information from a claim form, but must be extracted from a review of the supporting documentation submitted by the claimant.[9]

The quarterly reporting requirement alone would place this significant burden on the trusts. Moreover, the language requiring trusts to provide information on historical claims is so broad as to make the impact potentially vast and yet unquantifiable.[10]

5. *The FACT Act forces the trusts to disclose certain information about claims. Would this bill help asbestos victims? Who would benefit most from this bill?*

As the Subcommittee members must have noted, no victims or victims' group came to support this bill.

The bill's provisions grant solvent asbestos defendants new rights and advantages to be used against asbestos victims in state court and to add new burdens to the trusts, such that their ability to operate and pay claims would be damaged. Further, the bill is intended to help defendants skirt state laws regarding rules of discovery.

The bill would slow down or stop the process by which the trusts review and pay claims, such that many victims would die before receiving compensation, since victims of mesothelioma typically only live for 4 to 18 months after their diagnosis.[11] The bill's new burdens will require the trusts to spend time and resources complying with these requirements, causing trust recoveries to decrease and be delayed.

In addition, the bill overrides state law regarding discovery and disclosure of information. State discovery rules currently govern disclosure of a trust claimant's work and exposure history. If such information is relevant to a state law claim, a defendant can seek and get that information according to the rules of a state court. What a defendant cannot do, and what this bill would allow, is for a defendant to engage in fishing expeditions for irrelevant information which has no use other than to delay a claim for as long as possible.

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[8] *Id.* at 2.

[9] *Id.* at 1-2.

[10] *Id.* at 2-3.

[11] *Stages of Mesothelioma and Outcomes*, Mesothelioma Applied Research Foundation, http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.8055915/k.8443/Stages_of_Mesothelioma__Mesothelioma.htm (last visited Apr. 12, 2013).

Delay of the trusts will benefit tort system defendants. Terminally ill victims have no tolerance for delay and, when trust settlement monies prove unavailable, will be induced to settle their pending tort cases cheaper and sooner to reach some resolution before they die.

6. *The FACT Act would require the trusts to respond to any request from a party to any action if the subject of such action concerns liability for asbestos exposure. What would prevent a trust from receiving hundreds or even thousands of these requests during any given year? What would the effect of that be on the trusts and on the efficiency of paying out claims to asbestos victims?*

There is nothing in the bill to prevent defendants from blanketing the trusts with requests – indeed, the FACT Act is an invitation for asbestos defendants to flood the trusts with requests for information for no other reason than to delay the ability of the trusts to pay out claims and to help defendants avoid accountability for their wrongdoing. They have articulated no legitimate need for this data in case-by-case litigation. This is a heavy-handed piece of federal interference with the states' legal systems. State court discovery rules attempt to create balance between litigants; they already allow asbestos defendants to get information whenever it is relevant. The FACT Act, on the other hand, allows *any defendant* to request information from the trusts for *any reason* at *any time*. The reason for this is clear: asbestos defendants want to be able to bury the trusts in paperwork so that they slow down the process of paying out claims to victims of asbestos exposure.

As I explained during my testimony, the delay in that recovery will force plaintiffs to settle cases with solvent defendants faster, and, ultimately, for less money.

7. *Professor Brown claims that asbestos trusts have become less transparent and more aggressive in challenging efforts to investigate the operations.*

What is your response?

Professor Brown has not provided sufficient evidence to support these claims. Instead, relying on an article by Mr. Scarcella, he equates modifications in a few trust documents that standardize their provisions and make explicit the requirement that entities seeking trust information do so with a subpoena with the trusts acting aggressively – a conclusion without merit. However, given the extent to which asbestos defendants and their allies have been vigorously targeting the trusts with aggressive litigation and legislative initiatives, one would expect the trusts to respond.

8. *Professor Brown complains that the annual reports that trusts file with the courts are no longer accessible through PACER "because the judge overseeing the cases ordered them closed."*

Why are the courts limiting access to these reports? Does it reflect the fact that the courts are concerned about the privacy of asbestos victims who make claims against these trusts?

I am not aware of any such orders. As Professor Brown knows, all bankruptcy cases are closed when they are finished, primarily because the debtors want them closed so they can stop paying administrative fees. Professor Brown's complaint appears to be grounded on a misapprehension founded on a desire to find a conspiracy of silence where none exists.

Certain annual reports are inaccessible, but this is not related to any action taken by the trusts or courts. In 2010, the Judicial Conference amended the policy on privacy and public access to electronic case files by restricting access through PACER to all documents in all bankruptcy cases that were filed before December 1, 2003, and that have been closed for more than one year, due to a concern that documents filed prior to that date did not meet privacy standards implemented at that time.[12] Nonetheless, the filings remain available electronically to parties who appeared in the cases (including defendants and insurers who were interested enough to participate), and all court filings remain available to the public at the clerks' offices.[13]

The annual reports provide information on the number and type of claims paid. Courts do not require the trusts to publish individual data, likely due both to privacy concerns and to the sheer volume of claims paid. The Owens Corning / Fibreboard Trust, for example, paid more than 80,000 claims in 2011.[14]

9. *The trusts typically treat claimants' submissions as confidential.*

Please explain why such matters are treated as confidential.

The asbestos personal injury trusts replace insolvent defendants, and are settlement vehicles created to settle claims created by the liability of their insolvent predecessors. Claims

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[12] *See* Report of the Proceedings of the Judicial Conference of the United States at 12-13 (Sept. 14, 2010), *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2010-09.pdf. For implementation, see, e.g., *Review Case Files*, United States Bankruptcy Court for the District of Columbia, http://www.deb.uscourts.gov/deb/review-case-files (last visited Apr. 12, 2013).

[13] *Id.*

[14] Annual Report and Account of the Owens Corning/Fibreboard Asbestos Personal Injury Trust for the Fiscal Year Ending December 31, 2011 at 10, 12, *In re Owens Corning*, No. 00-3837 (Bankr. D. Del. Apr. 30, 2012) [ECF No. 21049].

paid out by asbestos trusts are settlements and therefore should be treated in the same manner as any others' settlements negotiated in the court system. Lawsuit settlements are classically deemed confidential by the parties. Just as a solvent corporation has no obligation to make settlement information available to the public, an asbestos trust should have no obligation to do so either.

Asbestos defendants insist on complete confidentiality when they address and settle claims in the tort system to ensure that other victims do not know how much they are willing to pay for their asbestos wrongdoing. Courts routinely refuse to compel discovery of settlement information. Settlements by asbestos trusts should be no exception.

The important issue is whether asbestos defendants have access to information about a claimant's exposure information when that information is relevant to a pending claim. State discovery rules already provide a method for defendants to obtain this information, so there is simply no reason to burden the trusts with the significant effort and expense of producing it again.

This bill requires the trusts to disclose the amount requested and paid out to the victim. This is identical in nature to requiring disclosure of a settlement. However, the bill does not affect the rights of asbestos defendants to demand confidentiality for their settlements. These same defendants are thus trying to force disclosure of a victim's settlement information with the trusts, while maintaining their own right to confidentiality.

Ironically, given that the trusts publish a list of the standard, average, and maximum settlement values which they pay for each asbestos-related disease, as well as their payment percentages, the defendant already has much more information about what a particular plaintiff is likely to recover from trusts than a plaintiff has about what the defendant has paid to other workers with similar injuries from the same places and products with which the plaintiff worked.

10. Professor Brown states that in "the absence of transparency, nobody with an interest in this debate - litigants, legal representatives, trust officials or judges - has access to sufficient information across trusts to reach the extreme conclusions that are commonly advanced - that fraud is nonexistent, on the one hand, or rampant, on the other - as an empirical matter."

What is your response?

This statement is a post hoc justification for the legislation. The production of the data required by the FACT Act "across trusts" would not allow anyone to find fraud. Each trust requires only evidence of disease and exposure to the products for which it has admitted responsibility and pays settlements. Releasing this data would not help. In addition, as I have explained previously, the GAO has investigated claims of fraud, and found no evidence of it.

Trusts regularly conduct audits. And even the *Wall Street Journal*, which spent months combing through data and conducting interviews, was able to find just one example of an allegedly fraudulent claim out of 850,000 claims examined. The data would not change this.

11. What is your response to the allegation that asbestos victims "double dip"?

Asbestos defendants commonly argue that asbestos lawsuits and claims against the trusts constitute "double dipping," since claimants may potentially recover both from defendants in the state court system and from bankruptcy trusts. The claim is false and reflects a basic, fundamental mischaracterization of the way both the bankruptcy system and state court lawsuits operate. If any court anywhere—any state or federal, trial or appellate court hearing asbestos cases, or any bankruptcy court—had found any merit in this contention, it might have credibility, but no court ever has.

For there to be "double-dipping" there would have to be a recovery beyond that to which a claimant is entitled. The only time that a fixed amount is set to which an asbestos victim is entitled is when his case goes to trial and the jury returns a verdict in his favor. In a settlement context (which accounts for – literally – more than 99% of asbestos cases) there is no fixed amount above which recovery is illegal or even inappropriate.

In a context where all the defendants are solvent and in the tort system, the plaintiff settles with whomever he settles with, and does not disclose the amounts of the settlements. He goes to trial with the rest, and the jury says how much he is entitled to. If he already received that much from settlers, the trial defendant(s) pay nothing. If not, the trial defendants pay the balance. But without a jury verdict, there is no set amount to compensate a plaintiff for his injuries, and no possibility of double-dipping.

Additionally, as I state in my written testimony, asbestos disease is typically the result of being exposed to multiple asbestos-containing products over the course of a person's working lifetime. The law in every state is settled that any victim can recover from every asbestos defendant who substantially contributed to his or her illness or injury; this includes asbestos trusts because the trusts essentially step into the place of the former defendant. Thus, when an asbestos victim recovers from each defendant whose product contributed to their disease, that victim is in no way "double-dipping;" rather they are recovering a portion of their damages from each of the corporations who harmed them. In fact, each trust is responsible for and pays for only its own share of the damages.

12. What are some of the reasons why defendant corporations demand that their settlement agreements be kept confidential? Do you think it would be hypocritical not to ask that they forgo confidentiality under the FACT Act?

I do not represent any defendant corporations, so I am unable to speak to their state of mind. It seems to me, however, that a defendant would not want a suing plaintiff to know how much that defendant had paid to other plaintiffs in similar circumstances because it would allow that plaintiff to better understand the "marketplace" threshold for settlement, and demand a larger settlement than he might have otherwise. Similarly, a plaintiff would not want a defendant to know what he settled for with other defendants, as that would provide a "ceiling" for the defendant.

This bill requires only the trusts to disclose the amount requested and paid out to the victim. This is requiring disclosure of a settlement. It is hypocritical for asbestos defendants to argue that they should maintain their right to demand confidentiality for their settlements while trying to force disclosure of a victim's settlement information from the trusts. If there is to be forced disclosure of settlements, why not force defendants to turn over their settlement information as well, including the amount of the settlement, the plaintiff's injuries, and the exposure evidence put forth by the plaintiff, including the location where the plaintiff was exposed and the defendant's products at that site.

13. To your knowledge, do any asbestos victims support the FACT Act?

No. The FACT Act is not in their interest. The record shows that a number of asbestos victims submitted statements opposing the FACT Act. No victim or victims' group appeared to support the bill.

Similarly, the Future Claimants' Representatives, who represent the interests of asbestos victims who have yet to manifest symptoms and make a claim, have submitted a statement opposing the FACT Act.[15] The only parties involved in asbestos litigation who support the FACT Act are the defendants themselves – those who injured hundreds of thousands of people through their conduct and are now attempting to evade responsibility for their actions – as they have done historically.[16]

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[15] *See* Letter from Future Claimants' Representatives to Committee Members (Mar. 11, 2013).

[16] This is not a new issue. For a history of the deliberate efforts of the asbestos industry to avoid responsibility for the deaths and injuries it has caused, see Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985).

Questions from Subcommittee Member Hank Johnson for Mr. Inselbuch

In your submitted testimony, you note that ALEC has drafted model legislation that delays recovery for plaintiffs.

1. *Please discuss ALEC's role in drafting model legislation in this area.*

The American Legislative Exchange Council, or ALEC, is a group which works to make state laws more corporation-friendly. While it is chartered as a nonprofit organization under Section 501(c)(3) of the Internal Revenue Code, ALEC provides a vehicle for its corporate members to lobby state legislators, while they deduct their payments to ALEC as charitable contributions.[17] One of the ways ALEC does this is to draft "'model' legislation" provided by its corporate and legislative members, and then lobby for the adoption of that legislation.[18]

While nominally controlled by members who are state legislators ("Legislative Members"), ALEC's Board of Directors is advised by a Private Enterprise Board, representing major corporate sponsors ("Private Sector Members").[19] According to ALEC's Bylaws, the "Private Enterprise Board of Directors" meets jointly with ALEC's Board of Directors at least once per year.[20] Members of the Private Enterprise Board represent tobacco, pharmaceutical, alcoholic beverage, oil and gas, and insurance companies, as well as lobbying firms that serve these industries.[21]

ALEC's Private Sector Members pay significant sums to sit down at the table with its Legislative Members. Whereas legislators pay membership fees of $50 per year,[22] private companies pay between $7,000 and $25,000, depending on the membership tier.[23] Buying into a

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[17] Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. Times (Apr. 21, 2012), available at http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?ref=mikemcintire&_r=0; *see also Letter Submission to the Internal Revenue Service under the Tax Whistleblower Act, 26 U.S.C. § 7623(b)*, Common Cause, at 1 (Apr. 20, 2012), *available at* http://www.commoncause.org/atf/cf/%7Bfb3c17c2-cdd1-4df6-92be-bd4429893665%7D/ALEC_FINAL_SUBMISSION_IRS_WHISTLEBLOWER.PDF.

[18] *Id.*

[19] *See* Robert G. Natelson, *Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers*, ALEC, at i (2011), *available at* http://www.alec.org/docs/ArticleVHandbook.pdf.

[20] *See* ALEC Bylaws art. V, § 5.10 (July 10, 2007); *see also id.* art. XV, §§ 15.01-15.08 (describing the role, composition, and responsibilities of the Private Enterprise Board).

[21] *See* ALEC Private Enterprise Advisory Council, http://www.alec.org/about-alec/private-enterprise-advisory-council/ (last visited Apr. 12, 2013).

[22] Legislative Membership: Join ALEC Online, http://www.alec.org/membership/legislative-membership/join-alec-online/ (last visited Apr. 12, 2013); *see also* Laura Sullivan, *Shaping State Laws with Little Scrutiny*, National Public Radio (Oct. 29, 2010), http://www.npr.org/templates/story/story.php?storyId=130891396.

[23] *See* ALEC Private Sector Membership, http://www.alec.org/membership/private-sector-membership (last visited Apr. 12, 2013).

more costly membership tier gives the corporation access to a greater number of ALEC meetings, policy summits, "VIP Events," and Board of Directors receptions.[24]

In addition to paying substantial membership fees, some Private Sector Members pay separate fees to participate in ALEC's issue-focused "Task Forces" where ALEC's Legislative Members "welcome their private sector counterparts to the table as equals" to jointly draft "model legislation" in areas like healthcare, energy and the environment, communications and civil justice.[25] These industry-written bills are introduced with few alterations – and, in many cases, passed – at statehouses around the country.[26]

ALEC has prepared model legislation to advance corporate interests in numerous subject areas, including so-called tort reform, which does such things as limiting the ability of injured Americans to file class actions, making it harder for them to bring lawsuits, and limiting their ability to recover for pain and suffering.[27] Some of this model legislation has included: laws designed to cap the liability of companies that acquired the assets of a business that previously engaged in asbestos-related activity, thus protecting their financial assets at the expense of victims of asbestos-related diseases and their families;[28] the "Stand your Ground" law which

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[24] *See Private Sector Membership Brochure*, ALEC, at 2, *available at* http://www.alec.org/wp-content/uploads/2011_privateSector_brochure.pdf.

[25] *See* ALEC Private Sector Membership, *supra* note 23.

[26] *See, e.g.*, Sullivan, *supra* note 22 ("Since Arizona Gov. Jan Brewer signed [ALEC-drafted] SB 1070 into law in April, five state legislators have introduced eight bills similar to it. Like SB 1070, four of them were also named 'Support Our Law Enforcement and Safe Neighborhoods Act.' Lawmakers in many more states NPR interviewed have said they would introduce or support a similar bill."); Beth Hawkins, *Treyvon Martin Case Leads to Corporate Exodus from ALEC*, MinnPost (Apr. 16, 2012), http://www.minnpost.com/politics-policy/2012/04/trayvon-martin-case-leads-corporate-exodus-alec ("In total over the last two years Minnesota lawmakers have introduced some 60 bills identical or very similar to model legislation drafted by ALEC."); Salvador Rizzo, *Some of Christie's Biggest Bills Match Model Legislation from D.C. Group Called ALEC*, N.J. Online (Apr. 1, 2012), http://www.nj.com/news/index.ssf/2012/04/alec_model_bills_used_in_nj_la.html ("The Star-Ledger found a pattern of similarities between ALEC's proposals and several measures championed by the Christie administration. At least three bills, one executive order and one agency rule accomplish the same goals set out by ALEC using the same specific policies. In eight passages contained in those documents, New Jersey initiatives and ALEC proposals line up almost word for word. Two other Republican bills not pushed by the governor's office are nearly identical to ALEC models."); Paul Krugman, *Lobbyists, Guns, and Money*, N.Y. Times (Mar. 25, 2012) http://www.nytimes.com/2012/03/26/opinion/krugman-lobbyists-guns-and-money.html ("[ALEC] doesn't just influence laws, it literally writes them, supplying fully drafted bills to state legislators. In Virginia, for example, more than 50 ALEC-written bills have been introduced, many almost word for word. And these bills often become law.").

[27] *Tort Reform, Corporate Liability and the Rights of Injured Americans*, Center for Media and Democracy: ALEC Exposed, http://www.alecexposed.org/wiki/Tort_Reform,_Corporate_Liability_and_the_Rights_of_Injured_Americans (last visited Apr. 12, 2013).

[28] *See* Brad Shrade, *Asbestos Victims Oppose Company's Push for Liability Shield in State Law*, Minneapolis Star-Tribune (Feb. 14, 2012), http://www.startribune.com/politics/statelocal/139335403.html. The law, 2012 Mich. Pub. Acts 84 (codified at Mich. Comp. Laws §600.3001) was signed into law in 2012; it primarily benefited a single corporation, Crown Holdings, Inc. (formerly known as Crown Cork & Seal). *See also, e.g.*, Anita Kumar, *Virginia Passes Bill to Limit Legal Claims on One Firm*, Wash. Post, Feb. 10, 2010, *available at* http://www.washingtonpost.com/ wp-dyn/content/article/2010/02/09/AR2010020903797_pf.html (discussing the

provoked public outcry following the shooting death of Florida teen Trayvon Martin, crafted by the NRA through ALEC's "Criminal Justice Task Force", and considered a priority by ALEC;[29] and a model bill which reportedly served as the basis for Arizona's controversial immigration law, and which was drafted by an ALEC group including officials from private prison companies focusing on immigrant detention as a growing market.[30]

One part of ALEC's agenda is limiting the ability of people injured by exposure to asbestos and asbestos-containing products to receive compensation in the legal system. In addition to the Crown Cork Bill described above, to facilitate this anti-victim agenda, ALEC drafted a model bill called the "Asbestos Claims Transparency Act", which was adopted by that organization's "Civil Justice Task Force" in July 2007 and by the ALEC Board of Directors in August 2007.[31] I explored the effects of such legislation in my written testimony; in sum, it is an effort to facilitate the defense against asbestos claims by forcing asbestos victims to assist the defendants' efforts to shift their responsibility (and financial obligations) to other entities, thereby reducing the victims' recoveries.

ALEC's own materials acknowledge that this is "an effort to keep claimants from collecting damages from both sources [tort system defendants and trusts]."[32] In other words, it is a law designed to enable corporations to avoid the consequences of their decision to knowingly (for much of the twentieth century) expose workers and their families to asbestos, a substance those corporations *knew* was deadly and would cause disease leading to death.

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efforts of ALEC Legislative Members and ALEC corporate member, Crown Holdings, to secure passage of a bill to limit Crown's successor liability for asbestos-related lawsuits in Virginia, where Crown employed 300 workers, and noting that "[s]ince 2007, Crown has donated more than $100,000 to 46 Virginia legislators or their political action committees.").

[29] Mike McIntire, *Conservative Nonprofit Acts as Stealth Business Lobbyist*, N.Y. Times (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html ("ALEC has drawn scrutiny recently for promoting gun rights policies like the Stand Y our Ground law at the center of the Trayvon Martin shooting case in Florida, as well as bills to weaken labor unions and tighten voter identification rules."); *see also* Krugman, *supra* note 26 ("[L]anguage virtually identical to Florida's ["Stand Your Ground"] law is featured in a template supplied to legislators in other states by the American Legislative Exchange Council, a corporate-backed organization."); Press Release, NRA Institute for Legislative Action, NRA Presents ALEC Model Legislation in Grapevine, Texas (Aug. 12, 2005), *available at* http://www.nraila.org/legislation/state-legislation/2005/8/nra-presents-alec-model-legislation-in.aspx?s=&st=10507&ps=; ALEC 2007 Legislative Scorecard, *available at* http://web.archive.org/web/20081106040540/http://www.alec.org/am/pdf/2007alecscorecard.pdf (listing the "Castle Doctrine Act" among the "Model Bill Highlights for 2007" and touting the passage of the legislation in Maine, North Dakota, and Tennessee).

[30] *See* Sullivan, *supra* note 22; Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, National Public Radio (Oct. 28, 2010), http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law.

[31] http://www.alec.org/model-legislation/asbestos-claims-transparency-act/; *see also Asbestos Claims Transparency Act Exposed*, Center for Media and Democracy: ALEC Exposed, http://www.alecexposed.org/w/images/c/c7/0E1-Asbestos_Claims_Transparency_Act_Exposed.pdf.

[32] ALEC Model Bill Review at 3 (Nov. 2012), *available at* http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/CJ%20MODEL%20BILL%20REVIEW%20(NEED%20UPDATES).PDF.

2. *Have many states passed such legislation?*

Ohio passed this legislation in December 2012.[33] Legislation based on ALEC's model bill has been introduced in a number of other state legislatures, including: Oklahoma;[34] Wisconsin;[35] Louisiana;[36] Texas; [37] Illinois;[38] Mississippi;[39] Pennsylvania;[40] and West Virginia (2011 session).[41]

3. *You mentioned in your written testimony that asbestos defendants and insurance companies, are simultaneously pushing for both federal and state asbestos trust reform legislation. Can you explain how the FACT Act would work with the proposed state bills that are currently being shopped in the states by asbestos companies and ALEC?*

This bill is part of a coordinated effort by asbestos defendants and their insurance companies to avoid or at least reduce their responsibility for the deaths and injuries of millions of Americans. In states where set-off regimes do not punish victims for first settling with trusts, the delays in trust payment will force dying plaintiffs, who are in desperate need of funds, to settle for lower amounts with solvent defendants. During my live testimony before the Subcommittee, I explained how delay matters to someone who is sick and dying from mesothelioma. They do not view the time value of money in the same way as a bank, insurer, or corporation. In an earlier case a test was run in which asbestos victims were asked whether they would prefer $50 now and $50 in three years, or $70 immediately, and notwithstanding the substantial discount

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[33] H. 380, 129th Gen. Ass'y (Ohio 2012), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_380.

[34] Personal Injury Trust Fund Transparency Act, S. 404, 54th Leg. (Okla. 2013), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20INT/SB/SB404%20INT.PDF.

[35] S. 13, 2013-2014 Leg. (Wisc. 2013), *available at* http://docs.legis.wisconsin.gov/2013/related/proposals/sb13.pdf; A.B. 19, 2013-2014 Leg. (Wisc. 2013), *available at* http://docs.legis.wisconsin.gov/2013/related/proposals/ab19.pdf.

[36] H. 481, 2013 Leg., Reg. Sess. (La. 2013), *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=835094&n=HB481%20Original.

[37] Act Relating to Settlement Credits in Asbestos and Silica Cases, H. 2545, 83d Leg. (Tex. 2013), *available at* http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/HB02545I.pdf.

[38] H. 153, 98th Gen. Ass'y (Ill. 2013), *available at* http://www.ilga.gov/legislation/98/HB/PDF/09800HB0153lv.pdf.

[39] H. 529, 2013 Leg., Reg. Sess. (Miss. 2013), *available at* http://billstatus.ls.state.ms.us/documents/2013/pdf/HB/0500-0599/HB0529IN.pdf; S. 2373, 2013 Leg., Reg. Sess. (Miss. 2013) *available at* http://billstatus.ls.state.ms.us/documents/2013/pdf/SB/2300-2399/SB2373IN.pdf.

[40] Fairness in Claims and Transparency Act, H. 1150, 2013 Leg. (Pa. 2013), *available at* http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2013&sessInd=0&billBody=H&billTyp=B&billNbr=1150&pn=1388.

[41] Asbestos Claims Transparency Act, S. 43, 79th Leg., Reg. Sess. (W.V. 2011), *available at* http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=sb43%20intr.htm&yr=2011&sesstype=RS&i=43; Asbestos Claims Transparency Act, S. 56, 79th Leg., Reg. Sess. (W.V. 2011), *available at* http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=sb56%20intr.htm&yr=2011&sesstype=RS&i=56; Asbestos and Silica Compensation Fairness Act of 2011, H. 2686, 79th Leg., Reg. Sess. (W.V. 2011), *available at* http://www.legis.state.wv.us/Bill_Text_HTML/2011_SESSIONS/RS/Bills/hb2686%20intr.htm.

they overwhelmingly chose the immediate $70 payment, to pay for their medical expenses and settle their affairs. Delay is a weapon for asbestos defendants.

In states where set-off regimes prevent victims from settling with trusts before resolving their tort system cases, the state laws drafted by ALEC, which would require trust resolutions before the trial can be calendared, will enable defendants to shift the shortfall created by the insolvency of the trusts' predecessors from the remaining culpable defendants to the innocent victims, and, as an added bonus resulting from delay at the trusts, further delay trials in the tort system. If a plaintiff is forced to settle first with a trust, then, in a jurisdiction that calculates set-offs against verdict not by the amount of any settlement but by the relative fault of the settling party (here a trust) the victim's recovery against the tort defendants will be reduced by the shortfall. Delaying trial until all trust claims are resolved will further put victims at the mercy of the culpable tort defendants, and delaying trust resolutions is a double whammy.

4. *How is ALEC funded? Do asbestos defendants contribute to ALEC? Does Koch Industries, as owner of Georgia Pacific, an asbestos litigant, contribute to ALEC?*

A 2011 report which reviewed ALEC's IRS filings indicates that almost 98% of ALEC's income comes from corporations, trade associations, and corporate foundations.[42]

As I note above, ALEC's Private Sector Members pay significant sums to sit down at the table with its Legislative Members. Whereas legislators pay membership fees of $50 per year,[43] private companies pay between $7,000 and $25,000, depending on the membership tier.[44] Buying into a more costly membership tier gives the corporation access to a greater number of ALEC meetings, policy summits, "VIP Events," and Board of Directors receptions.[45] And, in addition to paying substantial membership fees, some Private Sector Members pay separate fees to participate in issue-focused "Task Forces" where they draft model legislation.[46]

Many of the Private Sector Members and other supporters are asbestos defendants. A strong funder of ALEC is the privately-held Koch Industries, the parent company of Georgia-

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[42] *See* Lisa Graves, *A CMD Special Report on ALEC's Funding and Spending*, Center for Media and Democracy, nn.9-13 & accompanying text (July 13, 2011), http://www.prwatch.org/print/10887 (citing ALEC IRS Form 990s for 2007-2009).

[43] Legislative Membership: Join ALEC Online, http://www.alec.org/membership/legislative-membership/join-alec-online/ (last visited Apr. 12, 2013); *see also* Laura Sullivan, *Shaping State Laws with Little Scrutiny*, National Public Radio (Oct. 29, 2010), http://www.npr.org/templates/story/story.php?storyId=130891396.

[44] *See* ALEC Private Sector Membership, http://www.alec.org/membership/private-sector-membership (last visited Apr. 12, 2013).

[45] *See Private Sector Membership Brochure*, ALEC, at 2, *available at* http://www.alec.org/wpcontent/uploads/2011_privateSector_brochure.pdf .

[46] *See* ALEC Private Sector Membership, *supra* note 44.

Pacific LLC,[47] as are the related Claude R. Lambe Foundation (controlled by Charles Koch and his family), and the Charles G. Koch Foundation, which together donated more than $200,000 in 2009.[48] Georgia-Pacific has been a defendant in numerous asbestos lawsuits (in 2004, prior to being taken private by Koch Industries, it reported to the SEC that there were 59,700 pending claims against it, and it had paid more than $200 million in asbestos claims).[49]

Other large corporate asbestos defendants and their insurers supporting ALEC include: Exxon Mobile Corp., Dow Chemical Company (owner of Union Carbide), Caterpillar Inc., BNSF Railway, Travelers' Insurance, and Pfizer Inc.[50]

Lobbying groups which support limiting the rights of asbestos victims also support ALEC financially. These include the Tort Reform Association, the American Insurance Association, and the U.S. Chamber of Commerce's Institute for Legal Reform.[51]

Finally, some of ALEC's other big supporters are tobacco, oil, and health insurance companies, which have pushed for legislation that would restrict the liability of tobacco companies,[52] used ALEC to prevent action on climate change and distort science,[53] and tried to kill health care reform passed by Congress.[54]

5. *Does this mean that defendants, who are large corporations with an army of experienced attorneys ready to litigate disputes, are writing the rules for the road?*

While I was not called as an expert on, and cannot speak with personal knowledge about the operation of state legislatures generally and corporate influence thereon, the text which became the Ohio Asbestos Claims Transparency Act was drafted by ALEC.[55] Given the

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[47] http://www.gp.com/newsroom/quickfacts.asp (last visited Apr. 12, 2013).

[48] Graves, *supra* note 42, nn.14-15 & accompanying text.

[49] *Georgia-Pacific Hit With $9 Million Asbestos Verdict*, Atlanta Bus. Chron. (Mar. 15, 2005), http://www.bizjournals.com/atlanta/stories/2005/03/14/daily20.html.

[50] See http://www.sourcewatch.org/index.php?title=ALEC_Corporations for a list of corporate funders of ALEC.

[51] *See Civil Justice Task Force Meeting Agenda*, ALEC, 33-36, 38, 40 (June 30, 2011), *available at* http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/1-35-day_mailing_civil-final%20new%20orleans2.pdf.

[52] *Memorandum re RJR Tobacco 1987-89 Strategic Plan*, Legacy Tobacco Documents Library, Bates Number 504987561-65, *available at* http://legacy.library.ucsf.edu/tid/ pgp35d00/pdf; Bill Hogan, *A Big Business Agenda*, Defenders Magazine, Winter 2002.

[53] *Smoke, Mirrors & Hot Air*, Union of Concerned Scientists (Jan. 2007); *ExxonMobil's Continued Funding of Global Warming Denial Industry*, Greenpeace (May 2007).

[54] Lee Fang, *Blue Cross Blue Shield Lobbyists Quietly Helping Extreme Effort to Declare Health Reform Unconstitutional*, Think Progress (Dec. 5, 2009).

[55] http://www.alecexposed.org/w/images/c/c7/0E1-Asbestos_Claims_Transparency_Act_Exposed.pdf; *compare* http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_380.

evidence that ALEC is funded by large corporations, this certainly implies that asbestos defendants are successfully creating an environment which aids them in litigation.

In Ms. Abelman's testimony, she argues that defendants cannot be informed of the full extent of a claimant's exposure.

1. *Do federal or state rules of civil procedure prevent a defendant from gaining all relevant information about a claimant's exposure during discovery?*

No. As I explain above, defendants can inquire exhaustively into plaintiffs' work history, their knowledge of exposures to products, trust claims they have made, and, when and if it becomes appropriate, such as for molding a verdict, recoveries they have received from trusts.

2. *Are defendants and claimants on equal footing during discovery, or any other stage of litigation?*

In an ideal world, plaintiffs and defendants would be on equal footing. Defendants, however, have advantages throughout the litigation process: not only are they are better-funded than plaintiffs, they have specific knowledge of the sites where their asbestos-containing products were used, any delay in litigation is to their advantage, and they have the knowledge and experience gained from twenty-five or more years of litigation against similarly-situated plaintiffs.

3. *Is there a policy basis for granting additional discovery to defendants, which are often multi-billion dollar corporations represented by experienced and successful law firms?*

No. Discovery should be fair to both parties. The adversarial system theoretically places both parties on equal footing (ignoring the greater resources and knowledge already available to defendants), and there is no national policy basis for favoring defendants by shifting their responsibilities to trusts, causing further damage to innocent victims and interfering with the operation of organizations set up to compensate those victims.

4. *Should the FACT Act contain additional measures to automatically provide the full extent of a defendant's liability to prospective and current claimants?*

The bill is irredeemably flawed and the most sensible course of action is for the Subcommittee to report the bill out unfavorably. However, should that not be an option, in order to make the best of a bad situation and achieve even-handed transparency, the Act should require any entity that has been sued for an asbestos-related personal injury to report the following

information, and it should include a private right of enforcement so that bureaucratic neglect will not prevent disclosure:

- all asbestos-related lawsuits brought against that entity;
- all jury verdicts if found liable for an asbestos-related injury;
- the amount of each settlement it makes for an asbestos-related injury, and the nature of the injury, and the place of exposure;
- every location it is aware of where its asbestos-containing products are located; and
- every entity to which it sold its asbestos-containing products.

5. *Are other witnesses here today affiliated with any institutions that would benefit from passage of the FACT Act?*

While it is inappropriate for me to comment on the affiliation of the witnesses, as a general matter, the institutions most likely to benefit from the FACT Act are asbestos defendants and their insurance companies, and, at least secondarily, the entities they employ in asbestos litigation (such as lawyers, consultants, and expert witnesses). Conversely, the victims and their families for whom I speak will be harmed by, and not benefit from, the Act.

Question from Subcommittee Member Suzan DelBene for Mr. Inselbuch

Mr. Inselbuch, you mentioned in your written testimony that asbestos defendants and insurance companies, are simultaneously pushing for both federal and state asbestos trust reform legislation. Can you explain how the FACT Act would work in conjunction with the proposed state bills that are currently being considered, or the Ohio legislation that you cited in your testimony?

This bill is part of a coordinated effort by asbestos defendants and their insurance companies to avoid or at least reduce their responsibility for the deaths and injuries of millions of Americans. In states where set-off regimes do not punish victims for first settling with trusts, the delays in trust payment will force dying plaintiffs, who are in desperate need of funds, to settle for lower amounts with solvent defendants. During my live testimony before the Subcommittee, I explained how delay matters to someone who is sick and dying from mesothelioma. They do not view the time value of money in the same way as a bank, insurer, or corporation. In an earlier case a test was run in which asbestos victims were asked whether they would prefer $50 now and $50 in three years, or $70 immediately, and notwithstanding the substantial discount they overwhelmingly chose the immediate $70 payment, to pay for their medical expenses and settle their affairs. Delay is a weapon for asbestos defendants.

In states where set-off regimes prevent victims from settling with trusts before resolving their tort system cases, the state laws drafted by ALEC, which would require trust resolutions

before the trial can be calendared, will enable defendants to shift the shortfall created by the insolvency of the trusts' predecessors from the remaining culpable defendants to the innocent victims, and, as an added bonus resulting from delay at the trusts, further delay trials in the tort system. If a plaintiff is forced to settle first with a trust, then, in a jurisdiction that calculates set-offs against verdict not by the amount of any settlement but by the relative fault of the settling party (here a trust) the victim's recovery against the tort defendants will be reduced by the shortfall. Delaying trial until all trust claims are resolved will further put victims at the mercy of the culpable tort defendants, and delaying trust resolutions is a double whammy.

Questions from Subcommittee Member Hakeem S. Jeffries for Mr. Inselbuch

Before voting on this Act in the Subcommittee, it would be helpful to receive answers from all the witnesses on the following items:

1. Whether systemic fraud does actually exist in asbestos trust claims.

Quite simply, charges of fraud on the asbestos trusts are not supported by facts. A study by the GAO, which was conducted at the behest of the former Chairman of this Committee,[56] found no fraud on the trusts, stating: "each trust's focus is to ensure that each claim meets the criteria defined in its Trust Distribution Procedures ("TDP"), meaning the claimant has met the requisite medical and exposure histories to the satisfaction of the trustees. Of the trusts officials that we interviewed that conducted audits, none indicated that these audits had identified cases of fraud."[57] The Judicial Conference's Subcommittee on Business Rules, reporting back to the Advisory Committee on Bankruptcy Rules on a proposal by the Chamber of Commerce to amend the Bankruptcy Rules to require so-called trust transparency, stated that "the comments [i.e., all the evidence and rhetoric presented by the Chamber in support of its proposal] have pointed only to anecdotal evidence of abuse."[58]

2. Whether the information that trusts require for settlements has been reevaluated within the last three years to determine whether it is adequate for sufficient transparency.

The information that a trust requires for settlement is set forth in its TDP. Initially, the TDP is typically approved by a bankruptcy court when it confirms a plan of reorganization. The TDP is then available to the public. In addition to courts that have approved similar TDPs during

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[56] U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (2011), *available at* http://www.gao.gov/assets/590/585380.pdf (hereinafter "GAO Report").

[57] *Id.* at 23.

[58] Memorandum from Subcomm. on Business Issues to Advisory Comm. on Bankruptcy Rules (Sept. 19, 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Bankruptcy/BK2011-09%20Addendum.pdf.

the last three years,[59] as I note in my answer to the previous question, both the GAO and the Judicial Conference's Subcommittee on Business Issues found no fraud.

As an aside, please note that the GAO reported that the Judicial Conference's Rules Committee suggested that "quarterly reporting requirements would not necessarily achieve the purpose of ensuring the integrity of the trust payment system by rooting out improper claim payments, and acknowledged that one person seeking and receiving payments from several trusts does not itself reveal impropriety."[60]

3. *An estimate of the funds and resources that would be required by trusts to create quarterly reports.*

After the Subcommittee's hearing on this bill, four substantial trusts – the Babcock & Wilcox Company Asbestos Personal Injury Trust, the Federal-Mogul Asbestos Personal Injury Trust, the Owens Corning/Fibreboard Asbestos Personal Injury Trust, and the United States Gypsum Asbestos Personal Injury Settlement Trust – submitted a supplemental letter on or about March 20, 2013 to the Subcommittee addressing the burden the Act would place on the trusts.[61]

The four trusts estimated that a trust like one of them receiving 10,000 claims per quarter and paying 5,000 of them over time would require experienced managers and claim reviewers to spend an aggregate of 20,000 hours per year on that trust's compliance with the Act – the equivalent of ten new full-time employees.[62] Contradicting Mr. Scarcella's testimony before the Subcommittee, the four trusts explain that the data for "exposure history" and "basis for payment" required by the Act can not be collected using pre-set data or information from a claim form, but must be extracted from a review of the supporting documentation submitted by the claimant.[63]

The quarterly reporting requirement alone would place this significant burden on the trusts. Moreover, the language requiring trusts to provide information on historical claims is so broad as to make the impact potentially vast and yet unquantifiable.[64]

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[59] *See, e.g.*, Findings of Fact and Conclusions of Law and Order Pursuant to Sections 1129(a) and (b) of the Bankruptcy Code and Rule 3020 of the Federal Rules of Bankruptcy Procedure Confirming Debtors' Second Amended Joint Chapter 11 Plan, *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. Mar. 29, 2011), ECF No. 9941; Order Confirming Debtor's Joint Plan of Reorganization, *In re W.R. Grace Co.*, No. 11-199 (D. Del. June 11, 2012), ECF No. 218; Order Regarding Confirmation Amended Joint Plan of Reorganization in Respect of the Flintkote Company and Flintkote Mines Limited, *In re Flintkote Co.*, No. 04-11300 (Bankr. D. Del. Dec. 21, 2012), ECF No. 7254.

[60] GAO Report at 32-33.

[61] *See* March 20, 2013 Campbell Letter.

[62] *Id.* at 2.

[63] *Id.* at 1-2.

[64] *Id.* at 2-3.

4. *Information on the types of safeguards and best practices are already built into asbestos trusts to address concerns of fraud. Information on safeguards and best practices that are built into other types of trusts to address concerns of fraud.*

The asbestos personal injury trusts have a number of safeguards built in to ensure that only people entitled to compensation – who were actually injured by products for which a trust bears responsibility – are paid. Indeed, one of the examples of alleged misconduct in the March 11, 2013 *Wall Street Journal* article was discovered and is being prosecuted by the asbestos trusts to which the supposedly questionable claims were submitted.

First, the trusts are managed by independent trustees, a number of whom are former judges,[65] who are appointed by the bankruptcy court at the time that the plan of reorganization is confirmed. These trustees, like the trustees of any other trust, have a fiduciary duty dating back to the Middle Ages extending to all beneficiaries of the trust, and must treat all equally, both present and future. They are charged with the responsibility to ensure that funds are paid only to the legitimate beneficiaries of the trusts.

Second, the bankruptcy courts also appoint a future claimants representative ("FCR") whose only role is to ensure the trust is managed so as to preserve funds to treat future claimants equivalently to present claimants. When the trust reconsiders its payment percentage (as it is required to do on a regular basis by its governing documents) the FCR will often retain a separate expert to ensure that the trust's estimation of the funds needed for future claimants is sufficient.

Third, the trusts regularly perform audits of claims to ensure that the claims which are being paid are legitimate. As the GAO noted, 98 percent of the trusts it studied had a claims audit program; none of the trust officials interviewed had identified fraud.[66]

I am not involved with non-asbestos trusts, and am unable to comment on their practices.

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[65] These retired judges include; Hon. Jack Marionneaux (Louisiana) (Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust), Hon. Ken Kawaichi (California) (multiple trusts); Hon. Robert Parker (5th Cir.) (DII Industries, LLC Asbestos PI Trust); Hon. Edward "Chip" Robertson, Jr. (Missouri) (multiple trusts); Hon. Dean Trafalet (Illinois) (multiple trusts); Hon. Alfred Wolin (D.N.J.) (multiple trusts).

[66] *See* GAO Report at 22-23.

**Response to Questions for the Record from Marc Scarcella,
Bates White, LLC**

ANSWERS FOR THE RECORD BY MARC SCARCELLA
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H.R. 982, THE "FURTHERING ASBESTOS CLAIM TRANSPARENCY ACT OF 2013"

BEFORE THE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

MARCH 13, 2013

Questions for the Record
From the March 13, 2013 Hearing on
H.R. 982, the "Furthering Asbestos Claim Transparency Act of 2013"

Question from Subcommittee Member Suzan DelBene for Mr. Scarcella

1. **From the victims' statements I have read and the victims' advocates with whom I have met, I have not become aware of any victims who are suggesting that this legislation will advance the goal of ensuring a fair process that provides equitable compensation for victims of asbestos exposure. In what ways, if any, have your views on this legislation been shaped by consultation with victims or victims' advocates?**

   I have not personally consulted with any victims or victim advocates regarding the FACT Act.

Questions from Subcommittee Member Hakeem S. Jeffries for Mr. Scarcella

1. **Whether systemic fraud does actually exist in asbestos trust claims.**

   It's difficult to measure levels of fraud in a system that has no transparency and, in general, does not allow for external or inter-trust audits. I believe that further transparency will uncover questionable and potential fraudulent claiming behavior by plaintiffs' counsel.

2. **Whether the information that trusts require for settlements has been reevaluated within the last three years to determine whether it is adequate for sufficient transparency.**

   The information that trusts require for settlement can be easily disseminated through the quarterly reporting requirements of H.R. 982 without presenting a significant burden on the trusts. Trusts and claim processing facilities collect, store, process, evaluate and pay claims electronically with sophisticated systems that allow for data extraction at both a detailed and broad level.

3. **An estimate of the funds and resources that would be required by trusts to create quarterly reports.**

   Based on my extensive experience both preparing trust data for external third party requests as the former quantitative data analyst and statistician for the Manville Personal Injury Trust, as well as a consultant that received trust data on a regular basis in order to conduct analysis, I believe the quarterly reporting requirements can be met at minimal cost.

   The Manville Personal Injury Trust's data production process is instructive in this regard. Manville offers a data extract of claim level information for $1,000.[1] The Manville trust has made this data, which contains over 800,000 claim records and dozens of fields of information, available to *select*[2]

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[1] Manville Trust Single Use Data License Agreement: http://www.claimsres.com/documents/MT/DataAgreement.pdf

[2] Currently the Manville Trust only considers distribution of individual claims data to professionals engaged by another trust exclusively for aggregate analyses for the other trust and to professionals who have been retained to estimate asbestos liabilities in a court proceeding involving a bankruptcy plan. - *See* Manville Trust. Distribution of Manville Trust Data for Use Solely by Other Trusts: http://www.claimsres.com/documents/MT/DataPolicy.pdf

third parties. However, this charge does not necessarily represent the actual cost of producing the data, as it is likely less. In fact, based on my own experience as the quantitative data analyst and statistician for Manville's claims processing facility during 2001 and 2002, I believe the trust funds and resource expenditures required to produce a large dataset are minimal. I was able to respond to third party requests and produce data extracts in a matter of hours or even minutes, depending on the scope of the request. The efficiency trusts have achieved by developing electronic claim database systems makes generating data extracts an inexpensive process and expeditious process.

As I mentioned in my response to Question 2, trusts' claims data can be extracted with relative ease because trusts and claim processing facilities collect, store, process, evaluate and pay claims electronically with sophisticated systems that allow for data extraction at both a detailed and broad level.

4. Information on the types of safeguards and best practices are already built into asbestos trusts to address concerns of fraud.

I believe the trust system operates without the appropriate level of public accountability that is necessary for properly identifying fraudulent or specious claiming practices. In my experience, the audit procedures leveraged by many trusts focus on reviewing the medical data that has been submitted for compliance with the trusts' distribution procedures without comparing exposure allegations made across multiple trust and tort claims. Inter-trust comparisons and tort comparisons would allow inconsistencies and fraudulent claiming practices to be identified.

Section 5.8 of the Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures provides an example of the types of medical audits the trust will conduct.

*"**Claims Audit Program.** The PI Trust with the consent of the TAC and the Future Claimants' Representative may develop methods for auditing the reliability of medical evidence, including additional reading of X-rays, CT scans and verification of pulmonary function tests, as well as the reliability of evidence of exposure to asbestos, including exposure to AWI Products/Operations prior to December 31, 1982. In the event that the PI Trust reasonably determines that any individual or entity has engaged in a pattern or practice of providing unreliable medical evidence to the PI Trust, it may decline to accept additional evidence from such provider in the future.*

Further, in the event that an audit reveals that fraudulent information has been provided to the PI Trust, the PI Trust may penalize any claimant or claimant's attorney by disallowing the PI Trust Claim or by other means including, but not limited to, requiring the source of the fraudulent information to pay the costs associated with the audit and any future audit or audits, reordering the priority of payment of all affected claimants' PI Trust Claims, raising the level of scrutiny of additional information submitted from the same source or sources, refusing to accept additional evidence from the same source or sources, seeking the prosecution of the claimant or claimant's attorney for presenting a fraudulent claim in violation of 18 U.S.C. § 152, and seeking sanctions from the Bankruptcy Court."

In fact, many trusts have adopted procedural language explicitly stating that they are not concerned with inconsistent claiming behavior. For example, Section 5.7(b)(3) of the Babcock & Wilcox Company Asbestos PI Settlement Trust Distribution Procedures includes the following language:

"...failure to identify B&W products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of this TDP."

Based on this evidence, it seems that while the trusts may adequately identify potential medical fraud, they are severely lacking processes for identifying inconsistent and potentially fraudulent exposure

allegations across multiple trust and tort claims. In the absence of a mechanism that will allow trusts to cross-reference the claiming allegations made to other trusts, inconsistent and specious claiming will go unchecked. By establishing transparency across trusts as it relates to the demands and corresponding exposure allegations supporting those claims, the FACT Act will offer a necessary check and balance to the bankruptcy system, discourage inconsistent claiming across trusts, and preserve trust assets for legitimate claimants. Moreover, it will do so in a cost-effective manner that will not drain funds for claimant compensation.

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