

**FURTHERING ASBESTOS CLAIM TRANSPARENCY
(FACT) ACT OF 2015**

HEARING
BEFORE THE
SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

H.R. 526

FEBRUARY 4, 2015

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OFFICIAL HEARING RECORD

MATERIAL SUBMITTED FOR THE HEARING RECORD BUT NOT REPRINTED

GAO Report, GAO-11-819, entitled Report to the Chairman, Committee on the Judiciary, House of Representatives, September 2011, Asbestos Injury Compensation, The Role and Administration of Asbestos Trusts. This report is available at the Subcommittee and can also be accessed at:

<http://www.gao.gov/products/GAO-11-819>

**FURTHERING ASBESTOS CLAIM
TRANSPARENCY (FACT) ACT OF 2015**

WEDNESDAY, FEBRUARY 4, 2015

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

The Subcommittee met, pursuant to call, at 1:04 p.m., in room 2141, Rayburn Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Farenthold, Issa, Walters, Ratchliffe, Trott, Bishop, Johnson, Conyers, DelBene, Jeffries, Cicilline, and Peters.

Staff present: (Majority) Anthony Grossi, Counsel; Andrea Lindsey, Clerk; and (Minority) Susan Jensen, Counsel.

Mr. MARINO. Good afternoon. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order, and without objection, the Chair is authorized to declare a recess of the Committee at any time. And just to give you a little head's up, in about 15 or 20 minutes, that bell is going to ring, and we will have to go vote, and it should not be that long. I think we only have a couple of votes, and I apologize for the inconvenience.

We welcome everyone to today's hearing on the "Furthering Asbestos Claim Transparency Act of 2015," known as the "FACT Act." This morning, I am going to recognize myself for an opening statement, and then I am going to give my good friend, Mr. Hank Johnson, the opportunity for his opening statement.

This morning, the Subcommittee meets to examine H.R. 526, the "Further Asbestos Claim Transparency Act of 2015," or the "FACT Act." This legislation is aimed at preventing fraudulent activity within the asbestos bankruptcy trust system. Following the first successful tort lawsuit against an asbestos defendant in the 1970's, asbestos litigation dramatically increased to the point that the Supreme Court described the ongoing lawsuit as an, and I quote, "asbestos litigation crisis."

Under the backdrop of increasing asbestos claims and an expanding defendant population, courts and parties initiated several attempts to achieve a comprehensive resolution to asbestos litigation. Notwithstanding these efforts, no resolution has been reached. Likely due to the absence of a comprehensive resolution to the on-

slaughter of asbestos litigation, companies closed their doors with great cost to the economy and their employees. Estimates of the cost of asbestos litigation and the ensuing bankruptcies ranged from between \$1.4 and \$3 billion, coupled with a loss of approximately 60,000 American jobs.

To allow some companies to emerge from bankruptcy and continue their business operations, Congress amended the Bankruptcy Code. The amendment includes a provision, Section 524(g), which forges what is a simple compromise. A company can receive a permanent injunction against all of its asbestos liability claims if it funds a trust in an amount sufficient to pay all present and future asbestos claims. A product of bankruptcies that use Section 524(g) is a negotiated resolution. A company can continue generating jobs and income for the economy with the certainty that it will no longer face asbestos liability. Asbestos claimants will have confidence in a dedicated pool of money that is reserved to compensate them for their injuries.

Over the past several years, however, the Committee has heard complaints regarding the asbestos bankruptcy trust system. These complaints have focused on the ability of plaintiffs' firms to exert considerable control over the formation and operation of the trust, the dramatic reduction in transparency from these asbestos trusts, and troubling reports of fraudulent activity occurring as a result. The fraudulent activity follows a similar pattern where plaintiffs' firms file claims against a bankruptcy asbestos trust claiming injury with one set of facts. The plaintiffs then file claims against defendants in State court based on different and sometimes conflicting sets of facts. This conduct is calculated to exploit the opaque nature of bankruptcy asbestos trust operations.

Furthermore, fraud of this variety drains the finite funds set aside in these asbestos bankruptcy trusts so that when future asbestos victims start to develop symptoms and look to the trusts for compensation, their recoveries may be diminished dramatically.

I support the Vice-Chairman of the Subcommittee, Mr. Farenthold, for introducing the FACT Act, and I am an original cosponsor of this important legislation that will increase transparency in the asbestos bankruptcy trust system, and allow these trust funds to protect against fraudulent activity. Critics of this legislation have raised concerns that this bill imposes an undue burden on the asbestos trust. Critics also allege that it infringes on asbestos victims' privacy, and is not necessary because the critics allege fraud does not exist in the bankruptcy asbestos trust system. These concerns should be carefully evaluated.

Thankfully, we have an excellent panel of witnesses before us today who will help us build upon the Committee's extensive record in support of this measure, and address the concerns that have been raised by critics of the legislation. I look forward to their testimony.

[The bill, H.R. 526, follows:]

114TH CONGRESS
1ST SESSION

H. R. 526

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

JANUARY 26, 2015

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

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

1 **SEC. 2. AMENDMENTS.**

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

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

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

10 “(i) describes each demand the trust re-
11 ceived from, including the name and exposure
12 history of, a claimant and the basis for any
13 payment from the trust made to such claimant;
14 and

15 “(ii) does not include any confidential med-
16 ical record or the claimant’s full social security
17 number; and

18 “(B) upon written request, and subject to pay-
19 ment (demanded at the option of the trust) for any
20 reasonable cost incurred by the trust to comply with
21 such request, provide in a timely manner any infor-
22 mation related to payment from, and demands for

23

1 **SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.**

2 (a) EFFECTIVE DATE.—Except as provided in sub-
3 section (b), this Act and the amendments made by this
4 Act shall take effect on the date of the enactment of this
5 Act.

6 (b) APPLICATION OF AMENDMENTS.—The amend-
7 ments made by this Act shall apply with respect to cases
8 commenced under title 11 of the United States Code be-
9 fore, on, or after the date of the enactment of this Act.

Mr. MARINO. I now recognize the Ranking Member, Mr. Johnson, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman. And, Mr. Chairman, at this time, I know that the Ranking Member of the full Committee, Mr. Conyers, has some pressing business. And so I will yield to him insofar as his opening statement is concerned, and I would like the opportunity to make my own once he concludes.

Mr. CONYERS. Thank you so much, Ranking Member Johnson. I appreciate your kindness. We are all under time constraints here. I mean, the Committee is full of them. But before I make my remarks about the subject, I just wanted to congratulate our colleague, Tom Marino, on his new role as Chairman—

Mr. MARINO. Thank you, sir.

Mr. CONYERS. Congratulations, sir, on the Subcommittee of Regulatory Reform, Commercial and Antitrust Law. And I look forward to working with him and hope that he will continue in the spirit of collegiality that his predecessor, Spencer Bachus, exemplified during his tenure as Chairman of the Subcommittee, and I know that he will.

And I also see the widow of our former colleague, Bruce Vento, Mrs. Sue Vento, here and present, and I wanted to thank her for coming, acknowledge her presence here in the Judiciary Committee. Bruce Vento represented the 4th District of Minnesota for almost 24 years until his death from mesothelioma, a form of cancer in the lining of the chest cavity often linked to exposure to asbestos fibers. Many of us remember Bruce fondly, a tireless champion of the American worker, the environment, and the homeless. And so, I am very pleased that Mrs. Vento has chosen to continue his fight, their fight, against those who do harm.

I also note that she is joined by a number of asbestos victims, as well as family members who have lost relatives as a result of their exposure to asbestos. Will all they just stand up for one moment, please?

[Audience members stand.]

Mr. CONYERS. I did know it was that many. Congratulations. Thank you. And I am sure everyone on this Subcommittee appreciates your presence here. You may sit down, please. I understand that among them, there are both Democrats and Republicans, and you come from across the United States, so welcome again. And in spite of your suffering and personal loss, you are here today to help enlighten us about your concerns regarding this legislation. You are all to be commended, and we are glad that you are here. I also want to note the presence of our distinguished witnesses.

I just want to mention before I yield back that H.R. 526, the “Further Asbestos Claim Transparency Act,” commonly referred to as the “FACT Act,” gives asbestos defendants new weapons with which to harm asbestos victims. It imposes invasive disclosure requirements that would threaten asbestos victims’ privacy when they seek payment for injuries from an asbestos bankruptcy trust.

The bill would require disclosure of claimants’ sensitive personal information, including their names and exposure histories when they seek payment for injuries from these trusts. This means asbestos victims will be re-victimised by allowing this highly personal and sensitive health information to be irretrievably released into

the public domain. Just imagine what insurance companies, prospective employers, lenders, data collectors, and others could do with this private information. Worse yet, these asbestos victims would be more vulnerable to predators.

Although H.R. 526's supporters claim that it is intended to help victims of asbestos exposure, asbestos victims vigorously oppose H.R. 526. In fact, I am not aware of a single victim who supports this bill. And so, it is a proposal that is fundamentally inequitable and requires these bankruptcy asbestos trusts to make certain disclosures that imposes no comparable demands on asbestos victims. Remember, these are the very companies whose products killed or injured millions of Americans. In fact, some manufacturers intentionally concealed information about the known risk of asbestos exposure, and used every trick in the book to avoid liability. They even fought the Federal Government's effort to ban use.

And so, as a result, asbestos continued to be widely used in constructing our homes, offices, public schools, and even this very building in which we are all gathered today. But now, the very manufacturers want Congress to help them by passing H.R. 526, which effectively shifts the cost of discovery away from these defendants to asbestos bankruptcy trusts. So, while today's majority witnesses may claim that the asbestos trust system is rife with fraud, I think we will find out that there is very little merit to this assertion.

And so, I will in closing note that several organizations—the Military Order of the Purple Heart, Asbestos Disease Awareness Organization, AFL-CIO, the Public Citizen Environmental Working, among others—all oppose the legislation. And I yield back my time, and thank the Chairman for his generosity.

Mr. MARINO. You are welcome. Thank you, Mr. Conyers. The Chair now recognizes the Vice-Chairman of the Subcommittee, Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much, and I will be brief. This bill is designed to protect future victims of asbestos, or victims who have not yet discovered their injury. There are limited resources in these trusts. It is designed to prevent double dipping. It is designed to prevent fraud as a result of filing suits in multiple cases.

There is a long history of abuses within the asbestos litigation system, a lot of which were brought to light in the district that I represent in Corpus Christie where Judge Jan Jack discovered massive abuses. We are just trying to get the facts out. We are not asking anybody who is a victim who gets a claim from a trust to give any more information than they would give in pleadings in a typical lawsuit. All we are trying to do here is set up a system of transparency where we know if you have been injured and been compensated, it keeps unscrupulous plaintiffs' attorneys, and, in some cases, unscrupulous alleged victims from double dipping.

This is just simple get the facts out there so the lawyers and the courts all know what is going on. It is a simple, short, 2-page bill, 3 pages if you count the header. And all it asks for is a disclosure of information that would normally be available in pleadings. It is a quick, easy step to solve a problem and preserve limited resources in these trusts for as yet undiscovered victims. I will yield back.

Mr. MARINO. Thank you, Mr. Farenthold. The Chair recognizes the Ranking Member, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. Before I begin, I would like to take a moment to congratulate you on your new position as Chairman of this very important Subcommittee. I enjoyed a terrific relationship with your predecessor, Congressman Bachus, and I look forward to continuing that relationship with someone that I consider a close colleague and a personal friend. Although we will not see eye-to-eye on every issue, I look forward to working closely with you on important matters this Congress.

Turning to the substance of today's hearing, I have serious concerns with the so-called FACT Act. It is actually a very small compact Trojan horse piece of legislation that is quite dangerous to the ability of claimants to, particularly those in the future, to get an adequate recovery for the harm that was done. And I think all of you people here, victims and the families of victims, have probably been called perpetrators, malingerers, and fraudulent individuals trying to make a dollar off of something that you should not even be, you know, trying to get. But I recognize you as people who have been aggrieved, and this court system is the place to go to receive the relief that you are due.

Not only does this bill create a major hurdle for families already facing the insurmountable fight against asbestos-related disease, it also violates their privacy by publicizing sensitive information about claimants. This information is already discoverable if relevant to a claim or defense at trial. As written, little would stop this litigation from allowing third parties to collect and monetize claimants' medical history, or use this information to discriminate against victims and their families.

Federal or State rules of civil procedure already allow a defendant to gain all relevant information about a claimant's exposure during discovery. Defendants are often wealthy corporations represented by experienced, powerful litigators who have the knowledge and resources to handle discovery. They get paid well to do so. But even if both parties 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? This question is especially troubling when we stop to consider the equities of these actions where defendants and claimants are rarely on equal footing during discovery, or any other stage of the litigation.

Rather than providing for broader transparency for both parties in litigation, the FACT Act creates significant hurdles for asbestos victims while doing nothing to address the other party to the litigation. If we remove the rhetoric behind the FACT Act, all we are left with is legislation that creates an asbestos death database with the sole purpose of allowing Honeywell, Koch Industries, and the two largest asbestos insurers, Berkshire and Mutual, to easily gain or easily access other asbestos corporations' kill lists so they can determine if asbestos victims are getting what they view as too much justice and if there is way they can nickel and dime the families they have devastated.

That is what this bill is all about. It is a Trojan horse. It guarantees the asbestos industry and its insurers, it guarantees that they pay as little to their victims as possible. That alone is offensive, but

the way the bill achieves this objective is morally reprehensible. Moreover, for the second straight Congress, the majority has ignored and disregarded the hardships and testimony of asbestos victims and families. Not one victim or their family is seated at this table today to give testimony. At no point were victims or family members invited to testify about a bill that would seriously affect their lives. After retracting a promise to these families last Congress, I am disappointed to report that the majority has again shut the doors to these families to testify on the real effects of this bill. But these problems are only the tip of the iceberg when it comes to my concerns about the FACT Act.

In closing, although I welcome Chairman Marino and look forward to working with him on many important issues this Congress, I must respectfully voice my deep opposition to this legislation. And with that, I yield back.

Mr. MARINO. Thank you, Mr. Johnson. I am going to declare a recess in a moment, but I would like to bring out a point that my good friend brought out before, just in his comments. The procedure has been when the Democrats were in control and we have four people at the panel, whoever is in control invites three, and the other side invites one. We have continued with that under my chairmanship. We invited three. The other side invited one. The Democrats could have invited any one of you or anyone else—victim—to come and testify. They chose not to. They chose to have the attorney that represents the attorneys in these cases testify, so I want to make that perfectly clear. You could have been invited by my colleagues on the other side of the aisle. They chose not to.

I am going to declare a recess at this point, and we will be back within 20 or 25 minutes. We have two votes, and then we will introduce our witnesses.

[Recess.]

Mr. MARINO. The hearing will now resume. Without objection, the other Members' of the Committee opening statements will be made part of the record.

We have a very distinguished panel today, and I will begin by swearing in our witnesses before introducing them. So, if you would, please all rise. Raise your right hand.

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

[A chorus of ayes.]

Mr. MARINO. Let the record reflect that all the witnesses responded in the affirmative. Thank you. Please be seated.

I would like to introduce from my left to right, first Mr. Inselbuch. Is that correct, sir? Okay. Mr. Inselbuch practices law at Caplin & Drysdale New York offices. He has 30 years of experience practicing on behalf of asbestos plaintiffs' bar, and was first retained in that capacity in a landmark asbestos bankruptcy case of Johns Manville in 1985. He has represented the asbestos plaintiff's bar in a number of complex bankruptcies, including those of W.R. Grace, Babcock & Wilcox, Pittsburgh Coining, and Armstrong World Industries.

Mr. Inselbuch earned his undergraduate degree from Princeton University, his law degree from Columbia University, and a mas-

ters of law degree from the New York University School of Law. Welcome, sir.

Mr. Vari is a partner at the Pittsburgh office of the law firm of K&L Gates, where he specializes also in asbestos litigation. He has over 25 years of asbestos litigation experience in both trial and appellate courts in a number of States, including: California, New York, Illinois, Pennsylvania, Texas, Massachusetts, Michigan, and Ohio. Mr. Vari has been recognized repeatedly for the quality of his work, including being named one of the best lawyers in America and the Pennsylvania Super Lawyer.

Mr. Vari earned his undergraduate degree in finance from the University of Akron and his law degree, summa cum laude, from the University of Akron School of Law, where he was the managing editor of the Law Review. Welcome, sir.

Mr. Scarcelli—correct pronunciation?

Mr. SCARCELLA. Close enough.

Mr. MARINO. Okay. What is it?

Mr. SCARCELLA. Scarcella.

Mr. MARINO. Scarcella.

Mr. SCARCELLA. Scarcella, yes.

Mr. MARINO. Okay. Mr. Scarcella—I apologize—is an economist and principal with Bates White Consulting Firm. He has over 10 years of experience in economic consulting related to asbestos litigation, and has extensive knowledge of the Administration and operation of asbestos bankruptcy trusts. Additionally, Mr. Scarcella regularly provides his expertise to ongoing asbestos litigation suits, and has served as an expert witness in over 50 individual asbestos-related cases.

He earned his bachelor's degree in both economics and public affairs, as well as a master's degree in economics from American University. Again, welcome, sir.

Mr. Brickman is a former acting dean and professor of law at Benjamin N. Cardozo School of Law at Yeshiva University. He is a leading scholar and expert on asbestos litigation. Professor Brickman has published numerous articles, spoken on many panels, and testified frequently before governing bodies and courts on the issues related to asbestos litigation.

Professor Brickman earned his bachelor of science degree in chemistry from Carnegie Tech, his law degree from the University of Florida where he was a member of the Law Review and graduated Order of Coif, and a master's of law degree from Yale University where he was a Sterling Fellow.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each of you witnesses summarize your testimony in 5 minutes or less. And to help you stay within the time, there is a timing light in front of you. Now, I do not know how good I am going to be about this because I am color blind, and I cannot see the last two. They look they are on or off all the time. The light will switch from green to yellow indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired. And what I will do is if we get to that red light, when someone nudges me, I will just politely do a little tap and give you a hint to please wrap up.

Okay. We are going to start with Mr. Inselbuch's testimony. Sir, please make sure the microphone is on and pulled up to you. Sir, I think you may have to push that button on that microphone in front of you. The light should come on.

Mr. INSELBUCH. Yes.

Mr. MARINO. Okay, good. Now, we can hear you. Thank you.

**TESTIMONY OF ELIHU INSELBUCH, MEMBER,
CAPLIN & DRYSDALE, CHARTERED, NEW YORK, NY**

Mr. INSELBUCH. Thank you, Mr. Chairman. The Committee press release says, the "FACT Act reduces fraud in the asbestos bankruptcy system through increased transparency measures." The Committee has been led to believe there is fraud. Presumably claims are being paid by trusts based on false information, depleting the pool of funds available for legitimate claimants.

Nothing could be further from the truth. I know. Unlike these other witnesses, my work involves regular interaction with many asbestos trusts. No one, certainly not any of these witness, has provided a listing of any such fraudulently paid claims.

Who is telling you this and asking you to help the trusts help themselves and their victims? Not one trust or trustee, not one victims group, not one victim. There are real victims sitting behind me in this room today. Ask them how this bill would help them. No, this bill comes through the United States Chamber of Commerce on behalf of the asbestos companies and their insurers. They presume on your goodwill here and are selling a false bill of goods.

Increased so-called transparency is apparently only a one-way imperative for asbestos corporations because nothing in the act would require asbestos defendants to provide transparency for all the settlements that they demand be held confidential and hidden from public view. Presumably, asbestos defendants do not want asbestos victims to know what they paid to other victims to resolve their conduct.

And whose private information becomes public? Thousands of your constituents, many aging veterans, who might prefer the world not know who they are, where they live, that they are sick, that they have recently resolved a claim, and are in possession of funds. And who pays for this transparency? The victims themselves. As Mr. Campbell's letter attests, "Compliance with this act will cost the trust millions of dollars each year on Section A alone, with no possible estimate for Section B." Mr. Scarcella disagrees, but he has never worked at any of the trusts in question, and his long-ago experiences at the Manville trust hardly qualifies him to contradict the people who will actually do the work.

A word about double dipping. Mr. Vari and his defense colleagues are insulting the intelligence of those members who have law degrees, and presuming on the ignorance of the tort law of those who do not. First, it is imperative that the Committee Members understand this point. Each trust only pays its respective defendant's share of the harm caused to a victim, meaning that there is absolutely no opportunity to double dip because each trust and each settling defendant in the tort system only pays for their portion of the harm caused. No one defendant or trust pays for the harm caused by another trust or defendant.

Also, as the tort law makes clear, an injured person can sue and collect from each and every person or entity who culpably caused that injury. Asbestos victims are individuals exposed during their employment history to dozens of asbestos-containing products, and recover from each and every entity responsible. Typically, over 99 percent of the time, all the claims are settled with tort system defendants and with trusts. What the victim receives is the total sum of those settlements, and there is no standard by which to measure how well or how poorly compensated he or she has been.

Only in the very rare circumstance that a case goes to verdict has a victim been compensated in full. Mr. Vari knows about cases like this, at least in New York where his client, Crane Company, went to verdict and was found not only liable, but recklessly so. And only after such a verdict has been paid to a victim, and, of course, the jury finding is always reduced by any settlement amounts already received by the victim, if a victim then sought and obtained recovery from a trust, could there be even a possibility of so-called double dipping. But this does not ever happen because after satisfaction of the rare verdict, the defendant steps into the shoes of the victim and can on its own behalf pursue any unpaid trust claims.

So why are we here? If the act will not force the trust savings, and if no trust or victims group wants this, who does and why? I can only surmise that the bill sponsors believe by trumping long-developed State law and obtaining information on hundreds of thousands of their victims, asbestos corporations will be able to pay less for the injuries and deaths they have caused. You should not help them. Thank you.

[The prepared statement of Mr. Inselbuch follows:]

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Hearing: February 4th, 2015
H.R. 526, the “Furthering Asbestos Claim
Transparency (FACT) Act of 2015”

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

I would like to thank Subcommittee Chairman Marino, Ranking Member Johnson and the members of this Subcommittee for the opportunity to testify on H.R. 526, the “Furthering Asbestos Claim Transparency (FACT) Act of 2015.” 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 has 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. Since then I’ve represented the interests of claimants in a number of large asbestos-related bankruptcies and class actions, including, for example, Jim Walter Corp., Fibreboard, Raytech Corporation, Babcock & Wilcox, Pittsburgh Corning, Armstrong World Industries, G-I Holdings, and W.R. Grace. In addition, I serve as counsel to a number of the Trust Advisory Committees appointed under plans of reorganization in asbestos-driven bankruptcies to serve as fiduciaries to the trusts created by the plans.

As a result of this work, I’ve become intimately familiar with the horrors of the asbestos-disease epidemic, this country’s systematic attempts to grapple with how to compensate such large numbers of victims over decades of disease, and the operations of the asbestos trusts.

I. Summary

H.R. 526, the FACT Act of 2015, 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 for decades have been determined liable for recklessly and willfully exposing unknowing workers and their families to the companies’ 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 you would not be sitting here today.

What many people do not realize is that the asbestos-disease epidemic is the longest-running public health epidemic in our history. Asbestos exposure kills thousands of Americans every year and because asbestos has yet to be banned in this country, 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 denied 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, how it works, and the false belief that there is significant fraud in the asbestos trust system.

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.² 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.³ The most serious asbestos-related disease is mesothelioma, a virulent cancer of the lining of the chest cavity that can be caused by even a short period of exposure, and is inevitably painfully fatal, often within months of diagnosis.⁴ Other illnesses caused by asbestos include lung cancer, asbestosis, and pleural diseases.⁵ 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 1979.⁶ 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,⁷ and in some cases until 2000.⁸ Asbestos diseases have long latency periods; a person exposed while working may not fall ill for forty years or fifty years, or even longer.⁹ 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.”¹⁰ 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.”¹¹ 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.¹²

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.”¹³ Angered by evidence that information about the dangers of asbestos had been suppressed, juries began awarding large punitive damages.¹⁴

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.*¹⁵ *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.¹⁶ Recognizing that because of the very nature of their employment 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.¹⁷ The overwhelming majority of courts throughout the country have accepted the legal principles set out in *Borel*.¹⁸

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.¹⁹

III. The Creation of The Asbestos Trust System

Epidemiology makes clear that thousands of people each year for decades to come will fall ill and die as a result of asbestos exposure. The overwhelming numbers of people who asbestos manufacturers made sick and who are dead or dying from exposure to their asbestos-containing products and the large numbers of future claims have required many asbestos manufacturers to resort to bankruptcy to deal with these claims. Private asbestos 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. Asbestos corporations are required to fund asbestos trusts in order to pay victims before they can emerge from bankruptcy free and clear of all asbestos liability.

a. Manville

The Johns-Manville Corporation was the largest manufacturer and distributor of asbestos products in the United States in the twentieth century. Manville officers and directors knew of the dangers of asbestos since at least 1934, and in concert with other industry members 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 1982.²⁰ 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 plan²¹ — 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.²²

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.²³ As Senator Brown then 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.”²⁴

Section 524(g) satisfies due process concerns with respect to future claimants by providing for appointment of a legal representative to protect their interests.²⁵ 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.²⁶ 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 Inc., the Babcock & Wilcox Company, Halliburton (Dresser Industries), Owens Corning Corporation, and United States Gypsum.²⁷

IV. Asbestos Trusts and Victim Compensation Today

According to the GAO, as of 2011, there were sixty private asbestos trusts.²⁸ 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.²⁹ 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.³⁰ 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 a liquidated settlement value for his or her claim discounted by the payment percentage.³¹ The functioning of the trusts approximates the process through which lawsuits in the tort system are settled.

An asbestos trust is a private trust; there are no government monies involved. Each private 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.³² 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.³³ The Trust Agreements and TDPs are publicly available information.

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.³⁴ 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. In other words, each private asbestos trust is responsible only for its debtor’s portion of the harm caused; trust payments do not take into account harm caused by any other wrongdoer.

For a claimant to recover from an asbestos trust, he or she must provide all of the information required by that trust. This typically includes 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.³⁵ 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.³⁶

These criteria are combined with audit programs to ensure that the trusts do not pay fraudulent claims.³⁷ The trusts do not pay every claim that is filed, but routinely reject those that are deficient.³⁸ Indeed, in my experience, nearly half of the claims filed with trusts go unpaid. 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 an asbestos defendant in the state tort system while filing claims against (and potentially receiving payment from) multiple trusts is not abusive; indeed, it is fully appropriate and the only route through which the claimant can be fairly compensated. As the Fifth Circuit reflected in the *Borel* case many years ago, 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 for its portion of the harm caused.

The private asbestos trusts replace asbestos defendants after those defendants go through the 524(g) process, and are a settlement vehicle. The trusts are not tort defendants; rather, they settle claims created by the liability of their 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 invariably a small fraction of the tort system recoveries. The GAO survey found the median payment percentage across trusts is 25%.³⁹ 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 illustrates some of this data. This information is publicly available.

Sample Trust Recoveries⁴⁰

Trust	Payment %	Scheduled Value — Mesothelioma	Paid to Claimant
AWI	35%	\$110,000	\$38,500
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	6.25%	\$350,000	\$21,875
OC	8.8%	\$215,000	\$18,920
USG	20%	\$155,000	\$31,000

As shown, none of these major trusts have the funds to pay the full scheduled value to all present and future claimants. Indeed, most recoveries are quite small. For example, recovering from all of the trusts listed above would yield a claimant roughly \$167,000.

V. Myths and Facts About Asbestos: What Asbestos Companies Want You to Believe

a. The Myths

Most recently, these asbestos defendants have created a myth of victim 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.

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 has been adopted in Ohio, Oklahoma, and Wisconsin. While these proposals masquerade as mechanisms

designed to advance evenhanded justice, they are, in fact, obvious efforts by asbestos defendants to do an end-run around uniform rules of discovery in the tort system, reverse principles of tort law established hundreds of years ago, and delay and deny fair compensation to victims and their families.

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.⁴¹ Outrageously, ALEC is funded as a tax-exempt charity, although the IRS has 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.⁴² In addition, ALEC has coordinated the state effort through introduction of the “Asbestos Claims Transparency Act,” which seeks to further limit the ability of victims to recover.⁴³

b. The Facts

First, there is nothing inappropriate or illegal with an asbestos victim filing a claim against multiple asbestos corporations as it is almost always the case that a victim’s disease was caused by exposure to a number of different asbestos corporations’ products. This is no different than if a victim is mugged by five criminals; each of those criminals would be prosecuted for the crime because each is responsible for causing harm. But by an asbestos corporation’s logic, so long as one criminal can be prosecuted for the group mugging, the remaining four criminals should be allowed to go free.

Second, it is a fundamental principle of American tort law that an injured person can recover damages from every entity that has harmed him. This is especially necessary in asbestos cases because it is scientifically impossible to look at a picture of a person’s lungs and identify which asbestos product ultimately led to a person’s death; rather, science tells us that it is the cumulative exposure to all asbestos products over the course of a person’s life that leads to disease.

Once a victim files a claim against the group of asbestos corporations responsible for causing harm, and litigation progresses, a victim 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 to account for payments by settling co-defendants or bankruptcy trusts), is the victim’s claim fully satisfied.

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 victim 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, and the situation was remedied by the state court. Thus, despite asbestos companies' claims, there is no "double-dipping" problem that needs to be fixed. Indeed, in the rare case where a judgment is paid, the defendant who paid the judgment succeeds by law to any rights of claims remaining to the plaintiff, including claims against trusts.

i. There Is No "Double Dipping"

Supporters of these recent proposals claim that "transparency" is necessary to prevent "double-dipping" on the part of victims — 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. Strikingly, while "transparency" is sought here for settlements victims reach with private asbestos trusts, no "transparency" is sought by asbestos corporations for settlements victims reach in the tort system with defendants. Surely, if the goal were to truly identify the sum of settlements received by any one victim, the tort system settlements which these same defendants demand be held confidential would have to be included.

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 a private trust's formation, it operates in the same manner as a company that is reorganized as part of a bankruptcy. The trusts are governed by applicable state law and their trust agreements, which are public documents approved by a federal bankruptcy judge. 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 myriad asbestos exposures and 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 cases have 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 victims — hundreds of thousands of victims — 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 victims. An individual victim often does not know what corporations provided the asbestos products present at a site where he worked decades earlier. 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 victims' memories. And the evidence is widely available. For defendants to claim that having access to victims' individualized, personal trust claim information would solve a problem, therefore, is false. Should a defendant wish to lay off liability on an asbestos trust or other asbestos corporation, 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 victims do, and can prove the fault of the absent asbestos corporation as easily as plaintiffs originally could. Defendants can obtain, for example, the victims' work histories, employer records, and depositions of the victims and co-workers to determine the asbestos-containing products to which the victims 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 victim's work history.⁴⁴

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

States have different rules about how and when multiple wrongdoers are held accountable, 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 victim or defendant bears the risk of another responsible defendant'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 victim cannot recover that defendant's liability share from co-defendants; the victim bears the loss.⁴⁵ 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 in order to reflect settlement payments a victim has recovered from other tort system defendants and trusts.⁴⁶

VI. H.R. 526, The "FACT Act": A Solution In Search of A Problem

The FACT Act's provisions have no intended consequences other than to grant 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. And it would accomplish all of these objectives by needlessly forcing the public disclosure of victims' personal information. H.R. 526 would require each trust to publically disclose the fact of each settlement it reaches together with 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.

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 8 to 18 months after their diagnosis.⁴⁷ The bill's new burdens will require the trusts to spend time and resources complying with these requirements, causing trust recoveries to be delayed.

Indeed, counsel for 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 letter to the Committee on the Judiciary and this subcommittee on January 30, 2015 addressing the burden the Act would place on the trusts.⁴⁸ The four trusts estimated that each trust like one of them receiving 10,000 claims per quarter and paying 5,000 of the claims 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 Act⁴⁹ – the equivalent of ten new full-time employees. The trusts explain that the data for "exposure history" and "basis for payment" required by the Act cannot 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.⁵⁰ In the aggregate this will reduce trust funds available to compensate victims by millions of dollars.

The quarterly reporting requirement alone would place this significant burden on the trusts. Moreover, the language requiring trusts to provide information on historical claims on a demand-by-demand and victim-by-victim basis is so broad as to make the impact in terms of cost and time potentially vast and yet unquantifiable.⁵¹

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 victim 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. At the same time, the bill threatens the privacy of asbestos victims, many of whom are elderly veterans, by placing information about their confidential settlements on the public record.

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. Chairman Goodlatte praised its introduction on the grounds that there is “fraud in the asbestos trust system”⁵² However, there is no evidence of such fraud. Former Committee on the Judiciary Chairman Lamar Smith asked the U.S. Government Accountability Office (the “GAO”) to examine asbestos trusts set up pursuant to § 524(g), and the GAO published a report in 2011. The GAO did not find any trusts that indicated their audits had identified cases of fraud.⁵³ Had the GAO suspected that nonetheless there was reason to suspect systemic fraud, surely it would so have advised the Committee.

VII. The *Garlock* Decision Does Not Demonstrate Fraud in Trust Claims

In the same Committee press release announcing introduction of this bill, Subcommittee Vice-Chairman Farenthold is quoted to say that “[t]he revelations in the [*Garlock*] case show the ongoing troubles with asbestos claims and the need for the FACT Act.”⁵⁴ While this is not the forum for review of the *Garlock* interlocutory estimation decision, the Committee should note that the *Garlock* case is wholly irrelevant to the issue of whether the FACT Act is sound policy. The *Garlock* case is about how much money an asbestos corporation should set aside to compensate its victims; the FACT Act is about putting additional burdens on private asbestos trusts. One has little to do with the other.

Second, the Committee should not assume the *Garlock* case was correctly decided. It was based upon a presentation of skewed and misleading accounts of fifteen “Designated Cases” which Garlock cherry-picked from more than 10,000 mesothelioma claims it paid in the ten years before filing bankruptcy. From this, Garlock invented a story of “disappearing evidence.” It accused plaintiffs’ law firms of suppressing the evidence of their clients’ exposures to additional asbestos from products for which bankrupt companies were liable. Garlock contends this evidence was not readily available to it and as a result Garlock’s perceived trial risk was increased and Garlock was forced to settle for higher amounts.⁵⁵ Of course, in all fifteen Designated Cases, the actual victims – the men who died from mesothelioma – proved substantial exposures to asbestos from Garlock products. Regrettably, the Bankruptcy Court permitted Garlock to withhold as privileged from the Asbestos Claimants Committee (which my firm and I represent as counsel) almost all of the files that reveal Garlock in fact had contemporary knowledge of the additional asbestos exposures and expose Garlock’s actual bases for settlement of those cases. Instead, the court accepted the self-serving testimony of Garlock lawyers.

Where, after the decision, the Committee has been able to piece evidence together about Garlock’s actual knowledge and behavior, I believe that evidence contradicts the Bankruptcy Court’s conclusions and shows that Garlock’s depiction of its 15 “Designated Cases” is tainted by convenient recharacterizations.

For example, in 2004 a jury awarded one of these victims⁵⁶ the largest verdict ever against Garlock, including \$15 million in punitive damages, and a 40% share of more than \$18 million in compensatory damages.⁵⁷ Although the Bankruptcy Court found that this plaintiff “did not admit to any exposure from amphibole insulation, did not identify any specific insulation product and claimed that 100% of his work was on gaskets”⁵⁸ this finding is directly contradicted by the trial record in the underlying case, where the plaintiff testified at length about his exposure to products other than gaskets,⁵⁹ that he breathed the dust from, *inter alia*, pipe insulation that was torn off or removed in his presence,⁶⁰ and specifically identified Asbeston insulating blankets.⁶¹ Examination of the Bankruptcy Court’s treatment of the other “Designated Cases” reveals similar errors.

Even Garlock doesn’t believe the estimation decision will control the resolution of its bankruptcy. Recently it filed a proposed plan of reorganization which proposes to pay out almost three times what the Bankruptcy Court estimated as Garlock’s liability,⁶² an amount which nonetheless remains wholly inadequate to fairly compensate the victims Garlock killed and injured.

VIII. 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 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 delay fair compensation until victims pass away by providing defendants with an advantage, using the existence of the trusts and claims of a lack of “transparency” as a subterfuge. These bills have been enacted in Ohio, Oklahoma, and Wisconsin⁶³ and have been introduced in a number of additional states.

In Ohio, H.B. 380 (originally drafted by ALEC) was enacted in 2012. The law shifts control of key elements of a victim’s case to asbestos defendants while simultaneously shifting significant burdens to the victim. This new Ohio law requires victims to identify all trust claims and material pertaining to those claims, and update those identifications when new claims are made.⁶⁴ Defendants can delay trial indefinitely and force victims to make claims against other trusts.⁶⁵ Then, trust claims are presumed to be relevant and discoverable and can be introduced to prove causation and allocate responsibility.⁶⁶

With a law like Ohio’s H.B. 380, defendants shift their burden — to prove fault on the part of other entities — to victims, while simultaneously lessening victims’ control of their own claims. The victim now has to make claims at a defendant’s demand, and then produce those claims forms and supporting materials to that defendant, who may be able to use them against the victims. The bill 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.

Whether a defendant found liable for a victim’s injuries is liable for the shares of other wrongdoers is a question of public policy. 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, these legislatures have changed public policy under the guise of so-called transparency, on the basis of largely anecdotal and unproven allegations, in favor of asbestos defendants. It is an effort to facilitate the defense against asbestos claims by forcing victims to assist in the defendant’s efforts to shift responsibility to other entities.

IX. 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 private asbestos trusts. These laws that force claims, 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 legislative proposals were never designed — nor intended — to address any purported 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 asbestos defendants to take advantage of the bankruptcies of their co-wrongdoers by shifting to victims the burdens of the shortfalls caused by the bankruptcies, as well as the burdens of discovery and proof of the bankrupt wrongdoers’ responsibility. These proposals 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 asbestos corporations to evade accountability by shifting

blame to the victims of asbestos exposure, and Congress should be vigilant to protect the rights of injured workers and their families.

Endnotes

¹U.S. Government Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 6 (Sept. 23, 2011) (“GAO Report”).

²Agency for Toxic Substances & Disease Registry, U.S. Department of Health & Human Services, *Asbestos Fact Sheet* 1 (2001).

³EPA, *Learn About Asbestos*, <http://www.epa.gov/asbestos> (last visited Jan. 31, 2015).

⁴National Cancer Institute, NIH, *Malignant Mesothelioma*, <http://www.cancer.gov/cancertopics/types/malignantmesothelioma> (last visited Jan. 31, 2015).

⁵See 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).

⁶See 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).

⁷See *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”).

⁸See *Enpro Industries Inc. Form 10-K* (Mar. 3, 2009) at 84.

⁹Muriel 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).

¹⁰*Manville I*, 129 B.R. at 737.

¹¹Barry 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).

¹²*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-1940s).

¹³*Id.* at 743 (citing Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985) (“Brodeur”).

¹⁴*Id.* at 745-46.

¹⁵*Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

¹⁶See *id.* at 1089.

¹⁷See *id.* at 1095.

¹⁸See, 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.>").

¹⁹Brodeur at 73.

²⁰See *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).

²¹See *id.* at 624.

²²See *id.*

²³See, 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.

²⁴Bankruptcy Amendments Act of 1993, Amendment No. 1633, 140th Cong. (2d Sess. 1994) (amending 11 U.S.C. § 524).

²⁵See 11 U.S.C. § 524(g)(4)(B)(i).

²⁶See *id.*

²⁷GAO Report at 3.

²⁸GAO 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.

²⁹See 11 U.S.C. § 524(g)(2)(B)(i)(III).

³⁰See, 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/wp-content/uploads/2014/04/USGTDP.pdf> (“USG TDP”).

³¹See USG TDP §§ 2.3 and 4.2; see also *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 114, 136 (D. Del. 2006).

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

³³See, e.g., USG TDP § 5.3(a).

³⁴See, e.g., *id.* § 5.3(b).

³⁵See, e.g., *id.* §§ 5.3(a)(3); 5.7(a), (b).

³⁶See, e.g., *id.*

³⁷GAO Report at 29.

³⁸GAO Report at 19.

³⁹GAO Report at 21.

⁴⁰See Manville Personal Injury Settlement Trust, 2002 Trust Distribution Process § D (Jan. 2012 Revision), <http://www.claimsres.com/documents/MT/2002%20TDPJanuary%202012%20Revision.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 Injury Settlement Trust Distribution Procedures* § 5.3(b)(4), [armstrongworldasbestostrust.com](http://www.armstrongworldasbestostrust.com) (updated Mar. 20, 2013), <http://www.armstrongworldasbestostrust.com/wp-content/uploads/2014/02/Conformed-Copy-of-AWI-TDP-as-of-March-20-2013.pdf>; *Frequently Asked Questions*, [armstrongworldasbestostrust.com](http://www.armstrongworldasbestostrust.com), <http://www.claimsres.com/documents/MT/FAQS.pdf> (last visited Jan. 31, 2015); *Asbestos PI Settlement Trust Distribution Procedures* § 5.3(b)(3), [bwasbestostrust.com](http://www.bwasbestostrust.com) (revised Dec. 3, 2013), <http://www.bwasbestostrust.com/wp-content/uploads/2014/02/B-W-TDP-DEC-2013-POST-TO-WEBSITE-P0325875.pdf>; *Frequently Asked Questions*, [bwasbestostrust.com](http://www.bwasbestostrust.com), <http://www.bwasbestostrust.com/resources/> (last visited Jan. 31, 2015); *Third Amended Trust Distribution Procedures* § 5.3(b)(3), [kaiscrasbestostrust.com](http://www.kaiscrasbestostrust.com) (Nov. 20, 2007), <http://www.kaiscrasbestostrust.com/Files/Third%20Amended%20Trust%20Distribution%20Procedures%2000013238.pdf>; *Notice of Payment Percentage Adjustment*, [kaiscrasbestostrust.com](http://www.kaiscrasbestostrust.com) (May 13, 2011), http://www.kaiscrasbestostrust.com/Files/20110513_KACC_Payment_Percentage_Notice.pdf; *Trust*

Distribution Procedures §§ 2.3, 5.3(b)(4), [burnsandroctrust.com](http://www.burnsandroctrust.com) (Nov. 10, 2008), http://www.burnsandroctrust.com/Files/20081110_BurnsAndRoc_TDP.PDF; *Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures* (Revised Feb. 2, 2010) § 5.3(b)(4), http://www.ocfbasbcstostrust.com/wp-content/uploads/2014/07/Revised-OCFB-TDP-dated-February_2_-2010_final1.pdf (last visited Jan. 31, 2015); *United States Gypsum Asbestos Personal Injury Settlement Trust Distribution Procedures* (Revised Mar. 29, 2010) § 5.3(b)(3), <http://www.usgasbcstostrust.com/wp-content/uploads/2014/04/USGTDP.pdf> (last visited Jan. 31, 2015)

⁴¹ Am. Ass'n for Justice, *ALEC: Ghostwriting the Law for Corporate America* (May 2010), https://www.justice.org/sites/default/files/file-uploads/ALEC_Report.pdf.

⁴² 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](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/research-reports/National_042012_Submission_to_IRS_ALEC_Lobbying-pdf.pdf.

⁴³ The Asbestos Claims Transparency Act has been introduced at various times over the last four years in Illinois, Indiana, Louisiana, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, West Virginia, and Wisconsin. *See, e.g.*, H.B. 0153, 99th Sess. (Ill. 1013); H.B. 1400, 119th Sess. (Ind. 2015); 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. 1150, Sess. 2013-2014 (Pa. 2013); S. 281, Sess. 121, 2015-2016 (S.C. 2015); H.B. 2034, 82d Leg. (Tex. 2011); S.B. 1202, 82d Leg. (Tex. 2011); 2013 A.B. 19, 2013-2014 Leg. Sess. (Wisc. 2014); S.B. 43 & 56, 80th Leg., Reg. Sess. (W.Va. 2011). The Ohio, Oklahoma, and Wisconsin bills are the only ones to have been enacted to date and are discussed below.

⁴⁴ *See, e.g.*, *USG Approved Site List*, [usgasbestostrust.com](http://www.usgasbestostrust.com) (updated Jan. 12, 2015), <http://www.usgasbestostrust.com/?s=%22usg+approved+site+list%22>.

⁴⁵ *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).

⁴⁶ *See* Paul D. Kheingold, *Litigating Mass Tort Cases* § 10:65 (2012).

⁴⁷ Mesothelioma Applied Research Foundation, *Mesothelioma Statistics, Mesothelioma Facts, Meso Foundation*, available at http://www.curcmco.org/site/c.duIWJhNqKIL8G/b.8578843/k.AF18/Mesothelioma_Statistics_Mesothelioma_Facts_Meso_Foundation.htm.

⁴⁸ *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. Tom Marino, Chairman, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, and Rep. Hank Johnson, Ranking Member, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (Jan. 30, 2015) ("January 30, 2015 Campbell Letter").

⁴⁹ January 30, 2015 Campbell Letter, at 3.

⁵⁰ January 30, 2015 Campbell Letter, at 2-3.

⁵¹ January 30, 2015 Campbell Letter, at 3.

⁵² Press Release, H.R. Judiciary Committee, *Bill Introduced to Increase Relief for Victims of Asbestos* (Jan. 26, 2015); available at <http://judiciary.house.gov/index.cfm/2015/1/bill-introduced-to-increase-relief-for-victims-of-asbestos> (last visited January 31, 2015). Mr. Goodlatte also referred to “duplicitous or conflicting claims” – a misleading concept I address in Section V.a above.

⁵³ GAO Report at 23.

⁵⁴ Press Release, Jan. 26, 2015.

⁵⁵ See, e.g., Estimation Hr’g Tr. at 15:02-10, *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C. July 22, 2013) (Cassada Opening Statement).

⁵⁶ This case is discussed in detail in the Post-Hearing Brief of the Official Committee of Asbestos Personal Injury Claimants (“ACC”) for Estimation of Pending and Future Mesothelioma Claims [Filed Under Seal] at 14-16, 32, 39, and Appendix II to the Post-Hearing Brief at 2-10. *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C. Nov. 1, 2013), ECF Nos. 3198, 3200; Mem. in Supp. of Motion to Reopen the Record of the Estimation Proceeding [Filed Under Seal] at 8-23, Nov. 7, 2014, ECF No. 4201; Reply in Support of ACC’s Motion to Reopen the Estimation Proceeding [Redacted] at 4-20, Nov. 7, 2014, ECF No. 4205; and Response of the ACC to Debtors’ Surreply to the Motion to Reopen the Record of the Estimation Proceeding at 8-23, Nov. 24, 2014, ECF No. 4239.

⁵⁷ See J. on Special Verdicts at 5, *Treggett v. Alfa Laval Inc.*, No. BC 307058 (Cal. Super. Ct. Jan. 3, 2005).

⁵⁸ *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 84-85 (Bankr. W.D.N.C. 2014).

⁵⁹ *Treggett v. Alfa Laval Inc.*, No. BC 307058 (Cal. Super. Ct. Sept. 14, 2004), (“Trial Tr.”) at 731:18-733:23, 1035:22-1036:2; Trial Tr. at 1213:15-25, 1219:2-26, 1226:8-20, 1227:7-22, 1232:7-1233:17, 1248:16-20 (Sept. 16, 2004).

⁶⁰ Trial Tr. at 1226:8-20 (Sept. 16, 2004).

⁶¹ Trial Tr. at 719:19-23; 720:8-27; 736:19-21 (Sept. 14, 2004). See also Janice Robinson Pennington, *A Look at the Record in Garlock’s Celebrated Estimation Order*, Mealey’s Asbestos Bankruptcy Report (July 2014).

⁶² Debtors’ Second Am. Plan of Reorganization, *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C. Jan. 14, 2015), ECF No. 4306.

⁶³ Ohio Rev. Code Ann. § 2307.91 et seq.; Okla. Stat. § 76-94 et seq.; 2013 Wisc. Act 154, enacted Mar. 27, 2014 (Wisc. Stat. § 802.025).

⁶⁴ Amended Substitute H.B. 380 § 1 (amending § 2307.952(A)(1)(a)).

⁶⁵ *Id.* (amending § 2307.953(A)).

⁶⁶ *Id.* (amending § 2307.954(B)).

Mr. MARINO. Thank you, sir.
Mr. Vari?

**TESTIMONY OF NICHOLAS P. VARI, ESQ.,
K&L GATES L.L.P., PITTSBURGH, PA**

Mr. VARI. Mr. Chairman and Members of the Subcommittee, thank you very much for affording me the opportunity to appear before you today on the important issue of the FACT Act legislation. Just to re-introduce myself, my name is Nick Vari. I am an attorney with K&L Gates in Pittsburgh, and for nearly 25 years I have represented asbestos defendants across the United States, and it is those experiences that shape my comments today. The reason I am here is that the asbestos claim recovery system is broken. There are billions of dollars that are being paid every year by entities that collectively do not have complete information regarding the claims that are being paid.

There are two competing remuneration systems or compensation systems that exist for asbestos claimants. One is a trust system, and that trust system was formed by now bankrupt entities that have put money into trusts to not only pay present claimants, but future claimants who do not even yet know that they have a claim. The other system is the civil justice, or what we refer to as the tort system, and that is where the solvent entities are, and the plaintiffs can seek recovery from the solvent entities.

The mechanisms in each instance are pretty similar. The claimant comes forward with information regarding exposure to a product or showing circumstances that a trust or entity is responsible for the claim. Then they also need to provide evidence of a compensable injury that is attributable to that asbestos exposure, and then the claim is reviewed. It can be contested, and ultimately it is disposed of and often paid.

The big difference between the two systems, though, is that the claim information for the tort system claimants is available to the public largely and takes place under the sunlight of the disclosure in the court systems. The trust system disposition or claims disposition occurs behind closed doors, and that information is not available to other stakeholders or folks who may need to know or could benefit from that information.

Now, it is the same people, the same claimants, that are seeking recovery in each system. And the proposed legislation that we are talking about today is not about who is a good guy and who is a bad guy, and putting white hats or black hats on people or entities. It is just about information, and it is about making sure that all of the stakeholders in this claims process have access to the same information regarding what claims are being made, and of whom, and what is being alleged in all of those claims.

I reference in my comments the Garlock opinion. It is a bankruptcy opinion out of the Western District of North Carolina. I am sure we will have some more discussion on that. But the teaching in that claim or in that decision was that the bankrupt entity, Garlock, was paying 10 times more in the tort system than the bankruptcy court felt that it should have paid had it had access to all of the information regarding other exposure claims that its claimants were making.

Now, while it is correct that I have personally not worked with the trusts, I can only presume, though, that each trust would benefit from the same information, and knowing what claims were made and what allegations of exposure were being made, and what diseases were being alleged by the various trust claimants. At this point, all these trusts exist in a vacuum. If that information was open, it would not only benefit defendants. It would benefit the trusts in evaluating the claims to it.

The arguments against transparency even from my perspective just do not seem to resonate. An asbestos claimant in the tort system makes full disclosures of his or her medical history and medical records. They provide Social Security printouts. They provide tax returns. They provide all sorts of wage information. There is no information that is submitted to the trust that is not made available within the civil justice system.

And the most important thing, from my perspective, is that nothing in this legislation relates to compensation or costs any claimant one cent in compensation. The effect of this information and what that may be is a function of state courts and the recovery systems that are available on a state-by-state basis. All the legislation provides for is information and enables all of the stakeholders in that litigation to have access to the same information.

Thank you very much, and I appreciate your time.

[The prepared statement of Mr. Vari follows:]

United States House of Representatives

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

Testimony of Nicholas P. Vari
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Hearing on H.R. 526, the "Furthering Asbestos Claim Transparency (FACT) Act of 2015"

February 4, 2015

Chairman Marino, Vice-Chairman Farenthold, Ranking Member Johnson, and members of the Subcommittee, thank you for allowing me to appear before you today in support of the Furthering Asbestos Claims Transparency (FACT) Act of 2015; H.R. 526.

INTRODUCTION

My name is Nicholas Vari. I am a partner with the law firm of K&L Gates, LLP, resident in Pittsburgh, Pennsylvania. For nearly twenty-five years, I have represented defendants such as Crane Co. in asbestos cases throughout the United States. Those experiences shape my comments today. Nevertheless, the views I offer herein are mine alone, and do not reflect the views of my law firm or its clients.

At the outset, the modern-day asbestos defendant can hardly be characterized as an "asbestos company". Many of these companies never manufactured a single item that contained asbestos. Rather, those companies manufactured equipment, vehicles, or similar devices that may have, at some point in time, contained small, consumable parts—manufactured by others—that contained asbestos. And those parts were replaced soon after the sale. Other of the current tort system defendants may have sold—decades ago—limited amounts of materials that contained some asbestos. Nevertheless, those companies—and not the now-bankrupt companies that were the primary asbestos defendants in years past¹—are left to respond in the tort system for injuries caused by *all* of the asbestos-containing materials that were made and sold by anyone, including those entities that can no longer be reached in the tort system.

¹ Shelly, Cohn, Arnold, *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener Law Journal 675,676 (No. 3, 2014) (noting that "the 'main players' have exited the tort system" which has led to plaintiffs "targeting an ever-growing number of 'peripheral' defendants that have comparatively lower degrees of culpability for the claimant's injuries").

Since I began defending asbestos claims, over eighty-five companies have filed for bankruptcy protection due to asbestos claims.² In many instances, those tort system defendants were replaced by asbestos bankruptcy trusts, which hold billions of dollars in assets to compensate asbestos claimants.³ Due to the lack of any meaningful interface between the trust and tort systems, however, the trust recoveries often occur in *addition* to the *complete* recoveries that are available in the tort system. I have observed personally the impact that the lack of access to information regarding trust submissions has had on tort system litigants.

THE DUAL COMPENSATION SYSTEMS

The processes of submitting a claim in the tort system and submitting a claim to a bankruptcy trust are similar. In the tort system, the plaintiff files a complaint, often naming 40 or more defendants, and then provides one or more sworn statements evidencing his or her alleged exposure to asbestos-containing materials made or sold by the defendants from whom the plaintiff seeks to recover. The tort system plaintiff further provides evidence of a compensable injury that he or she attributes to asbestos exposure. Each defendant against whom a claim is made, then, evaluates the claim. The vast majority of the claims are settled or dismissed before trial, although some are tried, and the plaintiff is compensated accordingly.

Similarly, a trust claim is instituted with a submission that includes proof of an asbestos-related injury and a statement that the plaintiff is entitled to compensation from

² See, e.g. Dixon, McGovern, Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (RAND Corp. 2010) at Table A.1.

³ Scarcella and Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, Mealey's Asbestos Bankruptcy Report Vol. 12, #1 (June 2013) at pp. 2-3.

the trust for his or her injury. That claim is then processed, evaluated, and, if appropriate, paid. Most claims are accepted, and some are contested.⁴ The primary difference between the two situations is that the product exposure information in the tort system claim is largely a matter of public record, while the product exposure information for the bankruptcy trust claim is concealed from public view.

Before assessing the importance of product exposure evidence to a tort system defendant, it is important to note how responsibility for an asbestos-related injury is allocated in the tort system. Asbestos-related diseases are traced to the cumulative dose of asbestos that one has received during his or her lifetime. The sources of these exposures include product-related, occupational, and environmental exposures. Nevertheless, one cannot assess the actual cause or causes of a cumulative-dose disease without first knowing and evaluating all of the exposures that may have contributed to the disease. When substantial pieces of a particular individual's asbestos exposure history are not included in the analysis, the entire responsibility for those cumulative-dose conditions may be spread disproportionately upon a small group of solvent defendants that may have collectively played a minor role, if any, in actually causing that injury. Therefore, when the tort system defendants are deprived of information regarding a claimant's overall asbestos product exposure history, those defendants are unable to accurately apportion the plaintiffs' claims among the various asbestos exposures that caused the plaintiffs' injuries. In turn, courts and jurors are

⁴ See, Scarcella, Kelso, *supra*, at p. 11 (Noting that the trust review process is not a negotiated or compromised process. The claim either qualifies, or it does not. The trusts spend approximately two cents on claims review for every dollar paid).

also deprived of a complete picture, and, therefore, unable to assess accurately the potential contribution of each exposure to a particular injury.

When information pertaining to a claimant's asbestos exposure are not disclosed, the financial burdens relating to asbestos personal injury lawsuits claimants fall increasingly upon the remaining tort system defendants. The amount of compensation available for a particular injury does not diminish simply because fewer defendants are available to pay. Instead, only the number of payers among whom that compensation can be spread diminishes. In these instances, it is important for those who are left in the tort system to be able to assess the entirety of a claimants' exposure history, and not just a subset of those exposures.

THE LESSONS OF GARLOCK

When information regarding exposures to products made and sold by now-bankrupt entities is not disclosed, the burden of compensating tort system claimants falls disproportionately upon those who remain in the tort system. And the same claimants who pursue full remuneration in the tort system can, for the most part, recover more money from the asbestos bankruptcy trusts without any impact on their tort system recoveries. The undue burdens created by this "double-dipping" are exacerbated in situations where now-bankrupt companies contributed significantly to the asbestos exposures that caused a particular claimant's disease. The fact that new defendants with increasingly tangential relationships to asbestos-containing materials are being added to the tort system does not solve this problem.

This is precisely the teaching of the United States Bankruptcy Court for the Western District of North Carolina's *Garlock* opinion.⁵ In that case, the Court compared the amount of money that Garlock Sealing Technologies, LLC, a now-bankrupt manufacturer and supplier of industrial seals, *actually* paid to resolve claims in the tort system compared to what it *should* have paid if one had considered Garlock's *actual* potential legal responsibility for the asbestos-related injuries for which it was sued. After conducting its analysis, the Bankruptcy Court found the value of Garlock's *actual* potential legal responsibility for asbestos claims was roughly *one-tenth* of the amount than *Garlock* likely would have paid had it resolved those claims in the tort-system.⁶

The *Garlock* opinion details a claim in which I was involved personally that illustrates how the absence of product exposure information available to the bankruptcy trusts can prejudice tort system defendants. The *Garlock* court described "a California case involving a former Navy machinist mate aboard a nuclear submarine", in which, after the verdict, *Garlock* discovered that the plaintiffs' lawyers had failed to disclose exposure to 22 different asbestos products, many of which involved bankrupt entities.⁷ The *Garlock* opinion does not disclose, however, that many tort system defendants settled the claim in question for significant sums, based on the mistaken impression that the plaintiffs had disclosed all of the injured plaintiffs' potential asbestos exposure.⁸ But for the *Garlock* opinion, those defendants would have never known about the twenty-two other allegedly injurious products to which that plaintiff claimed to have been

⁵ *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (Bankr. W. D. N.C. 2014).

⁶ *Id.* at 94.

⁷ *Id.* at 74, 97.

⁸ At numerous points in the tort system discovery process, plaintiffs were asked to identify all sources of the injured plaintiff's asbestos exposure. None of the exposures that the *Garlock* court referenced were disclosed in the discovery process.

exposed. And since the *Garlock* opinion was issued years after the claim was settled, defendants are substantially handicapped – if not entirely precluded – from recovering the amounts they overpaid to settle that claim.

Juries in California are permitted to assign a share of plaintiffs' often extensive non-economic damages awards (here \$9 million, in the claim described in the *Garlock* opinion) among all entities (including bankrupt entities) whose products may have contributed to a plaintiffs' injuries. Defendants, therefore, evaluate their own potential liability exposure by comparing the injured plaintiff's overall historical asbestos exposure to the alleged exposure to the defendant's product. By failing to disclose evidence of additional exposures, this particular plaintiff avoided entirely the allocation of fault to other potentially culpable entities who may have contributed to the plaintiffs' injuries—from whose trusts plaintiffs collected—while at the same time inducing the tort system defendants to over-value plaintiffs' claims against them. In so doing, each of the tort system defendants was induced to over-estimate its potential liability *before* entering into settlement negotiations. Had all the plaintiff's asbestos exposures been disclosed to the tort system defendants these excessive settlements probably would not have occurred.

THE ABSENCE OF A MEANINGFUL CASE AGAINST TRANSPARENCY

In light of the foregoing, and in light of the prospect for confusion and misinformation that may occur if only one side has access to the asbestos product exposure information within the trusts' possession, there is good reason to permit asbestos defendants and other asbestos bankruptcy trusts access to product exposure

information that is known to individual asbestos bankruptcy trusts. At the same time one may ask “what is the downside to having trusts provide exposure information?” Several arguments against disclosure have been offered, but none merits precluding transparency.

1. **The Proposed Act Does Not Reduce Any Recovery of Any Asbestos Claimant.**

The financial impact of exposures to non-parties’ asbestos-containing products is a function of state law. The proposed FACT Act does not even address this issue. Rather, the FACT Act provides only for the disclosure of information possessed by the trusts, so that the tort system defendants and asbestos bankruptcy trusts can have a complete picture of a tort claimant’s asbestos-exposure history. The *impact* of that information is left to state law. Put another way, those who advocate that bankruptcy trust recoveries should not impact an injured claimant’s tort system recovery may continue to do so, and their efforts in that regard are not hindered by this proposed legislation. The present legislation deals only with access to the information. The question of the ultimate impact of this information remains an issue that the parties can address going forward. Without disclosure, however, that debate cannot ever occur.

2. **The Defendants Do Not Already Have the Product Exposure Information to Which the Trusts Are Privy.**

If the information that is within the possession of the bankruptcy trusts was already available, there would be no need for the FACT Act. The reality—as illustrated by the *Garlock* opinion—is that vital product exposure information that is submitted to the trusts is often not disclosed. The reality is also that the bankruptcy trusts often are not readily willing to provide claims information.

The information regarding the asbestos-containing materials to which an asbestos claimant was exposed is largely, if not exclusively, within the control of that claimant and his or her counsel. There is no question that a tort system plaintiff must disclose all of the product disclosures of which the plaintiff or his or her counsel is aware. And, many courts have ruled that a plaintiff must disclose all of his or her trust filings in the tort system. Accordingly, there is no real basis for precluding asbestos defendants from obtaining claims information from the bankruptcy trusts.

3. **Discovery of Trust Submissions Will Not Violate Anyone's Privacy.**

In the context of an asbestos lawsuit, the injured person provides releases to the defendants that give those defendants access to a lifetime's worth of the plaintiff's medical records, and all of the plaintiff's work and earnings history. There are no medical records or other identifying information provided to the trusts that are not otherwise discoverable in the tort system. Accordingly, unless there is something missing from the tort system disclosures, the information held by the trusts should not generate additional information, confidential or otherwise. Nevertheless, the prospect of

omissions in the tort system discovery process merits this additional check on the tort system discovery process.

4. **Plaintiffs Are Required, Already, to Provide All Product Exposure Information in Discovery.**

In every asbestos lawsuit, plaintiffs are asked at length about their exposures to asbestos. These questions are asked, among other ways, in the form of written interrogatories, the answers to which are provided by counsel. This is not work product; it is information that is extremely relevant to addressing each defendant's contribution, or lack thereof, to the totality of the asbestos exposures at issue. And this information is fully discoverable in an asbestos personal-injury lawsuit.

In over two decades of defending asbestos claims, I am not aware of a plaintiff ever objecting—on any grounds—to a question asking him or her to identify the asbestos-containing materials to which he or she was exposed. At the same time, there are those who object strenuously to asbestos defendants getting the same information from the bankruptcy trusts. This distinction makes little practical sense. The information is relevant, and admissible, and it should be available from the trusts, as well as from the plaintiffs.

CONCLUSION

In closing, recent history teaches us that information contained in bankruptcy trust submissions does not flow freely to tort system defendants and other bankruptcy trusts. Complete asbestos exposure history information is necessary to enable the tort system defendants (and courts and juries where appropriate), as well as asbestos bankruptcy trusts, to evaluate a defendant's potential contribution to an asbestos related

disease. The product exposure information is readily available to plaintiffs and to the trusts. To deprive tort system defendants and the general asbestos bankruptcy trust system of the same information creates an inequality that is solved by a simple legislative cure that creates no undue hardship for anyone.

There is good reason to provide open access to bankruptcy trust claim submission information. There is no good reason for precluding such access. Accordingly, H.R. 526 is not only sound in theory, it will be sound in practice.

Thank you for your consideration of these issues.

Mr. MARINO. Thank you, sir.
Mr. Scarcella, please.

**TESTIMONY OF MARC SCARCELLA, PRINCIPAL,
BATES WHITE ECONOMIC CONSULTING, WASHINGTON, DC**

Mr. SCARCELLA. Thank you, Mr. Chairman, Members of the Subcommittee. I will be addressing a number of Mr. Inselbuch's concerns throughout my testimony. But one in particular that I think is important to address right off the bat is that while it has been a number of years since I was the statistician and data management specialist for the Johns Manville trust, I did spend more than 7 years as a consultant to trustee boards, future claimant representatives, to trustees, where I regularly received and analyzed trust data extracts at the claimant level that far exceeded the level of detail requested here in the FACT Act. And I was able to receive that data in short turnaround at far less cost than opponents of this bill seem to posture will actually take place.

I have testified two times before, both in 2012 and 2013. And I can say that since that time the problem has gotten worse, or, at the very least, the problem has been partially exposed by cases such as the Garlock bankruptcy. I do not intend to speak at length about the Garlock proceedings, but its relevancy to this hearing and this bill is clear. Transparency uncovers inconsistent, specious, or potentially fraudulent claiming behavior. And moreover, a system of standardized transparency, as proposed by the FACT Act, will help deter such activity in the future.

Since I last testified in 2013, there has continued to be a rapid depletion of trust assets that far exceeds trust forecasted expectations. Since 2009, 23 trusts have had to lower the net payout that they provide to claimants because claim rates and payments rates have exceeded what they expected, 23 trusts.

There are currently 50 trusts operating over a corpus of total assets close to \$30 billion, yet there are no standardized requirements for reporting or disclosure. To the extent that these advanced accelerated rates that exceed what the forecasts expected by these trusts have anything to do with inconsistent, tenuous, or potentially fraudulent claim behavior, transparency would be the appropriate response and solution to curbing such activity in the future, thus preserving money not just for claimants today, but claimants in the future.

The point I just brought up about 23 trusts lowering their net payouts to claimants since 2009, a claimant today receives on average 50 percent less in most cases than a similarly-situated claimant received just in 2009. And claimants who get sick and make claims next year, 5 years now, 10 years from now, which are all claimants that these trusts owe a responsibility to, are going to receive even less if the problem is not stopped now. There is still \$30 billion. We should bring some more transparency to the system.

Which will bring me to my final set of points which have to do with cost because it is difficult to weigh the benefits of any proposed legislation without talking about costs incurred. As I mentioned in my opening, I received regularly claimant-level data from various trusts at a level of detail that far exceeded anything that is being requested here under the quarterly reporting requirements

of the FACT Act. I received it quickly, and I received it at very little cost to anyone. I was able to analyze it and make use of it.

The quarterly reporting requirements of the FACT Act require detail in a tabulated form that the trust can produce in an easy and repeatable way, especially information regarding the site, occupation, and dates of exposure, which is information that is submitted electronically through standardized claim forms and stored electronically.

Moreover, the burden of discovery under Part B of this bill shifts the cost away from the trusts and onto defendants. If a third party defendant or insurer would like to gain additional information that is not provided in the quarterly reporting disclosures, they can request it, but it is at their cost. And I think that shift in cost burden, as well as the transparency that could help deter future inconsistent or fraudulent claiming activities, makes the FACT Act a reasonable, sound, and useful piece of legislation for preserving trust assets for future claimants.

Thank you.

[The prepared statement of Mr. Scarcella follows:]

United States House of Representatives
Committee on the Judiciary's Subcommittee on Regulatory Reform,
Commercial and Antitrust Law

Testimony of Marc Scarcella
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Hearing on H.R. 526, the "Furthering Asbestos Claim Transparency
(FACT) Act of 2015"

February 4, 2015

Executive Summary

Chairman Marino, Ranking Member Johnson, Chairman Goodlatte, Ranking Member Conyers, and members of the subcommittee, thank you for holding today's hearing on H.R. 526 -- the Furthering Asbestos Claims Transparency (FACT) Act of 2015. 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 nearly 15 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 and March 2013, 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.

¹ Testimony of Marc Scarcella, 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; Testimony of Marc Scarcella, Hearing testimony on H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013," US House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law, March 2013

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 current asbestos bankruptcy 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, and despite the majority of plaintiffs in today's litigation having product exposures to both tort and reorganized defendants, this substantial source of plaintiff compensation cannot properly be integrated into the allocation of shares against defendants in the civil tort system.

The FACT Act seeks trust claims disclosures through public quarterly reporting requirements, 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 proposes to disclose the same level of information on trust filings that is already available to the public in 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 centralized, 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

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

³ Scarcella, Marc C. and Peter R. Kelso. "Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance." Mealey's Asbestos Bankruptcy Report 12, no. 11 (2013), Exhibit 2

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.

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

On the issue of cost, I believe that any out-of-pocket expense the trusts incur in complying with the quarterly 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

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.

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.

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.

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

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

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.

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 six 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 systems¹¹

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

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>

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 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, is 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

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>

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

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

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 specious or 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

In most cases involving asbestos exposure, the plaintiff was exposed to asbestos fibers while working with or in close proximity to the asbestos-containing products and operations of various companies. As such, most asbestos lawsuits, both historically and today, pursue compensation from dozens of defendants. For a given defendant, the degree of culpability is determined by both the nature in which the plaintiff was exposed, as well as the relative causal contribution of its co-defendants. This

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; 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."

dynamic of having multiple causal sources to a single plaintiff's injury places a great deal of importance on the proper allocation of fault and compensation shares across all liable parties; an exercise that has been complicated by the bankruptcy filings of some of the litigation's most culpable defendants.

Currently, the asbestos civil tort system provides a level of claiming and resolution transparency that the asbestos bankruptcy trust system lacks. As previously noted, 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.¹⁷ 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.

¹⁷ API, Inc. Asbestos Settlement Trust 2011 Annual Report of the Trustee, filed April 23, 2012 (case no. 05-30073)

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*.¹⁸

The efficient manner in which trusts are able to receive, process, and pay claims has produced over \$17 billion in payments to hundreds of thousands of claimants between 2006 and 2013.¹⁹ 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 potential claimants.²⁰ 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.²¹ 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.

¹⁸ See for example: Sample Excel file for Electronic Filing offered by Verus
<http://www.kaiserasbestostrust.com/Files/KACC%20Sample%20Excel%20Files.zip>

¹⁹ *Supra* 3.

²⁰ Scarcella, Marc C., Peter R. Kelso, and Joseph Cagnoli, Jr. “Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts: The Economic Incentives Behind The New Recruitment Of Lung Cancer Cases.” *Mealey’s Asbestos Litigation Report* 13, no. 4 (2013)

²¹ *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

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.”²²

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 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.”²³

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

²² *Supra* 7.

²³ *Supra* 9.

asserted that their audits had never uncovered a single case of fraud.²⁴ 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.²⁵ 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 disclose every document on every claimant, as the trust attorneys had to review each document to delete confidential information not germane to the subpoena.²⁶ 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

²⁴ *Supra* 10.

²⁵ *Supra* 3.

²⁶ *Supra* 6.

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."²⁷

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 \$1,000.²⁸ Extracting quarterly summary tables at the claim level from these 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

²⁷ Ibid.

²⁸ 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.*

privileged medical information or disclosure of any proprietary trade secrets or confidential information belonging to the Claim Facilities.²⁹ 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 whether or not a claim has been filed.³⁰ 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.

²⁹ 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.

³⁰ 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>

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.

Cost effective transparency and external oversight may deter the premature depletion of trust assets.

On April 28, 2014, the UNR Asbestos Disease Claims Trust filed a motion with the United States Bankruptcy Court for the Northern District of Illinois, requesting permission to terminate operations in the year 2019; decades prior to the expected duration of the trust and related compensable claim filings. According to the UNR trust, the circumstances that led to their premature termination involve a history of higher than forecasted claim filings that included the unimpaired, non-malignant claim filing wave of the 1990s and in recent years, an increase in both lung cancer and mesothelioma claims. In total, the UNR trust received nearly 450,000 claims since its inception in 1990, making payment to more than 300,000 claims for a total of \$266 million. While UNR's aggregate payout over more than 20 years pales in comparison to the \$17 billion dollars that the entire asbestos bankruptcy trust system has paid out since 2006, the events that led to the UNR trust's insolvency are not unique and should serve as a cautionary tale to other trusts, the bankruptcy courts from which they were confirmed, and policymakers interested in preserving the financial rights of future claimants.

Asbestos bankruptcy under section 524(g) of the U.S. bankruptcy code is unique compared to traditional chapter 11 reorganizations in that a majority of the creditors do not exist at the time of confirmation. The latent nature of asbestos-related injuries, where the diagnosis of an asbestos-related disease can occur decades after exposure, creates a future creditor class of claimants that is unknown in

terms of both quantity and compensable value at the time of bankruptcy. However, the basic principle of 524(g) reorganization and bankruptcy in general, is that claimants within the same creditor class be treated in an equitable manner. Therefore, the sufficient preservation of current funds for the equitable payment of future personal injury claimants relies on future estimates of claims that will be made against the trust and the assets a trust will need to fulfill its financial obligations.

Uncertainty is inherent in most forecasting exercises, and the level of uncertainty increases with the duration of the forecasted projections. Most asbestos trusts expect claims to be filed decades into the future. Therefore, in order to properly manage finite assets overtime, every trust has adopted "Payment Percentage" provisions. The Payment Percentage mechanism allows trusts the ability to adjust net claim payments in the event that future financial expectations change. For example, if future liability expectations increase relative to assets, then trusts will likely decrease individual claim payments in an attempt to maintain sufficient assets for future claimants. Conversely, if future liability expectations decrease relative to assets, then trusts will likely increase individual claim payments, and in most instances will provide a retroactive, or "True-Up" payment to previously paid claimants equal to the difference between what they previously received from the trust and what the trust is currently paying similarly situated claimants.

Unfortunately for future claimants, recent history has seen a dramatic decline in Payment Percentages. For example, currently there are 23 trusts that are paying claimants less today than in 2008, and 11 of the 23 trusts have had to decrease the net claim payment amount more than once. In contrast, only nine trusts are paying more on a per claim basis today than in 2008. Table 1 summarizes these changes in Payment Percentages.

Table 1: Summary of Payment Percentage Changes since 2008

Trust	Initial Pay %	12/31 2008	12/31 2009	12/31 2010	12/31 2011	12/31 2012	12/31 2013	12/31 2014
A-Best	3.6%	3.6%	17.4%	17.4%	17.4%	17.4%	17.4%	17.4%
APL Inc.	13.5%	13.5%	55.0%	55.0%	30.0%	30.0%	30.0%	30.0%
Armstrong World Industries	20.0%	20.0%	20.0%	20.0%	20.0%	20.0%	35.0%	35.0%
ARTRA	7.5%	7.5%	7.5%	7.5%	0.5%	0.5%	0.5%	0.5%
Babcock & Wilcox	34.0%	34.0%	15.0%	15.0%	11.9%	7.5%	7.5%	7.5%
C. E. Thurston & Sons	40.0%	40.0%	40.0%	40.0%	80.0%	25.0%	25.0%	25.0%
Celotex ³¹	12.0%	14.1%	14.1%	9.4%	9.4%	9.4%	6.5%	6.5%
Combustion Engineering	48.3%	48.3%	48.3%	48.3%	48.3%	44.0%	44.0%	33.0%
Congoleum	6.3%	0%	0%	0%	6.3%	6.3%	6.3%	12.5%
DII Industries ³²	100%	100%	52.5%	52.5%	52.5%	52.5%	35.6%	35.6%
Engle-Picher Industries	31.9%	38.0%	38.0%	38.0%	31.0%	31.0%	28.0%	28.0%
G-I Holdings (GAF)	8.6%	0.0%	8.6%	8.6%	7.4%	7.4%	7.4%	7.4%
H.K. Porter	4.6%	4.6%	6.3%	6.3%	6.3%	4.0%	4.0%	3.0%
J.T. Thorpe (California)	50.0%	40.0%	40.0%	45.0%	45.0%	45.0%	45.0%	45.0%
J.T. Thorpe (Texas)	18.5%	38.0%	57.0%	57.0%	57.0%	57.0%	57.0%	57.0%
Kaiser Aluminum & Chemical	39.5%	39.5%	39.5%	39.5%	35.0%	35.0%	35.0%	35.0%
Keene Creditors Trust	1.1%	1.1%	1.1%	0.8%	0.8%	0.8%	0.8%	0.8%
Leslie Controls	40.0%	0.0%	0.0%	0.0%	40.0%	40.0%	40.0%	5.0%
Lummus (ABB)	100%	100%	100%	100%	10.0%	10.0%	10.0%	10.0%
Manville	10.0%	7.5%	7.5%	7.5%	7.5%	7.5%	7.5%	6.3%
National Gypsum ³³	55.6%	55.6%	55.6%	55.6%	18.0%	18.0%	18.0%	18.0%
OCF - Fibreboard	25.0%	25.0%	11.0%	11.0%	9.5%	7.6%	7.6%	7.6%
OCF - Owens Corning	40.0%	40.0%	10.0%	10.0%	10.0%	8.8%	8.8%	8.8%
Plibrico	1.1%	8.5%	8.5%	8.5%	1.2%	1.0%	1.0%	1.0%
Raytech	2.0%	2.0%	2.0%	2.0%	0.8%	0.8%	0.8%	0.8%
Shook & Fletcher	65.0%	100%	100%	100%	100%	70.0%	70.0%	70.0%
T H Agriculture & Nutrition	100%	0.0%	100%	100%	30.0%	30.0%	30.0%	30.0%
Thorpe Insulation Company	17.5%	0.0%	0.0%	17.5%	17.5%	17.5%	30.5%	30.5%
U.S. Gypsum ³⁴	45.0%	45.0%	45.0%	30.0%	30.0%	20.0%	20.0%	20.0%
UNR	18.6%	1.1%	1.1%	1.2%	0.8%	0.8%	0.8%	0.3%
U.S. Mineral	12.5%	12.5%	12.5%	12.5%	12.5%	12.5%	12.5%	14.0%
Western Asbestos/MacArthur	31.5%	40.0%	40.0%	44.0%	44.0%	44.0%	44.0%	48.0%

**Amendments to trust distribution procedures increasing gross payment values in conjunction with, or in lieu of a Payment Percentage change. See endnote for more detail.*

³¹ In June 2008 the Celotex Trust increased its TDP values in lieu of increasing the Payment Percentage from 14.1% to 18.3%. Notice is available on Celotex Trust website.

³² In October 2009 the DII Trust increased its TDP values by more than double (e.g. Harbison-Walker Mesothelioma average value increased from \$68K to \$182K), prior to decreasing the Payment Percentage from 100% to 52.5%.

³³ NGC trust decreased its Payment Percentage twice in 2011 (First to 41% in July and then to 18% in November).

³⁴ United States Gypsum trust decreased its Payment Percentage twice in 2010 (First to 35% in April and then to 30% in November).

To quantify the impact these changes in Payment Percentages can have on net claim payments, Exhibit 4 summarizes the net claim payment for 6 large trusts (8 potential payments) that were processing and paying claims at the Delaware Claims Processing Facility ("DCPF") as of 2008. Even with the Armstrong World Industries trust increasing its net payout by more than 75%, the overall payout to a mesothelioma claimant collecting all 8 potential payments across the 6 trusts is 46% lower as of yearend 2013 compared to yearend 2008.

Table 2: Net Mesothelioma Claim Payments from DCPF trusts (dollars in thousands)

Trust	12/31 2008	12/31 2009	12/31 2010	12/31 2011	12/31 2012	12/31 2013
Armstrong World Industries	\$26	\$26	\$26	\$26	\$26	\$46
Babcock & Wilcox Company	\$41	\$18	\$18	\$14	\$9	\$9
Celotex	\$18	\$18	\$12	\$12	\$12	\$8
DII Industries - Halliburton	\$29	\$40	\$40	\$40	\$40	\$27
DII Industries - Harbison-Walker	\$68	\$96	\$96	\$96	\$96	\$65
OCF - Fibreboard	\$45	\$20	\$20	\$17	\$14	\$14
OCF- Owens Corning	\$108	\$27	\$27	\$27	\$24	\$24
U.S. Gypsum	\$101	\$101	\$68	\$68	\$45	\$45
Total Net Payment	\$437	\$346	\$306	\$300	\$265	\$238
Percent Change from 2008	--	21%	30%	31%	39%	46%

As noted by the recent UNR Trust disclosures, and my own professional experience analyzing trends in trust claim activity, the rapid depletion of trust funds has been a result of higher than forecasted claim filings and payments. To the extent that these increased levels are the result of specious or possibly fraudulent claiming behavior, the transparency provided through the FACT Act should deter such activity in the future. Even with the recent premature depletion of significant trust assets, as of yearend 2013 there was still more than \$18 billion in confirmed trust assets with more than \$8 billion more confirmed in 2014. With additional trust funds still pending bankruptcy reorganization, the total trust compensation system has nearly \$30 billion in committed assets. The FACT Act will serve as an effective mechanism for protecting the rights of future deserving claimants by preserving these remaining assets.

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.

Mr. MARINO. Thank you, sir.
Professor Brickman?

**TESTIMONY OF LESTER BRICKMAN, BENJAMIN N. CARDOZO
DISTINGUISHED PROFESSOR OF LAW, YESHIVA UNIVERSITY,
NEW YORK, NY**

Mr. BRICKMAN. Mr. Chairman, Members of the Subcommittee, I want to thank you for this opportunity to address the critical issues of how to check the fraudulent practices that permeate mesothelioma litigation today.

Approximately a year and a half ago, I testified in the Garlock bankruptcy as an expert witness for Garlock, that the settlements that Garlock had entered into in the period 2005 to 2010, which the lead plaintiff's expert had relied on for his calculation that Garlock should fork over \$1.3 billion to the trust to cover its asbestos liabilities, was simply not a valid basis for these projections. The reason I gave was that these settlements were infected by plaintiffs' counsels' strategy of suppressing evidence of claimants' exposures to a group of large companies that were bankrupted in the years 2000 and 2001.

The presiding judge in Garlock, Judge Hodges, agreed, finding that, "The estimate of Garlock's aggregate liability are infected with the impropriety of some firms." I think the attempts by Mr. Inselbuch that you heard today and others to marginalize Judge Hodge's finding would not rattle in a thimble.

Permit me to briefly explain how this illegal and unethical suppression of evidence is carried out. Plaintiffs' counsel, who have effective control over the creation and administration of bankruptcy trusts, have used that power to include, amend, or add provisions to trust distribution procedures, known in the trade as TDPs, designed to limit, if not preclude, defendants' ability to use discovery, to access information, evidence that a tort plaintiff has filed trust claims. In filing a trust claim, a claimant must demonstrate "meaningful and credible exposure to the products of the company funding the trust."

To facilitate fraud, asbestos trusts have modified or adopted TDPs to include provisions designed to allow claimants, who are also suing defendants in the tort system, to prevent tort defendants from accessing exposure information and other vital information submitted by the claimants as part of the trust claims. Now, I have more fully described these provisions in my written statement and in my scholarship.

Now, in the teeth of this overwhelming evidence that exists today that some plaintiffs' counsels' practices are designed to defraud defendants, plaintiffs' counsel continued to deny any fraudulent practice or practices in mesothelioma litigation. For example, we just heard Mr. Inselbuch, who has testified previously as he has testified today, that fraudulent actions to suppress the production of exposure evidence submitted with claim filings are essentially non-existent. And as for the massive fraud in the Canadian case, which I presume some of you are familiar with, he testified previously before this Subcommittee that it 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.” There has also been congressional testimony from plaintiffs’ counsel, Charles Siegel, to the same effect. Now, because of time I will have to rely on my written statement that goes further into this.

Now, much of the evidence that was presented in the Garlock proceeding, including my expert report in particular, still remains under seal, though I understand that this will start to come out in about 2 weeks. Now, the Garlock evidence that Judge Hodges did disclose in his order as to the frequency of apparently perjurious denials of exposures, the products to which plaintiffs had asserted “meaningful and credible exposure,” coupled with plaintiffs’ counsels’ brazen manipulation of TDPs to facilitate such denials, lead, in my opinion, to an inexorable conclusion: the practice of deliberately failing to disclose evidence of other exposure is far closer to the norm than the exception. Indeed it is likely that cases in which fraud has been successfully employed dwarf the number of cases in which abuse has been discovered.

Now, improper trust payments no doubt have amounted to billions of dollars to this point. As for tort defendants, it is simply not possible to even begin to estimate how much money they have paid out as a consequence of plaintiffs making false statements as to product exposures. Undoubtedly, it amounts to hundreds of millions of dollars, but more likely billions. And it is improbable, to say the least, that the scheme to suppress evidence of other exposures is being hatched by plaintiffs.

Mr. MARINO. Sir, would you please wrap up your testimony in your next sentence?

Mr. BRICKMAN. Yes, sir. Judge Hodges in his estimation order in the Garlock bankruptcy has allowed us to peer behind the asbestos curtain that shrouds the inner workings of this highly successful scheme to use the judicial system to defraud asbestos defendants and their insurers out of billions of dollars. It is now up to the Congress to take the critically important step of enacting H.R. 526 to contain this massive fraud that now permeates mesothelioma litigation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Brickman follows:]

WRITTEN STATEMENT OF LESTER BRICKMAN
PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW

Hearing on H.R. 526: *Furthering Asbestos Claim Transparency (FACT) Act of 2015*.

Before the U.S. House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

February 4, 2015

I. INTRODUCTION

Exposures to asbestos-containing materials, mostly in the 1940s and 1950s, and to a lesser extent in the 1960s and 1970s, have exacted and continue to exact an enormous toll on occupationally exposed industrial and construction workers.¹ By about 2047, when this scourge will have mostly run its course, several hundred thousand deaths will have resulted from asbestos exposures. The litigation spawned by these exposures has no counterpart in our history. Over 10,000 corporations have been named as defendants, leading to over 100 bankruptcies (and counting). The bankruptcies have led to the creation of a dual system for compensating claimants, with the bulk of the funds being paid out for mesothelioma claims.² Personal injury lawsuits continue to be brought against a dwindling number of solvent defendants that manufactured, sold, or distributed asbestos-containing products. The companies that were bankrupted by asbestos litigation continue to be a second source of compensation through the

¹ For the source material upon which this Statement is based, see LESTER BRICKMAN, *Fraud and Abuse in Mesothelioma Litigation*, 88 TULANE L. REV. 1071 (2014).

² Mesothelioma is a rare, aggressive, and mostly fatal cancer of the mesothelium, the protective covering surrounding many of the internal organs of the body. The most common locus of mesothelioma is the mesothelial cells lining the pleura (the lining around the lung)—a condition called malignant pleural mesothelioma. The main cause of malignant pleural mesothelioma is exposure to manufactured asbestos-containing materials. Approximately 80% of those who develop pleural mesothelioma have a history of such asbestos exposure; the other 20% (some studies indicate that the percentage is as high as 40%) are considered idiopathic, that is, having no known cause. The latency period of the disease—the length of time from first exposure to manifestation—is mostly in the twenty-to forty-year range.

creation of trusts as part of their emergence from bankruptcy. There are sixty of these asbestos bankruptcy trusts (“trusts”) with current and anticipated assets totaling between \$30 billion and \$37 billion. The trusts—funded with cash, debtors’ insurance assets, and securities in the reorganized companies—assume the legal responsibilities of the reorganized companies to compensate current and future claimants injured by exposure to the companies’ products. Upon approval of the plan of reorganization, a channeling injunction is issued to direct all asbestos claims based on exposure to debtors’ products to the trusts. As part of the process of reorganization, the bankruptcy court conducts an estimation proceeding to determine the amount of assets to be conveyed to the trusts based on estimates of the value of the pending claims that were stayed by the bankruptcy filing and projections of the number of future claims and their anticipated values had the debtor remained in the tort system. Based on the court’s determination, a range of compensation to be paid to claimants for each category of disease, along with other criteria, is then determined. In setting the amounts to be paid to current claimants, the interests of future claimants must be taken into account so that the assets of the trust are equitably distributed. Because of plaintiffs’ counsel’s control over the drafting of the provisions setting forth the trusts’ criteria for payment and the adoption of extremely lax standards for paying trust claimants—many of whom are represented by the same counsel who drafted the standards—actual claims filed with the trusts have far exceeded the plaintiffs’ counsel’s own projections. As a consequence, trusts have been repeatedly forced to dramatically lower the percentage of the liquidated values of claims that are actually paid to claimants. Nonetheless, discovery undertaken in a currently ongoing asbestos bankruptcy proceeding indicates that recoveries for a representative sample of mesothelioma plaintiffs who responded to information questionnaires, average a total of about \$600,000 from 22 trusts.

Despite these reductions, trusts have been paying billions of dollars a year to claimants. Nonetheless, there is virtually no public accountability or oversight independent of the trustees who are selected by the plaintiffs' lawyers, who also set the terms for payment of claims. This motivated the United States Court of Appeals for the Third Circuit to express concern that trusts "place the authority to adjudicate claims in private rather than public hands, a difference that has at times given us and other observers pause, since it endows potentially interested parties with considerable authority." In addition, trusts provide no public disclosure of individual claims including what exposures were claimed or the amounts paid. In fact, trusts zealously guard this information and seek to hide it from tort defendants.³ Mesothelioma victims typically qualify for payment from multiple trusts, depending upon the sources of their exposures to asbestos-containing products. If the products responsible for the exposures were distributed on a national basis for industrial or commercial use, then a substantial percentage of those mesothelioma claimants are likely to be eligible for compensation from as many as twenty- five trusts invested with assets provided by the reorganized companies that produced and distributed these products.

When companies that were providing substantial compensation to mesothelioma plaintiffs go bankrupt, the flow of money to plaintiffs and their counsel from these companies is stayed by the bankruptcy filing. Although at some later time there will be payments from the trusts to be created, there can be a delay of as many as four years (and, in some cases, even longer) before the plan of reorganization is approved. Moreover, because of the volume of claims and the need for the trusts to retain funds to pay future claimants, the individual amounts paid by the trusts are usually substantially less than the amounts that plaintiffs were receiving

³ The Manville Trust used to be receptive to my requests for data which I used in my published writings. When Dr. Mark Peterson, plaintiffs' counsel's leading expert witness in asbestos bankruptcy estimation proceedings, was appointed to the Trust's Board of Trustees, all data availability ceased. When I asked one of the trustees why Manville had ceased providing access to its data, he answered: "come on, you know the answer."

when they successfully sued these companies in the tort system, offset by the fact that the requirements for receiving payments from trusts are far less rigorous than what needs to be proven in the tort system.

From 2000 to 2001, a “Bankruptcy Wave” took ten top-tier defendants that had produced thermal insulation and refractory products and had accounted for a substantial share of the compensation then being paid by defendants in the tort system. Some analysts believe that top-tier companies were paying upwards of 80% of what plaintiffs were receiving as compensation in the tort system during the late 1990s. Payments from the resulting trusts would not mount to substantial sums until 2006. Continuing to name the top-tier companies that had gone bankrupt as defendants would have resulted not only in substantial delays in receiving payment but also much reduced amounts. Not surprisingly to those who have studied asbestos litigation, in the immediate aftermath of the Bankruptcy Wave, plaintiffs stopped identifying exposures to the asbestos-containing thermal insulation and refractory products of these top-tier companies. Instead, they stepped up litigation efforts against formerly peripheral companies that prior to the Bankruptcy Wave were paying nominal amounts to settle claims. In addition, they started to bring suit against a new group of defendants involved in the manufacture and distribution of such asbestos-containing products as gaskets, pumps, automotive friction products, and residential construction products, rather than the thermal insulation and refractory products that were the dominant sources of exposures alleged prior to the Bankruptcy Wave. When trust payments began to mount to substantial sums in 2006, it apparently proved too lucrative for plaintiffs’ counsel to abandon a system of seeking payments from multiple trusts by asserting their clients’ exposures to the products of the reorganized companies while, in the same time frame, also suing defendants in the tort system, on behalf of the same claimants who then denied exposures to the

very same products of the reorganized companies, stating under oath that defendants' products were the only ones or nearly the only ones to which they were exposed.

This is borne out in a recent estimation proceeding before Judge George R. Hodges of the United States Bankruptcy Court for the Western District of North Carolina, who is presiding over the bankruptcy of Garlock Sealing Technologies ("Garlock"). Judge Hodges agreed with Garlock's expert, Dr. Charles E. Bates, who had determined Garlock's liability for present and future mesothelioma claims to be \$125 million. Experts selected by counsel for the current and future asbestos claimants maintained that Garlock's liability was between \$1 billion and \$1.3 billion. In rejecting the claimant's experts, Judge Hodges found that their calculations were flawed because of their reliance on Garlock's settlement history in the period from 2005 to 2010, when Garlock filed for bankruptcy, as the basis for determining the values of pending and future asbestos claims. Echoing my testimony as an expert witness for the debtor in that bankruptcy proceeding, he found that "[t]he estimates of Garlock's aggregate liability. . . are infected with the impropriety of some law firms and inflated by the costs of defense."

Garlock is a leading producer of gaskets and sheet gasket material that contained chrysotile asbestos encapsulated in a polymer substance. Garlock's name was printed on its gaskets, making it well-known in the industry and to workers who installed gaskets and replaced worn gaskets. Gaskets were installed in pipes, flanges, and valves, which were then wrapped in a thick covering of asbestos-containing thermal insulation produced by other manufacturers. Garlock's gaskets only emitted asbestos fibers when they were cut to size or removed by use of chisels and abrading tools. To get to the gasket to be replaced, the thermal insulation had to be removed—usually done by hammering the material—a process that created a great deal of dust containing a far more virulent form of asbestos. By comparison, the chrysotile asbestos used in

Garlock's gaskets was 1/100 to 1/2000 as carcinogenic as friable amphibole asbestos used in thermal insulation. According to Judge Hodges, the process of removal was commonly described by workers as producing a "snowstorm of dusts." In a key finding, Judge Hodges found that Garlock had demonstrated that its products resulted in relatively low exposure of a relatively lower-potency asbestos to a limited population and that the population exposed to Garlock's products was necessarily exposed to far greater quantities of higher-potency asbestos from the products of others.

Though Garlock was a minor producer of asbestos products that were insignificant with respect to the density and carcinogenic quality of asbestos-containing products from the 1940s to 1970s, it was named as a defendant hundreds of thousands of times in its thirty-five-year asbestos litigation history and paid more than \$1.3 billion in liability and defense costs until its insurance ran out and it filed for bankruptcy in 2010.

My testimony today focuses on the interplay between trust payments to claimants and suits against solvent defendants in the tort system and how that is affected by plaintiffs' counsel's effective control over the production of evidence of exposure to asbestos-containing products and their use of that control to suppress evidence of plaintiffs' exposures to the products of reorganized companies. Defendants seek to reduce the amount of compensation they pay to plaintiffs by asserting that (1) plaintiffs have received or will receive payments from trusts that should be credited against defendants' tort liabilities; (2) in states such as California, New York, and Pennsylvania, which allow juries to allocate shares of the liability to the bankrupts, plaintiffs were exposed to the products of the bankrupts, thus reducing defendants' liability share and therefore its trial risk; and (3) plaintiffs' exposures to products of the reorganized companies that funded the trusts were so much more intense and extensive than the exposures to defendants'

products that defendants' share of the total liability to plaintiffs should be determined to be significantly less than the share accorded to the reorganized companies. Defendants further assert that even when—over the strenuous objections of plaintiffs' counsel—they are able to obtain evidence of other exposures by engaging in extensive discovery including filing subpoenas with trusts, motions to compel and so on, they are still at a considerable disadvantage. Because courts limit the amount of time available for discovery, when plaintiffs' counsel disclose trust claims on the eve of trial, the closer to trial that the evidence is uncovered, the less time is available to follow up the evidence with new interrogatories, demands for documents, and other discovery. Defendants contend that when there is suppression, they have to go to trial with an out-of-date trial plan and without having been able to investigate plaintiffs' other exposures adequately and gather the necessary evidence to counter plaintiffs if they fail to disclose or deny other exposures in pretrial discovery or at trial. These factors also drive up defense costs, which in a mesothelioma case can easily run \$100,000 or even multiples thereof. Defendants are typically willing to settle claims for amounts determined by their expectations of the outcomes of trials and also their defense costs. This calculation applies as well to claims they expect to win if taken to trial where settlement costs are lower than the cost to litigate the claim. Thus, the higher the costs to defendants to resolve claims, the greater the willingness of defendants to settle claims, including nonmeritorious claims, for higher amounts than would otherwise be the case.

Countering defendants' efforts to reduce their share of liability, plaintiffs and plaintiffs' counsel seek to suppress defendants' access to evidence of plaintiffs' exposures to asbestos-containing products manufactured, sold, or distributed by the reorganized companies that funded the trusts. This practice of suppression of evidence of exposures increases tort claim values while often denying defendants a fair trial. Judge Peggy L. Ableman, formerly the Delaware Superior

Court judge responsible for all asbestos litigation in the state of Delaware, strongly denounced the practice of plaintiffs denying exposures to the products of reorganized companies when, in fact, plaintiffs and their counsel had asserted just such substantial exposures in claims submitted to trusts:

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 of 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.

The conclusion I draw from the research I have undertaken is that to provide “real justice or fairness” and restore the “integrity of the judicial process,” there is a critical need to adopt legislation at the federal level to prevent plaintiffs and their counsel from denying defendants access to evidence of other exposures of plaintiffs to asbestos-containing products. H.R. 526 is designed to do just that by mandating the transparency of evidence of plaintiffs’ exposures to the products that make them eligible for payments from trusts. While three states have now enacted legislation that requires plaintiffs to provide the evidence of their exposures that they currently suppress and access to the claims they filed with trusts, there nonetheless remains a compelling need for federal legislation to amend federal bankruptcy law to require the trusts to cease throwing up these many roadblocks to production of their claims filings and instead, to make that information readily accessible to defendants in the tort system and their insurers.

II. THE ENTERPENEURIAL MODEL

In a 2004 law review article, I identified an “entrepreneurial” model used to generate the

hundreds of thousands of nonmalignant asbestos claims that were supported by unreliable medical reports that were not the product of good faith medical practice.⁴ My conclusion that the vast majority of these nonmalignant asbestos claims were spurious was largely corroborated by a report issued by United States District Court Judge Janis Jack who presided over a multidistrict litigation involving approximately 10,000 silica claims and who found that the medical reports supporting the claims were “manufacture[d] . . . for money.”

Although the entrepreneurial model I described was based on nonmalignant claims, it does have specific application to mesothelioma litigation. In both nonmalignant and malignant asbestos litigation, plaintiffs’ counsel exercise near complete control over the production of evidence as manifested by the phenomenon of widespread changes in witness testimony concerning the products to which plaintiffs were exposed whenever a top-tier asbestos defendant is driven into bankruptcy—an event that significantly depreciates the value of claims against that company.

There is evidence that this phenomenon is attributable to plaintiffs’ counsel’s use of witness preparation techniques to produce testimony that denies or minimizes plaintiffs’ exposures to asbestos-containing products that were manufactured by top-tier defendants that had filed for bankruptcy and instead identifies only or mostly the products manufactured by the defendants being sued in the tort system.

This practice first became evident in the aftermath of the bankruptcy of the Johns-Manville Corporation (“Manville”) in 1982. Prior to 1982, the focus of asbestos litigation was on Manville, then the largest producer of asbestos-containing products. Plaintiffs and their witnesses testified that the company produced the dominant share of the asbestos-containing

⁴ LESTER BRICKMAN, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33 (2004).

construction materials encountered by claimants, and as a consequence, the company paid out the most funds to claimants. The 1982 bankruptcy of the company imposed an immediate stay on all payments to tort claimants, thus halting the main flow of revenue derived from asbestos litigation. Payments would not resume until 1988 when a “run on the bank” by plaintiffs’ lawyers quickly depleted the assets of the trust that was created to pay Manville’s asbestos claims, resulting in a further delay in payments and a series of substantial reductions in the amounts paid out for each disease category. Accordingly, the more witnesses would continue to identify the company’s products as dominating the list of asbestos-containing products to which claimants claimed exposure, the less funds would then be available to pay to claimants and their counsel. However, immediately after the bankruptcy, witness testimony underwent a sea change. Whereas testimony in the Philadelphia Navy Yard cases, for example, put Manville’s share of asbestos-containing workplace products as high as 80%, after bankruptcy, witnesses testified that Manville products accounted for an increasingly declining percentage of asbestos-containing products used at work sites. In the Brooklyn Navy Yard cases, for example, after hearing witness testimony, the jury apportioned only 9-11% of the overall liability to Manville. Letting the cat out of the bag, a witness who was deposed just months after the Manville bankruptcy testified that only 25% of the asbestos containing products used at a shipyard were manufactured by Manville. Earlier in that deposition, the witness had at first estimated that “basically, most of the [asbestos-containing] materials [were made by] Johns-Manville.” He then quickly added, “I wasn’t supposed to mention that, was I?”

The phenomenon of witness testimony switching from identifying exposures to companies that had entered bankruptcy to identifying products of solvent companies that had formerly been peripheral defendants, or simply not defendants at all, has become a salient feature

in mesothelioma litigation as well.

A method by which plaintiffs' counsel have been able to bring about sea changes in witness testimony was revealed in an extensive series of reports in 1998 by newspaper reporters who investigated the litigation screening practices of Baron & Budd, a leading plaintiffs' law firm in asbestos litigation. This investigation revealed the extensiveness of the practice of witness preparation that focused on implanting false memories in asbestos claimants. In 1997, a novice lawyer at Baron & Budd inadvertently produced a twenty-page internal memo titled "Preparing for Your Deposition," which I have referred to as the "Script Memo." Claimants were instructed to memorize the information that a paralegal had filled out for them on their Script Memos but to never mention it. The Script Memo included instructions for clients on how to prepare for their deposition including specific answers, even if false, that were to be given regarding product exposure. The newspaper reported that in filling out the form, former employees of Baron & Budd told them that "[w]orkers were routinely encouraged to remember seeing asbestos products on their jobs that they didn't truly recall," and where necessary, employees would "implant false memories." One former paralegal explained that by the time she finished preparing a client, she had a product "ID for every manufacturer that we needed to get ID for." Baron & Budd paralegals were also instructed to steer clients away from identifying the products of bankrupt companies, such as Manville, and to "warn . . . [the client] not to say you were around [a certain product]—even if you were—after you knew it was dangerous" and "deny that they ever saw warning labels on product packages." Finally, clients were assured that defense lawyers who questioned them in a deposition would have no way of knowing what products were actually used at relevant job sites, signaling that anything the client testified to, no matter how false, could not be challenged.

Fred Baron, the late lead partner of Baron & Budd, justified the use of the Script Memo, arguing that there was nothing unethical or illegal about its contents. Indeed, he asserted that the way the firm prepared its asbestos clients to testify was how “any lawyer in the country that is worth a damn’ works.”

III. THE DUAL COMPENSATION SYSTEM IN MALIGNANT LITIGATION

As noted, asbestos litigants suing on the basis of a malignancy seek to obtain compensation both from suits filed in state and federal courts and claims filed with bankruptcy trusts. The amounts of money disbursed by the trusts have soared in the past decade due in particular to the creation of nearly thirty bankruptcy trusts since 2006. From 1988, when the first trust was established, through 2008, trusts paid about 2.4 million claims totaling \$10.9 billion. An additional \$5 billion to \$6 billion was paid by certain debtors prior to plan confirmation as part of prepackaged bankruptcy settlements. Trust claim payments rose rapidly from 2006 onward. From 2006 through 2012, trusts paid out over \$15 billion to asbestos claimants. In 2008, trusts paid about 575,000 claims totaling \$3.3 billion; in 2009, an additional \$3.6 billion was paid, and in 2010, \$3 billion. Nonetheless, total trust assets grew substantially in this period because of the establishment of new trusts with substantial assets. As of 2011, sixty trusts had been established or were in the process of being established with assets totaling between \$30 billion and \$37 billion.

Malignant claimants also seek compensation from defendants in the tort system whose ranks have been considerably thinned by over 100 bankruptcies. When the 2000 to 2001 Bankruptcy Wave occurred, plaintiffs’ counsel increased their settlement demands to make up for the interruption of payments from solvent defendants. Defendants reasonably anticipated that

after all of the United States Bankruptcy Code § 524(g) trusts became operational, substantially increasing bankruptcy trust assets, their share of the compensation paid to those injured by exposure to asbestos would significantly decline as trusts were in position to, and did, pay billions of dollars to claimants. This did not happen. What follows is an explanation of why mesothelioma claim values in the tort system have actually risen in recent years despite the payouts of billions of dollars to mesothelioma claimants by trusts since 2006.

A. *Plaintiffs' Counsel's Control over the Formation and Operation of Bankruptcy Trusts*

The same baker's dozen or so law firms that represent the large majority of asbestos claimants also represent the majority of claimants in asbestos-related bankruptcy proceedings. In most cases, these leading asbestos law firms largely control the asbestos bankruptcy process and the operation of the trusts created under § 524(g). In the bankruptcy process, creditor committees are appointed by the United States Trustee Program to represent the interests of classes of creditors. One of those committees, the asbestos creditors' committee (ACC) initially consists of tort creditors who are selected by the U.S. Trustee. However, the practice is for those tort creditor/clients to cede control to their attorneys through powers of attorney. Thereafter, the appointed members of the committee fade from view. A handful of law firms constitute most representation on the ACCs. The leading asbestos law firms also draft the trust distribution procedures (TDPs) that contain the medical and exposure criteria for determining eligibility and a schedule of payments by disease. Claimants can elect to receive (1) scheduled values applied to various levels of disease and length of exposure, (2) amounts determined by individual evaluation, or (3) a "quick pay" minimal documentation option. Thus, the leading plaintiffs' counsel establish the criteria for the payment of the very claims that they are and will be asserting on behalf of their clients. These criteria are designed to allow asbestos claimants to

obtain funds on the basis of claims of exposure that must meet far less stringent standards than those required in the tort system. Indeed, the exposure requirement can be satisfied by an affidavit—submitted by the claimant, a coworker, or family member— or by having been employed at various work sites identified in the TDPs. As testified to by a plaintiffs’ counsel, the TDPs are designed to permit claimants to withdraw as much money as possible from the trusts as quickly as possible.

In addition to their control over the ACCs, though formally appointed by the bankruptcy judge, these plaintiffs’ counsel effectively select the trustees to operate the § 524(g) bankruptcy trusts that will be created to actually pay the claims, the administrator of the trust, and also the “future claimants representative” (FCR) who is to represent the interests of future claimants. Finally, they also constitute the membership of trust advisory committees (TACs), which represent the interests of current asbestos claimants. While trustees have the authority to amend TDPs, it can only be done with the consent of the TAC and FCR. Essentially, it is the TACs that exercise effective control over trusts’ TDPs after they have been initially adopted.

The FCRs, though appointed by the bankruptcy court, in reality, are selected by the ACC, aka, plaintiffs’ counsel. The appointment is most lucrative for FCRs, and some FCRs have proven so congenial with the plaintiff’s bar that they have been appointed to be FCRs in multiple trusts. Prior to the Garlock case, I am aware of no occasion when an FCR ever took a position opposed to the interests of plaintiffs’ counsel. It does not appear to be a coincidence that the deals struck by asbestos claimants in past asbestos cases have often been abysmal for future claimants. In a common scenario, trusts substantially reduce payment levels for future claimants after present claimants have been fully resolved and paid.

Unlike all other bankruptcies, the FCR appointed by Judge Hodges had no prior

connection with any stakeholder in asbestos litigation. The FCR represents *future claimants* who appear to far exceed in both numbers and claim values, *current claimants*. In a series of unprecedented acts, the Garlock FCR has broken rank with the Garlock ACC. He first moved the bankruptcy court to impose a bar date for present asbestos claims in order to ensure that the court could identify truly deserving claimants and avoid overpaying those claims to the detriment of future claimants. He also refused to adopt the standard TDPs used in other asbestos bankruptcies which, as explained earlier, have resulted in inequitable treatment for future claimants. Finally, he negotiated a plan of reorganization with Garlock that guarantees funding of at least \$357 million for present asbestos claimants, an amount almost three times Judge Hodges \$125 million estimation. Central to the deal between Garlock and the FCR are claims resolution procedures that preserve money for claimants with injuries based on real medical diagnoses who demonstrate that they really worked with Garlock's products. Not surprisingly, the ACC, composed of plaintiffs' lawyers, currently opposes the plan.

B. *The Use of TDPs to Suppress Evidence*

Plaintiffs' counsel, who have effective control over the creation and administration of asbestos bankruptcy trusts have used that power to include, amend, or add provisions to TDPs designed to limit, if not preclude, defendants' ability to use discovery to access evidence that a tort plaintiff has filed trust claims. In filing a trust claim, a "claimant must demonstrate "meaningful and credible exposure" to the products of the company funding the trust. As of 2011, 65% of asbestos trusts had modified their TDPs after confirmation to include provisions designed to allow claimants who are also suing defendants in the tort system to prevent tort defendants from accessing exposure evidence and other vital information submitted by the

claimants as part of their trust claims.

One such provision is a “confidentiality” provision, which generally states that all information submitted to trusts by an asbestos claimant is to be treated as made in the course of settlement negotiations and is intended to be confidential and protected by all applicable privileges. Not only does this provision require a subpoena for production of claims information, it requires that the subpoena issue from the bankruptcy court, not simply the trial court. This is intended by plaintiffs’ counsel to at least delay defendants’ access to possibly vital information by having to run an additional gauntlet of bankruptcy judges, thus imposing increased costs on defendants. Additionally, the provision instructs the trustees of the trusts to take the initiative to challenge subpoenas seeking trust claim information, thus magnifying the increased costs and delay.

Plaintiffs’ counsel maintain, as they have set forth in section 6.5 of most TDPs, that because trust claims and all materials related to the claim are made in the course of settlement discussions, they are therefore privileged. This argument does not rise to featherweight status. Over their strenuous opposition, more than twenty trial courts have held that claim forms submitted to asbestos bankruptcy trusts and factual information such as medical records submitted in support of trust claims are not confidential records and are discoverable in civil litigation.

Nonetheless, plaintiffs’ counsel continue to erect barriers to tort defendants’ accessing trust claim filings. Written discovery propounded to plaintiffs related to bankruptcy trusts is almost always met with objection. Even subpoenas served on the trusts are vigorously opposed by plaintiffs’ counsel. Indeed, on December 28, 2011, the three plaintiffs’ firms representing all plaintiffs within the Rhode Island asbestos docket filed a joint motion for a blanket protective order asking the court to prevent “the disclosure of the terms and supporting documentation of

any settlement entered into between any plaintiff and any named or unnamed defendant or bankruptcy trust.” On August 7, 2012, Judge Hodges, presiding over the Garlock bankruptcy, denied the requests by the Delaware Claims Processing Facility, which processed claims for these trusts, joined by the numerous trusts that had been subpoenaed by Garlock to provide trust claim filings by those who had sued Garlock and the Garlock ACC, to make anonymous the trust claim data before submitting it to Garlock. Doing so would have disabled Garlock from determining whether plaintiffs who had sued Garlock had also submitted trust claims and what exposures were alleged in the claims.

Furthermore, there is evidence that plaintiffs and their counsel, in some cases, simply ignore the requirement in standing orders of courts that plaintiffs provide defendants with a statement of any and all claims that may exist against asbestos trusts. In addition to “confidentiality” provisions—many added by amendment after confirmation of the plan of reorganization, plaintiffs’ counsel have also had trusts’ TDPs amended after confirmation to add a paragraph that provides that evidence submitted to the trust is for the “sole benefit” of the trust and claimants are not required to list any other exposures in filing a claim except those for which the trust is responsible. In addition, if an asbestos plaintiff in a tort action fails to identify exposure to products of a reorganized company or fails to do so when filing claims with other trusts, then the plaintiff would not be precluded from recovering as an asbestos claimant from that trust.

This provision appears intended to enable plaintiffs and their counsel to limit the exposure evidence they must provide in support of trust claims, thus minimizing the evidence of exposures that a defendant may acquire by obtaining a court ruling enforcing a subpoena directed to a trust to produce any trust claims that a plaintiff filed with that trust. This provision also

vitiates any consequence of failing to identify product exposures in responses to interrogatories, depositions, and trial testimony in tort cases. For example, if plaintiffs suing an asbestos defendant respond to interrogatories or give testimony in a deposition or at trial or all three in which they deny that they were exposed to any other asbestos-containing products besides the defendant's products, indeed deny that they were exposed to specific asbestos products not manufactured or sold by the defendant, for example, Unibestos (manufactured by Pittsburgh Corning) or Kaylo (Owens Corning), and then file claims before, during, or after conclusion of the tort case with, *inter alia*, the Pittsburgh Corning and Owens Corning Trusts attesting to "meaningful and credible exposure" to their products, section 5.7(b)(3) of the TDPs provides that, regardless of any such perjurious trial testimony, as long as the claimant has satisfied the medical and exposure requirements in the TDPs, the trust claim is valid.

A third TDP provision that appears intended to suppress evidence of plaintiffs' exposures to the products of reorganized companies so as to inflate the value of tort claims involves the timing of trust claim filings. Most TDPs have a three-year statute of limitations requiring that trust claims be filed within three years of diagnosis of an asbestos-related disease or, if later, within three years after the "initial claims filing date" or the date of the asbestos-related death. This allows plaintiffs to file and resolve many tort actions before filing trust claims. In the event that plaintiffs are unable to resolve their tort claims within the allowed time period, most TDPs, in section 6.3, allow a claimant to file a trust claim to meet the applicable statute of limitations first and then to withdraw the claim "at any time . . . and file another claim subsequently without affecting the status of the claim for statute of limitations purposes." Section 6.3 further provides:

A claimant can . . . request that the processing of his or her PI Trust Claim by the PI Trust be deferred for a period not to exceed three (3) years without affecting the status of the claim for statute of limitations purposes, in which case the claimant shall also retain his or her original place in the

FIFO Processing Queue.

Thus, a plaintiff suing in the tort system can have filed trust claims, then withdrawn or deferred them, completed the tort suits during which they testified that they had not filed any trust claims, and then immediately refile or revive the trust claims asserting product exposures that controvert the plaintiff's testimony in the tort action. Section 6.3 further facilitates plaintiffs' and their counsel's denials in the course of pretrial discovery that they had filed trust claims, despite their having done so. Upon refiling or reviving the trust claims, plaintiffs and their counsel will almost certainly assert product exposures that are inconsistent with the claims of causation advanced in the tort litigation. The practice of using section 6.3 of TDPs for this purpose is laid bare in *Barnes & Crisafi v Georgia-Pacific*. There, plaintiffs' counsel justified plaintiffs' denial of filing any trust claims—when they had in fact filed at least four trust claims—on the grounds that the claims were deferral claims and therefore were not filed trust claims. An irate judge emphatically rejected that excuse stating that her order required all trust claims to be disclosed, including “deferral claims,” and that “[t]he defense is entitled to know that.” She then reopened discovery to permit the defendant to further investigate the plaintiffs' trust filings.

The timing of the TDP changes is noteworthy. The “sole benefit” and “deferral” provisions were mostly added or adopted during the years 2006 to 2010. It was during this period when the current version of the “confidentiality” provisions became standard in TDPs and when there was an influx of new trusts with substantial assets and the bulk of the trust money began to be paid out. This was also the time when concerns about “double-dipping,” i.e., asserting trust claims with work histories and exposure claims that are inconsistent with plaintiffs' testimony in tort actions, were gaining national attention because of *Kananian v Lorillard Tobacco Co.* This case (which I will not be discussing in detail) illuminated the practice

of plaintiffs and their counsel falsely denying exposure to the products of reorganized companies, even though counsel had not only filed claims with several trusts but had received payment from one of them.

In my view, the TDP changes discussed above are an effort by plaintiffs' counsel, who exercise effective control over the trusts, to prevent defendants from demonstrating that plaintiffs' denials of exposure to other products are belied by plaintiffs' having filed multiple trust claims before the tort case was filed, during the tort case, or after the conclusion of the tort case, which assert product exposures that were denied by plaintiffs during the course of pretrial discovery and trial testimony. To curb this abusive practice, it is incumbent on Congress to pass H.R. 526.

C. Rule 2019 Statements

Other evidence of plaintiffs' counsel's suppression of evidence of plaintiffs' exposures to asbestos-containing products not manufactured, sold, or distributed by defendants and thus the need for a federal law curbing this illegal scheme involves Federal Rule of Bankruptcy Procedure 2019 statements ("2019 Statements"). Section 2019(a) requires that attorneys representing more than one creditor file a verified statement listing the creditors, the amount and nature of their claims (as well as the acquisition date of claims acquired within the last year), the facts surrounding the attorney's employment in the case, and the nature and amount of any claims or interests owned by the attorney at the time they were hired. This requirement enables the court to identify actual or potential conflicts that may require conflicted counsel to withdraw from representing one or more of the lawyer's clients. Every law firm representing more than one plaintiff with a claim against the debtor is required to file this statement.

In 2019 Statements, claimants' counsel provide a verified statement that their clients have

claims against the debtor because their clients were exposed to the asbestos-containing products of the debtor and that these exposures caused the claimant's disease. For example, in the Pittsburgh Corning bankruptcy, counsel filed the following 2019 Statement:

2. I have personal knowledge of the facts set forth herein. I make this Verified Statement ("Statement") pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure and the Court's Order of October 22, 2004.
.....
4. As of the date of this Verified Statement, the Firm Claimants (the "Claimants" or individually "Claimant") who have been injured by asbestos products manufactured, marketed, distributed, sold, or produced by Pittsburgh Corning Corporation ("Debtor") and others, and thus hold claims against, inter alia, the Debtor.
.....
6. The nature of the claim held by each Claimant is a personal injury tort claim for damages caused by asbestos products manufactured by the Debtor.

In practice, in order to further their scheme to suppress evidence of their client's exposures, plaintiffs' lawyers representing asbestos claimants numbering in the hundreds and thousands in bankruptcy proceedings, routinely failed to file 2019 Statements and strongly resisted efforts to secure compliance with the rule. These filings contain statements of plaintiffs' exposures to numerous products of the reorganized companies. If copies are secured by defendants, they could impeach testimony by plaintiffs denying such exposures. Only in the last decade have courts begun mandating compliance with Rule 2019. In 2004, United States Bankruptcy Judge Judith Fitzgerald, who has presided over twelve asbestos bankruptcies, issued an omnibus order requiring all counsel representing more than one creditor in several specified asbestos bankruptcy proceedings to comply with Rule 2019 or else the votes of their clients would not be counted in the voting on approval of the plan of reorganization. However, although Judge Fitzgerald ordered counsel to submit exhibits in compliance with Rule 2019, she further ordered that the exhibits were not to be scanned into the docket and instead would be kept confidential and only accessible if the bankruptcy court ruled favorably on a motion to access the

exhibits. In contrast, United States Bankruptcy Judge Kathryn C. Ferguson, presiding over the Congoleum bankruptcy, ordered full compliance with Rule 2019, including public disclosure of personal injury and wrongful death claimants represented by firms. Judge Ferguson's order was in response, *inter alia*, to a motion to compel the law firm of Motley Rice to provide the information called for by Rule 2019. United States District Court Judge Stanley R. Chesler affirmed Judge Ferguson's order, holding that complete disclosure in compliance with Rule 2019 is necessary to ensure the overall fairness of the reorganization plan.

During the course of the Garlock bankruptcy proceeding, the debtor's counsel, recognizing the potential value of having access to these statements, for the first time in asbestos bankruptcy proceedings, filed motions to access the exhibits to the 2019 Statements in the twelve bankruptcies presided over by Judge Fitzgerald. This was done so that the debtor could use the 2019 Statements in an attempt to prove that in asbestos litigation against Garlock, plaintiffs and their counsel had failed to disclose or denied exposure to the products of reorganized companies, even though their counsel had filed 2019 Statements attesting that their clients had valid claims against the companies in bankruptcy. Judge Fitzgerald denied Garlock's request. She then entered essentially identical orders and opinions in each of nine Delaware bankruptcy cases and the three Western District of Pennsylvania bankruptcy cases. Garlock appealed these orders to the United States District Court for the District of Delaware, which overruled Judge Fitzgerald on this point and permitted Garlock access to the 2019 Statements and exhibits that had been kept from public access.

D. *Master Ballots*

In order to be eligible to vote on a plan of reorganization in an asbestos bankruptcy as set

forth in §524(g), plaintiffs' counsel, on behalf of their claimant-clients, are required to certify, under penalty of perjury, that they have a claim against the debtor because of exposure to asbestos-containing products for which the relevant debtor is responsible. Here too, plaintiffs' counsel seek, to preclude, or at least impede any attempts to obtain the Master Ballots filed by plaintiffs' counsel on behalf of their clients. Moreover, although these ballots are court filings, they are generally filed with a balloting agent and not made readily available to the public.

Garlock's bankruptcy counsel, in another "first," sought access to the Master Ballots but was only allowed to view Master Ballots cast on behalf of personal injury claimants in the Pittsburgh Corning proposed plan of reorganization. Garlock then did a random sampling of discovery responses by asbestos plaintiffs who had sued Garlock. Of 255 Garlock mesothelioma plaintiffs who had voted, via their counsel, on the Pittsburgh Corning plan, with counsel certifying under penalty of perjury that their clients were injured by exposure to Pittsburgh Corning products and therefore had a valid claim against the debtor, only 19 had disclosed in their suits against Garlock that they had been exposed to Pittsburgh Corning products. Garlock indicated in its own bankruptcy filing that it had entered settlements with thirty-seven of the sampled plaintiffs for at least \$100,000 each. Only six of these plaintiffs had mentioned exposure to a Pittsburgh Corning product in their tort suits.

One of the thirty-seven plaintiffs "ha[d] been asked by his own counsel in deposition, 'Have you ever been exposed to Unibestos insulation [a Pittsburgh Corning product]?' The plaintiff testified, 'No.'" Three months later, Garlock settled his mesothelioma claim for \$400,000. Nine months after the payment, the law firm cast a ballot on his behalf, certifying under penalty of perjury that he had indeed been exposed to Pittsburgh Corning's asbestos-containing products.

Another one of the thirty-seven plaintiffs insisted repeatedly in his deposition that he had never been exposed to pipe insulation (such as Unibestos). Garlock settled this mesothelioma claim for \$450,000 in January 2010. Two months later and only eight months after his deposition, his attorney certified under penalty of perjury that his client had been harmed by exposure to Pittsburgh Corning products and was therefore entitled to vote on the plan of reorganization. Forty-one different Pittsburgh Corning voters in the sample submitted discovery after casting a ballot in the Pittsburgh Corning bankruptcy. All but two of these plaintiffs (95%) *failed* to identify exposure to Unibestos or another Pittsburgh Corning product despite their lawyers' prior certification to the contrary under penalty of perjury. This record explains why plaintiffs' counsel opposed Garlock's attempts to subpoena the balloting agents to obtain this information and is further evidence, if further evidence is needed, that federal legislation is needed to curb practices which amount to a fraud on courts.

E. *The Kananian Case*

Plaintiffs' counsel's efforts to increase tort claim values are not limited to (1) opposing disclosure of 2019 Statements, exhibits, and Master Ballots cast to approve plans of reorganization; (2) adopting or adding TDP provisions designed to prevent defendants from accessing product exposure claims contained in trust filings; and (3) concealing the existence of trust claims that have been filed prior to filing the tort suit or thereafter that assert "meaningful and credible exposure" to the products of reorganized companies that are not disclosed, and even denied, in pretrial discovery. To conceal trust claim filings, plaintiffs and their counsel, according to some judges, have engaged in fraudulent actions in pretrial discovery. Plaintiffs' counsel have argued that fraudulent actions to suppress the production of exposure evidence submitted with trust filings are extremely rare—that, indeed, the widely reported case of

Kananian v. Lorillard Tobacco Co. was a one-off, an “isolated incident.”

According to the presiding judge, the facts in *Kananian* reveal fraudulent conduct by plaintiff’s counsel on a massive scale.

Judge Peggy L. Ableman, has characterized the deceptive practices of some asbestos plaintiffs and their counsel as “dishonesty at its highest level,” observing, “This is trying to defraud. . . . [I]t happens a lot [in asbestos litigation].” Judge Ableman’s comments are supported by a number of cases demonstrating patterns of deceptive and fraudulent conduct by plaintiffs and their counsel that can be accessed in my recent article.⁵

F. *Lies, Damned Lies, and Discovery Responses*

There are many documented incidents of plaintiffs and their counsel, throughout discovery and trial, withholding information about asbestos trust claims that they filed. Even where a court’s rulings make clear that trust claim materials must be produced, tort defendants are nonetheless often forced to file motions to compel the production of trust claim information. If production is finally made, trust materials can reveal “substantial and inexplicable discrepancies between the positions taken in Court and the trust claims.” In *Warfield v. AC & S, Inc.*, the plaintiff failed to disclose nine trust claims, eight of which had been filed before he testified in the litigation. Though egregious, this kind of deceit is by no means exceptional. In another case, the plaintiff denied having filed trust claims despite having received payment of approximately \$185,000 from five trusts and “deferring” fourteen other claims worth at least \$313,000—a total of nineteen undisclosed filed claims.

Another tactic employed by plaintiffs and their counsel is to postpone filing trust claims that would undermine a particular theory of liability at trial until after disposition of the suit.

⁵ *Supra* note 1 at 1112-1118.

G. *Plaintiffs' Counsel's Explanations for Their Failure To Disclose*

Plaintiffs and plaintiffs' counsel often pose specious explanations for their failure to disclose trust claims. One excuse tendered is that the undisclosed claims are merely "deferral claims," filed only to toll the statute of limitations. As noted, the court in *Barnes & Crisafi* categorically rejected the argument that the distinction between a claim and a "deferral claim" could excuse nondisclosure and admonished the plaintiff's counsel: "You cannot be blind, deaf and dumb."

Another excuse is for trial counsel to claim ignorance of claims that have been filed on behalf of the client by other law firms. In one case where nondisclosure was brought to light, counsel claimed that his client had lied to him about product exposures and concealed the fact of applications to numerous trusts and the receipt of payment.

In *Stoeckler v. Am. Oil Co.*, trial counsel denied any prior knowledge of the plaintiff's multiple trust filings. Once revealed, one of the plaintiff's trial counsel first argued that the claim forms contained no assertion by Stoeckler that he was actually exposed to products of the reorganized companies. The court rejected this contention, pointing out that trust forms Stoeckler submitted required claimants to provide information regarding their exposures to products for which the trusts were responsible and that the trust claims filed had identified specific products to which he claimed exposure. Another trial counsel then argued that the trust filings, including the product identifications, were not made by Stoeckler but rather by another firm that represented him, and therefore Stoeckler could still maintain that he was not exposed to the products of the four reorganized companies.

In her opinion in *Montgomery v. American Steel & Wire Corp.* as well as in her recent congressional testimony and her article that appeared along with mine in the *Tulane Law Review*,

Judge Ableman discussed abusive, if not fraudulent, practices in a pretrial hearing.

In *Montgomery*, plaintiffs' failed to identify twenty bankruptcy trusts to which they had submitted claims. In response to an interrogatory asking plaintiffs to identify all entities who were not defendants to whose products plaintiff June Montgomery had been exposed, plaintiffs identified none of the trusts to which claims had been submitted. Indeed, counsel for plaintiffs stated that no bankruptcy submissions had been made and no monies received. Two days before a two-week trial was to commence, plaintiffs' counsel reported that his client had received two bankruptcy settlements of which he was previously unaware. The following day, the defendant learned that, in fact, twenty bankruptcy trust claims had been submitted.

According to Judge Ableman, the fraudulent scheme was only exposed because one of the named defendants knew of other instances of plaintiffs' counsel submitting "conflicting work histories to multiple trusts [and] filed a motion in advance of trial requesting that the Court order disclosure of all pretrial settlements, including monies received from bankruptcy trusts." The court called the failure to report those twenty trust claim filings examples of "dishonesty and disreputableness," stating, "The core of this case has been fraudulent." This is trying to defraud," the jurist stated. "[I]t happens a lot [in asbestos litigation].

In the teeth of the overwhelming evidence that some plaintiffs' counsel's practices are designed to defraud defendants, plaintiffs' counsel continue to deny any fraudulent practice in mesothelioma litigation. For example, Elihu Inselbuch, the lead lawyer for Caplin & Drysdale which has represented plaintiffs' counsel's interests in the vast majority of asbestos bankruptcies, has argued that fraudulent actions to suppress the production of exposure evidence submitted with trust filings are extremely rare.⁶ As for the massive fraud in *Kanamian*, he testified before

⁶ See Elihu Inselbuch et al., *The Effrontery of the Asbestos Trust Transparency Legislation Efforts*, MEALEY'S LITIG. REP.: ASBESTOS Feb. 2013, at 17.

this Subcommittee that it “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.”⁷ Inselbuch’s denial of plaintiffs’ counsel’s involvement with fraud is echoed by the plaintiffs’ asbestos bar.⁸ Congressional testimony from Charles S. Siegel, then of the plaintiffs’ firm of Waters, Krause & Paul LLP, is to the same effect:

“The few examples that we have of fraud in the system today I think show that the system works. The Kananian case is a terrible example. That lawyer was disbarred, and that claim was dismissed. And so once in a while we have a situation like that, the system deals with it, and the parties go on down the road.”⁹

There is no evidence, however, that the Brayton Purcell lawyer whose *pro hac vice* status was revoked by the presiding Judge in *Kananian*, was ever subjected to discipline further let alone disbarred for his conduct which the judge characterized as “lies upon lies upon lies.”

H. *The Results of Garlock’s Limited Discovery*

Judge Albeman’s words that “it happens a lot” has been corroborated by Judge Hodges in the Garlock bankruptcy. Though Garlock sought to undertake extensive discovery to establish that evidence of exposures to the products of the top-tier reorganized companies had been

⁷ *Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 66 (2013) (prepared statement of Elihu Inselbuch, Member, Caplin & Drysdale) [hereinafter *Inselbuch Statement*]

⁸ *See e.g. id.* at 68 (“Indeed, there is not a scintilla of evidence of [fraud in the trust system]”); Task Force on Asbestos Litigation and the Bankruptcy Trusts, ABA 165-66 (June 6, 2013), http://www.americanbar.org/content/dam/aba/administrative/tips/asbestos_tf/revised_task_force_on_asbestos_litigation_and_the_bankruptcy_trusts_06-06-2013.auth_checkdam.pdf (testimony of John Ruckdeschel, Ruckdeschel Law Firm) (“I’m not aware of a single instance where anybody has come forward and said [during the course of an asbestos trial that ‘I was not exposed,’ and then after that files a bankruptcy claim attesting to just such exposure]. I’m not aware of any instance where that has happened.”)

⁹ *Furthering Asbestos Claim Transparency (FACT) Act of 2012: Hearing on H.R. 4369 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 58 (2012) (statement of Charles S. Siegel, Partner, Waters, Kraus, & Paul LLP).

suppressed, most of Garlock's attempts were vigorously contested by counsel for the Garlock ACC and were denied by the court.

Judge Hodges did, however, at a later point during discovery, allow Garlock to conduct discovery regarding fifteen plaintiffs represented by five law firms with which Garlock had settled mesothelioma cases for substantial sums. Judge Hodges' findings were both illuminating and inculcating:

Garlock demonstrated that exposure evidence was withheld in *each and every one* of [the] cases that Garlock had settled for large sums. The discovery in this proceeding showed what had been withheld in the tort cases—on average plaintiffs disclosed only about 2 exposures to bankruptcy companies' products, but after settling with Garlock made claims against about 19 such companies' Trusts.

In the fifteen cases, plaintiffs disclosed a total of thirty-two exposures but failed to disclose an additional 284 exposures—a failure-to-disclose rate of 90%.

Judge Hodges then went on to provide details on five of the fifteen cases:

In a California case involving a former Navy machinist mate aboard a nuclear submarine, Garlock suffered a verdict of \$9 million in actual damages. The plaintiff did not admit to any exposure from amphibole insulation, did not identify any specific insulation product and claimed that 100% of his work was on gaskets. Garlock attempted to show that he was exposed to Unibestos amphibole insulation manufactured by Pittsburgh Corning. The plaintiff denied that and, moreover, the plaintiff's lawyer fought to keep Pittsburgh Corning off the verdict form and even affirmatively represented to the jury that there was no Unibestos insulation on the ship. But, discovery in this case disclosed that after that verdict, the plaintiff's lawyers filed 14 Trust claims, including several against amphibole insulation manufacturers. And most important, the same lawyers who represented to the jury that . . . there was no Unibestos insulation exposure had, seven months earlier, filed a ballot in the Pittsburgh Corning bankruptcy that certified "under penalty of perjury" that the plaintiff had been exposed to Unibestos insulation. In total, these lawyers failed to disclose exposure to 22 other asbestos products.

A Philadelphia case involved a laborer and apprentice pipefitter in the Philadelphia shipyard which Garlock settled for \$250,000. The plaintiff did not identify exposure to any bankrupt companies' asbestos

products. In answers to written interrogatories in the tort suit, the plaintiff's lawyers stated that the plaintiff presently had "no personal knowledge" of such exposure. However, just six weeks earlier, those same lawyers had filed a statement in the Owens Corning bankruptcy case, sworn to by the plaintiff, that stated that he "frequently, regularly and proximately breathed asbestos dust emitted from Owens Corning Fiberglas's Kaylo asbestos-containing pipe covering." In total, this plaintiff's lawyer failed to disclose exposure to 20 different asbestos products for which he made Trust claims. Fourteen of these claims were supported by sworn statements, that contradicted the plaintiff's denials in the tort discovery.

Another case in New York was settled by Garlock for \$250,000 during trial. The plaintiff had denied any exposure to insulation products. After the case was settled, the plaintiff's lawyers filed 23 Trust claims on his behalf—eight of them were filed within twenty-four hours after the settlement. In another California case, Garlock settled with a former Navy electronics technician for \$450,000. The plaintiff denied that he ever saw anyone installing or removing pipe insulation on his ship. After the settlement, the plaintiff's lawyers filed eleven Trust claims for him—seven of those were based on declarations that he personally removed and replaced insulation and identified, by name, the insulation products to which he was exposed.

In a Texas case, the plaintiff received a \$1.35 million verdict against Garlock upon the claim that his only asbestos exposure was to Garlock . . . gasket material. His responses to interrogatories disclosed no other product to which he was exposed. The plaintiff specifically denied any knowledge of the name "Babcock & Wilcox" and his attorneys represented to the jury that there was no evidence that his injury was caused by exposure to Owens Corning insulation. Garlock's discovery in this case demonstrated that the day before the plaintiff's denial of any knowledge of Babcock & Wilcox, his lawyers had filed a Trust claim against it on his behalf. Also, after the verdict, his lawyers filed a claim with the Owens Corning Trust. Both claims were paid—upon the representation that the plaintiff had handled raw asbestos fibers and fabricated asbestos products from raw asbestos on a regular basis.

Judge Hodges then addressed the issue of how representative these fifteen cases were of the mesothelioma cases that Garlock settled in the years 2005 to 2010.

These fifteen cases are just a minute portion of the thousands that were resolved by Garlock in the tort system. And they are not purported to be a random or representative sample. But, the fact that each and every one of them contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those

cases appears to have been sufficiently widespread to have a significant impact on Garlock's settlement practices and results. Garlock identified 205 additional cases where the plaintiff's discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases. Garlock's corporate parent's general counsel identified 161 cases during the relevant period where Garlock paid recoveries of \$250,000 or more. The limited discovery allowed by the court demonstrated that almost half of those cases involved misrepresentation of exposure evidence. It appears certain that more extensive discovery would show more extensive abuse. But that is not necessary because the startling pattern of misrepresentation that has been shown is sufficiently persuasive.

I. *The Extent of Suppression of Exposure Evidence*

The examples I present here and those I further set out in my published scholarship, as well as the findings by Judge Hodges in the Garlock bankruptcy, support the conclusion that plaintiffs and their counsel are routinely employing deceptive and in many cases fraudulent practices in contravention of law, the rules of discovery and often in defiance of direct court orders. These *known* attempts at deceit can only be the tip of the iceberg. As Judge Hodges concluded, there are undoubtedly many cases in which plaintiffs' and their counsel's efforts to suppress defendants' ability to uncover evidence of plaintiffs' other exposures have succeeded. In his own words, the evidence in the Garlock bankruptcy despite "limited discovery allowed by the court demonstrated that almost half of [the several hundred cases that Garlock was able to investigate] involved misrepresentation of exposure evidence [, to the extent that it] appears certain that more extensive discovery would show more extensive abuse [beyond that demonstrated by the] startling pattern of misrepresentation." Although much of the evidence that Garlock presented still remains under seal, the Garlock evidence that Judge Hodges did disclose in his order as to the frequency of apparently perjurious denials of exposures to products to which plaintiffs had asserted "credible and meaningful exposure," coupled with plaintiffs' counsel's brazen manipulation of TDPs to facilitate such denials, leads in my opinion, to an

inexorable conclusion: the practice of deliberately failing to disclose evidence of other exposures is far closer to the norm than the exception. Or, as Judge Ableman stated, what the asbestos lawyers are doing “is trying to defraud. . . . [I]t happens a lot.” Indeed, it is likely that cases in which fraud has been successfully employed dwarf the number of cases in which abuse has been uncovered.

J. The Effect of Inconsistent Trust Claims on Payments to Trust Claimants

The evidence discussed by Judge Hodges as well as the evidence I have set forth in my scholarship demonstrates that plaintiffs and their counsel seek to suppress evidence of other exposures and trust claim filings so that in pretrial discovery and trial testimony they can deny, with impunity, any other exposures than those to defendants’ products. It is also the case that they file trust claims that are inconsistent with each other with regard to claims of exposure. Trusts do not compare the work histories of claimants with the work histories submitted by the claimants to other trusts to support their claims. Indeed, work histories of those filing claims with trusts appear to be fungible. The Wall Street Journal did a study of approximately 850,000 claims filed with the Manville Trust since the late 1980s up to 2012.

The analysis found numerous apparent anomalies: More than 2,000 applicants to the Manville trust said they were exposed to asbestos working in industrial jobs before they were 12 years old.

Hundreds of others claimed to have the most-severe form of asbestos-related cancer in paperwork filed to Manville but said they had lesser cancers to other trusts or in court cases.

The result of trusts’ failures to provide for a single clearinghouse to which all claims would be first submitted so that sampling can be done to compare work histories submitted by a claimant to multiple trusts to check for inconsistencies is that trusts are paying out substantial sums to claimants who are not entitled to those payments, at the expense of future claimants.

As a consequence, trusts are receiving claim submissions that far exceed their projections. This, in turn, has caused most trusts, mainly at the expense of future claimants, to decrease substantially the percentage of the liquidated value of claims to be paid to eligible claimants as set forth in the TDPs for specified diseases and exposures.

K. *The Source of the Scheme to Suppress Evidence of Exposure to the Products of Reorganized Companies*

Improper trust payments no doubt have amounted to billions of dollars. As for tort defendants, it is simply not possible even to begin to estimate how much money they have paid out as a consequence of plaintiffs making false claims as to product exposures. Undoubtedly, it amounts to hundreds of millions, if not billions, of dollars. It is improbable, to say the least, that the scheme to suppress evidence of other exposures is being hatched by plaintiffs. The account of how the firm of Baron & Budd prepared their clients to identify only the “right” products as the ones to which they were exposed and reassured their clients that defendants and their counsel had no way of knowing if they lied about their product exposures is instructive with regard to the question of how plaintiffs’ counsel in mesothelioma cases may be going about instructing their tort clients to tailor their testimony to further the scheme to suppress evidence of their other exposures and thus maximize the value of their claims. One manifestation of the effect of such preparation, as discussed earlier, is the abrupt change in plaintiffs’ testimony about which products they were exposed to after a top-tier asbestos company declares bankruptcy. A prominent example is the comparison of product exposures that plaintiffs’ asserted prior to the 2000 to 2001 Bankruptcy Wave and those products they named after the Wave. Prior to the Wave, asbestos litigation focused on companies that manufactured, sold, or distributed thermal insulation and refractory products. After the Wave, product identification changed just as it had in the aftermath of the Manville Bankruptcy in 1982; plaintiffs stopped identifying the products

of the bankrupts and maintained that their sole exposures were to the products of the defendant or defendants they were suing. Up until the Bankruptcy Wave, Garlock was a peripheral defendant in asbestos litigation. Though named as a defendant along with top-tier companies hundreds of thousands of times mostly in nonmalignant litigation, Garlock was able to settle the vast majority of these cases for nominal amounts. Not so after the Bankruptcy Wave. When suing Garlock, plaintiffs stopped identifying exposures to the products of ten of the top-tier companies—all of which declared bankruptcy between 2000 and 2001—and claimed that their only exposures were to Garlock's products and, in some cases, to the products of a few other gasket and pump manufacturers.

Plaintiffs' counsel argue that elderly plaintiffs' inability to identify the products of the reorganized companies to which they had been exposed is a combination of their having forgotten or not ever having known the names of the manufacturers or distributors of products to which they were exposed thirty, forty, and even fifty years earlier. Judge Hodges, echoing my testimony in *Garlock*, responded forcefully to that argument.

[W]hile it is not suppression of evidence for a plaintiff to be unable to identify exposures, it is suppression of evidence for a plaintiff to be unable to identify exposure in the tort case, but then later (and in some cases previously) to be able to identify it in Trust claims. It is that practice that prejudiced *Garlock* in the tort system—and makes its settlement history an unreliable predictor of its true liability.

IV. MESOTHELIOMA LITIGATION

Mesothelioma litigation is highly lucrative and will continue to be so for perhaps two more decades. Retainer agreements typically provide for 40% contingency fees. This helps to explain why it is the most heavily recruited form of litigation in the United States today, with massive and expensive efforts devoted to finding the small number of people diagnosed each

year and bringing suit on their behalf. For example, the mesothelioma practice of certain law firms appears to be devoted almost entirely to recruiting mesothelioma plaintiffs and then referring them to other firms to handle the tort litigation, with the referral firm often handling the trust filings. These firms employ cutting-edge marketing techniques to obtain clients, using Internet search engine advertising, techniques for ensuring that they appear high in search results, and networks of Web sites, Facebook pages, and Twitter handles purporting to provide information to people with disease but actually guiding individuals to the law firm. Demonstrating the level of competition in this field, “mesothelioma” and other phrases containing that word such as “mesothelioma settlement” and “mesothelioma asbestos attorney” are among the most expensive Google AdWords in the Google search engine, commanding as much as \$80 a click according to one report and \$143 a click according to another report.

Once these referral firms refer a case to a trial firm, they usually retain the right to file the trust claims for the client and receive a contingency fee on both the trust recoveries and tort recoveries, while the trial firm, on the other hand, often receives a contingency fee only on the tort recoveries and not on the trust recoveries. Trial firms therefore have an obvious financial incentive to minimize any evidence of plaintiffs’ exposures to the products of reorganized companies because if that evidence were available before the tort cases were resolved, it would impair the value of the tort cases. The referral firms have an interest in the value of the tort claims being maximized (because they receive a substantial percentage of the trial lawyer’s contingency fees), but they also have an incentive to maximize fees from the trust claims by filing as many claims as possible with multiple trusts. Thus, the trial firms have a financial incentive to request referral firms to delay filing trust claims until all tort cases have been concluded in order to maximize the value of tort litigations. If the trust claim filings are

thus delayed which is the practice of some firms, then when defendants conduct discovery and request disclosure of trust claim filings and the accompanying statements of exposures, they will come up bare. Once the tort claims are resolved, however, counsel will typically file 15-25 trust claims including those based on the very exposures denied in pretrial discovery.

Nonetheless, as the evidence in *Garlock* indicates, referral firms often file trust claims *before* the tort actions are completed. Part of the incentive for doing so is the time value of money and the fact that trusts are significantly decreasing their payment percentages in response to the claims filing rates, which far exceed projections. Especially in view of the recent rapid increase in lung cancer filings, it is likely that payment percentages will continue to decrease in coming years. Another factor that may influence referral firms is the differing economic interests of clients and their counsel. From time of diagnosis, mesothelioma clients may have four to eighteen months to live. Their economic interest is to obtain payment as soon as possible, if only to provide for their families.

If referral firms file some or all of their trust claims before the tort case is concluded, then CMOs and standard interrogatory requests adopted by courts require plaintiffs' counsel to identify these trust claims in pretrial discovery. However, trial counsel may take steps to be consciously unaware of referral counsel's trust claim filings. Plaintiffs and their trial counsel are then in a position to deny exposures to the products of the reorganized companies that were the basis for the referral firm's filing of trust claims. If prior to the termination of the tort litigation, evidence is adduced that trust claims had been filed by referral counsel, then trial counsel can profess ignorance of the trust claim filings by the referral firms. Notably, such claims of ignorance are not uncommon when failures to identify trust claims become known.

The same incentive to suppress evidence of exposures to the products of reorganized

companies exists even when a referral firm is not involved. Many trial firms also spend massive amounts of money on advertising and client recruitment. Here too, it is to the financial benefit of these trial firms to delay filing trust claims until after the tort cases have been concluded and to have their clients deny any exposures to the products of reorganized companies—exposures that will very likely be asserted when the trust claims are filed. Even when trust claims are filed before tort suits have been resolved, some trial firms that directly obtain mesothelioma clients employ a strategy of erecting “Chinese walls” within their own firms to enable their counsel to maintain plausible deniability if their scheme to hide trust claim filings is discovered. In such cases, the lawyer defending the deposition of the plaintiff or arguing at trial may claim that a plaintiff’s sole exposure was to the defendant’s products (or to the products of a few companies that do not detract from the value of the tort claims), even though the firm’s intake lawyer had previously filed numerous trust claims on behalf of the plaintiff alleging “meaningful and credible exposures” to the products of reorganized companies. If, however unlikely given the control exercised by plaintiffs’ counsel over the production of evidence, trial counsel are confronted with regard to false interrogatory responses and testimony, trial counsel can steadfastly maintain that they were unaware of any previous trust filings. Even if, after the settlement (based on the plaintiff’s testimony of solitary exposure to the defendant’s products), it somehow were to come out that the plaintiff and trial counsel had denied exposure to the products of the reorganized companies, even though the plaintiff had previously asserted just such “meaningful and credible exposures” in trust claim filings, 2019 Statements and exhibits, and Master Ballots cast on accepting plans of reorganization, based upon the record of mesothelioma litigation, there is a substantial likelihood that neither plaintiffs nor their counsel would suffer any financial consequence or disciplinary sanction.

V. THE FACT ACT

The most effective immediate way to eliminate the fraudulent suppression of evidence of exposures to the products of the reorganized companies is to enact H.R. 526. Plaintiffs' counsel offer a number of arguments against the FACT Act. They maintain (1) that there is no double-dipping problem, claiming that courts take trust payments into account and reduce tort judgments accordingly; (2) that the system of dual compensation is necessary because asbestos victims are not fully compensated by asbestos trusts and because trust payments usually cover only a fraction of the value of the claim; (3) there is no evidence of fraud in the asbestos trust system; (4) the *Kamanian* case is an aberration; and (5) the FACT Act will slow the administration of payments—leaving more claimants to die before ever receiving compensation—and impose significant costs on the trusts, and violate the privacy of trust claimants.

These arguments are simply makeweight -- an attempt to avoid passage of a law that would deprive them of hundreds of millions of dollars of fees by maintaining the current fraudulent practices. As Mark Scarella previously testified, the FACT Act will not be burdensome on trusts because trusts are merely required to compile quarterly reports—for which they can employ basic data processing systems—and to comply with third-party disclosure requests—for which they can charge reasonable processing fees. Moreover, as Scarella also testified, that based on his own experience as a statistician for the Manville Trust, the FACT Act will not drain asbestos trust resources. Professor S. Todd Brown of SUNY Buffalo Law School also testified previously that the potential privacy implications of the FACT Act are likely minimal because trust claimants waive some of their reasonable expectations of privacy by

making the decision to pursue compensation and because the disclosures required under the FACT Act are typically less than can be expected by an asbestos tort litigant or, for that matter, any tort litigant. Furthermore, the FACT Act provides that the publicly available quarterly reports generated by the trusts will not include confidential medical records or full social security numbers of trust claimants. As for counsel's claim that *Kananian* is an aberration and that there is no evidence of fraud in the asbestos trust system, the Garlock case, my testimony today and my published scholarship serves as a response.

VI. THE CONSEQUENCES OF UNSEALING THE GARLOCK PROCEEDINGS

As noted previously, Judge Hodges sealed the record in Garlock in response to requests from plaintiffs' counsel. In my article on Garlock,¹⁰ I predicted that Judge Hodges' decision would be overturned on appeal -- as it was. Many asbestos defendants and their insurers are eagerly awaiting for the record to become available. Presumably, these companies, as well as others, may then seek to depose successful plaintiffs and their counsel suspected of having concealed evidence of plaintiffs' exposures beyond those identified in responses to CMOs, pretrial discovery, and at trial. This may then lead to lawsuits being filed against asbestos plaintiffs and their counsel who are believed to have provided false exposure evidence, seeking to disgorge payments that were received. It may also lead to Racketeer Influenced and Corrupt Organizations (RICO) actions being brought against law firms just as Garlock has filed such suits against four law firms that frequently brought mesothelioma actions against Garlock.

Lawsuits claiming fraud or RICO violations may, in the fullness of time, have a significant impact on double-dipping in mesothelioma litigation. But action is needed in the short term to check the fraudulent practices that abound in this litigation. H.R. 526, which

¹⁰ See *supra* note 1.

requires asbestos trusts to file publicly available quarterly reports with bankruptcy courts detailing claims filed with trusts, is the most effective, efficient and timely way to breach the walls plaintiffs' counsel have erected to insulate the fraudulent practices from public scrutiny.

Judge Hodges, in his estimation order in the Garlock bankruptcy, has allowed us to peer behind the asbestos curtain that shrouds the inner workings of the highly successful scheme to use the judicial system to defraud asbestos defendants and their insurers out of billions of dollars in mesothelioma litigation.

It is now up to Congress to take the critically important step of enacting H.R. 526 to contain the massive fraud that now permeates mesothelioma litigation.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from California, Mr. Issa. I have a policy of, since I am going to be here, of waiting to go last, and let my colleagues go before me.

Mr. ISSA. And, Chairman, I have a policy that if my colleague from Texas is walking in, as you recognize me and he is supposed to go first, that I yield.

Mr. MARINO. That is fine.

Mr. FARENTHOLD. I apologize. I picked up a bit of a cough. I had to get a cough drop, or I would not have been able to get a sentence out. And I appreciate, and I have reviewed you all's testimony.

Mr. Inselbuch, yes, I talked a little bit earlier about a judge in the district I represent in Corpus Christie, actually retired now, Jan Jack, who exposed widespread fraud in asbestos litigation. And while her stand on shady medical litigation practices serve to get rid of some of the claims, she said that they were neither driven by health or justice. We still have strong indications that some of the same activities persist today in the asbestos trust system.

In your written testimony, you state there is not a scintilla of evidence of fraud in the asbestos bankruptcy system. Yet the judge in the Garlock case where you served as counsel to the Asbestos Claimant's Committee, they found a startling pattern of misrepresentation in 15 cases where the judge allowed full discovery and went on to state that those 15 cases were not isolated or unique, but rather stated, "It appears certain that more extensive discovery would show more excessive abuses." Were there misrepresentations in the 15 cases highlighted in that decision?

Mr. INSELBUCH. No.

Mr. FARENTHOLD. Okay. Mr. Brickman, you have indicated in prior testimony that some of the profit-driven screening tactics that Judge Jack pointed out may or soon will be used to generate additional claims for asbestos trusts. Can you please tell me more about the situation and how the FACT Act would fix that?

Mr. BRICKMAN. Plaintiffs' counsel back at the time of Judge Jack's decision in about 2004, 2005, were, just as today, denying that there was any fraud in the asbestos litigation system. At that period of time, the major cases—that is, the majority of cases—were non-malignant cases, asbestosis. Hundreds of thousands of asbestosis cases that were the product of what Judge Jack said was a scheme by plaintiff lawyers, litigation doctors, and screening companies to manufacture diagnoses for money. In other words, the vast majority of those hundreds of thousands of claims were bogus, fraudulent. I think the evidence on that is overwhelming.

Now, what we heard with regard to that finding by Judge Jack is again repeated today with regard to mesothelioma litigation. It is the same script, just a few words changed. Despite the clear example of massive fraud that she exhibited, which confirmed what I had written previously, plaintiffs' counsel said—

Mr. FARENTHOLD. And it is your belief that it is going on today, and the FACT Act will help fix it.

Mr. BRICKMAN. It is going on today, just in a different form, except that now more money is involved.

Mr. FARENTHOLD. Some of my colleagues on the other side of the aisle expressed some concern about the privacy of plaintiffs and

their medical records. Let me read you exactly what this says. It says, "A trust described in Paragraph 2 shall, subject to Section 107(a), file with the bankruptcy court not later than 60 days at the end of each quarter a report that shall be made available on the court's public document with respect to such quarter, that, one, describes each demand the trust received from, including the name and exposure history of a claimant and the basis for any payment for the trust made for such claimant, and, two, does not include any confidential medical records or the claimant's full Social Security number."

So basically, all we are asking for is you were exposed by company X, Y, Z, and you got—I mean, we are just basically asking, so you do not go sue three different companies for the same deal. One of our goals here is to lower the cost of litigation and going through a costly discovery process to get to that, which is sometimes difficult to get to. We are trying to make it easier for plaintiffs and defendants here. Do you think this is an invasion of the medical privacy, or is this stuff that would normally come out during any sort of litigation?

Mr. BRICKMAN. That claim is simply a red herring, sir. If you file a tort action in a State court or a Federal court claiming that you were injured, you have to provide in a public forum a great deal more information than is to be disclosed by H.R. 526. In other words, the claim that this is an invasion of privacy is just utter nonsense. It is a make-way claim that is not even gossamer. So the bottom line is, anybody can say anything by way of an argument. This is an argument that has no credibility whatsoever.

Mr. FARENTHOLD. Thank you very much. I see my time has expired.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from Georgia, the Ranking Member, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. Before I begin my questions and before we start running the clock, I would like to ask unanimous consent to submit several materials into the record. These include an internal memo from National Gypsum Company stating, "Just as certain as death and taxes, if you inhale asbestos dust, you get asbestosis."

Also to be submitted for the record with unanimous consent an internal memo from Honeywell stating, "If you enjoyed a good life while working with asbestos products, why not die from it?" Also an internal industry discussion on asbestosis resulting in the unanimous decision not to admit liability in discussing defensive strategies, as well as an internal memo that chronicles damaging industry documents dating to 1934, explaining that the plaintiffs' bar will probably take the position, not unreasonably, that the documents are evidence of a corporate conspiracy to prevent asbestos workers from learning that their exposure to asbestos could kill them.

Mr. MARINO. Without objection—

Mr. FARENTHOLD. While I am not going to object to those being admitted, I would like to question their relevance to a disclosure. But I have no problem with them going in.

Mr. MARINO. Without objection, the documents will be entered into evidence, and if at some point the determination needs to be

made on an issue that Mr. Farenthold raised, we will address that at that time.

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Inselbuch, do you agree with this timeline? Excuse me. Let me ask you to take a look at the timeline assembled by the Environmental Working Group, this timeline, which is a small collection of internal memoranda from asbestos corporations that I have submitted into the record, represents a century of corporate fraud on the public. It contains evidence amply demonstrating the actual knowledge of corporations concerning the dangers associated with asbestos exposure dating back to 1934, evidence of corporations intentionally misleading the public about the widespread use and catastrophic effects of asbestos in home schools and workplaces.

Mr. Inselbuch, do you agree that this timeline, along with the other examples in your testimony indicate that asbestos corporations have defrauded the public for decades through a massive corporate cover up?

Mr. INSELBUCH. I have not had an opportunity to look at the specific timeline, but I certainly agree with the set of facts that you have recited. Indeed the asbestos industry is the most outrageous example of corporate misconduct this country has ever seen.

Mr. JOHNSON. Thank you. Thank you. And the majority witnesses have testified that though deeply regrettable, evidence of fraud has no bearing on the current corporate practices. Please describe contemporary tactics by the asbestos corporations to reduce asbestos liability, including recent litigation involving Georgia-Pacific, a Koch Industries subsidiary.

Mr. INSELBUCH. Well, as I said in my opening remarks, asbestos victims are exposed in the course of their employment to the products of dozens, if not hundreds, of culpable defendants. And they have a right to recover from each and every one of those defendants in the tort system or when they go bankrupt from their trusts. What the current defendants would have this Committee believe and the world believe is that somehow because the claimants are collecting from trusts, that somehow they are being overcompensated by the defendants in the tort system.

Mr. JOHNSON. And that is something that I want to get further elaboration on you from, but perhaps one of the other questioners can elicit that information.

Mr. INSELBUCH. Okay.

Mr. JOHNSON. I would like to move on now to Mr. Vari. Mr. Vari, as a lawyer representing asbestos corporations responsible for killing and then covering up the deaths of Americans across the country, I am particularly interested in hearing your thoughts on this issue of transparency, which proponents of the FACT Act, including yourself, argue will add more transparency and truth to the asbestos trust system.

Now, Mr. Vari, your client, Crane Company, routinely seeks confidentiality agreements when settling their asbestos exposure claims, is that not correct? You routinely use these confidentiality agreements, correct? Yes or no.

Mr. VARI. They are part of settlements, and the reason I hesitate is I am here in a personal capacity and not behalf of—

Mr. JOHNSON. I understand that.

Mr. MARINO. Please let the witness answer your question first.

Mr. VARI. I will say that——

Mr. JOHNSON. I do not want the witness to filibuster and use my time. I just want a yes or no answer.

Mr. MARINO. Well, we will approach that if that is the case, but let the witness answer your question.

Mr. VARI. I will do my best.

Mr. JOHNSON. Mr. Chairman, if he will answer it yes or no, that will be——

Mr. MARINO. He has a right to explain reasonably.

Mr. JOHNSON. After he answers yes or no.

Mr. VARI. No. Then the answer would be no.

Mr. JOHNSON. All right. Okay. And you seek increased transparency from victims, but would you also for purposes of leveling the playing field and in the interest of fairness support legislation that would ban confidentiality agreements from asbestos litigation settlement agreements?

Mr. VARI. On a personal level, I am not sure. But I can tell you that in the tort system——

Mr. JOHNSON. So is that a yes or no?

Mr. VARI [continuing]. The plaintiffs resist disclosure of settlement information. In my experience more often defendants——

Mr. JOHNSON. Well, I am asking about defense policy. Since we are talking about transparency, it seems only to be fair that if you are going to have transparency from plaintiffs or from claimants, you would also seek it from defendants. And one way that defendants keep from having to be transparent is to insist upon confidentiality agreements. And if you like that process, if you support that process, then say you do. If you do not, then it is simple to say you do not.

Mr. VARI. It is unnecessary because the plaintiffs already possess the settlement information. The plaintiffs collect the settlements. They know what the amounts are. So there is nothing being withheld from the plaintiffs in any settlement regarding information.

Mr. JOHNSON. Mr. Vari, that answer——

Mr. MARINO. Okay. The gentleman's time has expired. The Chair now recognizes Mr. Issa from California.

Mr. ISSA. Thank you, Mr. Chairman. Would the ladies and gentlemen that were affected by asbestos please stand again?

[Audience members stand.]

Mr. ISSA. Just a shake of head, if you do not mind. You are not under oath. Do you all either have current cases or have you settled?

[Nonverbal response.]

Mr. ISSA. So everybody is involved in that level of either a suit or having settled. Thank you.

Mr. Chairman, my questions for each of the witnesses will fall along a simple line. I understand bankruptcy and I understand diminishing amounts of money. As I understand it, there is a fixed amount of money in the trust of bankrupt entities, and this will represent the entire settlement whether there is one more litigant, no more litigants, or an infinite amount of them. So let me go through the question, because Mr. Conyers in his opening statement implied that somehow we would be unfair to people if, in fact,

we tried to ensure that only those who were actually affected by asbestos—not exposed, but affected by asbestos—were, in fact, given a settlement.

So, Mr. Inselbuch, I will start with you and I will go right down the line. Would you agree that, in fact, if we run out of money before we run out of actual victims, that, in fact, the harm will go to those who have been affected by asbestos and for whom there is no money left?

Mr. INSELBUCH. Well, the design of these trusts would not permit that to happen.

Mr. ISSA. What you are saying is that the amounts will keep getting smaller and smaller, so everyone will get something.

Mr. INSELBUCH. That is—

Mr. ISSA. So if some of the people behind you were to get a settlement today and it was more in actual dollars, not even constant dollars, but in actual dollars, it was more today than for somebody 2, or 3, or 4 years from now, that would be a horrible thing for the person later who gets a diminished amount of money for the same actual damage, would it not be?

Mr. INSELBUCH. Yes, and the trusts try very hard to prevent that from happening.

Mr. ISSA. Well, Mr. Vari—

Mr. INSELBUCH. But it is very difficult to predict the future with great accuracy.

Mr. ISSA. Well, I am going down each of you, but I think for each of you next, if you agree with what has been said, that, in fact, there will be diminished payments eventually reaching a de minimus amount or nothing if you continue to have additional claimants. I am not an economist, but I did take accounting in college in addition to economics. My basic understanding is for each person that is not a valid claimant who is somehow taken out of receiving money through kind of reform, whether it is this or others, we are, in fact, preserving a larger amount of money for an actual victim. Would that not be correct, Mr. Vari?

Mr. VARI. Yes, that would. And I also would concur in the observation that once the money runs out, there is no more recovery.

Mr. ISSA. Okay. So you worked with specificity on a lot of this. Do you see that exact event happening in which later victims are going to be shortchanged or all together left out if we do not ensure, at a minimum, that only those who truly are dealing with dreaded diseases caused by exposure are put at the head of the line?

Mr. SCARCELLA. Absolutely. I think it is important for everybody to understand that sitting as advisors to many of these trustee boards are committees of plaintiff attorneys. They advise the trustees as best they can on current trends in the litigation. These are men and women who, probably more than anybody, have their finger on the pulse of claimant filing trends. Yet time and time again, trust forecasts of expectations, unclaimed filings, continue to be outpaced by reality.

So, what concerns me is are there bad actors participating in this trust compensation system that are staying one step ahead of the men and women who are trying to advise these trusts on what their future expectations should be. If there are such bad actors,

then they are going to continue to deplete funds and keep money away from those who truly deserve it, and if transparency can help deter that, then I see no reason why it should not be passed.

Mr. ISSA. And, Mr. Brickman, if you will quickly follow up as our time is expiring.

Mr. BRICKMAN. Trusts are paying out hundreds of millions of dollars today to claimants who have no valid claims against those particular trusts. People being defrauded today are the mesothelioma claimants in particular who are yet to manifest with the disease. The people defrauding them are plaintiffs' counsel.

Mr. ISSA. Thank you. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. The Chair now recognizes the Congresswoman from Washington, Ms. DelBene.

Mr. JOHNSON. Mr. Chairman, before Ms. DelBene starts her questioning, I would like to raise a point of order. What just happened to me with the Chair trying to extract testimony beyond the scope of my question and apply our rigorous time schedule to my time, what that does is prevents me from moving forward with the questions that I have to ask.

Mr. MARINO. Mr. Johnson, you know what the rules are. You know what the policies are. If you have additional questions—

Mr. JOHNSON. Well, but my point is—

Mr. MARINO [continuing]. You put them in writing. Ms. DelBene, you are up next.

Mr. JOHNSON. No, no, no. My question—

Mr. MARINO. Ms. DelBene, you are up next.

Mr. JOHNSON. My question I have raised—

Mr. ISSA. Regular order. Regular order.

Mr. JOHNSON. I have raised a point of order.

Mr. MARINO. You have stated no point of order.

Mr. ISSA. Regular order.

Mr. JOHNSON. Parliamentary inquiry. Parliamentary inquiry. And my inquiry is what is the policy when a person is asking a question on this panel, what is the power of the Chairman to take over the questioning from that particular—

Mr. MARINO. We allowed you almost a minute when you were introducing documents. I did not time you on that, which is normally done. You tried this yesterday in a hearing, and we are not going to tolerate this.

Mr. JOHNSON. No, no, no.

Mr. MARINO. So, Ms. DelBene, are you going to ask—

Mr. JOHNSON. You have not answered my point of inquiry.

Mr. MARINO. Before I go to this side. I have answered your question.

Mr. JOHNSON. You have not. No, you have not.

Mr. MARINO. Ms. DelBene, are you going to ask questions?

Mr. ISSA. Regular order, Mr. Chairman.

Ms. DELBENE. An opportunity to—

Mr. JOHNSON. I am going to yield to Ms. DelBene, but I will assure the Chair that I am going to take this matter up and make sure that what is good for the Republican side is also good—

Mr. MARINO. You will see both sides handled equally the same way.

Mr. JOHNSON. And I would like for Ms. DelBene to be able to ask her questions without interruption.

Mr. MARINO. The Chair will decide what takes place. Please, Ms. DelBene.

Ms. DELBENE. Thank you. First, Mr. Chair, I would ask unanimous consent to submit two letters for the record from victims and their families asking the majority for the ability to testify at this hearing and also in the last Congress.

Mr. MARINO. Without objection, but I do not think you were here when I stated that the Democrats had the opportunity to have those people sit at the table, and they chose not to do it. But it is entered for the record.

Ms. DELBENE. I wish they had the opportunity to represent themselves. In the interest of transparency, my first question is for you, Mr. Vari. You support transparency in terms of the victim, information on victims' exposure. And I wondered, do you also support transparency for asbestos corporations, the ones that you have represented, so that they can be more forthcoming with information about the name and location of asbestos-contained products, work sites, and exposures? Would you support congressional legislation to do that?

Mr. VARI. I would repeat my answer that the plaintiffs know that information. The plaintiffs who settle know how much—

Ms. DELBENE. But this could be publicly-available information, which could be important for others to be aware of as well in the interest of transparency.

Mr. VARI. The existence of a settlement is a matter of public record in the tort systems. So, to say that my client or any client of mine—I am using a hypothetical because I am not here on behalf of a particular client. But the fact that a client settles has to be a matter of public record, and it is on a docket. So the same information that is being requested here, which is what is the basis of the suit, that is in a complaint. Did my client get sued? Yes. Did the client settle? That is already in.

Ms. DELBENE. It seems like there is an inconsistency between the depth of information you would require from victims and the information required from corporations. That is disappointing that we talk about transparency, but we are not willing in legislation to look at this in an equal-sided way.

Mr. Inselbuch, I wanted to ask, you talk about some of the State legislation that has also happened in the interest of transparency in Ohio, and Oklahoma, and other areas. I wondered if you could respond to some of the issues on transparency and also what you have seen from the impact of State legislation so far.

Mr. INSELBUCH. "Transparency" is a funny word. Mr. Vari says, well, the plaintiffs know what they know, and they do, but the plaintiff who knows about his settlement when he is a litigant does not know about the other fellow's settlement. And it is the other fellow's settlement and how much that was that would be of interest to that plaintiff, and that is what Mr. Vari and his clients do not want anybody to know about.

And, yes, the fact that there was a settlement, that goes on a docket someplace, but not the amount of the settlement. That is never disclosed, and it is never disclosed because the defendants do

not want to disclose it. What they are trying to accomplish is to get from this Congress a kind of lending library of information about hundreds of thousands of trust claims filed. And in companion legislation throughout the States, they are trying to enact laws, and have been successful in some jurisdictions, that would require plaintiffs before they bring cases in the tort system to trial to first file and resolve their claims against the trusts.

This will shift a number of the values in how cases are resolved in the tort system and will reverse the rule that we have long-standing in the tort system that the plaintiff is the master of his case and decides who he sues, and who he settles with, and when. And the whole purpose of this is to get unreasonable reductions and delays in the tort system based upon this ironic request for transparency in the trust system.

I would also add, Mr. Brickman would like you to believe that the information that was so-called withheld from the Garlock defendant is information that the defendants in the tort system never have. Nothing could be farther from the truth. I suspect that Mr. Vari, who has been in the tort system for 25 years, has an extensive library on where any one of these tort system plaintiffs can collect from trusts just based on their work history. And if he does not, he can buy it from Mr. Scarcella, who sells it to the public based upon his ability with a computer to just plug in all of the places where trusts will pay, and cross-ref that with the work history of any one of these plaintiffs.

The defendants are not missing anything. They know everything. They want this list so that they can further prevent asbestos plaintiffs from pursuing their legitimate claims in the tort system, and they want to offset the plaintiffs' claims in the tort system with things they would not otherwise be entitled to.

Ms. DELBENE. Thank you. I know my time is going to expire, so I yield back, Mr. Chairman.

Mr. MARINO. Thank you. The Chair now recognizes Mr. Bishop from Michigan.

Mr. BISHOP. Thank you, Mr. Chairman, and I would like to take a moment to thank everybody that has come today. My heart goes to all of you for what you have been through, and I hope that this hearing is a reflection of the fact that inasmuch as it looks like there is some infighting here, that there is a true effort to try and make the system better and address some concerns. And I, for one, am grateful for you being here today. I am grateful for the panel to be here today to share their experience as well.

Mr. Vari, I have heard varying degrees of testimony today with regard to double dipping, and I am wondering if you might be able to—I have heard that it does not exist. I have heard that it does exist. I assume that it is somewhere in the middle, but if you could share with me your experience.

Mr. VARI. Sure. I do not think that anyone quarrels with the notion that no one should recover for the same injury twice. Where we seem to be hung up on is how much information will be available to allow anyone to make that determination.

So, you know, are there recoveries that occur that are above the true value of the claim? As Mr. Inselbuch said, most of these claims are settled, so, you know, in that instance it would require an esti-

mation. But certainly there are a lot of recoveries going on and occurring in the trust system that are not made available to the tort system defendants. So, if nothing else, transparency would at least enable one to say that it does not happen, but in the absence of a meaningful cross-flow of information, it could happen, you know, and it likely does happen. But without the information, there is no way to really study the question.

Mr. BISHOP. Thank you very much. I also have a question for Mr. Scarcella. Sir, I appreciate your testimony, and wonder if you might expound a little bit on the portion of your testimony where you talked about the discrepancy between disclosures made in State court and the asbestos bankruptcy system. It is a lot of nuance, and I am wondering if you can share with me the difference between the two systems.

Mr. SCARCELLA. Was that question for me for Mr. Brickman?

Mr. BISHOP. Either, or, whatever. I know both of you have ample knowledge in this area. It was to you, sir, but either one would be fine.

Mr. SCARCELLA. Well, I will defer to Professor Brickman since that who was intended—

Mr. BISHOP. Yes, sir, thank you.

Mr. BRICKMAN. The issue is very simple once you understand the facts. And this Committee has benefitted by the fact-finding by Judge Hodges in the Garlock bankruptcy. What he found out, based upon the evidence presented, was that plaintiffs in the tort system when they sue somebody in State court, they are denying exposure to the products of the bankrupted companies, like Owens Corning, and GAF, and Armstrong World Industries, and U.S. Gypsum, and on and on.

Now, at the same time in some cases, or during the course of that trial, or subsequent to that trial, they are putting in claims to the trusts. For example, Pittsburgh-Corning manufactured a very, very virulent product in terms of asbestos content, Unibestos. In the tort case, they are asked, were you exposed to Pittsburgh-Corning's Unibestos. They say no under oath in interrogatories, in depositions, and in trial testimony, and their lawyers argue to the jury there was no such exposures. Then their lawyers file trust claims in which they say there is meaningful and credible evidence of exposure to Unibestos. That is as plain as I can make it.

Mr. BISHOP. Thank you, sir. I yield back my time.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chairman, and let me thank the witnesses for their presence here today, and certainly we thank all of the victims and their families for your presence here today. And certainly you have been subjected to something that no American should have to deal with in terms of the asbestos exposure, and now this fight to ensure that you are justly compensated.

Let me start with Mr. Scarcella. You are here today in support of the FACT Act, correct?

Mr. SCARCELLA. Correct.

Mr. JEFFRIES. And as far as you know, the victims of asbestos, those who have been exposed unjustly to asbestos and mesothe-

lioma, other forms of cancer, they do not support the FACT Act, correct?

Mr. SCARCELLA. That is what has been told to me today.

Mr. JEFFRIES. And as you understand it, the trusts do not support the FACT Act, correct?

Mr. SCARCELLA. Correct.

Mr. JEFFRIES. So other than the asbestos industrial complex, who in terms of interested stakeholders actually supports the FACT Act?

Mr. SCARCELLA. I cannot speak for who else supports the FACT Act. I know I support it.

Mr. JEFFRIES. Why do you support it, sir?

Mr. SCARCELLA. Why do I support it? Because I have had the unique perspective of working both in the trust and tort system. I know how both processes work, and I know how damaging the premature depletion of trust assets can be. Just last April, the UNR Asbestos Trust, which was one of the first asbestos trusts that was confirmed in the early 1990's, filed a motion with its bankruptcy court requesting early termination by 2019 because it is simply running out of money. And at the heat of their request was a claim that they received more claims and paid more claims than they expected.

Mr. JEFFRIES. Right. So, you do not believe that there is any evidence of fraud as it relates to the administration of these trusts, correct?

Mr. SCARCELLA. No, I do not think the management of these trusts is acting in any fraudulent way. I think it really comes down to a system that is set up in a way that could allow and incentivize bad actors to infect it. It is not to say that all plaintiff attorneys do not act appropriately. Certainly, I think the plaintiffs all do. They put a lot of trust in their counsel. But it is a system that is set up to allow bad actors to take advantage of certain loopholes.

Mr. JEFFRIES. Right, but we are putting the cart before the horse because we are here to try and correct a problem that does not exist. There is no evidence, you have just acknowledged, of fraud in the administration of the trusts. Do you think there is evidence of waste or abuse?

Mr. SCARCELLA. Well, no, I believe, at least my understanding of your question was that was there fraud being conducted at the management level of the trusts.

Mr. JEFFRIES. Right.

Mr. SCARCELLA. I am concerned that there may be inconsistent or potentially fraudulent claimant behavior being conducted by bad actors, such as plaintiff attorneys, who file with the trusts. That is my concern. You have to keep in mind, as Mr. Vari put correctly in his direct testimony today, these trusts operate in vacuums. There are 50 trusts controlling collectively almost \$30 billion in assets, and they do not really interact with one another at the claim resolution level. I—

Mr. JEFFRIES. Sir, let me ask you a question there. Are you familiar with the 2011 GAO report that studies the administration of these trusts?

Mr. SCARCELLA. Very much so.

Mr. JEFFRIES. Am I correct that it looked at, I believe, a 23-year period with respect to these trusts, correct?

Mr. SCARCELLA. I do not know that, but I will take that to be accurate.

Mr. JEFFRIES. 22, 23 years, from 1988 to 2010, and analyzed about 3.3 million claims, correct?

Mr. SCARCELLA. Again, I will take your word for it.

Mr. JEFFRIES. Over \$17 billion in payouts, correct?

Mr. SCARCELLA. Again, I will take your word for it.

Mr. JEFFRIES. And not a scintilla of evidence that so-called plaintiff attorney bad actors had actually managed to pull off a fraud resulting in an inaccurate payment, correct? That is what the GAO concluded.

Mr. SCARCELLA. Yes, and I addressed that in my testimony. The fact that there was no fraud self-reported by these trusts that they interviewed—it was self-reported—

Mr. JEFFRIES. Thanks for raising that—

Mr. SCARCELLA [continuing]. Is not an indication there is a lack of a fraud, but more a serious indication of the lack of ability for these trusts—

Mr. JEFFRIES. Sir, let me reclaim my time—

Mr. SCARCELLA [continuing]. To actually audit properly.

Mr. JEFFRIES. Sir, let me reclaim my time only because the Chairman has been particularly rigid, as I understand it, with respect to the 5-minute rule. The GAO report, which was requested by then Republican Chairman, Lamar Smith, never contested the GAO report in terms of its methodology. It used a whole host of publicly-available documents, interviewed trust officials, court officials, professors, used the RAND study. And it also had subpoena power if it determined that it was not getting accurate information. And so, I think the reality is, again, we are trying to solve a problem with the FACT Act that simply does not exist. I yield back.

Mr. MARINO. Thank you. The Chair now recognizes Mr. Trott from Michigan.

Mr. TROTT. Thank you, Chairman. I want to thank all of the folks who came here to testify today, and I apologize I missed some of your testimony. I am new to Congress, and they schedule you to be in three places at once. I did not know that was part of the process.

But I practiced bankruptcy law for the better part of the 20 years, did mostly secured creditor work. Never really dealt with Section 524(g). Did not handle that kind of litigation. But when we had to file a proof of claim on behalf of a client, we took that process very seriously. We documented it. We attested to it. We attached documents. We knew that the claim would be scrutinized by the debtor's counsel, by the court, by the U.S. Attorney's Office potentially.

So this transparency seems to me to be quite logical, and the only thing that I heard earlier when the Ranking Member of the Subcommittee and the Ranking Member of the whole Committee were making their comments, they offered two reasons as to why this was a bad idea. And I would be interested to hear from the panel briefly, whoever cares to take the question, first that the disclosures required by the act would compromise the confidentiality

of some of the folks that have suffered because of asbestos. And then also, that that information would be used potentially by employers against them. Do any of the folks here today have concern with respect to the use of that information given that there are some safeguards in the act?

Mr. INSELBUCH. I do.

Mr. TROTT. And I see people behind you nodding, so I would be curious if people who have lost victims or members of their family have the same—

Mr. INSELBUCH. Publishing the information about sick and dying people for no purpose at all, as the congressman pointed out, is really pointless. All you do is subject these people to inquiry, to ignominy, to charlatans who will try and take their money, and for what purpose? And it is not the same as the tort system. This would just be put on a court record.

In the tort system, if there is a reason why a plaintiff wants protection from exposure, there is a judge there. You can go to that judge and say do not describe this information about my sick or dying child. Do not describe this information. Do not publish it.

Mr. TROTT. So do you agree there is abuse in the State court system as suggested in some of the testimony?

Mr. INSELBUCH. I am sorry. I could not hear that.

Mr. TROTT. So the lack of disclosure is one of the reasons why people can make conflicting claims. Do you disagree with that—

Mr. INSELBUCH. I disagree with that entirely.

Mr. TROTT. Okay.

Mr. INSELBUCH. One thing has absolutely nothing to do with the other. There is no showing of any fraudulent claims. The whole distortion here is that somebody thinks that maybe somebody is pulling a fast one somewhere, and for that reason these defendants want you to provide them with information that the tort system—

Mr. TROTT. Yes, in my experience, I would have to respectfully disagree. My experience with the debtor's bar in bankruptcy court and my experience in State court and Federal court, I think there is substantial abuse, and the act is a good idea.

So let me move to my next question. Mr. Scarcella, in terms of the administrative costs of implementing the act, do you think those costs are exceeded by the costs of not having some transparency?

Mr. SCARCELLA. Well, I think the answer to that question remains to be seen once we have transparency. To the point that was made under the prior line of questioning, the reason why the GAO was not provided with any instances of fraud in the 22 years of the trust operation system is because the trusts are unable to properly audit for consistent exposure allegations across trusts. The system simply does not allow it, so I am not surprised that they were unable to uncover fraud. They are not given the equipment to actually seek it out and find it.

Mr. TROTT. All right. Professor Brickman, do you think the fact that the trusts are largely set up and organized by the plaintiffs' counsel is one of the reasons that has exacerbated some of the problems we see?

Mr. BRICKMAN. That is an understatement. First, let me make clear, the trustees are essentially appointed by plaintiffs' counsel. So when you hear trustees speak, it is the voice controlled by plaintiffs' counsel. Every aspect of the trust is controlled by plaintiffs' counsel. They effectively select not just the trustees, they populate the two committees that run the trusts and set up the rules. In all cases but one, they have been responsible for the appointment of the future claims representative, who never takes positions opposed to the interest of the plaintiffs' bar. So, the fact that the trusts do not support the FACT Act is simply saying that plaintiffs' counsel do not support the FACT Act because the trustees never say anything opposed to the interest of the plaintiffs' bar.

Now, in terms of the GAO report, that has been misrepresented. The GAO report did not look at data. What it looked at was what did the trustees say about fraud. And as Mr. Scarcella pointed out, the trustees said we do not see any fraud. Of course not. They are not looking for fraud. And the use of the word "audit" is completely misrepresented here.

Mr. MARINO. The gentleman's time has expired.

Mr. TROTT. Thank you, sir.

Mr. MARINO. The Chair now recognizes the gentleman from Rhode Island, Mr. Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman. Thank you to our witnesses. I first want to begin by thanking the many victims of asbestos injury and illness who are here and have taken time out of their lives to be part of this hearing. Thank you for being present today, and I hope that we will act consistent with the experiences you have had, and do the right thing, and defeat this bill.

I want to say to you, Mr. Inselbuch, thank you for your testimony, and for its clarity, and for giving us a really important context. And I apologize to witnesses. I have been in and out. I am in the middle of another hearing, but wanted to come back for a couple of purposes.

First, I would ask, Mr. Chairman, unanimous consent that a letter from the Military Order of the Purple Heart be introduced as part of the record; a letter from the Asbestos Disease Awareness Organization Voice of the Victims be made a part of the record; correspondence from the American Federation of Labor, AFL-CIO; a letter from AFSCME, the American Federation of State County Municipal Employees; Public Citizen; the Environmental Working Group; a letter from asbestos patients and their families; and a letter from Douglas Campbell of Campbell & Levine.

Mr. MARINO. Without objection, so ordered.

Mr. CICILLINE. Mr. Inselbuch, I want to ask you, Mr. Scarcella said that individual trusts operate in vacuums. Can you explain why this is not the case?

Mr. INSELBUCH. Well, every document that governs the trust's conduct is public. It is on a website. And every one of those documents was approved by a bankruptcy judge and a Federal district judge. So, there is no mystery about how the trust operates.

More than that, every trust's documents state for the public and for the defendants exactly what is required in order to recover from that trust. And in many cases, based on that information, unlike what Mr. Brickman would have you believe, everybody in the world

can tell from any plaintiff's work history what trusts he can collect from.

Also about audits, there is no vacuum about the audits either. Indeed, the five largest trusts or five of the largest trusts that operate and have their claims processed in Delaware, when they do audits, the audits are, in fact, cross-ref'd, notwithstanding that Mr. Scarcella did not know that. They are cross-ref'd one against the other to ensure that the trusts are not being given inconsistent information in the claims filing process.

And finally, I would like Mr. Brickman to tell Judge Robert Parker, retired from the 5th Circuit Court of Appeals, that he is the tool of the plaintiffs' bar. I would like to be in the room when that happens.

Mr. CICILLINE. Would you also tell me, Mr. Inselbuch, how trusts evaluate demands for payments specifically to prevent fraud and abuse, and whether or not the system under which that process is undertaken is sufficient to avoid or deter fraud?

Mr. INSELBUCH. First of all, to my knowledge, more than half of the claims that are filed with the trusts are not paid. So it seems that even though they pay very little attention to it, they seem to be figuring out whether or not the claims should be paid or not. The information that they get is very straightforward. It is not difficult for a mesothelioma victim to prove that they have mesothelioma. The doctors that treat them will certify to that, and, my god, God bless them, they do suffer.

Now, the next thing is, were they exposed to the defendants', the trusts' predecessors, asbestos? That is not difficult to prove either when you have the work history. The difference, though, sometimes that Mr. Brickman would like you to think is fraudulent is the worker 30 years ago when he worked in the factory, or in the shipyard, or in the ship's hole worked with product that did not have a label on it. So he said, yes, I work with insulation products, but he may not have known who made them. So when he is asked, as he is at a deposition or an interrogatory, did you work with Unibestos, he can say I do not know because he does not know.

If he wants to collect money from Unibestos, it is his lawyer's burden to prove to the court and the jury that that material that the plaintiff did not know who made it was, in fact, Unibestos from Pittsburgh-Corning. Once Unibestos is settled up, if Mr. Vari wants to show that the plaintiff was exposed to Unibestos, that becomes his burden, and it is his job to do it. And just saying that the plaintiff did not know it is not an answer to his burden.

Mr. CICILLINE. And just one final question. Can you explain why trusts treat claimant submissions as confidential? And conversely, can you explain why the defendant corporations demand that their settlements be kept confidential?

Mr. INSELBUCH. Well, I think that for many reasons, people that resolve tort cases, plaintiffs and defendants, have reasons for confidentiality. From the plaintiffs' standpoint, they might at least want to be free from charlatans who will come after them because they know they have come into a passel of money, if for no other reason. From the defendants' standpoint, they do not want anybody to know what they are paying and to whom they are paying it because they do not want to give additional information to plaintiffs.

So whether we are in the tort system or in the trust system, there is a reason for confidentiality.

But in the tort system, the defendants are perfectly entitled to subpoena from the plaintiff what the plaintiff has filed with any trust, and they do it all the time, and they get it all the time.

Mr. CICILLINE. Thank you. I thank you, Mr. Chairman. I yield back.

Mr. MARINO. Thank you. Seeing no others, I am going to ask my colleague if he has another question he would like to ask.

Mr. JOHNSON. Well, thank you, Mr. Chairman. I believe I will. Mr. Scarcella, as an analyst, did you calculate or have you ever had occasion to calculate the value of the lives of the millions of future claimants killed or injured due to asbestos-related disease?

Mr. SCARCELLA. Yes. In fact, the bedrock of 524(g) bankruptcy, in order to preserve assets for future claimants, requires an estimate of what those future financial obligations will be.

Mr. JOHNSON. And so, you used your best judgment to come up with a figure that in the worst case scenario would be high so that you would be able to advise your clients in terms of how much potential exposure they would have. Is that correct?

Mr. SCARCELLA. No, I do not think that would be necessarily true to advise on the high side of any range of estimates. It depends on the context in which it is being used.

Mr. JOHNSON. Okay, thank you. And for Mr. Brickman, do you get paid by the Manhattan Policy Institute?

Mr. BRICKMAN. No, sir. I had to fill out a form like every witness did about who he represents. And as I write down on every testimony I ever give to Congress, I represent myself. Nobody is paying me. Nobody is paying my transportation. Nobody is buying my lunch.

Mr. JOHNSON. Have you ever represented a claimant or a plaintiff before?

Mr. BRICKMAN. I have not represented anyone. I do not practice law, sir.

Mr. JOHNSON. Thank you, sir.

Mr. MARINO. I have a couple of questions I would like to conclude. Okay. The Chairman of the full Judiciary Committee, Mr. Goodlatte, has some questions.

Mr. GOODLATTE. Thank you, Mr. Chairman. No, I am going to put my statement before the Committee. First of all, let me start by thanking you for holding this hearing on this very important legislation that will help those asbestos victims who must look to the bankruptcy process to seek redress for their or their loved ones' injuries. Unfortunately, on too frequent an occasion, by the time asbestos victims assert their claims for compensation, the bankruptcy trust formed for their benefit has been diluted by fraudulent claims, leaving these victims without their entitled recovery.

The reason that fraud is allowed to exist within the asbestos trust system is the excessive lack of transparency created by plaintiffs' firms. Due to a provision in the Bankruptcy Code, plaintiffs' firms are essentially granted a statutory veto right over a debtor's Chapter 11 plan that seeks to restructure asbestos liabilities. Plaintiffs' firms have exploited this leverage to prevent information contained within the asbestos trusts from seeing the light of day.

The predictable result from this reduced transparency has been a growing wave of claims and reports of fraud.

The increase in claims has caused many asbestos trusts to reduce the recoveries paid to asbestos victims who emerge following the formation of the trust. In addition, instances of fraud within the asbestos trust system have been documented in news reports, State court cases, and prior testimony before the Judiciary Committee. Most recently, news reports have described numerous accounts of fraud that were uncovered during a bankruptcy case in North Carolina.

The FACT Act, introduced by Congressman Farenthold, would combat this fraud by introducing long-needed transparency into the asbestos bankruptcy trust system. The FACT Act increases transparency through two simple measures. First, it requires the asbestos trusts to file quarterly reports on their bankruptcy dockets. These reports will contain very basic information about demands to the trust and payments by the trusts to claimants. Second, the FACT Act requires asbestos trusts to respond to information requests about claims asserted against and payments made by the asbestos trusts.

These measures were carefully designed to increased transparency while providing claimants with sufficient privacy protection. To accomplish this goal, the bill leverages the privacy protections contained in the Bankruptcy Code, and includes additional safeguards to preserve claimants' privacy. The FACT Act also was deliberately structured to minimize the administrative impact on asbestos trusts.

I believe that the FACT Act strikes the appropriate balance between achieving the transparency necessary to reduce fraud in an efficient manner and providing claims with sufficient privacy protections. We cannot allow fraud to continue reducing recoveries for future asbestos victims.

I look forward to hearing testimony from today's panel, which has already taken place. And I thank the Chairman for yielding me the time.

Mr. MARINO. Thank you, Chairman. Mr. Inselbuch, could you please tell me who makes up the trust? Who is the trust comprised of?

Mr. INSELBUCH. You mean who the trustees are?

Mr. MARINO. Trustees, yes.

Mr. INSELBUCH. They are people selected by the litigants in the bankruptcy that includes the representatives of the plaintiffs, the futures representative, and the debtor, and they are approved by the bankruptcy court.

Mr. MARINO. And is there—

Mr. INSELBUCH. And for the most part, they are retired Federal and State court judges.

Mr. MARINO. Who makes up the panel? Is there not a group of people who can veto certain issues? Are there not plaintiffs that make up a committee that have a say in this?

Mr. INSELBUCH. There are two fiduciaries appointed typically under these documents. One is a representative of the future claimants, and one is a representative of the present claimants, sometimes called the trust advisory committee.

Mr. MARINO. Okay.

Mr. INSELBUCH. That committee consists of plaintiffs' lawyers. The futures claimants' representative and the trust advisory committee have the same rights under these documents. They have very little power. The trustees run these trusts. If the trustees want to amend the trust documents, in other words, change them from the way they were approved by the bankruptcy court, then they need, first, if they can get approval from the trust advisory committee and the futures representative. But if they do not get that approval, they can go to the bankruptcy court.

Similarly, if the trustees need to or want to change the payment percentage, they bring that again to the trust advisory committee and the future claimants' representative. And if they both consent, then it will be done. If not, the trustees can go to the bankruptcy court. Other than that, neither the trust advisory committee nor the futures claimants' representative have any significant input into the workings of these trusts.

Mr. MARINO. Does the advisory committee have a larger say, a larger percentage, that 75 percent have to agree to certain matters?

Mr. INSELBUCH. No.

Mr. MARINO. So, are you saying it is split evenly on both sides for the plaintiffs and the defendants?

Mr. INSELBUCH. No, there are no defendants there.

Mr. MARINO. Okay. So it is plaintiffs and plaintiffs' lawyers—

Mr. INSELBUCH. The trust.

Mr. MARINO. Is it plaintiffs and plaintiffs' lawyers?

Mr. INSELBUCH. The trust advisory committee, and the role they have is what I have just described to you.

Mr. MARINO. Okay. So do you think that they are going to step forward and say if there is fraud? Do you think they would actually step forward and say, yes, there is fraud here?

Mr. INSELBUCH. No, but I would be confident that the trustees would.

Mr. MARINO. You say that the court has a major say in this, is that correct? The bankruptcy judge has a major role in this.

Mr. INSELBUCH. The bankruptcy judge has to approve the plan of reorganization. These are the central documents of that plan.

Mr. MARINO. Can anyone on the committee oppose the judge's ruling?

Mr. INSELBUCH. On the committee?

Mr. MARINO. Yes.

Mr. INSELBUCH. Well, I would have to think back over 15 or 20 bankruptcies, but, yes, I can think of one where Mr. Vari's firm was concerned where we had opposition from members of the plaintiffs' bar. I forget whether they were actually on the committee to the plan of reorganization itself.

Mr. MARINO. What was the process for that?

Mr. INSELBUCH. Well, when a plan of reorganization is presented to the bankruptcy court, a disclosure statement is sent to all creditors. And all creditors have an opportunity to file objections, and filed objections, and the objections were sustained.

Mr. MARINO. Okay. If you are saying there is no fraud, what is the problem then with oversight so you could say, look, we told you there is no fraud here? What is the problem with looking into these

matters? You have heard time and time again that in many cases, Oklahoma and Maryland plaintiffs were disclosed to have filed inconsistent claims between asbestos trusts and the court. In Ohio, a judge described a plaintiff's case as lies upon lies after discovering that the plaintiff received hundreds of thousands of dollars from asbestos bankruptcy trusts, yet alleged in court that a single product caused the illness. In Virginia, as the Chairman said, a judge stated that the case over which he presided was the worst deception he had seen in over 22 years. Do you not think in order to clear all this up, there should be some oversight and these matters looked into?

Mr. INSELBUCH. Oversight by whom? Oversight by the defendants' bar? That is hardly oversight.

Mr. MARINO. I did not suggest that.

Mr. INSELBUCH. That is putting a fox—

Mr. MARINO. Sir, I did not suggest that. Do you not think there should be some oversight? Perhaps the courts can get involved in that?

Mr. INSELBUCH. I do not see any need for any oversight. I do not see any evidence of any rampant or systemic wrongdoing here. And all you are doing is doing the bidding of the asbestos defendants' bar.

Mr. MARINO. And I am going to go back to saying what I did say. Why not take the opportunity to make that known to the public based on what I just read here in this short synopsis?

Mr. INSELBUCH. How am I supposed to prove to you that I am telling the truth?

Mr. MARINO. You do not have to prove. I am saying that an oversight committee of some type looks into what documents, looks into testimony, looks into transcripts, looks into payouts, looks into the corporations to see if they held anything back and should be held accountable for it.

Mr. INSELBUCH. Well, that is the job of these fiduciary trustees. That is exactly what they do.

Mr. MARINO. It does not seem like it is working out, sir.

Mr. INSELBUCH. What?

Mr. MARINO. It does not seem like it is working out based on what has come to light over the past couple of months.

Mr. INSELBUCH. Perhaps to you, sir. I am there with them all the time, and it seems to me that it is working out real well. The only people that are complaining about these trustees that I know of are the plaintiffs' lawyers who say the trustees are too stringent.

Mr. MARINO. And how about the judges? When you just said you wanted Mr. Brickman to make a statement, are you willing to stand up in front of these judges and simply say to them what you are saying is not true?

Mr. INSELBUCH. This is not the place to re-litigate the Garlock case.

Mr. MARINO. No, it is not the place to re-litigate—

Mr. INSELBUCH. Bear in mind what the Garlock case was about—

Mr. MARINO. What we are here to make sure is that it is fair all the way around. Look, there is no one that has more sympathy. I had a friend who lost a father to this, and I have seen what it does,

and my heart goes out. And anybody that even is just around this for a short period of time, particularly because of their employment, should receive compensation and good compensation. I am just trying to make sure that there is a way that we can preserve the dollars to make sure both sides are playing fair so future victims, who may not even know they will have it for 10 years, are compensated. That is all.

Mr. INSELBUCH. Both sides are not playing fair.

Mr. MARINO. Well, that is what we hope to find out, sir. So I thank you.

Mr. INSELBUCH. Thank you.

Mr. MARINO. Okay. Ladies and gentlemen, I do not see anyone else here, unless my good friend wants to ask another question. I am just joking. [Laughter.]

Mr. JOHNSON. But I will refrain.

Mr. MARINO. This concludes today's—

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. MARINO. You are welcome. This concludes today's hearing, and thanks to all of you witnesses for attending. I want to thank the people in the gallery, and I do understand what you are going through. My heart goes out. I talk to people. I think I am going to talk to some victims after we are done here.

And without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

Mr. Scarcella, Mr. Jeffries had to leave quickly because of a conflict. I think you may be contacted to write your answer down on his last question when his time expired. If you do not know what it was, someone from the Committee will contact you, all right?

Mr. SCARCELLA. Certainly. Thank you.

Mr. MARINO. This hearing is adjourned. Thank you.

[Whereupon, at 3:17 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Gold
Bond

NATIONAL GYPSUM COMPANY
INTER-OFFICE CORRESPONDENCE

Gold
Bond

To: E. L. Kiernan - Subject: Hazardous Pigments
New Orleans

Date: Sept. 22, 1958
From: Buffalo -
Operations

cc: J. G. Stapler
W. A. Haasler - Research
J. Volk - Research
E. W. Odenwaldt

This has reference to your September 12th letter addressed to J. G. Stapler and his September 18th letter addressed to J. Volk.

Research is checking to learn the names of the products for which you sent labels. Until I get this specific information, I can comment generally about what you can do to prevent pigment stains and exposure to hazardous dust.

Men handling the bags of material should be required to wear the respirator approved by the U. S. Bureau of Mines for silica dusts.

A West Disinfecting Company representative should be called in and he will be able to recommend for you the proper protective cream that men can apply before they work with the pigment, and thus avoid stains of the skin. We know that you will never lose sight of the fact that perhaps the greatest hazard in your plant is with men handling asbestos. Because just as certain as death and taxes is the fact that if you inhale asbestos dust you get asbestosis. This means adequate dust control systems properly maintained to assure concentration within your state maximum allowable limits.

M. C. M. Pollard
M. C. M. Pollard 716

mb

cc - *Grob*
SEIFERT

PERSONAL & CONFIDENTIAL

000038

CE#

305345



September 12, 1966

Mr. Noel Hendry
Canadian Johns Manville Co. Ltd.
Asbestos, Quebec
Canada

Dear Noel

Just to be sure you have a copy, an article that appeared in
Chemical Week magazine is inclosed.

So that you'll know that Asbestos is not the only contaminat~~ed~~^{ed},
a second article from O.P. & D Reporter asses's a share of the
blame on trees.

My answer to the problem is: if you have enjoyed a good life
while working with asbestos products why not die from it. There's
got to be some cause.

Director Of Purchases

E. A. Martin

EAM:MAC
ENC:

MEMORANDUM OF MEETING OF DISCUSSION GROUPASBESTOSIS - APRIL 21, 1977

Executive Conference Room
 12th Floor
 85 John Street
 New York, New York 10038

The meeting of the discussion group on asbestosis opened with a consideration of the question "who owes a defense?" The problem arises in asbestosis claims because of the long duration of the condition. As a result, several insurers could be on the risk and periods of non-insurance may also exist. Consequently, the crucial question, is when did the injury occur for coverage purposes? Two views emerged, which might be characterized as the majority and minority view. The minority view was that the event which triggered coverage was the discovery or diagnosis of asbestosis. While there is no authority directly in point to sustain this view, the advocates of this position relied on U. S. F. & G. v American Insurance Company, 345 N.E. 2d 267. The minority also argued that their view should be tested through litigation and that, if successful, the result would be that asbestosis, as an industry problem, could be contained. The majority view was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, i.e. from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss. The majority relied on Borel v Fibreboard Paper Products Corporation, 493 F. 2d 1076, U. S. Court of Appeals, Fifth Circuit (applying Texas law).

The majority was cognizant of the fact that Borel was not a coverage case. Despite this, however, the majority believed that the essential holding of Borel, i.e. that the injury was cumulative and that with each exposure the plaintiff suffered an injury, would lead to the courts holding that each carrier covered the loss and would be liable for the full defense and possibly the full loss as well. Amongst those carriers favoring the majority view, it was reported that some were working out agreements to pro-rate the loss and defense costs with one carrier acting as a lead carrier. The question was raised as to whether these agreements included insureds where periods of noncoverage existed. It was reported that the insureds were also agreeing to participate on a pro-rata basis for both the defense costs and the losses. One of the carriers advised it would supply a copy of such an agreement which could be distributed to the entire group. This has not as yet been received and therefore cannot be distributed at this time.

The next question discussed was settlement possibilities which might occur before trial. All agreed that the interest of the insured should be given priority consideration so that no possible cause of action for bad faith could arise.

The group was then asked whether they would be willing to identify their insureds so that a list could be prepared which would be distributed. It

Memorandum of Meeting of Discussion Group
April 21, 1977

was agreed that this was desirable. With such a list, as soon as a new suit is received, reference could be made to the list and contact between the carriers involved facilitated. To date, only one company has supplied its list of insureds and therefore distribution cannot be made with this memorandum. The possibility of reducing defense costs by the sharing of technical knowledge and possibly using single counsel for multiple defendants was next considered. It was suggested that carriers interested contact Mr. Ingegneri if they wished to use single counsel and Mr. Ingegneri would advise them of other carriers who indicated a similar interest. It was recognized that problems with insureds would have to be resolved before single representation was resorted to.

With respect to the pro-rata sharing of the loss and other costs, the majority were of the opinion that this was an equitable manner to proceed. They also expressed concern that if litigation were resorted to, the result might be conflicting decisions in the various states. The method of dividing the loss and defense expenses could be subsequently resolved by negotiations and/or arbitration. It was suggested that the arbitration procedures utilized in the cumulative injury workmen's compensation cases in California might be utilized. Attached are copies of the Workers' Compensation Inter-Insurer Arbitration Agreement, its Rules and Regulations and the Arbitration Request Notice.

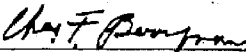
One other view was expressed, i.e. that a test case be brought and attempt to have this decided directly by the United States Supreme Court. The consensus that there was little likelihood of this approach being successful. Finally, the group discussed the possible use of governmental immunity as a defense. In this connection, the case of Sanner v Ford Motor Company, 364 A. 2d 43, Superior Court of New Jersey, Law Division, was cited which held that a manufacturer of a vehicle produced in strict compliance with U. S. Army plans could not be held liable for an alleged design defect.

Attention was also called to a recent case McNeece v United States, which is pending in the United States District Court for the Eastern District of Texas. In this case, employees are seeking to recover from the United States Government alleging that under the Walsh-Healy and OSHA Acts, the United States Government has a duty to warn employees of the danger of working with asbestosis.

The meeting closed with a unanimous rejection of a suggestion that liability in asbestosis cases be admitted and the carriers agree between themselves as to their respective losses and expenses.

For the convenience of the group, attached is a separate memorandum summarizing the cases discussed.

Respectfully submitted,


Chas. F. Berryman
Assistant Vice President
American Mutual Insurance Alliance


Richard F. Ingegneri

MANVILLE PERSONAL INJURY SETTLEMENT TRUST
MEMORANDUM

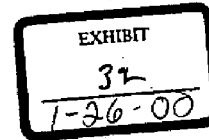
ATTORNEY WORK PRODUCT
 PRIVILEGED AND
 CONFIDENTIAL

TO: TRUSTEES, MANVILLE PERSONAL INJURY
 SETTLEMENT TRUST

FROM: DAVID T. AUSTERN

RE: MANVILLE DOCUMENTS

DATE: FEBRUARY 8, 1988



This memorandum concerns certain documents which have come to my attention the contents of which threaten the survival of the Trust. In addition, the documents are potentially very embarrassing to the trustees and the Trust employees through no fault of their own. For all Trust employees, information concerning this matter has been treated on a need-to-know basis. Marianna Smith is the only Trust employee (other than me) who knows (in general terms) the contents of the documents. Except for my secretary, other employees are mostly unaware of the documents.

For many years, in response to discovery requests in cases in which plaintiffs sued Manville for personal injuries suffered as a result of exposure to asbestos and asbestos products, Manville stated it was unaware until approximately 1964 that exposure to asbestos could cause injury. In addition, in response to Requests For Production of Documents in many of the same cases, Manville stated there were no documents in existence that would establish the corporation was aware (prior to 1964) of the harm caused by exposure to asbestos and asbestos products.

In 1980 Manville sued eleven insurance carriers which had refused to defend and pay judgments in asbestos cases against the corporation despite insurance policies which named Manville as an insured. During that litigation (referred to herein as the insurance litigation), Manville was ordered to

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CRMC 0133213

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search for and produce every document in its possession which showed what the company knew about the effect of exposure to asbestos.

In addition, in 1982 Manville sued the United States government, alleging the government knew of the dangers of asbestos exposure and thus was partially responsible for many of the asbestos health claims which Manville had paid pursuant to either judgment or settlement. During this litigation (referred to herein as the government litigation), Manville was required to produce for inspection essentially the same documents the company was required to produce in the insurance litigation.

In complying with the production requests in both the insurance and the government litigation, Manville conducted a corporation-wide search. The company spent millions of dollars locating, identifying, and producing for inspection a large number of documents. Appendix A to this memorandum describes the scope of the production.

The documents in question are discoverable in personal injury and codefendant litigation against the Trust. Even if the material were not discoverable, Manville has denied the existence of much of it in responses to discovery requests previously filed in courts throughout the United States. At the very least, the Trust will be forced to amend the discovery responses previously filed by Manville.

Finding a facility large enough to permit lawyers, law clerks and paralegals to inspect and copy the documents described in Appendix A is difficult, and the cost, while not prohibitive, does not appear to be a prudent investment of Trust funds. The time this inspection would take is prohibitive. Assuming lawyers representing asbestos health victims pooled their resources in order to conduct an inspection, based on the time it took the government to complete its inspection, it would take twenty people one year to inspect the documents in question. For reasons stated below, I do not believe the Trust can settle any case, including pre-bankruptcy cases, until the Asbestos Victims Plaintiffs' Bar has had at least some opportunity to inspect the Manville documents.

Considering the cost of production and inspection, as well as the time it would take, I propose, in the alternative, that the Trust permit the plaintiffs' bar to purchase copies of the microfilms described in Appendix A to this memorandum. I have investigated the cost of microfilm reproduction and it is not

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prohibitive. For instance, if the plaintiffs' bar wanted to purchase all of the government microfilm (642 rolls) and the microfilm made by Travelers, it would cost less than \$7,000 (for one set). In short, microfilm reproduction, which would be paid for by the plaintiffs' bar, is much less expensive for the Trust and can be accomplished by the plaintiffs' bar in much less time than a complete document inspection.

With respect to the question of whether an inspection of only the documents microfilmed by the Government and by Travelers would reveal to the plaintiffs' bar substantial evidence of what all the documents contain, I have been informed by lawyers and paralegals who are knowledgeable about the documents that a review of the microfilm in question would present the viewer with approximately 95% of the information contained in the total collection. Note, however, that even this "limited inspection" would require the examiner to inspect over two million documents.

Based on the foregoing, I recommend that when the Trust has custody of the microfilm described in Appendix A, the Trust send a letter to all plaintiffs' lawyers representing victims who have claims against the Trust informing them of their opportunity to order copies of the microfilm.

In reading the following paragraphs, you may wish to keep in mind that (1) I have personally read in their entirety only six of the documents described below, (2) I have read a 209 page memorandum which describes in summary form approximately 1,000 of the documents in question, and (3) those people who are most familiar with the documents do not agree as to which of the documents are the most embarrassing to Manville and the most threatening to the Reorganization Plan, i.e. there are so many embarrassing documents that people disagree as to which group of any ten documents is the worst.

In the light most favorable to Manville, the bulk of the documents in question were discovered by the corporation after August 1982, when the Chapter 11 proceeding was commenced. In August 1986, the corporation filed a First Amended Disclosure Statement which was the basis upon which creditors, including asbestos health victims, voted for or against reorganization. Some parts of the Reorganization Plan suggest (some might say, "argue") that Manville was correct in denying liability for asbestos health claim injuries on the grounds that it was unknown prior to 1964 that exposure to asbestos dust could cause injuries. For instance, Exhibit III-A-1 to the Reorganization Plan, the 1985 Annual Report and Form 10-K, states, "(D)uring the periods of alleged injurious exposure,

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medical and scientific authorities, government officials and companies supplying products containing asbestos fiber believed that the dust levels for asbestos recommended by the United States Public Health Service did not constitute a hazard to the health of workers handling asbestos-containing insulation products. Accordingly, the company has maintained that there was no basis for product warnings or special hazard controls until the 1964 publication of results of scientific studies linking pulmonary disease in asbestos insulation workers with asbestos exposure. (Page M-467 of the Reorganization Plan) Similar language appears in the Disclosure Statement itself.

The documents noted above, however, show corporate knowledge of the dangers associated with exposure to asbestos dating back to 1934. In addition, the plaintiffs' bar will probably take the position -- not unreasonably -- that the documents are evidence of a corporate conspiracy to prevent asbestos workers from learning that their exposure to asbestos could kill them. (One employee of Manville, who co-authored a 30-year-old document which is among the group of documents described above, was told by Manville's Chief of Litigation to hire his own lawyer after the document came to light because it was the opinion of the Chief of Litigation that the employee could be indicted for manslaughter.)

It is impossible in summary form to describe even the few documents I have seen or the summaries I have read. Subject to a later correction based on my review of further documents, it is my present opinion that at the very least the documents in question will result in a) substantially higher values for all personal injury claims made against the Trust, and b) potentially much higher values for all co-defendant claims made against the Trust. Post-Consummation there may be an attempt by the plaintiffs' bar, following their review of the documents, to (1) amend the Reorganization Plan to permit the addition of punitive damages for asbestos health claims against the Trust, and (2) require Manville to contribute substantially more funds to the Trust.

More seriously, an argument could be made that the Reorganization Plan was procured by fraud and, therefore, should be set aside. While it is true that many of the documents in question are eluded to in Outrageous Misconduct, and while it is true that many of the documents were revealed in open court during Manville's litigation against the Government, the fact remains that the Reorganization Plan did not disclose to those who voted for it that Manville's previously asserted positions concerning its knowledge of the danger of asbestos had been shown to be false. (I have asked

February 8, 1988

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Manville representatives why the "new evidence" was not disclosed in the Reorganization Plan. On February 10, 1988, I am meeting with Richard Von Wald, General Counsel of Manville, and Stephen Case, a partner in Davis, Polk, the law firm that represented Manville and continues to represent it in the Bankruptcy, concerning this matter.)

Note that the appeal of the Plan pending in the Second Circuit argues, among other things, that the Trust is under-funded. In light of the newly discovered documents, the contents of which are apparently unknown to appellate counsel, there is even stronger evidence the Trust is under-funded.

Nothing in this memorandum is intended to address the issues associated with what may have been false statements filed by Manville in 10-Ks submitted to the SEC after the documents were discovered. Nothing in this memorandum is intended to address the issues associated with the Trust's responsibility to defend and to indemnify 109 present and former employees of Manville (mostly former) who have been sued individually by plaintiffs in asbestos health cases. In that regard, based on at least one document I have seen, there is the possibility one or more private civil rights actions will be brought against Manville employees by plaintiffs who were injured as a result of exposure to asbestos. These issues will be the subject(s) of a future memorandum.

The success of the Trust depends, at least in part, on our ability to settle before Consummation a substantial number of the 17,000 cases stayed by the bankruptcy. We had been planning to start negotiating such settlements this month. I do not believe we can settle any of these cases until the documents described above have been disclosed. Thus, because of the appeal, the timing of the disclosure is important.

If we settle cases prior to disclosure of the documents, we run some risk that Post-Consummation, some plaintiffs' lawyers will ask to have the settlements set aside on the ground they were procured by fraud, i.e., had the lawyers known of the documents in question, they would not have settled the case for the amount originally agreed upon.

More seriously, settling cases before disclosure of the documents destroys all of the trust we are trying to establish with asbestos health victims and their lawyers. Marianna Smith has made a number of speeches, and has had numerous telephone conversations with lawyers, in which she has stated that the Trust never made asbestos, is separate from Manville, and is not and never will be guilty of the kinds of tactics Outrageous

February 8, 1988
Page 6.

Misconduct describes. Failure to disclose the existence and the contents of the documents before settling any cases, including pre-bankruptcy cases, will go a long way towards destroying any confidence and goodwill that Marianna has succeeded in establishing. Stated differently, if Manville (in concert with others or absent such concert) has been guilty of a failure to disclose the existence and the contents of the documents to both the Bankruptcy Court and the SEC, and if, as the documents suggest, Manville may have conspired with others to defraud its creditors, the Trust will want to disclose the documents.

Again, I have read only a very small number of the documents in question, and Manville and its attorneys may have sound arguments (none occur to me at this time) as to why the documents were not disclosed. One could argue, for instance, that many of the documents are cumulative, i.e., Outrageous Misconduct and other sources have revealed that Manville and other asbestos manufacturers apparently knew for many years that exposure to asbestos was detrimental to the health of asbestos workers. To me, at least, this is not a persuasive argument, particularly when Manville, as a debtor, failed to file the kind of Disclosure Statement that is required by Section 1125 of the Bankruptcy Code.

While it is not my intention to be an alarmist, I believe the documents evidence corporate irresponsibility of a magnitude which is understated in Outrageous Misconduct. The content and tone of the documents demonstrate that Manville officers, directors, and employees -- including some present employees -- held secret information that had it been revealed, would have prevented the deaths of thousands of people.

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APPENDIX A

At its corporate headquarters in Denver, Colorado, Manville produced for inspection and copying 5,411 boxes of material. Each box is one foot square (12" x 12"). At Manville, New Jersey, the corporation produced for inspection and copying 10,471 boxes. At Waukegan, Illinois, the company produced 4,682 boxes, and at Lompoc, California, the company produced 122 boxes.

In addition, following its own inspection of the material described in the preceding paragraph, the corporation claimed attorney/client or attorney work product privileges with respect to 933 boxes of material. Thus, there are 21,619 boxes containing documents produced (or claimed as privileged) during the insurance and government litigation. This material is approximately 4.1 linear miles long. Each box is estimated to hold approximately 1,000 pieces of paper. There are, therefore, approximately 22 million pieces of paper.

(During the course of both the government and insurance litigation, Manville requested its own production and inspection from both the government and the eleven insurance carriers. These productions resulted in Manville copying approximately 25 million pieces of paper contained in either government or insurance carrier files. The documents produced in the insurance litigation are subject to a Protective Order, and Manville is not permitted to turn over or to show these documents to the Trust. The documents produced in the government litigation are also subject to a Protective Order. It is unclear whether this latter Order prevents Manville from showing representatives of the Trust the documents in question, and it appears this Order will terminate when the government litigation is concluded. The case is pending on appeal before the Federal Circuit.)

Manville's counsel believe the government's inspection and copying of documents was more complete than the inspection and copying undertaken by the insurance carriers. The government employed fifteen people for six months (plus two full-time microfilm processors) to complete its inspection and copying of the material in Denver, Colorado. Thereafter, fifteen government representatives spent three months examining and copying the material in Waukegan, Illinois. Finally, twenty government representatives spent six months inspecting and copying the material in Manville, New Jersey. Stated differently, the government inspection employed approximately seventeen people full-time for over one year.

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Each page of every Manville document the government requested was microfilmed. The Manville documents copied by the government are contained on 642 rolls of microfilm. Each roll contains approximately 2,500 pages. Thus, there are slightly over 1,605,000 pages of material copied by the government.

The insurance carriers inspected essentially the same documents the government inspected. The insurance carriers microfilmed 822 rolls of material. Because these documents were copied by eleven different insurance carriers, there are many duplications, i.e., the Travelers Insurance Company and Aetna Casualty microfilmed more or less the same documents. Of course, there is also some duplication between the documents copied by the government and the documents copied by one or more insurance carriers. Among the insurance carriers, the Travelers Insurance Company copied the greatest amount of material: this production totaled approximately 220 rolls of microfilm. Approximately 2,055,000 pages of material (822 rolls x approximately 2,500 pages per roll) were microfilmed by the insurance carriers.

Susan Vento
553 Deer Ridge Lane
Maplewood, MN 55119
(651) 491-8139
slvento@g.com

Honorable Tom A. Marino
Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

January 30, 2015

Dear Chairman Marino:

My name is Susan Vento, and I'm writing to request an opportunity to testify at the Subcommittee hearing on the Furthering Asbestos Claim Transparency Act (FACT Act). I would like to testify because I have first-hand experience of the ravages of asbestos and the vicious harm that this substance has caused many Americans.

My husband was the late Congressman Bruce F. Vento who served for almost 24 years in the House of Representatives representing Minnesota's Fourth Congressional District.

Mesothelioma is an aggressive cancer caused by asbestos exposure. Bruce was exposed as a young husband and father while working his way through college. My husband died three days after his 60th birthday in October 2000, just eight and one-half months after the diagnosis. With his death, our country lost a hard-working and humble public servant years before his time. Bruce's family lost so much more.

During the consideration of this legislation in the Judiciary Committee in the last Congress, two other women who have been affected by the devastation of asbestos and I requested to testify about how the legislation would affect people like us. Our request was denied. One of the women who requested to testify, Genevieve Casey Bosilevac, unfortunately has passed away. She passed in May after courageously battling asbestos disease for five years. She leaves behind twin boys.

I understand that Members of Congress need to hear from experts about the asbestos litigation and trust systems and how the FACT Act will affect those systems. But you also need to hear from asbestos patients and their families who are concerned about this legislation and the well-established misconduct by companies over decades that led to catastrophic injuries and suffering of millions of American workers, consumers and families.

I am working with a network of hundreds of asbestos patients and their families from throughout the country who oppose the FACT Act. Many of them are too sick to travel. Others do not have the resources or the time to come to Washington, DC. We do not see this as a partisan issue, as we are both Republicans and Democrats. We see this as a citizens' rights issue and very much want our views heard on the record just as public officials and experts have had an opportunity to do. It is on this basis that I respectfully request the opportunity to testify before the Committee at the Subcommittee's upcoming hearing, Mr. Chairman.

I thank you for your consideration.

Sincerely,

Susan Vento

Cc: Members of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law

May 20, 2013

The Honorable Bob Goodlatte, Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte,

We are extremely disappointed that we were not invited to present testimony at a public hearing to express our opposition to H.R. 982, the "Furthering Asbestos Claim Transparency Act." At the March 20th mark-up on this bill, Chairman Bachus said, "we are here today to do what is right for the victims." With that said, he then promised us an opportunity to come back to Washington D.C. so we could give our testimony as witnesses at a hearing before his Subcommittee. However, this is not what actually occurred.

Instead of a public hearing as originally promised, we were invited to participate in an informal and private "information session" that would be closed off to the public and everyone else, except subcommittee members and their staff. We were told that this would be a closed door "conversation" that would not be recorded or become part of the official record of the legislation. This was insulting, and disturbingly ironic for a bill with the word "transparency" in its title.

We may not be Washington insiders, but we know the difference between being official witnesses and being treated as invisible people who need to be hidden behind closed doors and then forgotten. We rejected this offer because we felt it was not a serious effort to ensure that our views and those of other asbestos victims – who would be most affected by this one-sided legislation – were heard and considered before the bill moves forward.

To add insult to injury, after a Congressman specifically asked you to give us some advance notice when a markup was scheduled so that we could be present to witness the debate and vote on the bill, we learned last Friday that the bill would be marked up tomorrow. Three days is not sufficient notice for us to rearrange our medical treatments and other obligations to come to DC. We are bitterly disappointed that the committee plans to proceed to a vote on the bill without giving us the opportunity to at least be present when you cast votes to invade our privacy at the behest of asbestos companies.

We are three very different women, with three very different lives, and come from different areas of the country. However, despite these differences, we have one thing in common: we are all victims of the asbestos industry's cover-up of the dangers of asbestos exposure, which caused one of the worst public health crises in U.S. history, affecting, not just our families, but millions of American families, and that still continues to this day.

Despite these hardships that we've faced, we never once considered asking Congress for some kind of handout or special favor. So, when we learned that the asbestos companies – the

very same companies that caused and concealed all of this death and disease – were asking for legislation to make it harder for us and our families to seek justice and easier for them to delay our cases and pay out less to the victims, we were outraged.

Sponsors of the “FACT Act” say that the legislation is needed to stop so-called “double dipping” by asbestos victims and preserve money in the asbestos trusts for those of us who are “deserving.” But Congress hasn’t heard from the people who have to use the process. The only way to make sure the bill won’t end up serving asbestos companies at the expense of asbestos victims is to hear from the victims themselves.

We oppose the so-called FACT Act because it does not do a single thing to help us, our families, and countless other victims cope with the terrible effects of asbestos disease and death.

First, the FACT Act forces the asbestos trust funds to reveal on a public database personally-identifiable information about asbestos victims and their families. This would include private work history, asbestos exposure information, the last four digits of their social security numbers, and even the personal information of children who were exposed at an early age. This is offensive. The information on this public registry could be used to deny employment, credit, and health, life, and disability insurance. We are also concerned that victims would be more vulnerable to identity thieves, con men, and other types of predators.

Second, what we heard as “evidence of fraud” at the hearing does not hold water. A witness said that an asbestos victim claimed to be 12 years old at the time of exposure, and that this was an example of fraud against the trust. This is not fraud. Thousands of people were exposed to asbestos as children, either from their parents’ dusty work clothes or from construction materials that were used at home. Genevieve is one of those people. No one disputes that these people have asbestos diseases, and we can’t understand how these claims can be called fraud. This bill treats us and other asbestos victims like criminals rather than innocent victims of corporate deceit.

Third, the FACT Act is one-sided. We believe there is a fundamental unfairness to this bill that allows asbestos companies to continue to demand confidentiality of their settlements and hide information about how and when they exposed the public and their workers to asbestos.

We’ve been told that the asbestos companies want this bill because they are fighting among themselves about how much each of them owes to their victims. If this is a fight among the very companies who are responsible for killing thousands of Americans, why should the legislation place burdens on the victims? And why don’t the asbestos companies have to disclose anything about their business practices, such as which workplaces and which products contained asbestos and when their executives knew about the dangers of asbestos, and what, if anything, they did about it?

So far this committee has been told that this bill will, in fact, (1) slow down the processing of claims and payments to victims and their families, (2) expose claimants personally identifiable information to the general public, and (3) provide asbestos companies with significant new opportunities to slow down and ultimately avoid settling claims with deserving

victims. In addition we also heard testimony at the hearing that said there are government reports that found there is no systematic fraud in the trusts. With all of this information and evidence available, we can only hope that the members of the Committee will do the right thing and oppose the legislation.

Asbestos victims and our families don't have time on our side. Every day counts for us. Mesothelioma victims are typically racing against the clock to ensure their families aren't burdened with huge medical bills and that they are taken care of. It's astonishing to us, that, of all the issues Congress could be addressing relating to asbestos, you have chosen one that does nothing for victims, but rather one that gives additional tools to the asbestos industry to drag out these cases and escape accountability. We just can't understand how that is appropriate policy from a government that is supposed to serve and protect its citizens.

We represent thousands of people across the country who are suffering because of asbestos exposure. Many of them can't travel because of their illnesses. Others don't have the resources or the time to come all the way to Washington. But each and every one of them opposes any legislation that would make life more difficult for asbestos victims. We plan to send to the Judiciary Committee profiles of some of these victims and statements by others expressing the reasons they oppose this bill. Our campaign is growing. We are determined to stop any legislation that places the interests of the asbestos industry above the rights of innocent victims.

Sincerely,

Susan Vento
Widow of Rep. Bruce Vento (D-MN), Mesothelioma Victim
Maplewood, Minnesota

Genevieve Casey Bosilevac
Mesothelioma Victim
Omaha, Nebraska

Judy Van Ness
Widow of Dickie Vann Ness, Mesothelioma Victim
Richmond, Virginia

Cc: Members of the House Judiciary Committee

Enclosures



MILITARY ORDER OF THE PURPLE HEART

CHARTERED BY CONGRESS

NATIONAL HEADQUARTERS
5413-B BACKLICK ROAD
SPRINGFIELD, VA 22151-3960
(703) 642-6360 Fax (703) 642-1841

February 4, 2015

The Honorable John Boehner
Speaker
U.S. House of Representatives
H-232 U.S. Capitol Building
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol Building
Washington, DC 20515

The Honorable Kevin McCarthy
Majority Leader
U.S. House of Representatives
3'03 Cannon House Office Building
Washington, DC 20515

The Honorable Steny Hoyer
Minority Whip
U.S. House of Representatives
1705 Longworth House Office Building
Washington, DC 20515

Dear Speaker Boehner, Minority Leader Pelosi, Majority Leader McCarthy and Minority Whip Hoyer,

I am writing today on behalf of the Military Order of the Purple Heart, U.S.A. in opposition to H.R. 526, the Furthering Asbestos Claims Transparency (FACT) Act of 2015. The FACT Act adds insult to injury for veterans and their families at a time when they are suffering from the devastating effects of asbestos exposure.

Unfortunately, it is no secret that many of those who have served in the military have suffered greatly from exposure to asbestos during their time in uniform, and again in the civilian workforce. While on active duty, many service members were exposed to asbestos at military installations, shipyards, and housing. In addition, many modes of military transportation like ships, tanks, automobiles and aircraft often relied heavily on asbestos-containing products, with asbestos commonly used in electric wiring insulation, brake pads and clutch pads on jeeps, tanks and airplanes. After their service and returning home from defending our country, many veterans chose careers in the trades, shipyards, manufacturing and foundries, where they were also exposed to asbestos containing products. After a lifetime of repeated exposure, the reality is that although veterans represent only 8% of the nation's population, they comprise an astonishing 30% of all known mesothelioma deaths that have occurred in this country.^[1]

Despite what the proponents of this bill claim, the FACT Act was written to benefit asbestos corporations and their insurers, not their victims. This bill would delay compensation to veterans and their families suffering from the effects of asbestos exposure. Delaying justice for any veteran suffering from the fatal effects of these diseases is offensive to our brave men and women in uniform.

^[1] *Military.com* [www.military.com/benefits/veteran-benefits/asbestos-and-the-military-history-exposure-assistance.html]

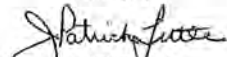
EXCLUSIVELY FOR COMBAT WOUNDED VETERANS

In addition, the FACT Act violates veterans' privacy by forcing the asbestos trusts to publically expose veterans' personally identifiable information. This bill unnecessarily intrudes upon all asbestos victims and their families' privacy, including our veterans who have fought bravely to defend our country.

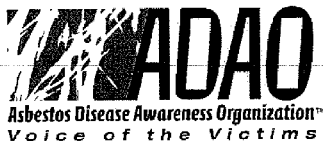
The Military Order of the Purple Heart firmly believes that H.R. 526 is unnecessary, unfair, and only benefits the asbestos industry rather than our veterans who proudly served their country and were unknowingly exposed to this deadly substance.

I respectfully call upon Congress to stand with the Military Order of the Purple Heart, U.S.A. and our veterans in opposing H.R. 526.

Thank you,



J. Patrick Little
National Commander



February 4, 2015

The Honorable Bob Goodlatte, Chairman
 US House Committee on the Judiciary
 2138 Rayburn House Office Bldg.
 Washington, DC 20515

The Honorable John Conyers, Jr., Ranking Member
 US House Committee on the Judiciary
 2138 Rayburn House Office Bldg.
 Washington, DC 20515

Re: Opposition to the Furthering Asbestos Claim Transparency Act of 2015 (HR 526)

Dear Chairman Goodlatte and Ranking Member Conyers:

As both a mesothelioma widow and the President and Co-Founder of the Asbestos Disease Awareness Organization, I respectfully write to express my strong opposition to the Furthering Asbestos Claim Transparency (FACT) Act of 2015, HR 526.

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. Notwithstanding these lethal exposures, the 2014 U.S. Geological Survey World Report confirmed that although Asbestos has not been mined in the United States since 2002, the U.S continues to import Asbestos to "meet manufacturing needs."¹

These same manufacturing interests who for years hid the dangers of their lethal Asbestos products, are now asking Congress—under the guise of transparency—to impose new time and cost-consuming requirements on the asbestos trusts, grant asbestos defendants new rights to infringe upon victims' privacy, and operate the trusts in a manner that will unduly burden asbestos victims and their families, without justification. I oppose the bill not only because it is both fundamentally unfair and discriminatory toward asbestos cancer victims, but because it is entirely one-sided, and seeks absolutely nothing in the way of increased transparency from the same industry that caused the largest man-made disaster in human history, and covered it up for years.

There is no justification for exposing families to the additional burdens set forth in HR 526. 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

¹ U.S. Geological Survey, Mineral Commodity Summaries, February 2014 (available at: <http://minerals.usgs.gov/minerals/pubs/commodity/asbestos/mcs-2014-asbes.pdf>)

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, yet the proposed reporting requirements contained in the FACT Act work contrary to that very purpose. Instead, 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. The resulting delay in compensation will gravely impact patients' pursuit of medical care, negatively affects all victims of asbestos exposure, and effectively limits the justice they deserve. Accordingly, I am strongly opposed to the FACT Act, which creates even greater burdens for patients and families to overcome during an already extremely difficult time.

I am extremely disappointed that recent Congressional legislative efforts have focused on ways to limit the litigation designed to compensate victims, when the most obvious way to limit the impact of asbestos exposure is through increased public awareness of the dangers posed, and prevention. Americans need legislation that will stop the continued import of asbestos into our country, and prevent the continued expanse of environmental and occupational asbestos-related diseases. As consumers and workers, Americans deserve transparency to prevent exposure to asbestos, not to penalize victims.

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 designed only to delay and deny justice for victims of asbestos exposure.

Sincerely,

President and Co-Founder, Asbestos Disease Awareness Organization

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

815 Sixteenth Street, N.W. • Washington, D.C. 20006 • (202) 637-5000 • www.aflcio.org

LEGISLATIVE ALERT**EXECUTIVE COUNCIL****RICHARD L. TRUMKA**
PRESIDENT**ELIZABETH H. SHULER**
SECRETARY-TREASURER**TEFERE GEBRE**
EXECUTIVE VICE PRESIDENT

February 3, 2015

Dear Representative:

I am writing to express the strong opposition of the AFL-CIO to H.R. 526, the "Furthering Asbestos Claim Transparency Act" (FACT Act). This legislation would invade the privacy of asbestos victims by posting personal exposure and medical information online and create new barriers to victims receiving compensation for their asbestos diseases. The AFL-CIO urges you to oppose this harmful bill.

Decades of uncontrolled use of asbestos, even after its hazards were known, have resulted in a legacy of disease and death. Hundreds of thousands of workers and family members have suffered or died of asbestos-related cancers and lung disease, and the toll continues. Each year an estimated 10,000 people in the United States are expected to die from asbestos related diseases.

Asbestos victims have faced huge barriers and obstacles to receiving compensation for their diseases. Major asbestos producers refused to accept responsibility and most declared bankruptcy in an attempt to limit their future liability. In 1994 Congress passed special legislation that allowed the asbestos companies to set up bankruptcy trusts to compensate asbestos victims and reorganize under the bankruptcy law. But these trusts don't have adequate funding to provide just compensation, and according to a 2010 RAND study, the median payment across the trusts is only 25 percent of the claim's value. With compensation from these trusts so limited, asbestos victims have sought redress from the manufacturers of other asbestos products to which they were exposed.

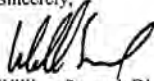
The AFL-CIO is well aware that the system for compensating asbestos disease victims has had its share of problems, with victims facing delays and inadequate compensation and too much money being spent on defendant and plaintiff lawyers. We have spent years of effort trying to seek solutions to make the asbestos compensation system fairer and more effective. But H.R. 526 does nothing to improve compensation for asbestos victims and would in fact make the situation even worse. In our view, the bill is simply an effort by asbestos manufacturers who still are subject to asbestos lawsuits to avoid liability for diseases caused by exposure to their products.

H.R. 526 would require personally identifiable exposure histories and disease information for each asbestos victim filing a claim with an asbestos trust, and related payment information, to be posted on a public docket. This public posting is an extreme invasion of privacy. It would give unfettered access to employers, insurance companies, workers compensation carriers and others who could use this information for any purpose including blacklisting workers from employment and fighting compensation claims.

The bill would also require asbestos trusts to provide on demand to asbestos defendants and litigants any information related to payments made by and claims filed with the trusts. This would place unnecessary and added burdens on the trusts delaying much-needed compensation for asbestos victims. Such a provision allows asbestos defendants to bypass the established rules of discovery in the civil justice system, and provides broad unrestricted access to personal information with no limitations on its use.

Congress should be helping the hundreds of thousands of individuals who are suffering from disabling and deadly asbestos diseases, not further victimizing them by invading their privacy and subjecting them to potential blacklisting and discrimination. The AFL-CIO strongly urges you to oppose H.R. 526.

Sincerely,



William Samuel, Director
Government Affairs Department

BS/PS/lkr



Leo Saunders
President

Laura Reyes
Secretary-Treasurer

Vice Presidents

Ken Allen
Portland, OR

Henry L. Beyer
Chicago, IL

Kari Daltz, RN
San Diego, CA

Greg Demerco
Orlando, FL

Darvy Demerco
Albany, NY

David R. Filman
Harrisburg, PA

Michael Fox
Harrisburg, PA

Kathleen Garrison
Lanham, MD

Raghu George Jr.
New York, NY

Maida Harrell
Wilkes-Barre, PA

Johanna Puno Hester
San Diego, CA

Danny J. Horton
San Diego, CA

Malvin Hughes Sr.
Houston, TX

Salvatore Luciano
New Britain, CT

John A. Lyell
Washington, DC

Kathryn Lyberger
Oakland, CA

Roberta Lynch
Chicago, IL

Christopher Paine
Mesa, AZ

Glenn S. Podderson Sr.
Baltimore, MD

Ralph Miller
San Diego, CA

Gary Mitchell
Madison, WI

Douglas Moore Jr.
San Diego, CA

Frank Moroney
Boston, MA

Henry Nicholas
Philadelphia, PA

Randy Parsons
Portland, ME

Steven O'Neil Sr.
Indianapolis, IN

Lillian Roberts
New York, NY

Edie Rodriguez
New York, NY

Lawrence A. Rowling
Lansing, MI

Joseph P. Ruggie
Columbus, OH

Elmer Salas
South St. Paul, MN

Mary E. Sullivan
Albany, NY

Bruno Torres
San Jose, CA

Janet D. Wynn
Tallahassee, FL

98-14
7-14

February 4, 2015

Dear Representative:

On behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees (AFSCME), I am writing with respect to Wednesday's hearing on the Furthering Asbestos Claims Transparency Act (H.R. 526).

H.R. 526 would impose additional obstacles to asbestos victims who are already experiencing difficulties receiving just compensation for their asbestos-related conditions. Moreover, it would cruelly invade the privacy of asbestos victims by making their personal exposure and medical information publicly available.

AFSCME members are employed in thousands of buildings across the country where asbestos is present and poses a risk of exposure on a daily basis. AFSCME has worked to ensure that adequate plans are in place to remove or manage asbestos by appropriately qualified personnel. These plans include informing workers of the location of asbestos hazards, training and equipping building service workers, establishing medical screenings to identify members and retirees with asbestos-related disease and assisting AFSCME members and retirees with asbestos-related claims.

AFSCME members and other citizens who are victims of asbestos exposure face countless impediments in their efforts to receive adequate compensation for asbestos-related diseases. In 1994, Congress required asbestos companies to establish bankruptcy trusts to compensate asbestos victims, but a lack of funding has prevented victims from receiving fair and needed compensation. As a result, asbestos victims have turned directly to the manufacturers of asbestos products for badly needed relief.

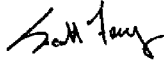
H.R. 526 would do nothing to provide relief to asbestos victims. Instead, it would create new impediments for victims. Those with an exposure history would have their medical information made available to the public once a claim is filed with a trust. Insurance companies, potential employers and others would have access to their private medical information. This punitive measure would discourage victims from making a legitimate claim for compensation. In addition, the bill allows asbestos defendants and litigants to demand information from the trusts on claims that are filed and payments that are made to victims. The bill violates the privacy rights of victims and provides no limitations on how this information can be used.

American Federation of State, County and Municipal Employees, AFL-CIO

TEL (202) 429-1000 FAX (202) 429-1293 TDD (202) 459-0444 WEB www.aflcchio.org 1625 L Street, N.W., Washington, DC 20036-5487

H.R. 526 does nothing to help asbestos victims and their families to overcome decades of unregulated asbestos use that has resulted in the death and illness of hundreds of thousands of people in this country. Asbestos victims should not be victimized again with more obstacles and by a gross violation of their medical privacy.

Sincerely,



Scott Frey
Director of Federal Government Affairs

SF:BC:rf



215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

February 4, 2015

U.S. House of Representatives Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Dear committee members,

On behalf of Public Citizen's more than 350,000 members and supporters, we strongly urge you to oppose H.R. 526, the Furthering Asbestos Claim Transparency Act (FACT Act).

The FACT Act invades the privacy of asbestos disease victims and will have the effect of delaying compensation for those suffering with lethal diseases like mesothelioma. Congress should act to protect these victims instead of opening the door for the asbestos industry to further escape accountability for poisoning the public and exposing trust claimants to scams, identity theft, and other privacy violations.

The dangerous product asbestos was once ubiquitous as an insulation and flame retardant in buildings, homes and workplaces like naval vessels. The frightening reality is that an unknown amount of the cancer-causing substance is still present in our surroundings, but the asbestos industry does not have to disclose where and when it was and is being used.

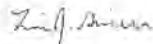
The Centers for Disease Control and Prevention report that roughly 3,000 people continue to die from mesothelioma and asbestosis every year and some experts estimate the death toll is as high as 10,000 people per year when other types of asbestos-linked diseases and cancers are included.

Instead of helping these victims, H.R. 526 would put unworkable burdens on claims trusts. For example, the bill would impose a requirement for victims to respond to any and all corporate defendants' information requests. Such a requirement would have the effect of slowing or virtually stopping the ability of trusts to provide compensation for victims. Since patients diagnosed with fatal asbestos-caused diseases like mesothelioma have very-short expected lifespans, a delay in justice could leave victims' next of kin struggling to pay medical and funeral bills.

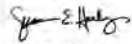
The FACT Act does nothing to improve the lives of those facing an asbestos death sentence through no fault of their own. The bill instead adds insult to injury and inexcusably invades the privacy of victims by requiring public disclosure of personal claim information, including portions of their social security numbers, opening the door to identity theft and possible discrimination.

The real outrage is the double oppression of asbestos victims, and the real need for transparency is disclosure of past and ongoing asbestos exposures. Please oppose H.R. 526.

Sincerely,



Lisa Gilbert
Director
Public Citizen's Congress Watch division



Susan Harley
Deputy Director
Public Citizen's Congress Watch division

EWG Action Fund: FACT Act Favors Asbestos Industry Over Justice, Public Health

Would waste assets meant to help victims, invade privacy and delay compensation

Contact: Sara Sciammacco

(202) 667-6982

ssciammacco@ewg.org

FOR IMMEDIATE RELEASE:

WEDNESDAY, JANUARY 28, 2015

WASHINGTON — Legislation re-introduced by Rep. Blake Farenthold, R-Texas, would place new burdens on asbestos bankruptcy trusts, slowing compensation to victims suffering from fatal asbestos-related diseases such as mesothelioma, EWG Action Fund said today.

The *Furthering Asbestos Claim Transparency Act (HR. 526)*, or FACT Act, would specifically require the bankruptcy trusts to issue quarterly reports disclosing detailed information about individuals seeking compensation, resulting in significant delays and unnecessary burdens for victims.

EWG Action Fund Executive Director Heather White said:

The FACT Act supports the asbestos industry's enduring, pervasive strategy to run out the clock on efforts by victims of asbestos-related disease to get justice before they die. Supporters of the bill assert that it's intended to help victims. That couldn't be further from the truth, given that it's backed by the same interests that hid the lethal dangers of asbestos for decades.

If asbestos companies truly care about transparency, they need to come clean about where asbestos is still being imported, used and stored. The chilling reality is that asbestos is still everywhere – both lethal and legal in the United States.

We urge lawmakers to do the right thing and reject the FACT Act.

As EWG Action Fund documented in its groundbreaking investigation "Asbestos: Think Again," thousands of Americans die each year from asbestos-related diseases. In addition to lung cancer and other illnesses, exposure to asbestos causes mesothelioma, an extremely painful and fatal cancer that attacks the lining of the lungs, stomach and other organs. Mesothelioma requires expensive medical treatment and often kills sufferers within months of being diagnosed.

EWG Action Fund is a 501(c)(4) organization that is a separate sister organization of the Environmental Working Group. The mission of EWG Action Fund is to protect health and the environment by educating the public and lobbying on a wide range of environmental issues. Donations to EWG Action Fund are not tax-deductible.

**Asbestos Patients and their Families Say
“Listen to Us”
Oppose H.R. 526, the So-Called “FACT Act”**

February 4, 2015

Dear Representative,

We write to express our strong opposition to the misnamed “Furthering Asbestos Claim Transparency Act” (the FACT Act, H.R. 526). The bill’s sponsors claim that the legislation will “increase relief for victims of asbestos.” We are asbestos patients and family members from across the United States, Republicans and Democrats, and we know the legislation would do just the opposite – it will make it harder for victims to seek justice and easier for asbestos companies to delay cases and pay out less to victims.

In the name of “transparency,” the FACT Act would force victims seeking any compensation from a private asbestos trust fund to reveal on a public web site private information including the last four digits of our Social Security numbers, and personal information about our families and kids. At the same time, the bill contains no requirements for transparency from the asbestos industry, which concealed the dangers of asbestos exposure for decades, causing one of the worst public health crises in U.S. history, affecting not just our families, but millions of American families, and that still continues to this day.

During consideration of the FACT Act in the last Congress, three members of our group traveled to Washington, DC to advocate against the legislation. They repeatedly requested to have an opportunity to testify before the Judiciary Committee so that the voices of the people who are most affected by this bill would be heard. They were turned down each time. And again this year, the Committee leadership refused to allow a victim to testify.

These are the stories of the women who were shut out by the FACT Act supporters:

Susan Vento is the widow of the late Congressman Bruce Vento, who served for over 20 years in the House of Representatives representing Minnesota’s Fourth Congressional District. He died from mesothelioma in 2000 within eight months of being diagnosed. Bruce was exposed through his work as a laborer years before he 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. Bruce died later that year, three days after his 60th birthday. With his death, our country lost a dedicated and humble public servant years before his time. Sue lost her best friend and so much more.

Judy Van Ness is a lifelong Republican from Richmond, Virginia. Judy's husband Richard was diagnosed with mesothelioma in August 2011. On August 30, 2012, Richard passed away. He was only 62 years old. Richard and Judy were married for 25 years and have one son named Anthony. Richard served his country proudly on the U.S.S. Charles R. Ware and as a result was exposed to asbestos. Then later, he worked as a union pipefitter for 35 years in his hometown of Richmond, Virginia. He finally retired on September 2009 after working hard all his life. He had been retired for only two years when they found the cancer. Judy and Richard should have had so many more years together.

The third member of the group was Genevieve Casey Bosilevac. Genevieve was diagnosed with mesothelioma in 2009 a few days before her 48th birthday. Genevieve tragically passed away last year. In 2013, she wrote this:

"I have six year old twin boys. Mesothelioma is one of the worst kinds of cancer you can get. I got sick because someone else decided to use asbestos in their automotive products – gaskets, brakes, clutches. I worked in my family's business. It was an automotive painting business. It was my job to make deliveries to the clients, the mechanics and auto body shops and the like. That's how they say I was exposed to asbestos. That, and the remodeling work my parents did on our family home. I fight hard for my life every day. I do it for my husband and those two little boys. I don't understand why the asbestos industry feels the need to expose my family's information on a web site for the world to see. The companies responsible for my illness already have that information because I had to give it to them to receive any compensation for my medical bills. I wish I could be in Washington for the vote on the FACT Act, but I am too ill to travel."

Sue, Judy, Genevieve and the rest of the signatories on this letter represent thousands of people across the country who are suffering because of asbestos exposure. Some of us plan to attend the FACT Act hearing on February 4th. But most of us can't travel because of our illnesses. Others don't have the resources or the time to come all the way to Washington. But each and every one of us opposes any legislation that would make life more difficult for asbestos victims.

The FACT Act forces private asbestos trust funds to reveal on a public database personally-identifiable information about asbestos victims and their families. This would include private work history, asbestos exposure information, the last four digits of their social security numbers, and even the personal information of children who were exposed at an early age. This is offensive. The information on this public registry could be used to deny employment, credit, and health, life, and disability insurance. We are also concerned that victims would be more vulnerable to identity thieves, con men, and other types of predators.

We have heard that the FACT Act is needed because of an epidemic of fraud against the asbestos trusts. But the evidence doesn't support this claim. This bill treats us and other asbestos victims like criminals rather than innocent victims of corporate deceit.

The FACT Act is also completely one-sided. It requires so-called transparency from asbestos victims but it allows asbestos companies to continue to demand confidentiality of their settlements and hide information about how and when they exposed the public and their workers to asbestos. How can asbestos companies claim they want *transparency*, after they spent decades covering up the dangers of asbestos while we and our family members were unknowingly exposed to this deadly toxin?

Asbestos victims and our families don't have time on our side. Every day counts for us. Mesothelioma victims are typically racing against the clock to ensure their families aren't burdened with huge medical bills and that they are taken care of. It's astonishing to us, that, of all the issues Congress could be addressing relating to asbestos, you have chosen one that does nothing for victims, but rather one that gives additional tools to the asbestos industry to drag out these cases and escape accountability.

We are the real people who matter in this debate, and yet the supporters of the FACT Act would not allow any of us to testify. We may have been shut out of the hearings, but we will not be silenced. We are determined to stop any legislation that places the interests of the asbestos industry above the rights of innocent victims. The U.S. Congress should honor all veterans and hard-working Americans. Please vote no.

Sincerely,

Susan Vento
Widow of Rep. Bruce Vento (D-MN), Mesothelioma Victim
Maplewood, Minnesota

Judy Van Ness
Widow of Richard Van Ness, Veteran and Mesothelioma Victim
Richmond, Virginia

George and Christine Dreith
George Dreith is a Mesothelioma Patient
Godfrey, Illinois

Loring and Mary Jane Williams
Mary Jane Williams is a Mesothelioma Patient
Springfield, Ohio

Ginger and Jarrod Horton
Ginger Horton is a Mesothelioma Patient
Candler, North Carolina

Jill Cagle
Widow of Robert Cagle, Mesothelioma Victim
Pekin, Illinois

Jill Waite
Daughter of Bruce Waite, Deceased Mesothelioma Victim
Ontario, Ohio

Latonya Manuel
Widow of Andrew Manuel Jr., Mesothelioma Victim
Canton, Michigan

Judy Duncan
Widow of Carl Duncan
Lynchburg, Virginia

310 Grant Street, Suite 1700
 Pittsburgh, PA 15219-2399
 Telephone: 412-261-0310
 Facsimile: 412-261-5066

Douglas A. Campbell • dac@camlev.com

Campbell & Levine, LLC

Attorneys at Law

January 30, 2015

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

The Honorable Tom Marino
 Chair, Subcommittee on Regulatory Reform,
 Commercial and Antitrust Law
 410 Cannon 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 Hank Johnson
 Ranking Member, Subcommittee on Regulatory
 Reform, Commercial and Antitrust Law
 2240 Rayburn House Office Building
 Washington, DC 20515

Re: Furthering Asbestos Claims Transparency ("FACT") Act of 2015

Dear Committee Members:

A bill has been introduced in the House of Representatives titled the Furthering Asbestos Claims Transparency ("FACT") Act of 2015, or H.R. 526, as an amendment to Section 524(g) of the Bankruptcy Code. The bill would negatively impact the numerous private settlement trusts established and funded by various companies to assume and pay their liability for asbestos disease claims, which facilitated their reorganizations under chapter 11 of the Bankruptcy Code. The 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. There is no requirement that the trusts 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 present and future asbestos disease claims.

II. The Bill Does Not Protect Asbestos Disease Victims

The bill does not, in any way, protect the trusts' beneficiaries. On the contrary, it imposes costly and time consuming requirements on the trusts to provide, quarterly and on demand, extensive and confidential personal information about trust claimants to third-party litigants, thus shifting discovery-related costs from the actual litigants onto the trusts. The bill will unduly and unnecessarily increase the trusts' administrative burdens and will inevitably lead to higher non-reimbursable costs, and delays in the processing of claims and payments to holders of asbestos claims. The bill does not protect the trusts or their beneficiaries, it burdens them.

III. The Trusts and Their Beneficiaries Would Bear the Economic Burden Associated with Quarterly Reports and Responses to Requests

Under Section 2 of the bill, a new Section 8(A) would be added to Section 524(g) of the Bankruptcy Code, which would require asbestos settlement trusts described in Section 524(g) of the Bankruptcy Code to publicly report certain information at the trusts' expense. 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...." However, a trust could not provide such a report by simply providing information taken from the claim form or pre-set data fields, because informed judgment by an individual claims reviewer (as opposed to simple electronic copying) would be required, insofar as 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 their respective 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. 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

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).

January 30, 2015

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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.²

With respect to the payment of claims, 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 an experienced manager 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 bill 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 bill. Under the provisions of the bill, the trusts would bear the ultimate economic burden associated with preparing these quarterly reports.

The bill 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 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.³

IV. 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.⁴

² The time estimates contained in this letter are based on discussions with the managers of a facility that processes trust claims.

³ Section 8(B) provides that a trust may seek payment for any "reasonable cost" incurred by the trust in complying with a Section 8(B) information request.

⁴ See Treas. Reg. §1.468B-1 (1993)

January 30, 2015

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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.

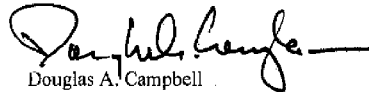
The trust documents approved by the District and Bankruptcy Courts for use by the asbestos trusts expressly provide that information about claims must be treated as confidential and not be released unless either: (i) the claimant consents or (ii) the trust is served with a valid subpoena. Such a confidentiality 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.

V. Conclusion

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 costly administrative obligations, solely for the benefit of solvent asbestos defendants. If full transparency were the true goal of this bill, the provisions of the bill would not be limited to burdening the trusts with compliance, they would also require the solvent asbestos defendants to make their asbestos-related claim and payment information publically available.

Accordingly, our trust clients respectfully request that the Subcommittee report the bill out unfavorably.

Yours Very Truly,



Douglas A. Campbell

DAC:jmb

**Response to Questions for the Record from Elihu Inselbuch, Member,
Caplin & Drysdale, Chartered, New York, NY**

**Subcommittee on Regulatory Reform, Commercial and
Antitrust Law of the Committee on the Judiciary
Heariug on H.R. 526, the “Furthering Asbestos
Claim Transparency (FACT) Act of 2015”**

Mr. Inselbuch’s Responses to Questions for the Record

Questions for the Record from Subcommittee Chairman Marino

- I. Do you believe the asbestos trusts are capable of policing themselves? Can you tell me how many times an asbestos trust has detected a fraudulent claim and referred it to law enforcement for their review? If so, please provide in your written response additional information on those claims, including the local, state, or federal agency to which the trust reported them.*

I have no doubt that the trusts are capable of policing themselves. By “policing themselves” I understand the Chairman to mean ensuring through reasonable expenditures of cost and effort that only meritorious claims are paid. The trusts I work with have been doing this for a long time and I am confident that they will continue to do so.

In fact, the majority of trust documents provide the trusts with the authority to “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 asbestos-containing products for which the trust is responsible.

Most trusts, certainly all of the larger trusts with which I am familiar, have adopted regular audit procedures, both random across all filings and special, triggered by particular questions. Some trusts that share claims processing facilities also compare the evidence a claimant has submitted across trusts during the audit. A law firm may not choose not to participate in the audit process – if a firm does not respond to an audit request, the trust will stop processing the firm’s claims as the firm will be deemed to have failed the audit.

Inselbuch QFR Responses
April 7, 2015
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What trust audits have shown is that the overwhelming percentage of the tens of thousands of claims filings allege factual matters that are solidly supported by underlying evidence in the files of the many hundreds of law firms throughout the country.

The trust audit process is not designed to uncover fraud any more than the certified public accounting firm audits of financial statements of public companies. In both situations the goal is to see to it that on balance and by applying a reasonable amount of resources, assurance can be given that, in the trust cases, only deserving claims are being paid, and in the accounting circumstances, the financial statements are being reasonably presented. I am confident that the trusts that I observe regularly, both through their careful initial claims review mechanisms and through their audit processes, are seeing to it with reasonable certainty that the scarce resources of the trusts are being devoted to meritorious claimants and are not being wasted.

The design of any audit must balance the level of inquiry deemed appropriate in the circumstance with the costs of the exercise. Since trust filings are almost all the work product of hundreds of law firms throughout the country it is unreasonable to assume that there is likely to be a high level of dishonesty, any more than one would so assume that our Congress, made up of nearly 50% lawyers, is rife with fraudulent activity simply because its members are dependent upon political contributions to mount their election campaigns. While there may well be dishonest lawyers and there may well be dishonest congressmen, there is no history to suggest that dishonesty is rampant.

Moreover, there is no financial motivation for the trusts or any of the parties involved to countenance fraudulent claiming. The trustees have a fiduciary responsibility to ensure that only valid claims are paid. The members of the trust advisory committees are lawyers representing asbestos victims – any fraudulent claims paid mean less money for their deserving clients. And the

Inselbuch QFR Responses
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Page 3

future claimants' representatives want to ensure that only valid claims are paid so as to preserve resources for future claimants. Given this diversity of interests aligned against the payment of fraudulent claims, it is difficult to see who would benefit.

I am aware of two incidents that were reported to law enforcement. The first involved a pro se claimant from Tennessee; that matter was reported to the FBI. Subsequently representatives of several trusts spoke to the FBI and the Tennessee Bureau of Investigation about that claimant. Second, an employee of a claims processing facility filed a false claim. That matter was reported to the Wilmington Police Department in Wilmington, Delaware.

In any event, it is inappropriate to evaluate the quality of the trusts' claims review and audit process by counting the number of frauds identified and reported to authorities just as it would be silly to evaluate the quality of work of a bank teller by counting the number of counterfeit bills the teller finds.

Questions for the Record from Representative John Conyers, Jr. and Representative Henry C. "Hank" Johnson, Jr.

1. *Mr. Vari states that "claimants who pursue full remuneration in the tort system can, for the most part, recover more money from the asbestos bankruptcy trusts without any impact on their tort system recoveries." Essentially, he asserts this results in "double-dipping." What is your response?*

Asbestos defendants like those Mr. Vari represents 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 – including the *Garlock* court.

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A plaintiff has the right to recover from each and every entity that caused his or her injury. Just as someone who is in the sixth car of a six-car accident can sue (and recover from) all five of the other drivers who hit him, so too can someone with mesothelioma who was exposed to thirty manufacturers' asbestos-containing products recover from all thirty. 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.

As Mr. Vari notes, a claimant may "pursue full remuneration in the tort system" but the claimant only obtains "full remuneration" if and when a case goes to verdict and the verdict is paid. As Mr. Vari well knows, trials to verdict and payment occur in less than one percent of the cases filed, and when this occurs, the claimant cannot "recover more money from asbestos bankruptcy trusts" as a matter of law. After the verdict is paid, the tort system defendants who paid the verdict succeed to any rights the claimant may have had against any trusts and can recover from those trusts in the claimant's stead. Of course, also as a matter of law, the amount of any tort system verdict is reduced to account for any amounts previously received in settlement by the claimant whether from other tort system defendants or from asbestos bankruptcy trusts. There cannot be any "double dipping" as a matter of law and Mr. Vari cannot show you even one case where this has happened. In the 99% of tort system cases where no verdict is ever reached, over time the claimant and the tort system defendants reach voluntary settlements just as the claimant reaches settlements with asbestos bankruptcy trusts. The claimant's ultimate recovery is the sum of all these settlements and whether or not it achieves "full remuneration"—what might have been a jury's verdict—or more than that or less than that is not and cannot ever be determined.

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2. *Mr. Scarcella states that “[I]ndividual trusts operate in vacuums”? What is your response?*

With this comment, Mr. Scarcella is presumably expressing concern that claimant demands made to one trust are not publicly available to other trusts.¹ The comment is misleading for at least two reasons.

First, it implies that the trusts’ audit programs are inadequate because the trusts do not share information. This is incorrect. I discuss some features of a trust audit program in my response to Subcommittee Chairnan Marino’s question 1, above.

Second, the comment implies that there is something improper about trusts focusing on claims for exposure to products for which they bear responsibility. As I explain in my written testimony,² each trust embodies a settlement between a particular defendant or corporate family of defendants and all the present and future victims who were injured by the asbestos for which that defendant is liable. The trust is only paying its several share of the defendants’ total liability – the amount which is attributable solely to the defendant that was the trust’s predecessor. The trust therefore pays those victims who can demonstrate that they meet the criteria under which that defendant would have settled. Unless the victim is alleging that he has an extraordinary claim and that products for which that trust is responsible were the only cause of his asbestos-related disease, the trust does not need to know about the person’s other exposure.

3. *Professor Brickman states that “trusts provide no public disclosure of individual claims including what exposures were claimed or the amounts paid” and that “trusts zealously guard this information and seek to hide it from tort defendants.” What is your response?*

Mr. Brickman’s first statement is correct, but meaningless, and the second statement is wrong.

There is no reason why an asbestos trust should be expected to provide public disclosure of individual claims. The trusts are private entities, replacing defendants who have chosen to avail

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themselves of bankruptcy code protection from civil tort liability, and are settlement vehicles created to settle claims created by the liability of their predecessors. Claims paid out by asbestos trusts are settlements and therefore should be treated in the same manner as any other settlements negotiated in the court system. The parties classically deem lawsuit settlements confidential. 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. Ford does not publish individual claims information, including what asbestos exposures were claimed, the amounts paid, or the basis for payment, any more than it reports settlements of cases involving defective vehicles. Honeywell does not publish individual claims information, including what exposures were claimed, the amounts paid, or the basis for payment – nor does Union Carbide, or the Crane Company, or any other solvent defendant. Nor for that matter do they report on the details of claims resolution for other of their many products. Why should the trusts be treated differently?

Nor does Mr. Brickman have any evidence for the statement that “trusts zealously guard this information and seek to hide it from tort defendants” – he cites to one cryptic private conversation he had with one anonymous trustee for one trust.³ The trusts like all people and entities respond to valid subpoenas, which are the means by which any party in a lawsuit can get information from third parties. There is no reason why defendants should get special privileges with respect to information in the trusts’ possession.

A trust claim is the settlement of a dispute between two private parties. That is why it is not publicly disclosed. There are many other situations where one party owes and pays another a sum of money, and those are not public. Insurance claims are a prime example. Should insurance companies be required to publish a list of the claims they pay, including the name and address of the claimants and the basis for payments?

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Indeed, the trusts, unlike insurance companies or asbestos defendants, are not operated with a profit motive. They are non-profit entities and are governed by trustees in the interest of the beneficiaries (both present and future) and not in the interest of shareholders. And the trusts already provide substantial information about what claims are likely to be successful and how much the claimants are likely to receive. In fact it is the defendants which are the entities that zealously hide this information, both from other defendants and from the people they have injured.

4. *Much has been said by the Majority witnesses regarding the Garlock case. What is your response?*

The majority witnesses misstate the content and effects of the Garlock estimation proceeding. In that proceeding, the bankruptcy court estimated Garlock's liability to all present and future victims of mesothelioma over the next 35 years at just \$125 million. In doing so, the court rejected Garlock's equally long history of resolving mesothelioma cases in the tort system throughout the United States, during which it paid over \$600 million to compensate its victims. Although Garlock's settlement average per mesothelioma claim for the five years before its bankruptcy was more than \$76,000, the bankruptcy court's estimate implied a per claim average of only \$7,600 going forward.

While bankruptcy law categorizes and prioritizes claims, it does not alter their values. Tort and contract claims are governed by state law and they retain their elements and values in bankruptcy. Accordingly, in *all* other contested asbestos bankruptcies, the court's estimate of the bankrupt defendant's liability for asbestos claims has been based on its settlement history in the tort system – since the best measure of what cases will settle for is what previous cases have settled for. If the *Garlock* case had followed these precedents, the estimate of Garlock's liability would exceed \$1.2 billion.

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To avoid this result, Garlock argued to the bankruptcy court that it was driven to bankruptcy by “fraud” committed by plaintiffs and their lawyers, who disclaimed knowledge of exposure to products of bankrupt defendants in tort-system lawsuits against Garlock, while at the same time presenting proof of such exposure in trust claim filings and bankruptcy ballots. Garlock argued that this “fraud” so permeated its recent tort-system experience that the history could not be relied upon to estimate its ongoing liability. Regrettably, this argument misled the bankruptcy court, unfamiliar with tort litigation. The time to appeal this decision has not yet arrived.

Among the representations Garlock made during the estimation hearing are the following:

- *Garlock told the bankruptcy court that plaintiffs control the proof of exposure.*

This is false. Indeed, when workers tore out insulation to get to Garlock’s gaskets, they rarely knew which companies made the insulation. Installed insulation is not labeled (check any basement). The victims can hardly be expected to recall, when they fall ill thirty years later, what they did not know at the time. Nonetheless, when insulation companies were defendants in the tort system, the burden was on the plaintiff’s lawyer to marshal the necessary proof of exposure by determining and supplying the identity of the insulation manufacturers from build records and other testimony. Garlock was a repeat defendant and litigated asbestos cases over decades with the same insulation co-defendants often involving the same worksites. This process generated libraries of evidence for defendants, including Garlock, about products, the sites where workers were exposed to these products, and the occupations in which workers were likely to suffer dangerous exposures to asbestos. Once the insulation defendants left the tort system, plaintiffs and their lawyers had no reason to marshal proof against them. To the extent Garlock and other remaining tort-system defendants wanted to identify any absent manufacturer, their unfettered access to the accumulated evidence put them in control of the proof.

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- *Garlock told the bankruptcy court that when plaintiffs denied knowledge of exposure to specific asbestos insulation, they were lying, and that this was proven when the plaintiffs filed claims for compensation against asbestos trusts.*

This is false. Unlike tort-system defendants, the trusts concede what they know and publish lists of work sites where past litigation showed that their predecessor's products were in use. Many claims are submitted to trusts relying only on proof that the claimant worked at a site on the applicable trust's published work site list in an occupation that typically involved asbestos exposure. In these circumstances, the plaintiff's lawyer did not need to marshal the evidence of these exposures in the tort suit and the plaintiff simply does not have it. The bankruptcy court, relying on Garlock's assertions, mistakenly treated all plaintiffs' trust submissions as presentations of proof of specific exposure and contrary to their tort-system testimony.

- *Garlock told the bankruptcy court that when plaintiffs denied knowledge of exposure to asbestos insulation, they were lying, and that this was proven when they voted on plans of reorganization in other bankruptcy cases.*

This is false. Ballots cast in favor of a plan of reorganization do not contain exposure evidence either, although the *Garlock* bankruptcy court wrongly assumed that they did. Correctly understood, a ballot cast for an asbestos victim in a bankruptcy case asserts only that he or she has an asbestos-related disease and that there are reasonable grounds to believe the bankrupt company may have legal responsibility for that injury, whether because of product exposure or on some other basis.

- *Garlock claimed that the 15 cherry-picked cases it presented proved that plaintiffs lied by disclaiming exposure to the bankrupts' products.*

This is false. The fifteen cases were cherry-picked by Garlock out of the more than ten thousand mesothelioma cases it tried or settled in the decade before its bankruptcy. They were not representative. More importantly, an examination of these cases reveals that in fact the plaintiffs

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told the truth. The *Treggett* case is a prime example. Garlock claimed Mr. Treggett suppressed evidence of insulation exposure when he worked on a Navy nuclear submarine. But the record shows Mr. Treggett freely testified to extensive insulation exposures and described the products involved; he just did not know what brand of insulation was used on the ship when he worked on it in the 1960s. This was typical; indeed in its bankruptcy case Garlock's own expert examined 550 plaintiff-side depositions in mesothelioma cases and conceded that the testimony freely identified insulation exposure. Ironically, while Mr. Treggett did not know the brand of insulation installed on the submarine, Garlock did. During the *Treggett* trial, Garlock was concurrently in trial in another case involving the very same submarine involving the very same insulation evidence it falsely accused Mr. Treggett of hiding from it. The \$22.4 million *Treggett* verdict against Garlock (including \$15 million in punitive damages) cannot be explained by "suppression of evidence" by the dying mesothelioma victim or his lawyer.

Garlock made a disingenuous presentation to the court about the realities of the workplace. It then relied on the testimony of an "expert" law professor whose only knowledge of the facts of the cases was what Garlock chose to teach him and who, in his testimony, read from a memorandum written by Garlock's own lawyers when he was on the stand to deliver his "opinion." Fairly viewed, there is nothing about Garlock's tort-system history that suggests Garlock was placed at any disadvantage other than by the reality of its own toxic product and its own culpable knowledge. The estimation decision is simply wrong.

5. *Do trusts rubberstamp demands for payment from asbestos claimants?*

The trusts do not rubberstamp demands for payment from asbestos claimants. Indeed, the most recent published annual reports for five of the largest trusts – AWI, B&W, OC, OC/FB, and USG – show that they have paid fewer than half of the claims they have received. The following

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table shows the number of unliquidated claims each trust has received between its formation and December 31, 2013⁴ and the number that had been paid as of that date.

Trust	Claims Received	Claims Paid	%
AWI	562,511	215,372	38%
B&W	520,019	237,056	46%
OC (OC)	582,005	257,653	44%
OC (FB)	571,482	248,543	43%
USG	542,151	222,007	41%

For a claimant to recover from an asbestos trust, the medical evidence must demonstrate that the claimant has an asbestos-related disease, and the product exposure evidence must satisfy the trust that the claimant worked with or around its predecessor's debtor's products so that the trust has responsibility for the claimant's injuries.⁵ This is the same proof required to recover in a jury trial.

6. *The trusts typically treat claimants' submissions as confidential. Please explain why such matters are treated as confidential.*

Please see my response to question 3, above.

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.

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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 tort defendants already have much more information about what a particular plaintiff is likely to recover from a trust 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.

7. *What are some of the reasons why defendant corporations demand their settlements be kept confidential?*

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

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put forth by the plaintiff, including the location where the plaintiff was exposed and the defendant's products at that site.

8. *Mr. Scarcella states that the FACT will "act as a deterrent to potential fraudulent claiming across trusts." What is your response?*

Please see my response to Rep. Marino's question 1, above, regarding audits. There has been no showing that there is any significant incidence of inconsistent, let alone specious or potentially fraudulent, claiming activity. Mr. Scarcella claims that it is through "public accountability" that the FACT Act will act as a deterrent.⁶ He is attempting to find a justification for the FACT Act, since there is no evidence that there either is a problem, or, if there were, that the FACT Act would be the solution.

9. *What burdens does the FACT Act's quarterly reporting requirement impose?*

The FACT Act's quarterly reporting requirements impose two sets of burdens – one on the claimants and one on the trusts.

A. Burdens on the Claimants

The primary burden is on the claimants whose privacy is being violated. The bill threatens the privacy of asbestos victims, many of whom are elderly veterans or their widows, by placing information about their confidential settlements on the internet for anyone to see. Who they are, where they live, how old they are, the fact that they are sick or dying, or recently widowed, and that they have recently resolved a claim and are in possession of funds – this will be available for anyone to see.

It strikes me as odd that while this Congress is horrified that the healthcare.gov website may be releasing information that *might* lead to a company being able to assemble a user's age, income, zip code, and medical information,⁷ it is considering enacting the FACT Act which would

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require that this same information be published about sick and dying cancer victims just because their cancer was caused by exposure to asbestos.

B. Burdens on the Trusts

The quarterly reporting requirement of the FACT Act will significantly increase the burdens and costs to the trusts as well. It will impose substantial administrative burdens, contrary to Mr. Scarcella's claims. These administrative burdens would divert staff from processing claims while they prepare the required reports. Even with additional staff, the burden of preparing the quarterly reports will impact the ability of the trusts to timely pay claims. The trusts will 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 to those defendants that have a legitimate right to it.

A group of 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 (the "Trusts") expressed strong opposition to this legislation, in part because of the burdensome administrative costs that will reduce recoveries for future trust claimants.⁸ In their letter to the Subcommittee, the Trusts stated that the bill "imposes costly and time consuming requirements on the trusts to provide, quarterly and on demand, extensive and confidential personal information about trust claimants to third-party litigants, thus shifting discovery-related costs from the actual litigants onto the trusts."⁹ The Trusts add that the bill "does not protect the trusts or their beneficiaries, it burdens them."¹⁰

The Trusts address the effects of the quarterly reporting requirement directly, explaining

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that the new Section 8(A) requiring asbestos settlement trusts to publicly report certain information at the trusts' expense would require the quarterly report filed by each trust to include "the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant"¹¹

Mr. Scarcella posits that the trusts can "produce these quarterly reports at minimal cost."¹² That is not the case. As the Trusts explain, neither the "exposure history" nor the "basis for payment" is or can be a pre-set data field, meaning that claims reviewers would likely have to review the supporting documents submitted with the claim form and then prepare a statement explaining the exposure and medical basis for the payment.¹³

The Trusts estimated that a trust like any 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 devote an aggregate of *20,000 hours per year* on that trust's compliance with the Act – the equivalent of ten new full-time employees.¹⁴

10. Mr. Scarcella states that the FACT Act's third party disclosure requirements "will not result in overly burdensome efforts or costs to the trusts." What is your response?

As with his analysis of the burden created by the quarterly reporting requirements, Mr. Scarcella is incorrect. As an initial matter, his examples cannot be generalized to the trusts as a whole. He references the API, Inc. Asbestos Settlement Trust's \$18.50 charge for an individual claim search.¹⁵ However, as Mr. Scarcella knows, the API Trust is a very small and unrepresentative trust; it only paid 34 new claims in 2013.¹⁶ And he is comparing apples to oranges – responding yes or no to the question of whether a claim was filed is not the same thing as "provid[ing] in a timely manner any information related to payment from, and demands for payment from, such trust. . . ."¹⁷ As the Trusts noted in their January 30 letter to the Judiciary Committee, "[t]his broadly drafted provision could arguably require a trust to provide information

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regarding every claim that it has ever received to multiple parties, with each request being unique in some manner, an unimaginable burden."¹⁸

While the bill has a proviso requiring the requesting party to pay "reasonable costs,"¹⁹ the very word "reasonable" is nothing more than an invitation to potentially expensive disputes between the trusts and the requesting parties.

Of course, this provision also leads to further privacy concerns. It opens up the medical and financial information of hundreds of thousands of cancer victims and their family members to any party in an asbestos case. The privacy violations are too many to count.

11. *Professor Brickman states that "plaintiffs and their counsel are routinely employing deceptive and in many cases fraudulent practices in contravention of law, the rules of discovery and often in defiance of direct court orders." What is your response?*

Mr. Brickman is mistaken, which is not surprising since he has no first-hand knowledge of asbestos litigation. Mr. Brickman has not attended the trial of an asbestos case since 2000.²⁰ He has never tried a case, represented a plaintiff or defendant, or practiced law.²¹ Mr. Brickman's evidence of misconduct mentions six of the hundreds of thousands of asbestos personal injury cases that have been tried or settled in the last fifteen years: the *Kananian*, *Warfield*, *Edwards*, *Montgomery*, *Barnes & Crisafi*, and *Stoeckler* cases.²²

Mr. Brickman is repeating a sound bite that the defense bar has been broadcasting for years. The predecessors to this committee have already heard discussions of the *Kananian*, *Warfield*, *Edwards*, and *Montgomery* cases from attorneys who work in the asbestos and products liability practices of the defense bar.²³ As for the content of the cases that Mr. Brickman describes, what is perhaps most worthy of note is that any complaints raised in those cases by the defendants were promptly resolved by the trial judges. The tort system is working and if and when misconduct arises it is being dealt with in the cases, as it should.

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Mr. Brickman also liberally repeats the findings of the *Garlock* estimation decision. (I address the *Garlock* case in my response to question 4 (above) and in my written testimony). Mr. Brickman is not an objective observer of the Garlock situation, nor is he familiar with its underlying evidence. While Mr. Brickman may not have been paid to testify before Congress,²⁴ he was a highly paid witness for Garlock²⁵ during the estimation hearing where he acknowledged that he had no independent knowledge of the underlying facts in the Garlock cases, however, and relied entirely on the materials supplied to him by Garlock's attorneys.

Mr. Brickman was not familiar with Garlock's litigation history or defenses prior to being retained by Garlock.²⁶

- Q. Prior to being engaged by Garlock, did you know anything about Garlock's litigation history?
 A. No.
 Q. Did you, prior to being engaged by Garlock, talk to anyone with personal knowledge about why Garlock settled cases?
 A. No.²⁷

Indeed, the only cases he looked at were those chosen by Garlock's lawyers:

- Q. How many claimants' materials did they ask you to review?
 A. Well, they asked me to review the 15 designated plaintiffs cases.
 Q. And there were three more, weren't there?
 A. There were two more that I'm aware of. There were 17, actually and –
 Q. Could it have been 18?
 A. What?
 Q. Could it have been 18?
 A. My recollection is 17. If it's 18, then my recollection's incorrect.
 Q. Now, do you know anything about, how if at all, these 15, 17, 18 cases are or are not representative of the 8,000 or 10,000 cases that were resolved?
 A. I don't claim that the 15 representative plaintiff cases are necessarily representative of the 11,000 mesothelioma claims that were settled in the time period that I listed.²⁸

He even brought a memorandum Garlock's lawyers prepared describing the case

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settlements they relied on to the witness stand – and referred to it during his testimony when asked about those cases:

- Q. Are you reading something?
 A. I am reading from an exhibit, yes.
 Q. You're reading from something that Mr. Cassada wrote?
 A. Yes.²⁹

And, while Mr. Brickman looked at very few cases of the more than 8,000 that Garlock actually settled, he did not even read all the documents related to Garlock's analysis of those 15 cases:

- Q. Did you review the underlying supporting documents?
 A. I reviewed some of them, yes.³⁰

Mr. Brickman claimed to have fact-checked the summary memorandum Garlock's lawyers prepared for him³¹ but during his testimony in July 2013 he did not know what materials he actually read five months earlier when he prepared his expert report:

- Q. Did you read that material when you prepared your report?
 A. As I sit here today, I have no recollection of whether I did or did not.
 Q. That was in April of this year sometime?
 A. It was before April.
 Q. February of this year?
 A. The memo from – is dated April 12th. There were preliminary memos that had some of this information. So some of it –
 Q. You don't remember –
 A. I read earlier, but I certainly –
 Q. But in any event –
 A. – spent a great deal in April reading this.
 Q. You don't remember when you read this within the last year or so?
 A. I don't – if I read it, I read it sometime in either February, March, or April –³²

Mr. Brickman continues to refer to an 18-year-old intra-firm paralegal's memorandum never shown to have been used and a single decision about litigation screening in silicosis cases in

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ad hominem attacks on the plaintiffs' bar for supposed misconduct.³³

Finally, I note that Mr. Brickman does not pay attention to misconduct on the part of defense lawyers. There are also recent examples of misconduct by the defense bar, including misconduct resulting in judicial sanctions,³⁴ but I am not going to waste this Committee's time by repeating them – anecdotes are not evidence. I suggest, however, that Mr. Brickman's "evidence" of plaintiff's bar misconduct is nothing of the sort.

12. *You describe the ALEC-sponsored legislation recently enacted in Ohio, Oklahoma, and Wisconsin and observe that it forces plaintiffs to file trust claims. What impact will this state law have on the trusts?*

These state laws are targeted at individual asbestos victims, rather than the trusts. I discuss the interaction of these state laws and the FACT Act in my response to question 13, below.

13. *You say the FACT Act will enable asbestos defendants to "skirt state laws regarding rules of discovery and joint and several liability." Please explain.*

If a defendant in an asbestos case can show a need for discovery from a nonparty, it can get permission for that discovery from a court – in other words, there is oversight so as to balance the value of what may be produced in the discovery with the burdens on nonparties. This means that the breadth and timing of the discovery are supervised by the court.

Defendants 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. However, the FACT Act would permit defendants, and not plaintiffs to skip right over the burdens of the discovery process.

I explain the pattern of asbestos litigation in my response to Representatives Conyers' and Johnson's question 1, above. In this tort system litigation a plaintiff typically settles with most

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defendants and may only proceed to litigation with one or two. The amount of the plaintiffs' recoveries from the settling defendants is not disclosed to the remaining defendants or to the judge or jury until it is needed, which is only after there is a verdict. At that time, the court will mold the verdict, which may include reducing the amount the remaining defendants have to pay as a result of prior settlements by the plaintiff in accordance with that state's liability rules. Until then, each defendant values its case without knowledge of the amount of settlements the plaintiff has received.

Defendants would like to change the tort law as to the allocation of liability, so as to avoid joint and several liability.³⁵ As you know, joint and several liability provides that each defendant who is found liable for a portion of a plaintiff's injury is liable for the entire amount of damages. The FACT Act is designed to interact with the so-called state trust transparency laws so as to do an end-run around these established principles.

The state laws force plaintiffs to act in such a way as to maximize the reduction in verdicts. Defendants can delay their tort cases until the plaintiff's file any trust claims the defendants think they should file. Defendants can then use the FACT Act to put together a library of filed claims, and use hypothetical recoveries to offset judgments (when plaintiffs have not yet recovered, and may never recover, any funds),³⁶ or to argue that plaintiffs should settle for less because they have made claims, even if those claims have not yet been paid and may never be paid.

In addition, the laws allow defendants to create delays, postponing the trial while trying to require the plaintiff to file potentially-spurious trust claims.³⁷ Delays are beneficial to defendants for obvious reasons. The insurance industry is based on a calculation of the time between receipt of premiums and payment of claims. And, whether a plaintiff is alive or dead is one of the

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strongest criteria for the value of a case.³⁸ Juries tend to award living, suffering plaintiffs much higher verdicts.³⁹

In essence, defendants are using Congress to get information that can then be used to inflict damage on plaintiffs, many of whom were exposed to asbestos while in the service of this Nation, in the state court system. This Committee should not countenance such action.

14. *Mr. Scarcella claims that the cost of compliance imposed by H.R. 526 would be de minimus. Yet, I have a letter from a firm representing four bankruptcy asbestos trusts states that such compliance will "necessitate experienced managers and claims reviewers spending an aggregate of 20,000 hours per year." What is your response?*

Mr. Campbell and his firm represent and are closely involved with the management of a number of private asbestos trusts. It is my understanding that Mr. Campbell and other members of his firm consulted with the claims processing facility involved with the four trusts mentioned in the letter, and came up with a good faith estimate of the time that compliance would take. I have no reason to quibble with Mr. Campbell's figures. Indeed, as I note in my response to questions 9 and 10 above, given the nature of the evidence required to prove that a trust should pay a claim, the estimates in Mr. Campbell's letter appear reasonable.

Mr. Scarcella, on the other hand, does not work for an organization with an interest in helping either the trusts or asbestos victims. His firm, Bates White, characterizes itself as being "economic experts in asbestos-related matters,"⁴⁰ and it works for defendants to minimize their asbestos liability.⁴¹ The Bates White firm has a vested interest in the proprietary model it sells, which "requires gathering data regarding claimants' demographic characteristics and sources of asbestos exposure history and exposure allegations in order to identify alternative exposures and sources of compensation that claimants might have."⁴²

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15. *During the hearing, we heard some negative comments at the hearing about the asbestos trustees and their capabilities. Who are these trustees and what gives you confidence in them?*

In a sample of twenty trusts that I work with as counsel to the Trust Advisory Committees, there are 47 trustee positions. Of these 47 trustee positions, eighteen are filled by retired judges, including one by a federal court of appeals judge; four by a retired federal district judge, three by a retired state supreme court judge, and ten by a lower state court judge. In addition, three are filled by elected officials and one by the dean of a prominent law school. The trustees have a fiduciary duty to act in the best interests of all claimants

In addition, each trust has a Future Claimants' Representative, or "FCR", who represents the interests of future claimants. Of the 20 FCR positions associated with these trusts, eleven are filled by either a retired corporate or defense-side attorney or professional, five by a retired state court judge, and three by a professional neutral. They are strong advocates for future claimants and are a check against potential inappropriate conduct.

For Professor Brickman to be correct that the trusts are complicit in the "illegal and unethical suppression of evidence"⁴³ because plaintiffs' lawyers "have effective control over the creation and administration of bankruptcy trusts,"⁴⁴ we would have to assume that everyone – all the retired judges, all the elected officials, and all these fiduciaries for the interests of future claimants – is involved in a conspiracy notwithstanding the lack of any evidence to support this assumption. Such an assumption defies common sense. Mr. Brickman suggests that the plaintiffs' bar controls the trustees' appointment, so they do whatever the plaintiffs want. This is equivalent to assuming that because members of Congress solicit campaign funds from entities the Congress regulates, the Congress will be complicit in illegal activity with the donors. I expect this Committee would not make that assumption.

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16. *The proponents of the FACT Act argue that more transparency is needed in the trust system and that asbestos corporations need legislation to get information that is currently being hidden from them to litigate claims. Could you please explain what information solvent defendants want from the trusts that they can't already get in state court?*

Solvent defendants in the tort system already get everything they are entitled to in the tort system. This includes information about plaintiffs' other exposures to asbestos, including exposure to the products of bankrupt defendants. As repeat players in the tort system, they already have libraries of evidence in their possession, including depositions from witnesses at any site where their products were. 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. Here, they are looking for a shortcut.

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. In addition, a defendant can subpoena any trust to get copies of materials the worker has submitted.

Through discovery in an individual case, therefore, a defendant can usually obtain the following information:

- Locations where a plaintiff worked and might have been exposed to asbestos;
- 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;
- And, when appropriate (such as in certain situations after a verdict), if a trust has paid a

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claim to a plaintiff and the amount of that payment.

This information is specific to the individual plaintiff in the case in which the defendant is involved. And, in the case of subpoenas to the trusts, the requests are supervised by the state courts in which the litigation is pending.

Under the proposed FACT Act, while those who can request information under § 8(B) are limited to parties in asbestos cases, the information they are entitled to request is not limited to those cases. Instead, they can request “any information related to payment from, and demands for payment from, such trust”⁴⁵ This is much broader than what defendants are entitled to receive in the tort system. In theory, this could arguably include internal trust financial or legal documents.

In addition, while information about whether a claim has been made is available in discovery, the amount for which the claim was settled is not disclosed to the defendant until after there has been an award of damages by a jury – when the information becomes relevant for molding that verdict to take settlements into account. The FACT Act does not include such a limitation, meaning that a defendant can get this information before it is entitled to do so in the tort system.

Discovery is a fundamental part of the legal system in the United States, implementing checks and balances enshrined in policies adopted state by state over decades, and asbestos litigation should not be treated differently – there is no need for the federal government to tip the scales across the board in favor of asbestos defendants.

Inselbuch QFR Responses
April 7, 2015
Page 25

17. *The FACT Act would require the trusts to respond to any request from any 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?*

There is nothing in the bill to prevent defendants from blanketing the trusts with such requests.

ENDNOTES

¹ *Furthering Asbestos Claim Transparency (FACT) Act of 2015: Hearing on H.R. 526 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (Feb. 4, 2015) (testimony of Marc Scarcella, Bates White LLC) (“**Scarcella Statement**”) at 2.

² *Furthering Asbestos Claim Transparency (FACT) Act of 2015: Hearing on H.R. 526 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (Feb. 4, 2015) (testimony of Elihu Inselbuch, Caplin & Drysdale, Chartered) (“**Inselbuch Statement**”) at 3.

³ *Furthering Asbestos Claim Transparency (FACT) Act of 2015: Hearing on H.R. 526 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (Feb. 4, 2015) (testimony of Lester Brickman, Benjamin N. Cardozo School of Law) (“**Brickman Statement**”) at 3 and n.3.

⁴ The Trusts’ most recent annual reports are for the year 2013. *See* Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust’s Notice of Filing of Annual Report for the Year Ended December 31, 2013 at 36, *In re Armstrong World Indus., Inc.*, Case No. 00-4471 (Bankr. D. Del. Apr. 30, 2014) [Dkt. No. 10804]; Annual Report and Account of the Babcock & Wilcox Company Asbestos PI Trust for the Fiscal Year Ending December 31, 2013 at 8, *In re Babcock & Wilcox Co.*, Case No. 00-10992 (Bankr. E.D. La. Apr. 30, 2014) [Dkt. No. 7842-1]; Annual Report and Account of the Owens Corning/Fibreboard Asbestos Personal Injury Trust for the Fiscal Year Ending December 31, 2013 at 10-11, *In re Owens Corning*, Case No. 00-03837 (Bankr. D. Del. Apr. 30, 2014) [Dkt. No. 21095]; Annual Report and Account of the United States Gypsum Asbestos Personal Injury Settlement Trust for the Fiscal Year Ending December 31, 2013 at 7, *In re USG Corp.*, Case No. 01-02094 (Bankr. D. Del. Apr. 30, 2014) [Dkt. No. 12705].

⁵ *See The Babcock & Wilcox Company Asbestos PI Settlement Trust Distribution Procedures* (revised Dec. 3, 2013), available at <http://www.bwasbestostrust.com/wp-content/uploads/2014/02/B-W-TDP-DEC-2013-POST-TO-WEBSITE-P0325875.pdf> at 24-26, 37, 40.

⁶ Scarcella Statement at 3.

⁷ *HealthCare.gov Privacy Questions Raised at Congressional Hearing*, iHealthBeat (Jan. 28, 2015), available at <http://www.ihealthbeat.org/articles/2015/1/28/healthcaregov-privacy-questions-raised-at-congressional-hearing>; Cory Bennett, *Lawmakers Grill Officials on Healthcare.gov Data*, The Hill (Jan. 27, 2015), available at <http://thehill.com/policy/cybersecurity/230912-house-worried-about-healthcaregov-data>.

⁸ *See* Letter from Douglas A. Campbell, Campbell & Levine, to The Hon. John Conyers, Jr., The Hon. Bob Goodlatte, The Hon. Hank Johnson, The Hon. Tom Marino (Jan. 30, 2015) (“**Campbell Letter**”).

⁹ *Id.* at 2.

¹⁰ *Id.* at 2.

¹¹ *Furthering Asbestos Claim Transparency (FACT) Act of 2015*, H.R. 526, 114th Cong. (“**FACT Act of 2015**”) § 8(A)(i).

¹² Scarcella Statement at 4.

¹³ *Campbell Letter* at 2-3.

¹⁴ *Id.* at 2-3.

¹⁵ Scarcella Statement at 14. As an aside, the actual fee has been \$25 since January 1, 2014. See *Notices from the Trustee*, API, Inc. Asbestos Settlement Trust, <http://www.apiincasbestossettlementtrust.com/noticesFromTheTrustee.html> (last visited March 24, 2015).

¹⁶ *Exhibit B to Annual Report of the Trustee, 2013*, API, Inc. Asbestos Settlement Trust (May 30, 2014), available at <http://apiincasbestossettlementtrust.com/documents/Trustee%20Annual%20Report%202013.pdf>.

¹⁷ FACT Act of 2015 § 8(B).

¹⁸ Campbell Letter at 3.

¹⁹ FACT Act of 2015 § 8(B).

²⁰ Hr'g Tr. 1142:24-1143:1, *In re Garlock Sealing Techs., LLC*, Case No. 10-31607 (Bankr. W.D.N.C. July 26, 2013) (Brickman). All further citations to the *Garlock* estimation hearing transcript are noted as ("**Garlock Hr'g Tr.**").

²¹ *Garlock Hr'g Tr.* 1244:08-11 and 1244:24-1245:1, July 26, 2013 (Brickman).

²² Brickman Statement at 24-28.

²³ See, e.g., *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy and the Legal System: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (Sept. 9, 2011) (written statement of James L. Stengel) at 101-05 (examining *Kananian, Warfield, and Edwards*). A year later defendants added a fourth case. See *Furthering Asbestos Claim Transparency Act (FACT) Act of 2012: Hearing on H.R. 4639 before the Subcomm. on Courts, Commercial and Administrative Law of the Comm. on the Judiciary*, 113th Cong. (May 10, 2012) (written statement of Leigh Ann Schell) at 18, 20-21 (describing *Kananian, Warfield, Edwards, and Dunford*); see also *Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the Comm. on the Judiciary* 113th Cong. (Mar. 13, 2013) (written statement of Peggy L. Ableman) at 4-8 (describing *Montgomery*).

²⁴ Transcript of FACT Act Hearing Feb. 4, 2015, 70:1635-1638 (Brickman) ("And as I write down on every testimony I ever give to Congress, I represent myself. Nobody is paying me. Nobody is paying my transportation. Nobody is buying my lunch.")

²⁵ *Garlock Hr'g Tr.* 1317:12-1318:10 July 26, 2013 (Brickman).

²⁶ *Garlock Hr'g Tr.* 1144:19-23; 1145:12-14, July 26, 2013 (Brickman).

²⁷ *Garlock Hr'g Tr.* 1145:12-18, July 26, 2013 (Brickman).

²⁸ *Garlock Hr'g Tr.* 1247:6-22, July 26, 2013 (Brickman).

²⁹ *Garlock Hr'g Tr.* 1249:12-15, 1259:23-1260:3, July 26, 2013 (Brickman).

³⁰ *Garlock Hr'g Tr.* 1208:4-5, July 26, 2013 (Brickman).

³¹ *Id.*

³² *Garlock Hr'g Tr.* 1262:9-25, July 26, 2013 (Brickman).

³³ Brickman Statement at 11-12, 33 (Memorandum); 9 (Judge Jack opinion).

³⁴ See, e.g., *Williams v. BASF Catalysts LLC*, 765 F.3d 306 (3d Cir. 2014) (reversing the District Court's dismissal of claims against BASF Catalysts LLC and Cahill Gordon & Reindel for allegedly concealing that products for which BASF was liable contained asbestos, including destroying tests that documented the presence of asbestos).

³⁵ *Joint and Several Liability Rule Reform*, American Tort Reform Ass'n., <http://www.atra.org/issues/joint-and-several-liability-rule-reform>.

³⁶ Okla. S.B. 404 § 7 (2013)

³⁷ *Id.*

³⁸ Julia Marsh, *Cancer Victims Win \$190 Million in Asbestos Case – the 'Largest Ever' Judgment of Its Kind in New York City*, N.Y. Post (July 24, 2013), available at <http://nypost.com/2013/07/24/cancer-victims-win-190-million-in-asbestos-case-the-largest-ever-judgment-of-its-kind-in-new-york-city/> (illustrating that live plaintiffs receive more compensation than deceased plaintiffs).

³⁹ For example, in a consolidated trial in July 2013, each of the two living mesothelioma victims in the trial was awarded a verdict twice that of each of the deceased. See, e.g., *id.*

⁴⁰ *Overview of Asbestos Litigation*, Bates White Economic Consulting, <http://www.bateswhite.com/practices-Asbestos.html>.


⁴¹ *Id.* (Stressing as favorable results that “[o]ur client achieved an unprecedented liability settlement below book value” and “[o]ur clients ultimately settled for a fraction of the amount paid by previous defendants.”).

⁴² *Webinar: An asbestos defendant's legal liability – the experience in Garlock's bankruptcy asbestos estimation trial*, Bates White Economic Consulting (July 29, 2009), <http://www.bateswhite.com/events-146.html>.

⁴³ FACT Act of 2015 Hr'g Tr., 31:690-691, Feb. 4, 2015 (Brickman).

⁴⁴ FACT Act of 2015 Hr'g Tr., 31:690-693, Feb. 4, 2015 (Brickman).

⁴⁵ FACT Act of 2015 § 8(B).



**Response to Questions for the Record from Nicholas Vari, Esq.,
K&L Gates L.L.P., Pittsburgh, PA**

Questions submitted for the Record from Subcommittee Chairman Marino

1. In your experience, what has been the difference between plaintiffs' disclosures in the state court tort process and the asbestos bankruptcy trust system?

ANSWER: In my experience, the plaintiffs in the tort system do not always disclose all of the asbestos bankruptcy trusts to which they have made or will be making claims, and, in many instances, they do not identify the product exposures that will support those trust claims.

2. Critics of the FACT Act argue that the legislation will impact plaintiffs' privacy. Based on your testimony, it sounds like plaintiffs disclose far more information in state court than they would be required to under the FACT Act. Do you agree with that assessment, and do you see the same plaintiffs filing claims against the asbestos bankruptcy trusts and in state court? And, are state court filings generally available to the public?

ANSWER: Tort system claimants customarily make disclosures that are far more detailed than the ones required by the FACT Act. The same claimants often make claims in both systems. And, while, except where they are filed with the court, the tort system disclosures are not distributed to the public, there does not appear to be any restriction on their public dissemination should someone wish to do so.

3. Based on your experience, how difficult is it to obtain information from the asbestos bankruptcy trusts, and do you think that existing discovery request methods are sufficient to access information from the trusts?

ANSWER: The process of obtaining individual trust claim information differs depending on the trust, but the existing mechanisms are inadequate to enable defendants to trace all of the trust claims made by a particular plaintiff.

4. Mr. Inselbuch stated in his testimony that defendants can already access the information required to be disclosed under the FACT Act through state discovery rules. Do you agree with his assessment?

ANSWER: No. Tort system defendants can ask these questions in many jurisdictions, but there is no way to confirm the accuracy of those responses, as indicated by the *In re: Garlock* opinion.

Questions submitted for the Record from Representative John Conyers, Jr. and Representative Henry C. "Hank" Johnson, Jr.

1. Do state discovery rules permit an asbestos defendant to demand that an asbestos plaintiff disclose his or her asbestos exposure history?

ANSWER: State discovery rules permit an asbestos defendant to *request* an asbestos plaintiff's asbestos exposure history, but asbestos defendants often do not have an ability to confirm the accuracy of that exposure history. As illustrated by the *In re Garlock* opinion, tort system claimants' discovery responses are often at odds with the trust-filings data.

2. Do these rules permit the asbestos defendant to ask an asbestos plaintiff whether he or she has made a claim against a bankruptcy trust?

ANSWER: State discovery rules permit an asbestos defendant to ask a plaintiff whether he or she has made claims to trusts, but the responses are often not compelled by courts, and when they are, asbestos defendants often have no ability to confirm the accuracy of those disclosures. As illustrated by the *In re Garlock* opinion, tort system claimants' discovery responses are often at odds with the trust-filings data.

3. It is clear from your testimony that you strongly believe there must be transparency in the bankruptcy trust payment process, at least with respect to asbestos claimants.

- a. Did asbestos manufacturers hide from consumers the lethal effects of their products?

ANSWER: I have had very little, if any, experience representing what I would term "asbestos manufacturers", but I have not personally observed any conduct of this type.

- b. Why do asbestos defendants enter into confidential settlement agreements?

ANSWER: Often because plaintiffs request them.

- c. Would you support allowing public disclosure of those confidential settlement agreements as a matter of transparency?

ANSWER: It would depend on the circumstances, and the wishes of any particular client(s) I would be representing. As a lawyer, I am ethically bound to maintain the confidentiality of any such information.

4. Have you ever settled a case on behalf of an asbestos defendant and required the terms of such settlement be kept confidential?

ANSWER: I have been involved in negotiating settlements in which a defendant has requested confidentiality.

- a. If so, would you, in your capacity as an attorney who routinely represents solvent asbestos corporations in litigation, advise your asbestos clients to - - in the name of transparency and fairness - - waive their confidentiality clause and to publically report basic data on their settlements with victims?

ANSWER: To the extent I understand the question, it would depend upon the circumstances and the wishes of any particular client(s) I would be representing. To the extent I understand "victims" to mean asbestos plaintiffs, those individuals already have full access to all settlement information relating to their claims.

5. You are obviously a big proponent of transparency and disclosure.

- a. Would you therefore support legislation, such as the Sunshine in Litigation Act, that would prohibit a court from issuing protective orders and sealing records pertaining to settlements of civil actions where the pleadings state facts that are relevant to the protection of public health or safety?

ANSWER: I would need to review the legislation in question.

- b. Would you, in your capacity as an attorney who routinely represents solvent asbestos corporations in litigation, advise your asbestos clients to - - in the name of transparency and fairness - - disclose all relevant information about the name and location of their asbestos-containing products, worksites, and exposures?

ANSWER: To the extent I understand the question, I would advise any client to make all disclosures that they are required to make by law and court rulings. If the question encompasses those matters, yes.

6. Do your clients, who are defendants in asbestos lawsuits, typically disclose all of the details concerning their settlements acknowledging liability for causing injury based on asbestos exposure in the public record?

ANSWER: I cannot recall being involved with an asbestos settlement in which there was an acknowledgement of liability.



**Response to Questions for the Record from Marc Scarcella, Principal,
Bates White Economic Consulting, Washington, DC**

ANSWERS FOR THE RECORD BY MARC SCARCELLA
BATES WHITE ECONOMIC CONSULTING

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H.R. 526, THE "FURTHERING ASBESTOS CLAIM TRANSPARENCY ACT OF 2015"

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

February 4, 2015

Questions for the Record
From the March 13, 2015 Hearing on
H.R. 526, the "Furthering Asbestos Claim Transparency Act of 2015"

Question from Chairman Marino

1. **You say the administrative costs of implementing the FACT Act would be minimal. By comparison, what might be the costs of not adopting the FACT Act and allowing what little transparency there is to occur by fits and starts of discovery?**

I believe that any out-of-pocket expense the trusts incur in complying with the quarterly 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.¹ 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.² 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.³ 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.

2. **Critics of the FACT Act often point to a GAO report that they allege concluded that there were no instances of fraud in the asbestos trust system. Do you have any concerns with the GAO report and its alleged conclusion that no fraud exists in the asbestos trust system?**

The GAO *did not* determine that no fraud exists in the asbestos trust system; this is a common misrepresentation of their report and findings made by opponents of the FACT Act. In reality, the GAO never conducted an independent audit of any trust records. Rather, the GAO simply

¹ Release of Information and Documents Pursuant to the 2002 Manville Trust TDP
<http://www.claimsres.com/documents/MI/INFO.pdf>

² 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.

³ Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts, Government Accountability Office, September 2011, pg. 30.

interviewed eleven trusts regarding their audit procedures, and it was the trusts themselves asserting that their audits had never uncovered a single case of fraud.⁴ 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.

In my experience, the audit procedures leveraged by many trusts focus on reviewing the medical data 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.

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 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. Without transparency across trusts I am not surprised that GAO was unable to find instances of alleged exposure fraud because there is currently no avenue for identifying these claiming inconsistencies.

The quarterly reporting requirements of the FACT Act will finally provide trusts with a cost effective avenue for assessing claiming patterns across the entire trust system. This will allow trusts to properly identify inconsistent claiming patterns and potential fraud. More importantly the provisions in the FACT Act will act as an effective deterrent against future specious claiming practices.

⁴ *Supra* 6, pg. 23

3. **Do payouts from the asbestos bankruptcy trusts generally increase or decrease to asbestos victims over the duration of the asbestos trusts' existence? What might this trend be attributed to?**

Recent trends have shown a dramatic decrease in net claim payments. Currently there are 23 trusts that are paying claimants less today than in 2008, and 11 of the 23 trusts have had to decrease the net claim payment amount more than once.⁵ In contrast, only nine trusts are paying more on a per claim basis today than in 2008.

I believe the primary factors driving these payment percentages down are higher than anticipated trust claiming and payment rates that are a direct result of administrative trust procedures, crafted by plaintiff attorneys, that allow for tenuous claims to be paid. I have outlined these issues in a recent Mealey's commentary that I have included as an exhibit to these responses.⁶

It is a common misconception that the stock-market recession of 2008 and early 2009 is the root cause of these declines, but this is simply *not true*. Most trusts have investment guidelines that require a majority of the assets be invested in non-equity funds geared towards asset preservation. As such, the trust system as a whole has earned a return on investment (ROI) of 4.1% since 2006, which includes temporary losses in 2008. Since 2009, the trust system as earned an ROI of 7.5%. I have outlined these figures and specific trust examples in the same Mealey's commentary referenced above.

4. **Do you think that the FACT Act would lead to a reduction of fraud, and how would that impact payouts for future asbestos victims?**

Transparency through public accountability and external oversight will help deter any fraudulent or tenuous claiming behavior in the future. All else being equal, the resulting asset preservation that accompanies such determent will result in higher payouts for future asbestos claimants.

5. **In your view, is there any justifiable reason for the discrepancy between disclosures made in the state court tort system and the asbestos bankruptcy trust system?**

There are always exceptions to the rule, but generally speaking there should be consistency between trust and tort disclosures.

Questions from Representative Conyers and Representative Johnson

1. **You acknowledge a GAO report that found it cost a bankruptcy trust \$1 million in attorney fees to respond to a discovery request. What if that bankruptcy trust received a thousand such demands?**

Without the FACT Act, such a scenario would be costly to the trusts. This example referenced on page 30 of the GAO report, is the type of costly and burdensome situation the FACT Act will prevent

⁵ The total number includes the T H Agriculture & Nutrition, LLC Industries Asbestos PI Trust and the Leslie Controls, Inc. Asbestos PI Trust, both of which did not become operational until 2009 but have since lowered their respective net claim payments.

⁶ Scarcella, Marc C. and Peter R. Kelso. "A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System" Mealey's Asbestos Bankruptcy Report 14, no. 7 (2015).

from happening 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.”

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 system. The information required 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, 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 not germane to the asbestos claim.

Additionally, the FACT Act will 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 fees for this claimant search ranging from \$0, \$18, or at most \$100 so it is clearly not a burdensome process. Once the search has been conducted and the matching claim is identified, producing the additional claim information that may be required under the bill would require a minimal level of additional effort. Furthermore, the FACT Act requires that the requesting third party pay reasonable costs for producing the information, thus shifting the cost burden of production away from the trusts.

- 2. Professor Brickman states that “several hundred thousands deaths will have resulted from asbestos exposures.” As an economist, what in your estimation would have been the result if asbestos product manufacturers did not conceal from consumers for decades the fact that exposure to their products could result in death or injury?**

I have not conducted such an analysis.

- 3. Should prospective employers have access to an asbestos victim’s exposure history?**

They already do through public tort lawsuits that include far more personal information about asbestos claimants than the FACT Act is seeking from trust disclosures.

- 4. Should lenders have access to an asbestos victim’s exposure history?**

They already do through public tort lawsuits that include far more personal information about asbestos claimants than the FACT Act is seeking from trust disclosures.

5. Should insurance companies have access to an asbestos victim's exposure history?

They already do through public tort lawsuits that include far more personal information about asbestos claimants than the FACT Act is seeking from trust disclosures.

6. Do your clients, who are defendants in asbestos lawsuits, typically disclose all of the details concerning their settlements, which often acknowledge liability for causing injury based on asbestos exposure, in the public record?

I am not an attorney so I cannot speak to the information disclosed in settlement agreements.

EXHIBIT ATTACHED

MEALEY'S™ LITIGATION REPORT

Asbestos

A Reorganized Mess: The Current State Of The Asbestos Bankruptcy Trust System

by
Marc C. Scarcella
and
Peter R. Kelso

Bates White Economic Consulting
Washington, D.C.

**A commentary article
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Commentary

A Reorganized Mess: The Current State Of The Asbestos Bankruptcy Trust System

By
Marc C. Scarcella
and
Peter R. Kelso

[Editor's Note: Marc C. Scarcella is a Principal and Peter R. Kelso is a Manager at the Washington, DC office of Bates White Economic Consulting. Any commentary or opinions do not reflect the opinions of Bates White Economic Consulting or LexisNexis, Mealey's. Copyright 2015 © by Marc C. Scarcella and Peter R. Kelso. Responses are welcome.]

Introduction

In 2005, the Chairman of our firm, Dr. Charles Bates, testified before a United States Senate Judiciary Committee as to the long-term financial feasibility of the proposed \$140 billion federal asbestos trust fund (S. 852 Fairness in Asbestos Injury Resolution (FAIR) Act). In his testimony and associated report, Dr. Bates cautioned that the proposed claim qualification criteria of the FAIR Act established a lower compensable claim threshold for certain injury classes relative to the tort system. As a result, he predicted that the number of claims filed against the national fund would far exceed the levels one would expect by extrapolating the tort history. Therefore, in order for the FAIR Act to be financially feasible either 1) the funding would need to be set to a level sufficient to compensate all current and future claims based on the economic incentives created by the trust procedures and qualification criteria, or 2) the trust procedures and qualification criteria would need to be more closely tailored to mimic the resolution and valuation process in the tort system from which the \$140 billion in proposed funding was based. In general, ignoring such differences between the incentives of the tort system and those created by an administrative trust would lead to an underestimate of the number of expected trust claims and would result in the premature

insolvency of the fund decades prior to its intended duration.¹ Though the FAIR Act failed to pass in 2006, nearly a decade later there are dozens of individual asbestos bankruptcy trusts that are operating under a similar procedural construct, and as Dr. Bates predicted in 2005 in relation to the FAIR Act trust, many of these current asbestos trusts have experienced a dramatic, premature depletion of funds.

Asbestos bankruptcy trust funds are intended to pay initial and future claims in an equitable manner decades into the future. However, due to the accelerated depletion of funds, many asbestos trust claimants receive only half as much today as compared to the amounts similarly situated claimants received from the same trusts just six years ago. In fact, on April 28, 2014, the UNR Asbestos Disease Claims Trust filed a motion with the United States Bankruptcy Court for the Northern District of Illinois, requesting permission to terminate operations in the year 2019; decades prior to the expected duration of the trust and forecasted compensable claim filings. While the UNR trust termination represents the most extreme case of trust insolvency, the events that led to the UNR trust motion for premature termination are indicative of the systemic flaws of the current trust system and its procedural construct that incentivizes the over filing and payment of tenuous claims. The resulting disparate treatment between initial and future claimants raises concerns over the lack of trust operational transparency, and whether or not the procedural design of these trusts has resulted in a system of "Institutionalized Fraud"² that has led to the improper depletion of funds and financial harm to those plaintiffs that are the most impaired.

The following commentary will illustrate how the status quo trust procedural construct is flawed, resulting in an adverse treatment of future claimants, and similarly placing those trusts at risk of premature insolvency. Additionally, the commentary will demonstrate that the continued inequitable treatment of current and future claimants necessitates a change in the procedures governing these trusts, and at the very least requires a greater level of trust operational transparency.³

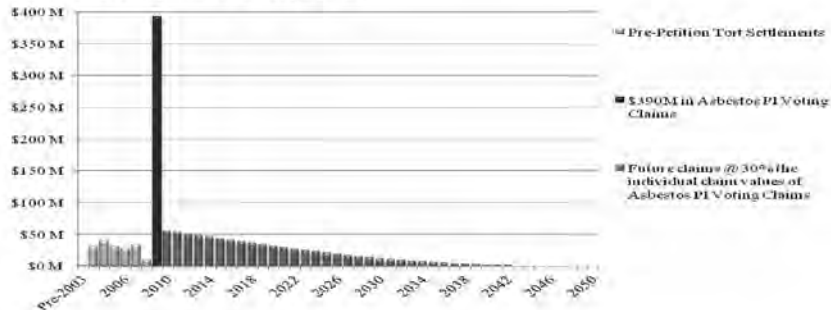
Trusts Continue To Reduce Their Net Payouts To Individual Claimants

Asbestos bankruptcy under section 524(g) of the U.S. bankruptcy code is unique compared to traditional chapter 11 reorganizations in that a majority of the creditors do not exist at the time of confirmation. The latent nature of asbestos-related injuries, where the diagnosis of an asbestos-related disease can occur decades after exposure, creates a future creditor class of claimants that is unknown in terms of both quantity and compensable value at the time of bankruptcy. Nevertheless, the basic principle of 524(g) reorganization and bankruptcy in general, is that claimants within the same creditor class be treated in an equitable manner. Therefore, bankruptcy courts allow for the estimation of future financial claim obligations in order to determine a sufficient level of funding necessary to provide equitable treatment for both initial and future claims. However, the estimation process can only be effective if the eventual Trust Distribution Procedures ("TDP") that govern the compensability and valuation of claims are based on the filing and resolution expectations that underlie the actual bankruptcy estimation

forecasts. Any divergence between the forecasted value of future financial obligations and the actual application of the trust administrative process will create shortfalls in funding to the detriment of future claimants.

Possibly the most egregious example of inequity between initial and future asbestos claimants in a 524(g) bankruptcy occurred during the reorganization of T H Agriculture & Nutrition ("THAN"); the focus of our co-authored 2011 Mealey's commentary titled "Pre-Packaged Plan of Inequity: the financial abuse of future claimants in the T H Agriculture & Nutrition 524(g) asbestos bankruptcy."⁴ The commentary details the events that led to the THAN trust paying initial claimants a 333% premium compared to future claimants. In short, the bankruptcy plan proponents all assured the bankruptcy court that the \$900 million in proposed trust funding would be sufficient to pay all current and future claims in an equitable manner. However, these assurances were supported by projections of future claim obligations that were not estimated based on the resolution and valuation criteria set forth in the proposed THAN TDP. As a result, the THAN trust immediately distributed close to \$400 million in negotiated claim obligations to pending claimants that voted in favor of the plan of reorganization ("Asbestos PI Voting Claims"). After the fact, THAN reduced the net payout available to future claimants to 30% the level of those initial Asbestos PI Voting Claims. Figure 1 illustrates the dramatic, and immediate inequity between initial and future claimants under the THAN plan of reorganization and proceeding trust.

Figure 1: The inequities of the THAN trust



The ability for the THAN trust to reduce net payouts to future claimants was the result of a "Payment Percentage" mechanism that bankruptcy courts allow asbestos trusts to adopt in order to manage claim payment distributions in the event that future financial expectations change over time. For example, if future liability expectations increase relative to assets, then trusts will likely decrease individual claim payments in an attempt to maintain sufficient assets for future claimants. Conversely, if future liability expectations decrease relative to assets, then trusts will likely increase individual claim payments, and in most instances will provide a retroactive, or "True-Up" payment to

previously paid claimants equal to the difference between what they previously received from the trust and what the trust is currently paying similarly situated claimants.

Unfortunately for future claimants, recent history has seen a dramatic decline in Payment Percentages. For example, currently there are 23 trusts that are paying claimants less today than in 2008, and 11 of the 23 trusts have had to decrease the net claim payment amount more than once.⁵ In contrast, only nine trusts are paying more on a per claim basis today than in 2008. Figure 2 summarizes these changes in Payment Percentages.

Figure 2: Summary of Payment Percentage Changes since 2008

Trust	Initial Pay%	12/31 2008	12/31 2009	12/31 2010	12/31 2011	12/31 2012	12/31 2013	12/31 2014
A-Best	3.6%	3.6%	17.4%	17.4%	17.4%	17.4%	17.4%	17.4%
API, Inc.	13.5%	13.5%	55.0%	55.0%	30.0%	30.0%	30.0%	30.0%
Armstrong World Industries	20.0%	20.0%	20.0%	20.0%	20.0%	20.0%	35.0%	35.0%
ARTRA	7.5%	7.5%	7.5%	7.5%	0.5%	0.5%	0.5%	0.5%
Babcock & Wilcox	34.0%	34.0%	15.0%	15.0%	11.9%	7.5%	7.5%	7.5%
C. E. Thurston & Sons	40.0%	40.0%	40.0%	40.0%	80.0%	25.0%	25.0%	25.0%
Celotex ^a	12.0%	14.1%	14.1%	9.4%	9.4%	9.4%	6.5%	6.5%
Combustion Engineering	48.3%	48.3%	48.3%	48.3%	48.3%	44.0%	44.0%	33.0%
Consoletum	6.3%	0%	0%	0%	6.3%	6.3%	6.3%	12.5%
DII Industries ⁷	100%	100%	52.5%	52.5%	52.5%	52.5%	35.6%	35.6%
Eagle-Picher Industries	31.9%	38.0%	38.0%	38.0%	31.0%	31.0%	28.0%	28.0%
G-I Holdings (GAF)	8.6%	0.0%	8.6%	8.6%	7.4%	7.4%	7.4%	7.4%
JLK Porter	4.6%	4.6%	6.3%	6.3%	6.3%	4.0%	4.0%	3.0%
J.T. Thorpe (California)	50.0%	40.0%	40.0%	45.0%	45.0%	45.0%	45.0%	45.0%
J.T. Thorpe (Texas)	18.5%	38.0%	57.0%	57.0%	57.0%	57.0%	57.0%	57.0%
Kaiser Aluminum & Chemical	39.5%	39.5%	39.5%	39.5%	35.0%	35.0%	35.0%	35.0%
Koene Creditors Trust	1.1%	1.1%	1.1%	0.8%	0.8%	0.8%	0.8%	0.8%
Leslie Controls	40.0%	0.0%	0.0%	0.0%	40.0%	40.0%	40.0%	5.0%
Lummas (ABB)	100%	100%	100%	100%	10.0%	10.0%	10.0%	10.0%
Manville	10.0%	7.5%	7.5%	7.5%	7.5%	7.5%	7.5%	6.3%
National Gypsum ⁸	55.6%	55.6%	55.6%	55.6%	18.0%	18.0%	18.0%	18.0%
OCF - Fibreboard	25.0%	25.0%	11.0%	11.0%	9.5%	7.6%	7.6%	7.6%
OCF - Owens Corning	40.0%	40.0%	10.0%	10.0%	10.0%	8.8%	8.8%	8.8%
Pfibrico	1.3%	8.5%	8.5%	8.5%	1.2%	1.0%	1.0%	1.0%
Raytech	2.0%	2.0%	2.0%	2.0%	0.8%	0.8%	0.8%	0.8%
Shook & Fletcher	65.0%	100%	100%	100%	100%	70.0%	70.0%	70.0%
T H Agriculture & Nutrition	100%	0.0%	100%	100%	30.0%	30.0%	30.0%	30.0%
Thorpe Insulation Company	17.5%	0.0%	0.0%	17.5%	17.5%	17.5%	30.5%	30.5%
U.S. Gypsum ⁹	45.0%	45.0%	45.0%	30.0%	30.0%	20.0%	20.0%	20.0%
UNR	18.6%	1.1%	1.1%	1.2%	0.8%	0.8%	0.8%	0.3%
U.S. Mineral	12.5%	12.5%	12.5%	12.5%	12.5%	12.5%	12.5%	14.0%
Western Asbestos/MacArthur	31.5%	40.0%	40.0%	44.0%	44.0%	44.0%	44.0%	48.0%

^aAmendments to trust distribution procedures increasing gross payment values in conjunction with, or in lieu of a Payment Percentage change. See endnote for more detail.

To quantify the impact these changes in Payment Percentages can have on net claim payments, Figure 3 summarizes the net claim payment for 6 large trusts (8 potential payments) that were processing and paying claims at the Delaware Claims Processing Facility ("DCPF") as of 2008. Even with the Armstrong World Industries trust increasing its net payout by more than 75%, the overall payout to a mesothelioma claimant collecting all 8 potential payments across the 6 trusts is 46% lower as of yearend 2013 compared to yearend 2008.

The experience of the DCPF trusts is consistent with the trust system as a whole. As previously described, the Payment Percentage is a function of relative expectations for both future assets and liabilities. For example, the UNR trust not only experienced an increase in tenuous claim filings, but the trust's investment in the reorganized debtor also lost significant value over time leading to lower than expected available assets. However, as we detail below, in most instances a decrease in Payment Percentage is primarily due to higher than projected claiming and resolution rates rather than financially-driven factors, even during significant periods of economic recession.

The Current Financial Standing Of Bankruptcy Trusts

Prior to 2006 the trust system was a relatively minor source of plaintiff compensation as there were only a handful of active trusts, with total assets of less than \$8

billion. However, since 2006 more than 30 trusts have been created through bankruptcy reorganization, funding the trust system with more than \$23 billion in assets and yielding \$17 billion in plaintiff compensation. In 2013 alone, the trust system received more than \$1.5 billion in additional funding, the highest level of new funds received since 2009.

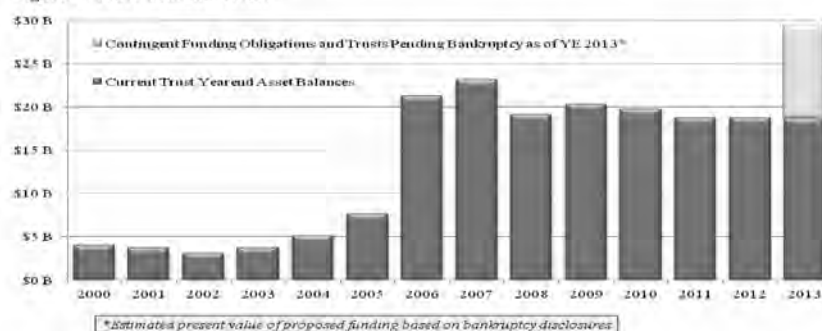
A majority of the 2013 funding resulted from the resolution of appeals to the confirmation plans proposed in the A.P. Green, North American Refractory (NARCO), and Thorpe Insulation bankruptcies.¹⁰ In 2014, the confirmations of Pittsburgh Corning, W.R. Grace, Specialty Products Holdings, Metex, Quigley, and Flintkote will provide more than \$8 billion in additional funding that was still pending as of yearend 2013. Figure 4 illustrates the annual assets of the trust compensation system.

In addition to direct funding from debtor contributions and insurance settlements, the trust system has also earned \$6.6 billion on its investments since 2006 (4.1% annual return), which includes significant losses in 2008 during the stock market recession. Between investment income and capital gains, the \$6.6 billion in earnings and asset appreciation since 2006 has offset nearly 40% of the claim payments made over the same period. In fact, in 2012 the trust system earned more in investment income and capital gains than was paid out to claimants. Figure 5 summarizes the financial activity of the trust system since 2006.

Figure 3: Net Mesothelioma Claim Payments from DCPF trusts (dollars in thousands)

Trust	12/31 2008	12/31 2009	12/31 2010	12/31 2011	12/31 2012	12/31 2013
Armstrong World Industries	\$26	\$26	\$26	\$26	\$26	\$46
Babcock & Wilcox Company	\$41	\$18	\$18	\$14	\$9	\$9
Celotex	\$18	\$18	\$12	\$12	\$12	\$8
DII Industries - Halliburton	\$29	\$40	\$40	\$40	\$40	\$27
DII Industries - Harbison-Walker	\$68	\$96	\$96	\$96	\$96	\$65
OCF - Fibreboard	\$45	\$20	\$20	\$17	\$14	\$14
OCF - Owens Corning	\$108	\$27	\$27	\$27	\$24	\$24
U.S. Gypsum	\$101	\$101	\$68	\$68	\$45	\$45
Total Net Payment	\$437	\$346	\$306	\$300	\$265	\$238
Percent Change from 2008	-	21%	30%	31%	39%	46%

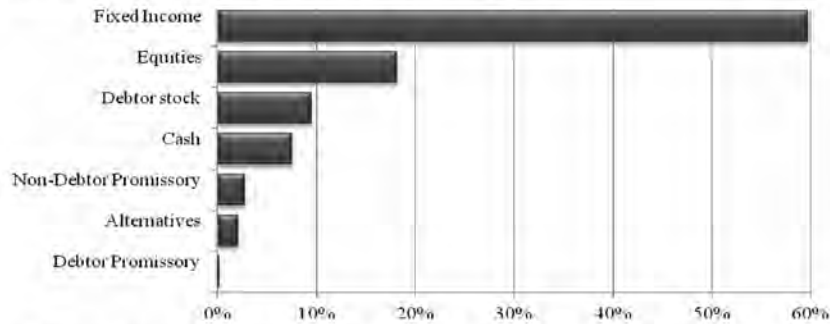
Figure 4: Trust Yearend Assets

Figure 5: Confirmed Trust Annual Financial Activity¹¹ (dollars in millions)

Balance	2006	2007	2008	2009	2010	2011 ¹²	2012 ¹³	2013 ¹⁴	Total
Beginning Assets	\$7,641	\$21,217	\$23,116	\$18,662	\$19,910	\$18,817	\$17,992	\$18,083	
Funding Received	\$13,305	\$2,928	\$988	\$3,104	\$584	\$706	\$208	\$1,586	\$23,408
Investment Gains/Income ¹⁵	\$897	\$670	(\$1,071)	\$2,363	\$1,313	\$764	\$1,450	\$1,106	\$6,592
Claim Payments	(\$493)	(\$1,450)	(\$3,360)	(\$3,927)	(\$2,779)	(\$2,077)	(\$1,244)	(\$1,737)	(\$16,990)
Trust Expenses	(\$95)	(\$132)	(\$156)	(\$147)	(\$180)	(\$176)	(\$173)	(\$221)	(\$1,279)
Taxes/Other Deductions	(\$68)	(\$117)	\$44	(\$145)	(\$40)	(\$92)	(\$151)	(\$30)	(\$879)
Ending Assets	\$21,217	\$23,116	\$18,662	\$19,910	\$18,817	\$17,992	\$18,083	\$18,487	
							Deferred funding ¹⁶	\$160	
							Current Confirmed Trust Assets	\$18,647	

From a high level, the trust system appears to be earning a reasonable rate of return, especially considering that most trust agreements mandate a relatively conservative investment strategy geared towards asset preservation as opposed to high growth. Figure 6 summarizes the weighted-average asset allocation from 2007 through 2013 for 15 of the largest trusts as measured by total fair market value of investments as of yearend 2013.¹⁷ The 2013 fair market value of investments totaled over \$15 billion across the 15 trusts, representing more than 80% of confirmed trust assets. The data indicates that trusts allocate a majority of assets in conservative fixed income holdings as opposed to equities that are subject to more potential volatility.

The data illustrated in Figure 6 also shows that while many trusts emerge from bankruptcy with significant equity in the reorganized debtor, most of those shares are liquidated following confirmation, which in turn helps to diversify the overall trust portfolio and minimize risk, a strategy that may have helped the UNR trust, assuming the liquidation of the reorganized debtor stock was a viable option in the late 1990s. Therefore, from an investment perspective, most current trusts clearly take a conservative approach to asset management. However, as important as a reasonable return on investment is to the trusts, the long-term financial viability of any individual trust, and the trust system as a whole, is even more dependent

Figure 6: Trust average asset allocation from 2007 through 2013

on the proper liability management and procedural standards surrounding the distribution of claim payments.

It's Not the Economy, It's The Claims

Despite the recent trend of declining Payment Percentages that yield significant payment reductions to today's similarly situated claimants, many of the individual trusts rarely disclose any meaningful, public explanation for the decrease. Rather most trusts choose to provide only vague public notices of the change, with little to no justification. To that end, it has been a common misconception in recent years that the stock market recession of late 2008 and early 2009 was the primary reason why so many trusts subsequently decreased their Payment Percentages. However, the actual experience of most trusts both during and following the 2008 stock market recession contradicts this notion.

As the previous section showed, while the recession certainly created a temporary loss in trust assets, the subsequent recovery has yielded an average annual return of 7.5% since 2009 across the entire trust system. In fact, the individual trust that was impacted the most by the 2008 stock market recession was the Armstrong World Industries (AWI) Asbestos PI Settlement Trust, which held roughly two-thirds of its assets (nearly \$1.5 billion) as of yearend 2007 in the reorganized debtor's stock. As of yearend 2008, the reorganized AWI stock value was nearly 45% less than it had been the year before.¹⁸ Fortunately the stock recovered the following year and continued to grow in

subsequent years, yielding substantial dividend distributions to the trust. In fact, the recovery and sustained growth of the Armstrong stock more than made up for the previous losses and allowed the trust to increase its Payment Percentage from 20% to 35% in 2013. However, what's more significant about the experience of AWI is that the trust never lowered its Payment Percentage despite its temporary, albeit substantial, loss in asset value.

A second trust that was heavily impacted by the 2008 stock market recession was the Owens Corning subfund of the Owens Corning/Fibreboard ("OCF") Asbestos PI Trust. The OCF trust was confirmed in September 2006, and the Owens Corning subfund was provided with approximately \$3.4 billion in present value assets, which included 28.2 million shares of reorganized Owens Corning common stock valued at \$820 million on the date of transfer to the trust. By May 31, 2009 the trust had incurred unrealized losses of roughly \$440 million of the stock's original transfer value, plus an estimated \$330 million in additional unrealized losses from other equity and bond investments.¹⁹ This substantial unrealized loss of approximately \$770 million was likely further magnified by an expectation that the trust assets would have experienced a modest return on investment during its first 30 months of operations rather than a significant loss.

Overall, the temporary, yet substantial investment loss likely cost the Owens Corning subfund approximately \$1 billion of its initial present value of \$3.4 billion (>30%). Therefore, when the trustees decided

to adopt a new Payment Percentage in June 2009, the initial Payment Percentage of 40% should have been decreased to approximately 28% had the stock market recession been the only factor leading to the reduction. Instead, the trust reduced the Payment Percentage to just 10%; proving that the stock market recession was not the primary factor that drove the reduction in Payment Percentage. In fact, if the dramatic decline in Payment Percentage was primarily due to a stock market recession, then the Owens Corning subfund would have increased the Payment Percentage in subsequent years as the market recovered. However, rather than increasing the Payment Percentage, the Owens Corning subfund eventually dropped the Payment Percentage again in September 2012 to just 8.8%.

Owens Corning is not alone. As previously noted, 11 trusts have reduced their Payment Percentages more than once since 2009, suggesting that the entire trust system is not suffering from a poor investment strategy or the lingering effects of the stock market recession, but rather higher than projected levels of claim filings and resolutions. To illustrate the degree to which claiming rates have outpaced initial projections just look at the experience of the United States Gypsum ("USG") trust. When the USG trust was confirmed in 2006, it was funded with \$4 billion in assets to resolve all existing and future asbestos claims over the proceeding four decades. The trust began processing claims in February 2007, and by the end of 2009 it had made \$1.5 billion in claim payments, including nearly \$900 million in 2009 alone. In reaction to this higher than expected level of expenditure, the trust dropped its initial Payment Percentage of 45% down to 35% in April 2010, and then again to 30% in November 2010. The most recent reduction occurred in September 2012 when the Payment Percentage was dropped to 20%.

In order to fully appreciate the divergence from initial to current claim expectations it helps to translate the Payment Percentage and claim payment statistics into gross claim valuation terms ("Liquidated Value").

- **Upon confirmation the USG trust valued all present and future claims at a present value of \$8.3 billion:** At an initial Payment Percentage of 45%, this implies an initial expectation that the Liquidated Value of all current and

future trust claims was approximately \$8.3 billion (in present value terms) when the trust was confirmed in 2006.²⁰

- **As of yearend 2013, the USG trust had already resolved a gross Liquidated Value of \$6.9 billion in claims:** Through 2013, the trust made \$2.6 billion in claim payments net of applicable Payment Percentages applied over time. When these payments are represented in gross terms (e.g., gross of any Payment Percentage application) it suggests that since 2006 the USG trust has already resolved approximately \$6.9 billion in claim Liquidated Value. That's 83% of the total claim Liquidated Value the trust initially expected to pay over the course of 40-plus years.
- **Current estimates suggest that the USG trust will ultimately resolve a gross Liquidated Value of more than \$16 billion:** The fact that the USG trust had \$1.9 billion in assets remaining as of January 2014 and a Payment Percentage of 20%, suggests that the trust expects the future Liquidated Value of claim resolutions to be \$9.2 billion (in present value terms) in addition to the \$6.9 billion previously valued.²¹

If their current estimates are correct, the USG trust will eventually close its doors decades from now having resolved more than \$16 billion in claim Liquidated Value; nearly double initial expectations. The experience of the USG trust, which has been shared by nearly two dozen other trusts, raises questions regarding the manner in which bankruptcy trusts qualify and value claims. To date, the current valuation and qualification criteria of the USG trust, and many others, have not been in-line with tort expenditures or bankruptcy court expectations at the time of plan confirmation; which is to say that the procedures adopted at plan confirmation were not designed in a manner consistent with the bankruptcy estimates of expected tort expenditure and related funding.²² As a result, there has been a precipitous decline in trust payments to similarly situated claimants.

Do The Trust Administrative Processes Sacrifice Diligence To The Detriment Of Future Claimants?

In 2002, the Manville trust adopted a new TDP, which provided an updated framework for the administration, review, resolution, and payment of claims.²³

Figure 7: Trust expenses category as a percent of total Trust expenses²⁵

Trust Expenses Category	2006	2007	2008	2009	2010	2011	2012	2013
Trustee Fees and Expenses	9.7%	8.7%	7.6%	8.1%	7.1%	7.6%	7.7%	7.8%
TAC Fees and Expenses	3.0%	1.8%	1.6%	1.4%	1.7%	1.5%	1.1%	0.8%
FCR Fees and Expenses	1.8%	1.7%	1.3%	1.1%	2.0%	1.6%	1.8%	2.1%
Legal and Professional Fees	30.9%	26.7%	25.2%	26.9%	34.9%	30.4%	25.3%	38.4%
Investment Fees	8.1%	19.0%	19.0%	16.3%	16.5%	17.9%	18.9%	16.9%
Insurance Expense	6.4%	3.5%	2.5%	2.5%	2.2%	2.4%	2.9%	1.9%
General Administration	14.5%	10.3%	9.3%	9.5%	7.3%	7.4%	9.9%	11.5%
Claim Processing Costs	21.1%	28.5%	33.9%	34.7%	27.0%	30.9%	31.9%	20.5%
Other Expenses ²²	4.6%	-0.1%	-0.4%	-0.5%	1.3%	0.3%	0.5%	0.0%
Total	100%	100%	100%	100%	100%	100%	100%	100%

These procedures were subsequently adopted by dozens of proposed trusts that were pending bankruptcy reorganization during that time. In regards to claimant qualifying medical and exposure criteria, there are nearly 40 trusts that currently operate under procedures that are substantively similar, if not identical, to the Manville 2002 TDP. These boilerplate trust procedures are designed to compensate qualifying claimants expeditiously with minimal administrative and transactional costs. Unlike lawsuits filed in the tort system, the trust compensation process is intended to avoid the time, expense, and resource burden often associated with litigation.

As previously summarized in Figure 5, since 2006 the trust system has spent just under \$1.3 billion in operations, administrative, and litigation costs relative to \$17 billion in claim payments. The figures in Figure 7 further suggest that over this same period, approximately 30% of trust expenses were associated with claim processing costs, or roughly \$370 million. When compared to the \$17 billion in claim payments made over that same span, it suggests that the trusts are spending approximately 2 cents to review, process, and pay \$1.00 in claim payments. Furthermore, even if one assumes that 100% of the Legal and Professional Fees are dedicated to the audit and verification of claim approvals, these costs would only account for an additional 2 cents for every \$1.00 in claim payments.

The manner in which trusts administer claim resolutions can be inexpensive for the trusts, as well as for the claimants, and claimants' counsel. The standardization of resolution procedures across trusts allows claimant counsel to utilize the same claims material for multiple trust submissions, thus minimizing the filing cost per claim. However, as we will discuss further below, to the extent this common procedural construct allows for inconsistent or questionable claiming behavior, the ease in which multiple trust claims can be made will only perpetuate that accelerated depletion of funds.

Further expediting the ability to file claims against multiple trusts is the use of joint processing facilities. Most trusts either contract with existing asbestos claim facilities such as Verus, LLC ("Verus"), or by partnering with one another to establish a multiple trust processing facility like DCPF. These facilities reduce administrative and processing expenses by leveraging overhead and other fixed costs across multiple trusts. In doing so, these facilities create a "one-stop shop" allowing plaintiff attorneys to electronically file bulk claim submissions against multiple trusts.²⁶ Verus and DCPF represent the two largest facilities both in number of trusts and total assets. In fact, as of yearend 2013, of the \$18.6 billion in confirmed trust assets, \$14.2 billion is associated with one of these two facilities. The two facilities were

Figure 8: Trust Assets and Claim Payments by Claims Administrator (dollars in millions)

Claims Processing Administrator	No. of Trusts	2013 YE Assets	2013 Claim Payments	2006-13 Claim Payments
Verus Claims Services ²⁷	16	\$4,588	\$377	\$2,641
Delaware Claims Processing Facility	7	\$9,628	\$937	\$11,187
MFR Claims Processing, Inc. ²⁸	6	\$781	\$36	\$151
Western Asbestos Settlement Trust	4	\$1,468	\$123	\$899
Claims Resolution Management Corp.	4	\$1,333	\$209	\$1,337
Claims Processing Facility	4	\$450	\$45	\$278
Trust Services, Inc. ²⁹	4	\$326	\$8	\$429
Other ³⁰	9	\$74	\$2	\$74
Total	54	\$18,647	\$1,737	\$16,996

responsible for over 75% of all trust claim payments in 2013, and over 80% since 2006. Figure 8 provides a summary of these figures.

The cost and time-saving benefits of the current trust system are obvious as billions of dollars in claim payments are made each year with minimal transactional burden. However, the ease in which claims can be made against multiple trusts at one time, coupled with the limited level of trust due diligence, generates more claims than any single trust would have otherwise received.

For instance, the Celotex Asbestos Settlement Trust was confirmed in December 1996 and began processing claims as of February 1998 with an initial Payment Percentage of 12%. During the late 1990s and early 2000s, the trust was inundated with non-malignant filings, leading to higher than expected claim volumes.³¹ As a result, Celotex lowered its Payment Percentage to 10% in June 2001. At the time, this was a common reaction amongst other operating trusts to the wave of non-malignant filings, as Manville, Eagle Picher, and UNR also lowered Payment Percentages. However, in subsequent years, the levels of qualifying non-malignant claims subsided, and many trusts began to increase Payment Percentages through the mid-2000s. In June 2006 Celotex increased its Payment Percentage to 14.1%.

Also in 2006, the Celotex Trust entered into a joint-facility agreement with four other trusts that were recently confirmed from bankruptcy reorganization; Armstrong World Industries, Babcock & Wilcox, Owens Corning Fibreboard, and United States Gypsum. The joint facility became the DCPF.³² As previously noted, this consolidation of trusts at a single facility creates cost-sharing benefits to the trusts and resource efficiencies for claimants and claimants' counsel. However, it also makes it very easy for claims to be filed against a particular trust that may otherwise not have been made.

For Celotex, 2007 yielded the lowest number of claims paid to date. In turn, the trust increased its net individual claim payments in June 2008, effectively yielding an 18.3% Payment Percentage.³³ However, these higher payment levels were short-lived. By 2010, Celotex dropped its Payment Percentage to 9.4% and then again to 6.5% in 2013; decisions that seem counterintuitive considering that overall levels of new claim filings against Celotex should have been a fraction of the peak levels experienced during the non-malignant wave of the late 1990s and early 2000s. One potential explanation as to why claim filings and resolutions were once again outpacing projections is the fact that by 2009 many of the newly formed DCPF trusts had received high volumes of pre-petition and pending claims that may

have created residual filings against Celotex that otherwise might not have been made.

Is The Current Trust Procedural Construct Antiquated?

A TDP will provide a list of compensable disease categories that may range from malignant asbestos-related injuries such as mesothelioma to less severe non-malignant respiratory conditions such as asbestosis and pleural plaques.³⁴ The compensable disease categories and corresponding settlement values are *intended* to compensate claimants based on the relative values for substantially similar claims in the tort system.³⁴ However, as previously noted, the TDPs and compensable claim criteria are often less discriminating than individual claim resolutions in the tort system. As a result, the trusts are incentivized to create an over filing of claims. Moreover, as trust compensation criteria and settlement values are static relative to tort system, their procedures become antiquated relative to a shifting litigation environment in the tort system. This raises questions about the appropriateness of trust payment and qualification criteria relative to current tort compensation. Figure 9 summarizes the minimum presumptive qualification criteria adopted by most trusts under the boilerplate TDP.

The general willingness by trusts to continue to pay claims that are tenuous from either a medical or causal

standpoint creates an alternative compensation system far removed from current tort standards. For example, while recent tort trends show an increase in lung cancer lawsuits, there is little indication that a significant proportion of these cases are currently being resolved for payment in the tort system. On the other hand, the trust qualification criteria of many trusts are not as discriminating. In fact, the UNR trust cited a recent increase in lung cancer cases as an unanticipated development leading to their motion for early termination. Limited trust disclosures with injury-level summary statistics indicate that lung cancer claims constitute an increasing proportion of malignant trust filings relative to mesothelioma claims. Though lung cancer trust claims are paid amounts substantially lower than mesothelioma claims, any unanticipated increase in filing and resolution rates could undermine current Payment Percentages. Figure 10 illustrates this growing shift in malignant trust filings towards lung cancer claims.

An even starker example of the antiquated nature of current TDPs is the continued payment of certain non-malignant injury claims. For nearly a decade most tort jurisdictions have adopted inactive dockets for non-malignant claims that do not meet minimum medical impairment thresholds; thresholds that far exceed the qualification criteria accepted by most

Figure 9: Trust Presumptive Medical and Exposure Criteria³⁵

Disease categories	Expedited Review Qualifying Claim Procedures
Mesothelioma	(1) Mesothelioma, (2) product exposure prior to December 31, 1982, and (3) 10-year latency
Lung Cancer 1	(1) Primary lung cancer plus underlying Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure prior to December 31, 1982, (3) 5-years Significant Occupational Exposure, (4) medical causation statement, and (5) 10-year latency
Lung Cancer 2	(1) Primary lung cancer plus underlying Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure prior to December 31, 1982, (3) medical causation statement, and (4) 10-year latency
Other Cancer	(1) Primary colo-rectal, laryngeal, esophageal, pharyngeal, or stomach cancer, plus underlying Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure prior to December 31, 1982, (3) 5-years Significant Occupational Exposure, (4) medical causation statement, and (5) 10-year latency
Severe Asbestosis	(1) Asbestosis with ILO of 2/1 or greater, or asbestosis determined by pathological evidence of asbestosis, plus a PFT less than 65% of normal, with (2) six months product exposure prior December 31, 1982, (3) 5-years Significant Occupational Exposure, (4) medical causation statement, and (5) 10-year latency
Asbestosis/Pleural III	(1) Bilateral Asbestos-Related Nonmalignant Disease plus a PFT less than 80% of normal, with (2) six months product exposure prior December 31, 1982, (3) 5-years Significant Occupational Exposure, (4) medical causation statement, and (5) 10-year latency
Asbestosis/Pleural II	(1) Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure prior December 31, 1982, and (3) 5-years asbestos exposure, and (4) 10-year latency

Figure 10: Shifts within trust malignant claim filings

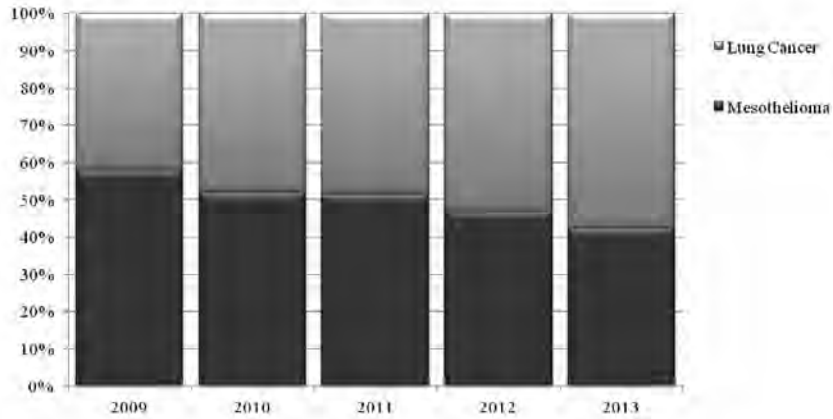
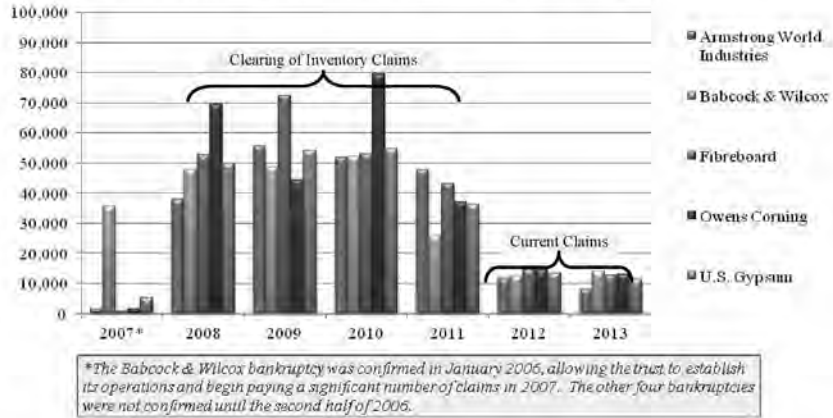
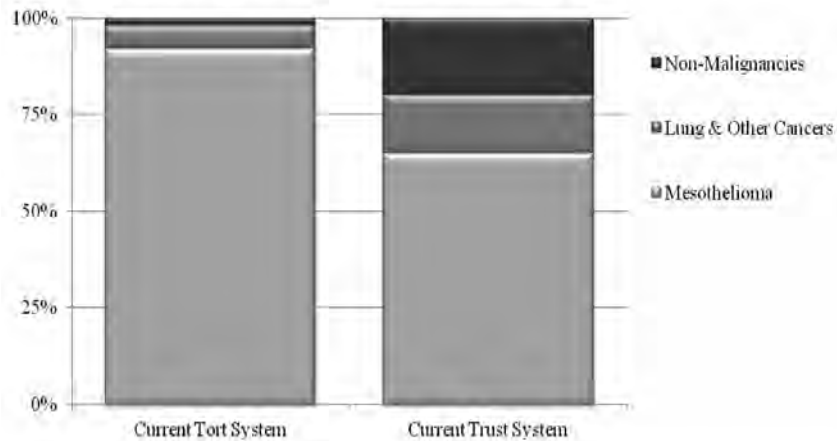


Figure 11: Number of claims paid by select trusts that were confirmed in 2006



trusts for the lesser impaired non-malignant injury categories. Moreover, other trust disclosures seem to suggest that non-malignant screening operations are once again being utilized, albeit on a smaller scale. As illustrated in Figure 11, large trusts such as Armstrong World Industries, Babcock & Wilcox, Owens Corning,

Fibreboard, and U.S. Gypsum each cleared significant non-malignant pending claim inventories between 2008 and 2011, yet have still paid on average more than 13,000 claims in each of the last two years. With less than 3,000 new diagnoses of mesothelioma each year in the United States, this data suggests that

Figure 12: Trust and tort system distribution of claim payments by disease

up to 10,000 contemporary, non-mesothelioma claims were paid by the trust system in each of the last two years.⁵⁶

Regardless of whether the current levels of compensable trust claims are being influenced by a new focus on lung cancer recruitment, or a renewed interest in non-malignant screenings, it is the current FDP criteria that provide the economic incentives for plaintiff attorneys to seek out and file such claims. As a result, claim resolutions in the trust system represent a stark divergence from contemporary tort compensation trends. Figure 12 illustrates the current difference in claim payment distribution between the trust and tort system.⁵⁷

Moreover, the incentives and resulting claim behavior could have been reasonably predicted even prior to most trusts becoming operational. One of the many legislative debates over the aforementioned FAIR Act centered on the trust fund's willingness to provide compensation to lung cancer claimants who may have smoked tobacco products. Dr. Bates' testimony before the U.S. Senate Judiciary Committee provided a report detailing how the trust would become insolvent due to the looser criteria established to compensate lung cancer

claimants.⁵⁸ The qualification criteria proposed under the FAIR Act was based on the same procedures adopted by the Manville Personal Injury Settlement Trust in 2002 and in place for dozens of trusts today. In fact, given that hundreds of thousands of individuals are diagnosed with lung cancer each year in the United States, the trusts should have anticipated that the recent lung cancer filing rates would rise as more lung cancer claimants are recruited – as would anyone who has seen the many ads on television in recent years seeking individuals with lung cancer for trust claim filings.

Should Trusts Re-Consider The Current Procedural Construct?

Adopting lower Payment Percentages is an appropriate response to higher than expected claim volumes. Especially since most trusts allow for the aforementioned "True-Up" payments if and when Payment Percentages are increased. Thus, from a management perspective, taking a conservative position on Payment Percentage levels allows trustees the ability to better assess the current and future payment expectations without sending too much money out the door to current claimants. Unfortunately, this conservative approach is rarely adopted from the onset of trust operations. As we've summarized in Figure 2 and Figure 3, the initial

claimants received substantially more money than subsequent claimants for a number of trusts. However, the conservative application of Payment Percentages that many trusts appear to be currently adopting seems to be nothing more than just a stop-gap for a much larger issue that needs to be addressed; the current set of trust procedures produce claim filing and resolution rates that far exceed tort experience and bankruptcy confirmation funding.

Given the current trends in dropping Payment Percentages and higher than expected claim volumes, it's a wonder why more trusts are not following the lessons of UNR. In 2001, the UNR trust amended its procedures to value different disease levels at ratios that were more in-line with the contemporary tort system.³⁹ Yet, current trusts seem unwilling to adapt and remain antiquated in regards to certain disease qualification criteria and relative valuations. Moreover, very few trusts have adopted filing fees; a decision UNR made in 2000 in an attempt to deter the over filing of tenuous claims.⁴⁰ Even at minimal levels, filing fees can significantly reduce the mass filing of tenuous or poorly documented claim submissions. As previously noted, there are nine trusts that are currently paying even more to claimants today than they did in 2008; notably, five of these nine impose filing fees of various levels.⁴¹

As shown, the trust system's willingness to pay claims that would not be compensable in the tort system creates a vast gap in the number of claims a company (debtor) historically resolved for payment in the tort system versus the number of claims that a debtor's trust will qualify for compensation. Exacerbating this disparity in claim volumes is the fact that future claim projections have traditionally been weighted heavily on the previous tort experience of the debtor and not on what claims the trust criteria will allow for payment. The resolution procedures and related claim qualification criteria for each trust should be predicated on the valuation and related claim expectations developed during the bankruptcy estimation process. This is critical to ensuring that sufficient trust assets are available to equitably pay claims over time.

However, even with the benefit of hindsight, the current trust advisors continue to propose and adopt the same TDP that has led to the significant reduction in

Payment Percentages for nearly two dozen trusts. Since 2011, at least nine trusts have been confirmed with substantially the same TDP payment criteria, including the recently confirmed Specialty Products Holding Corporation (Bondex) and Metex (Kentile) trusts. Moreover, the pending plan of reorganization filed in December 2014 in the Yarway bankruptcy proposes a similar TDP construct: decisions that seem to perpetuate past missteps by a number of other trusts. For example, in January 2011 the Leslie Controls Asbestos Personal Injury Trust was confirmed with the same TDP and an initial Payment Percentage of 40%. As of May 2014 the trust had already lowered the Payment Percentage to just 5%.

What makes the perpetual use of this flawed TDP even more questionable is that another trust distribution construct does exist and it being utilized by three asbestos bankruptcy trusts in California.⁴² Each of these trusts institute a filing fee to discourage tenuous claiming and have set qualification criteria that more closely resemble medical and exposure valuations in the tort system. Unlike the TDP used by most other trusts, these alternative procedures value all claims exclusively through an individual review process, which values each claim on multiple dimensions of medical severity, supporting exposure evidence, and economic loss. More importantly, these trusts are able to value weaker, albeit qualifying claims at amounts that can be as low as just 10% of base values.⁴³ As a result, each of these trusts has increased their respective Payment Percentages in recent years, allowing greater compensation to more worthy future claimants instead of paying these worthy future claimants less than worthy pending claimants.

Is External Oversight Needed To Ensure Finite Trust Assets Are Preserved?

As previously outlined, the TDP coupled with the joint-facility model and electronic claim filing systems utilized by nearly every asbestos bankruptcy trust creates a claim filing process that can seamlessly integrate multiple trusts. However, the individual resolution and valuation of each trust claim is an independent process that does not consider the claims that are made across multiple trusts. Moreover, the trusts do not seem to be concerned with inconsistent allegations that may be made in the underlying tort case as evident by inclusion of "Sole Benefit" clauses in many TDPs:

often adopted post-bankruptcy plan confirmation. The Sole Benefit clause states that:

"Evidence submitted to establish proof of exposure to [Predecessor Company] is for the sole benefit of the Asbestos PI Trust, not third parties or defendants in the tort system. The Asbestos PI Trust has no need for, and therefore claimants are not required to furnish the Asbestos PI Trust with evidence of exposure to specific asbestos products other than those for which [Predecessor Company] has legal responsibility, except to the extent such evidence is required elsewhere in the Asbestos TDP. Similarly, failure to identify [Predecessor Company] products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the Asbestos PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of the Asbestos TDP."⁴⁴

From a tort defendant perspective, the trust process of operating in a vacuum cuts against the fundamental principles of fault allocation across multiple parties, either on a proportional or several basis. However, the independent structure of the current trust system, both as it relates to the tort system and across trusts, may be a calculated design. In an article written by former asbestos plaintiff attorney Tom Wilson entitled, *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, Wilson describes certain trust procedures as "loopholes" that were created during the bankruptcy reorganization process and allow claimant attorneys to ultimately "game the system." According to Wilson:

"Institutionalized fraud is an inherent part of the current asbestos bankruptcy trust system. As shown, the trusts, designed by the same individuals who are now submitting claims, contain 'loopholes' allowing for ease of payment, often without the need for any real proof. By using the loopholes which have been integrated into the system itself, asbestos claimants can legitimately obtain compensation which they are otherwise precluded from obtaining in the tort system."

A trust system that is designed to make multi-trust filing as inexpensive as possible clearly has the infrastructure capabilities to leverage a higher degree of transparency through more robust disclosures. However, it appears that while the current trust

compensation system is highly integrated for the filing of trust claims, there does not appear to be the same level of integration at the resolution or post-payment audit phases. Thus, to the extent Institutionalized Fraud exists, it is perpetuated by a lack of inter-trust transparency or integration with the tort system.

Ultimately, the current trust process is efficient for compensating large numbers of claims, but such efficiency is compromised when participating players do not act in good faith. The procedures and rules established by the trusts presume that claims filed against them will be legitimate and based on meaningful medical and exposure evidence. However, these same procedures can also create avenues for specious claiming and *Institutionalized Fraud*. Therefore, it is disturbing when the subhead of a 2014 brief filed by Waters and Kraus in Los Angeles, California state court arguing against trust transparency is entitled, *"Many Bankruptcy Trust Claims Are Not Even Evidence of Exposure."*⁴⁵ Moreover, the brief is just a continuation of the same type of rhetoric proffered by other plaintiff attorneys throughout the years in various forums. In 2008, plaintiff attorney Steven Baron made similar statements in Texas state court before Judge Mark Davidson.

"You asked some questions about the claim form. Interestingly the claim form and what you must prove, you do not even have to prove exposure. The trusts readily acknowledge our products were at many, many job sites and they give you the list. They are on the web for the whole world to see. If you worked at one, all you have to say is, I worked there. That is all. No more inquiry. No more statements. No more allegations. By the way, with respect to mesothelioma, all one needs to prove their compensation, at least for an expedited claim, which is what he [Robert Riley] was talking about, is a pathology report for an accredited hospital that says mesothelioma. No causation. Nothing like that. One fiber - no fiber. I worked at a place decades after the product was there works for mesothelioma."⁴⁶

It would appear from these statements by practicing asbestos plaintiff attorneys that the avenue for compensation from bankruptcy trusts is not contingent on exposure to the asbestos products and/or operations of the reorganized company. The statements seem

more in-line with Tom Wilson's article and support the fact that the current trust compensation rules can allow for trust assets to be depleted by tenuous claims. This type of bankruptcy claim filing behavior raises issues regarding the lack of governance currently in place to eliminate payment to such claims as well as the ethical duty of plaintiff counsel to only file claims that allege exposure to the products and/or operations of reorganized companies.

The most logical form of external oversight to the operations and activities of asbestos bankruptcy trusts would seem to come from the federal bankruptcy and district courts that confirm the debtor's plan of reorganization. However to date, those court's oversight of the trusts seems to end in a "de-facto" manner upon plan confirmation, as the oversight of a resultant bankruptcy trust is left largely with appointed trustees and trust advisors.

The administrative governance and structure of each trust is established during the pendency of the bankruptcy case and involves negotiations between the debtor and various creditor classes. The most influential of these creditor classes is the current asbestos claimants represented by the Asbestos Claimant Committee ("ACC"), which is typically comprised of the plaintiff attorneys that hold the highest number and/or value of pending claims against the debtor at the time of bankruptcy. Not only does the ACC hold the highest number of creditor votes towards bankruptcy confirmation, but often times it is the ACC that negotiates with the debtor over the appointment of a legal representative for future claimants ("FCR"). Likewise, the ACC also participates in the selection of Trustees to be appointed as trust fiduciaries upon bankruptcy plan confirmation. Following bankruptcy

confirmation, the ACC assumes a trust advisory role as the Trust Advisory Committee ("TAC") along with the FCR.

Figure 13 summarizes ACC law firms that have attorneys as TAC members on the highest frequency of trusts and the recent assets held and claim payments made collectively across those trusts. As evidenced from the number of trusts and the billions of dollars in trust assets that these plaintiff firms both advise to and claim against, this trust advisory role has largely been repeated over time with many of the same players. Moreover, the ACC/TAC members appear to be almost exclusively responsible for the design of the trust procedures. In addition to the aforementioned quote by Steve Baron in front of Texas state court Judge Mark Davidson, he goes on to explain his role in the drafting of TDPs: *"I personally, me, wrote much of the language in these documents. What I didn't write, I was there and negotiated."*⁴⁷

The influence of the ACC as to the appointment of Trustees and FCRs, has led to a similar pattern of consolidation at both these positions. Currently, there are a number of individuals serving as either Trustees or FCRs across multiple trusts, which raises questions as to their independence from the ACC, who is in large part responsible for their initial and subsequent appointments. In turn, to the extent such a paradigm exists, it could foster a "fox guarding the henhouse" culture, which seems to be supported by Tom Wilson's claims of *Institutionalized Fraud*. Absent a complete restructuring of the current trust governance and procedural construct, there are alternative solutions that could help disincentivize inconsistent or specious claiming behavior, and help prevent further inequitable treatment of future claimants.

Figure 13: Summary of Trust Assets and Claim Payments by TAC Firm (dollars in millions)

TAC Member Firm / Affiliation	No. of Trusts	2013 YE Assets	2013 Claim Payments	2006-13 Claim Payments
Kazan, McClain, Lyons, Greenwood & Harley	20	\$14,020	\$1,360	\$14,360
Baron & Budd, P.C.	16	\$11,670	\$1,150	\$13,140
Motley Rice, LLC	12	\$11,300	\$1,130	\$12,830
Cooney & Conway	15	\$11,400	\$1,180	\$11,360
Weitz & Luxenburg	15	\$10,990	\$1,090	\$12,230

One such solution is a greater level of trust transparency through claim level disclosures that are standardized across the entire trust system. Proposed federal legislation such as the Furthering Asbestos Claim Transparency (FACT Act) bill would require public, quarterly trust disclosures that will provide a level of claim detail akin to what is currently publically available for civil tort claims.⁴⁹ 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.

The FACT Act seeks the same level of public disclosure from the trusts, which in effect, can help bridge the transparency gap between the two compensation systems. Perhaps more importantly, such transparency and related public accountability would make it more difficult for bad actors to intentionally assert inconsistent exposure or medical allegations across various trusts and tort defendants. As evident by recent cases

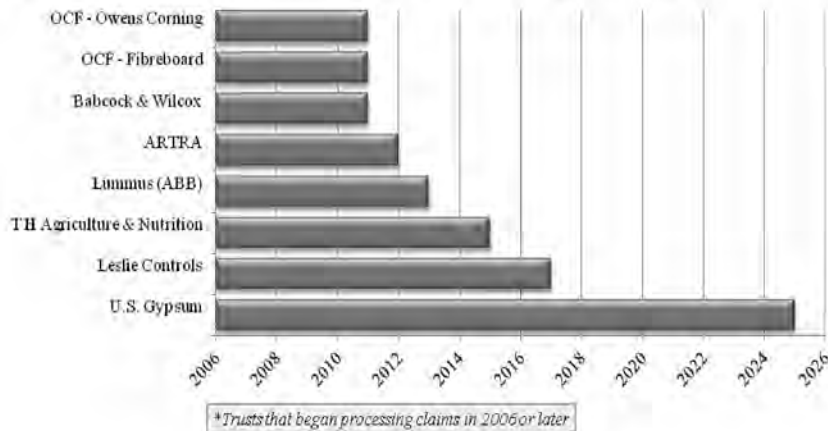
such as the Garlock bankruptcy, transparency can highlight inconsistent or potentially fraudulent behavior, and in turn can deter such activity from perpetuating in the future.

Conclusion

The news of the impending UNR trust insolvency is likely to reverberate through the entire trust compensation system. A cautionary tale to other trusts currently utilizing similar payment criteria, UNR's premature termination may finally be a wake-up call to the current trust leadership, and prompt serious consideration for amending the antiquated TDP. With a number of trusts lowering Payment Percentages to levels similar to UNR, it raises concerns over the premature termination of other trusts in the coming years. Moreover, even if current operating trusts are able to ward off insolvency, the fact that nearly two-dozen trusts have dropped their net claim payments since 2008 seems to be indicative of a larger, systemic failure of the trust system as a whole.

The critical mission of section 524g and the implementation of an asbestos bankruptcy trust is that similarly situated current and future claimants are treated

Figure 14: Year of estimated trust insolvency under each initial Payment Percentage*



equitably. Yet with no current external oversight of the trusts' post-confirmation operations, the majority of trusts confirmed under section 524g have failed to meet that legal mandate. As noted earlier, some trusts recently have taken a more conservative approach to claim payments by further reducing their payment percentages to account for a greater than anticipated volume of claims. However, had the trusts paid claims equitably to both current and future claimants at the initial payment percentage, several trusts would already be insolvent or face insolvency in the near term. For example, Figure 14 shows the year in which other currently active trusts would, or would have become insolvent if they had not lowered Payment Percentages and paid all claimants equitably as initially planned.

As indicated in Figure 14, there are five trusts that became operational in 2006 or later, that would already be bankrupt had they continued to pay future claimants at the same level as the initial claimants. Not coincidentally, these trusts all compensated claimants with the same TDP.

The latest iteration of section 524g bankruptcies have failed to pay claims equitably under the current trust governance due to the inaction of the trust leadership to modify compensation standards in light of a greater volume of anticipated claims. Beginning with Marville and UNR, and continuing with other active trusts today, the current class of claimants has been liquidated at a higher value than the similarly situated future class time and time again. This inequitable treatment raises valid concerns about whether the implementation of section 524g asbestos bankruptcy plans through the trust construct is effective without some type of public accountability. Efforts by public policy makers to create more trust transparency have shed some light on the issue but without external oversight it is likely that future claimants will continue to be prejudiced. Absent changes, it is also possible that other asbestos bankruptcy trusts like UNR will become insolvent.

Endnotes

1. Bates, Charles E. and Charles H. Mullin, *Analysis of S. 852 Fairness in Asbestos Injury Resolution (FAIR) Act*, September 2005.
2. Wilson, Thomas M., "Institutionalized Fraud in Asbestos Bankruptcy Trusts," *Mealey's Litigation Report: Asbestos*, Volume 29, Issue #7.
3. The statistics and other information in this paper are derived from the publicly available documentation produced by various asbestos bankruptcy trusts established pursuant to Section 524(g) of the U.S. bankruptcy code and the publicly available documentation produced during the proceedings of various Section 524(g) bankruptcy reorganizations.
4. Hartley, Kirk T., David C. Christian II, Marc C. Scarcella, and Peter R. Kelso, "Pre-Packaged Plan of Inequity: the financial abuse of future claimants in the T H Agriculture & Nutrition 524(g) asbestos bankruptcy," *Mealey's Asbestos Bankruptcy Report* 11, No. 4 (2011).
5. The total number includes the T H Agriculture & Nutrition, LLC Industries Asbestos PI Trust and the Leslie Controls, Inc. Asbestos PI Trust, both of which did not become operational until 2009 but have since lowered their respective net claim payments.
6. In June 2008 the Celotex Trust increased its TDP values in lieu of increasing the Payment Percentage from 14.1% to 18.3%. Notice is available on Celotex Trust website.
7. In October 2009 the DH Trust increased its TDP values by more than double (e.g., Harbison-Walker Mesothelioma average value increased from \$68K to \$182K), prior to decreasing the Payment Percentage from 100% to 52.5%.
8. NGC trust decreased its Payment Percentage twice in 2011 (First to 41% in July and then to 18% in November).
9. United States Gypsum trust decreased its Payment Percentage twice in 2010 (First to 35% in April and then to 30% in November).
10. In addition to its existing trust funds, the NARCO trust will continue to receive annual funding installments up to \$140 to \$150 million, contingent on the level of trust qualifying claims.

11. Balances may differ slightly from prior commentaries due to corrections made to financial data we collected from the U.S. Mineral trust annual reports.
12. 2011 annual reports were not available for the Rutland Fire and M.H. Detrick Trusts so these amounts have been estimated.
13. 2012 annual reports were not available for the Rutland Fire and M.H. Detrick Trusts so these amounts have been estimated.
14. 2013 annual reports were not available for the Rutland Fire and M.H. Detrick Trusts so these amounts have been estimated.
15. 2008 Investment Gains/Income includes \$166 million in special dividends received by the Armstrong World Industries Asbestos PI Settlement Trust that we previously classified as "Other Additions" in our 2012 commentary.
16. These assets include \$160 million in deferred note payments to the Federal Mogul U.S. Asbestos Personal Injury Trust that was not included in the trust's accounting of Net Claimant Equity.
17. Armstrong World Industries Asbestos Personal Injury Settlement Trust; Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust; Celotex Asbestos Settlement Trust; Combustion Engineering 524(g) Asbestos PI Trust; DII Industries, LLC Asbestos PI Trust; Eagle-Picher Industries Personal Injury Settlement Trust; Kaiser Asbestos Personal Injury Trust; Manville Personal Injury Settlement Trust; NGC Bodily Injury Trust; Owens Corning Fibreboard Asbestos Personal Injury Trust - FB Subfund; Owens Corning Fibreboard Asbestos Personal Injury Trust - OC Subfund; United States Gypsum Asbestos Personal Injury Settlement Trust; Western MacArthur-Western Asbestos Trust; ASARCO LLC Asbestos Personal Injury Settlement Trust (2010-2013); TH Agriculture & Nutrition, LLC Industries Asbestos Personal Injury Trust (2010-2013).
18. On December 31, 2006, the AWI stock closed at \$39.45/share. On December 29, 2009 the AWI stock closed at \$22.06/share.
19. As of December 31, 2008, the value of the Owens Corning stock had fallen to less than \$490 million; 60% of its original transfer value of \$820 million. In addition to the \$330 million in unrealized loss in the Owens Corning stock, the subfund also incurred an additional \$250 million in unrealized losses from other equity investments and bond holdings. As of May 31, 2009, the Owens Corning stock had fallen to less than \$380 million. Assuming the other equity investments and bond holdings experienced a similar rate of decline during the first five months of the year, the total asset loss due to investment performance would have been as much as \$770 million as of May 31, 2009.
20. Calculation assumes that the trust expected to spend \$200 million in present value terms on non-claim expenditures. As a result, \$3.75 billion of its initial \$3.95 billion in funding would be for claim payments (\$3.75 billion is 45% of \$8.33 billion).
21. Calculation assumes that as of January 2014 the trust expects to spend \$100 million in present value terms on non-claim expenditures. As a result, \$1.85 billion of the \$1.95 billion in yearend 2013 assets would be for claim payments (\$1.85 billion is 20% of \$9.25 billion).
22. *Supra* 4.
23. An alternative name for a TDP is Claims Resolution Procedures ("CRP").
24. Percentages based on 48 Trusts that provided sufficient expense detail as part of the annual report. The trust financials we reviewed included additional line-item detail on expenses totaling \$1.1 billion, or approximately 86% of the total expenses reported in Figure 5.
25. Other expenses may include refunds and other similar accounting entries that may create negative balances.
26. *See for example:* Sample Excel file for Electronic Filing offered by Verus <http://www.kaiserasbestostrust.com/Files/KACC%20Sample%20Excel%20Files.zip>.

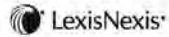
27. Venus Claims Services processes claims for the A&I Corporation Asbestos Bodily Injury Trust. This trust was not established through 524(g) bankruptcy reorganization and annual financial statements are not publically available. As a result, aggregate asset and claim payment figures are underestimated.
28. MFR Claims Processing processes claims for the Shook & Fletcher Asbestos Settlement Trust. To date, this trust has not made annual reports publically available on its bankruptcy docket. As a result, aggregate asset and claim payment figures are underestimated.
29. Trust Services, Inc. processes claims for the Fuller-Austin Asbestos Settlement Trust. We have been unable to locate publically available trust annual reports for Fuller-Austin. As a result, aggregate asset and claim payment figures are underestimated.
30. Asset and claim payment amounts include estimates for the Rutland Fire and M.H. Detrick Trusts. However, not enough information was publically available to estimate asset and claim payment amounts for the Rock Wool Manufacturing or Amatex Trusts. As a result, aggregate asset and claim payment figures are underestimated.
31. By yearend 2000 the Celotex trust had received 326,000 claims.
32. Since 2006, the DCPF has also contracted with the DII Industries and Federal Mogul trusts, and most recently the W.R. Grace trust, to process claims.
33. See Notice on the Celotex Asbestos Settlement Trust website dated June 23, 2008. In lieu of increasing the Payment Percentage, the trust amended its Claims Resolution Procedures to increase the gross valuations for each disease, which effectively represented a Payment Percentage increase to 18.3%.
34. Combustion Engineering 524(g) Asbestos PI Trust, First Amended and Restated Asbestos PI Trust Distribution Procedures (effective September 16, 2009), Section 2.1 Asbestos PI Trust Goals: *"The goal of the Asbestos PI Trust is to treat all claimants equitably. The TDP furthers that goal by setting forth procedures for processing TDP Claims and paying generally an impartial, first-in-first-out ("FIFO") basis, with the intention of paying all holders of TDP Determined Claims over time as equivalent a share as possible of the value of their claims based on historical values for substantially similar claims in the tort system."*
35. Amended and Restated Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures, pg. 11-12.
36. According to estimates by the Surveillance, Epidemiology, and End Results (SEER) Program of the National Cancer Institute, there are approximately 3,000 diagnosis of mesothelioma each year in the United States, and our experience analyzing trends in tort filings suggest that approximately 25% of these estimated diagnoses never file a lawsuit.
37. Biggs, Jennifer L., "Casualty Loss Reserve Seminar, LOB-6: State of the Risk Transfer Market for Asbestos" presentation given on September 16, 2011 in Las Vegas, Nevada.
38. *Supra* 1.
39. Annual Report, Summary of Claims Disposed, Financial Statements, and Account of the Trustees of the UNR Asbestos-Disease Claims Trust for the Fiscal Year Ended December 31, 2002.
40. *Ibid*.
41. A-best, API, JT Thorpe (CA), Thorpe Insulation, and Western Asbestos all require a filing fee.
42. Western Disease Settlement Trust; J.T. Thorpe Settlement Trust; and Thorpe Insulation Settlement Trust.
43. Second Amendment to and Complete Restatement of Western Asbestos Settlement Trust Case Valuation Matrix, pg. 2.
44. See for example Section 5.7(b)(3) of the Kaiser Aluminum & Chemical Corporation 3rd Amended Asbestos Distribution Procedures.
45. Response of Plaintiffs Represented by Waters, Kraus & Paul in Opposition to Defense Motion Proposing

- Disclosure Requirements for Personal Injury Claims to
11 USC 524(g) Asbestos Trusts, June 20, 2014.
46. Steve Baron, Baron & Budd, Texas MDL Hearing on
RTPs, October 16, 2008.
47. Ibid.
48. H.R. 526 "Furthering Asbestos Claim Transparency
(FACT) Act of 2015" 114th Congress, 1st Session,
January 26, 2015. ■

MEALEY'S LITIGATION REPORT: ASBESTOS

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Response to Questions for the Record from Lester Brickman, Benjamin N. Cardozo Distinguished Professor of Law, Yeshiva University, New York, NY

Response to Questions Submitted to Lester Brickman by Chairman Marino of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the U.S. House Committee on the Judiciary to Supplement Testimony on “The Furthering Asbestos Claims Transparency (FACT) Act of 2015” Hearing.

1. Based on your experience, how difficult is it to obtain information from the asbestos bankruptcy trusts, and do you think that existing discovery request methods are sufficient to access information from the trust?

A significant part of the strategy of plaintiffs’ counsel in mesothelioma litigation of suppressing evidence of plaintiffs’ exposures to the products of reorganized companies is preventing defendants in the tort system from obtaining the proof of claim forms filed by tort plaintiffs with the trusts. This suppression is because the forms require the claimant to state under oath that he has had “meaningful and credible evidence of exposure” to the asbestos-containing products of the reorganized companies that funded the trusts. In the same time frame, these claimants and their counsel, when suing a defendant in the tort system, assert under oath, that they had no exposure to the very products that were the subject of the trust claims. In order to prevent defendants from accessing filed trust claims, plaintiffs’ counsel, who exercise effective control over the trusts, have drafted trust distribution procedures (TDPs) designed to prevent defendants from accessing trust claims and facilitating the fraud that has become a near routine practice in mesothelioma litigation.

Even when defendants succeed after much effort and cost in accessing trust claims, they are severely disadvantaged because an intended consequence of the long delay in obtaining access, given the limitations on the time allotted for discovery, is that defendants don’t learn about plaintiffs’ other exposures, until it is too late to prepare an effective trial plan.

Plaintiffs’ counsel are seeking to maintain the status quo because the current system facilitates the fraudulent suppression of access to trust claims so that plaintiffs in the tort system can testify under oath, that they have not been exposed to the products of Owens Corning,

Fiberboard, USG, W.R. Grace, Babcock & Wilcox, Federal Mogul, Armstrong World Industries, and others, while at the same time submitting claims to all of the trusts established by these reorganized companies, stating under oath that they have “meaningful and credible evidence of exposure” to these very products.

I have set forth brief descriptions of the TDPs to which I refer in my Written Statement. A further description is available at Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TULANE L. REV. 1071, 1087-1090, 1099-1112, 1125-1126 (2014) [“Fraud & Abuse”].

2. Has there been a history of fraud in asbestos litigation generally, and are there any indications that the asbestos bankruptcy trust system is immune from fraud?

Massive fraud is endemic in asbestos litigation. In 2004, U.S. District Court Judge Janis Jack carefully documented massive fraud by lawyers, doctors and screening companies in silica and asbestos litigation. Despite her findings that lawyers, doctors and screening companies had devised a scheme to “manufacture diagnoses for money,” plaintiffs’ counsel are effectively immune from prosecution for fraud.

Judge Jack’s scathing indictment of rampant fraud in asbestos litigation is at least by matched by U.S. Bankruptcy Judge George Hodges’ Estimation Order in the *Garlock* bankruptcy. The very fraudsters whom Judge Hodges identified in his Estimation Order are among those who have had principal responsibility for creating the trusts and drafting their TDPs. (I suggest that the Subcommittee add Judge Hodges’ Estimation Order of January 10, 2014 to the hearing record). There is overwhelming evidence that the asbestos bankruptcy trust system is not only not immune from fraud, it is immersed in fraud.

3. Do the recent decisions in the *Garlock* bankruptcy case reinforce the need for the FACT Act?

To curb some of the fraud that has infected mesothelioma litigation, it is necessary to provide defendants with ready access to plaintiffs' trust claim filings. The most efficient and least costly way to do so would be by enactment of the FACT Act. In my oral testimony, I stated that the arguments raised by plaintiffs' counsel in opposition to the FACT Act do not have a shred of credibility.

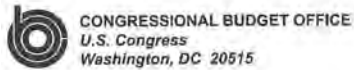
4. Mr. Inselbuch stated in his testimony that defendants can already access the information required to be disclosed under the FACT Act through state discovery rules. Do you agree with his assessment?

It is the height of *chutzpah* for Mr. Inselbuch to argue that defendants can readily access the information required to be disclosed under the FACT Act when his firm has been instrumental in drafting the very TDP provisions designed to further the scheme to use the judicial process to defraud defendants by insulating trust claims from being accessed by defendants.

5. Do you think it is credible that there is no fraud in the asbestos bankruptcy trust system, when there is such an extensive record of fraud in every other compensation program in history?

No doubt all compensation systems are subject to fraudulent manipulation. In the case of asbestos bankruptcy trusts, it is not necessary to generally rely on experience with compensation programs. As it testified in my Written Statement, trusts are under the control of plaintiffs' counsel. Trustees selected by plaintiffs' counsel never take actions which are inconsistent with the interests of plaintiffs' counsel. While several have stated that trusts conduct audits of their operations, this is simply false. TDPs are drafted by plaintiffs' counsel to process claims and make payments to plaintiffs' counsel without *any* determination of whether a claimant's work

history is valid. Indeed, the *Kananian* case clearly demonstrated that work histories are fungible, that is, that plaintiffs' counsel simply conform a client's work history to the eligibility criteria of the 15-25 trusts to which claims are submitted irrespective of the actual work history of the client. The consequence of this fraud is that hundreds of millions of dollars are being paid to claimants (and their counsel) who do not have valid claims, at the expense of future claimants who may be left with insufficient funds. *See Fraud & Abuse, id.* at 1126-27.



Douglas W. Elmendorf, Director

February 3, 2015

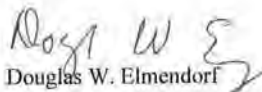
Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 527, the Small Business Regulatory Flexibility Improvements Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford, who can be reached at 226-2860.

Sincerely,


Douglas W. Elmendorf

Enclosure

cc: Honorable John Conyers Jr.
Ranking Member



CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

February 3, 2015

H.R. 527

Small Business Regulatory Flexibility Improvements Act of 2015

As ordered reported by the House Committee on the Judiciary on January 27, 2015

SUMMARY

H.R. 527 would amend the Regulatory Flexibility Act (RFA) to expand the number of rules covered by the RFA and to require agencies to perform additional analysis of regulations that affect small businesses. The legislation also would provide new authorities to the Small Business Administration's (SBA's) Office of Advocacy to intervene and provide support for agency rulemaking. Finally, H.R. 527 would require the Government Accountability Office (GAO) to report on the implementation of the legislation.

CBO estimates that implementing H.R. 527 would cost \$55 million over the 2015-2020 period, assuming appropriation of the necessary funds. Enacting the bill could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant. Enacting H.R. 527 would not affect revenues.

H.R. 527 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

If any federal agencies increase their mandatory fees to offset the costs of implementing the additional analysis required by the bill, H.R. 527 would increase the cost of an existing mandate on private entities to pay those fees. CBO expects that if such mandatory fees are increased as a result of the bill, the additional cost of the mandate in any one year would fall well below the annual threshold established in UMRA for private-sector mandates (\$154 million in 2015, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary effect of H.R. 527 is shown in the following table. The costs of this legislation fall within budget functions 370 (commerce and housing credit), 800 (general government), and all budget functions that include funding for agencies that issue regulations affecting small businesses.

	By Fiscal Year, in Millions of Dollars						2015- 2020
	2015	2016	2017	2018	2019	2020	
CHANGES IN SPENDING SUBJECT TO APPROPRIATION							
Estimated Authorization Level	3	9	12	12	12	12	60
Estimated Outlays	2	7	10	12	12	12	55

BASIS OF ESTIMATE

For this estimate, CBO assumes that the legislation will be enacted in fiscal year 2015, that the necessary amounts will be appropriated each year, and that spending will follow historical patterns for similar activities.

CBO is unaware of any comprehensive information on the current level of spending for regulatory activities governmentwide. However, according to the Congressional Research Service, federal agencies issue 3,000 to 4,000 final rules each year. Most rules, regardless of size, are promulgated by the Departments of Transportation, Homeland Security, and Commerce, and the Environmental Protection Agency (EPA). Most major rules (those with an estimated economic impact on the economy of more than \$100 million per year) are issued by the Departments of Health and Human Services and Agriculture, and EPA.

H.R. 527 would broaden the definition of a "rule" for rulemaking purposes to include agency guidance documents and policy statements. The bill also would expand the scope of the regulatory analysis for proposed and final rules to include an examination of indirect economic effects on small businesses and a more detailed analysis of the possible economic consequences of the rule for small businesses. The legislation defines indirect economic effects as any impact that is reasonably foreseeable. The legislation also would require agencies to prepare reports on the cumulative economic impact on small businesses of new and existing regulations.

Implementing H.R. 527 would increase the amount of regulatory analysis that agencies would need to prepare, and it would expand the role of the SBA's Office of Advocacy and the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) in the rulemaking process. Finally, the legislation would require more federal agencies to use panels of experts to evaluate regulations and to prepare reports on the economic impact of proposed regulations on small business.

Information from OIRA, SBA, and some federal agencies indicates that the new requirements would increase the cost to issue a few hundred of the thousands of federal regulations issued annually. Based on that information, CBO estimates that administrative costs in some regulatory agencies, the SBA's Office of Advocacy, and OIRA would eventually increase by a total of about \$12 million annually, subject to the availability of appropriated funds. We expect that it would take about three years to reach that level of effort. The GAO report on the impact of the legislation of the Office of Advocacy would cost less than \$500,000 to complete, subject to the availability of appropriated funds.

PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting H.R. 527 could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 527 contains no intergovernmental mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

If any federal agencies increase their mandatory fees to offset the costs of implementing the additional analysis required by the bill, H.R. 527 would increase the cost of an existing mandate on private entities to pay those fees. CBO expects that if such mandatory fees are increased as a result of the bill, the additional cost of the mandate in any one year would fall well below the annual threshold established in UMRA for private-sector mandates (\$154 million in 2015, adjusted annually for inflation).

ESTIMATE PREPARED BY:

Federal Spending: Matthew Pickford and Susan Willie
Impact on State, Local, and Tribal Governments: Melissa Merrell
Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Theresa A. Gullo
Deputy Assistant Director for Budget Analysis

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Presented to the ATI at Arlington, Virginia - 6/7/73

The first chart shows the actual results of Dr. Selikoff's four mortality studies of asbestos workers. The numbers in parentheses beside the figures for total number of workers indicate those who have so far died from all causes. The percentage figures alongside the total number of deaths from asbestosis, lung cancer and mesothelioma are based on the total number of deaths from all causes, not on the number of workers in the study.

The most important study of the group is the second from the top, showing the deaths from asbestos-related disease among all members of the insulation workers union, regardless of length of exposure. You will note that 34 per cent of those workers who have died thus far have died from one of the three asbestos-related diseases.

These, then, are the facts Dr. Selikoff works from. This is what he knows from his own investigations. Now let us take a look at what he has done with these figures in order to dramatize the problem.

Chart number II shows Dr. Selikoff's predictions about asbestos-related deaths in the United States. Without going into details, Dr. Selikoff has arrived at his projections by the simple procedure of multiplying the percentage of deaths from asbestos-related disease among his insulation workers by the total number of employees in the entire industry.

You will also note that he has raised his projected death estimate to enormous heights over the past year by simply increasing the base figure of employees exposed, while still retaining the percentage multiplier of 34 per cent being experienced by the insulation workers.

I might point out that this tactic, however deceptive, has been an enormous success since each raising of the estimate has earned Dr. Selikoff correspondingly greater coverage by the media. No finer example exists of the total gullibility of the press than the manner in which it allowed its prejudices to be manipulated and played upon in this situation.

Please don't get me wrong. I have no doubt that the insulation workers are in fact dying as rapidly as Dr. Selikoff says they are. The problem is that he has translated their mortality experience to the rest of the entire industry, which is completely erroneous.

In the first place, the estimated number of employees in the industry is too high -- five times too high to be precise. Even more important, according to an analysis by the Association of more than a dozen mortality studies, including those of Dr. Selikoff, our prediction is that approximately 25,000 past and present employees in the asbestos industry have died or will eventually die of asbestos-related disease. This is less than one-thirteenth

CHART NUMBER IDR. I. J. SELIKOFF --- RESEARCH DATA

	<u>NO. OF WORKERS</u>	<u>DESCRIPTION OF COHORT</u>	<u>TOTAL DEATHS FROM ASBESTOSIS, LUNG CANCER & MESOTHELIOMA</u>
MORTALITY STUDY OF TWO LOCALS OF INSULATION WORKERS UNION	625 (423)	THOSE WITH A MINIMUM OF 20 YEARS EXPOSURE	149 (35%)
MORTALITY STUDY OF ALL MEMBERS OF INSULATION WORKERS UNION	17,800 (1092)	ALL WORKERS ON ROLLS 1/1/67	368* (34%)
MORTALITY STUDY OF WORKERS IN A WORLD WAR II AMOSITE INSULATION PLANT	933 (484)	EXPOSED ONLY TO AMOSITE ASBESTOS	107 (22.1%)
MORTALITY STUDY OF WORKERS AT JOHNSTONVILLE CORP. PLANT **	689 (199)	THOSE WITH A MINIMUM OF 20 YEARS EXPOSURE	66 (33%)

* 340 OF THESE DEATHS WERE AMONG THE 5,119 EMPLOYEES WITH GREATER THAN 20 YEARS EXPOSURE

**UNPUBLISHED DATA TAKEN FROM ARTICLE IN THE NEW YORK POST, MAY 19 2

CHART NUMBER IIDR. I. J. SELIKOFF -- PREDICTIONS

	<u>NO. OF WORKERS</u>	<u>DESCRIPTION OF COHORT</u>	<u>TOTAL DEATHS FROM ASBESTOSIS, LUNG CANCER & MESOTHELIOMA</u>
ARTICLE IN WALL STREET JOURNAL - 6/8/72 - "STUDIES BY DR. SELIKOFF... LEAD HIM TO PREDICT..."	250,000	ALL WORKERS CURRENTLY EMPLOYED IN THE ASBESTOS INDUSTRY	85,000*
ARTICLE IN THE NEW YORK TIMES - 6/13/72 - (5 DAYS LATER) - "IF OUR EXPERIENCES...ARE A GUIDE..."	500,000	ALL WORKERS CURRENTLY & PREVIOUSLY EMPLOYED IN THE ASBESTOS INDUSTRY	170,000
TESTIMONY AT TOXIC SUBSTANCES HEARING - 1/21/73 - "OUR STUDIES INDICATE..."	1,000,000	ALL WORKERS CURRENTLY, PREVIOUSLY & WHO WILL BE EMPLOYED IN ASBESTOS INDUSTRY IN THIS CENTURY	360,000
AP STORY ON TOXIC SUBSTANCES HEARING	1,000,000	(AS ABOVE)	1,000,000 (MIS-QUOTE)

* ACTUAL QUOTED PREDICTION WAS 95,000, BUT THIS INCLUDED DEATHS FROM GI CANCER, WHICH I HAVE SUBTRACTED FROM THE TOTAL.

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Presented to the AIA at Arlington, Virginia - 6/7/73

of Dr. Selikoff's most recent estimate. In addition, our figures show that 20 of the 25,000 deaths -- or 80% -- will occur among those in the insulation trades.

While these estimates should be reassuring to those in the mining and manufacturing areas of the industry, we should not forget that 5,000 of our workmen are still going to die of asbestos-related disease and that, all things considered, there is absolutely nothing that we can do to prevent it. The only thing we can do is to clean up our plants to assure that those entering the industry in the future will not have the same experience.

Within the past year and a half, the main thrust of Association effort has shifted to the government affairs front. The principal agencies in Washington with which we have been dealing are the Occupational Safety and Health Administration; the Environmental Protection Agency; the Food and Drug Administration; the Bureau of Mines; and, to a lesser degree, the National Institute of Occupational Safety and Health, and the National Institutes of Health, both of which are mainly involved in research efforts.

In addition, a few weeks ago we were contacted by the Federal Trade Commission, which had received a petition from the Center for Science in the Public Interest requesting an investigation of consumer uses of asbestos for the purpose of determining whether certain products ought to be labeled as hazardous and whether warnings should be required on all advertisements for those products. On the basis of a preliminary meeting with an investigator from the FTC it would appear that we have little to worry about in this particular area.

The Occupational Safety and Health Administration has been of enormous concern to the industry over the past 18 months. As most of you already know, the Association expended tremendous efforts during the six month period leading to the promulgation of last June's OSHA standards on asbestos. I think it is a gauge of the effectiveness of the total industry involvement in this most crucial matter that of eleven main requirements in the standards, the industry position was accepted totally by OSHA on nine of the eleven, about fifty per cent on a tenth, and totally rejected on only one.

OSHA is now planning to redo the standard package and we are working closely with them on this project. The first step will be the formation of a 15 man advisory committee to review the current standards and any additional medical and technical data that has become available in the year since the standards were promulgated.

Working in cooperation with nine other trade associations we have selected four individuals as industry-wide recommendations to OSHA for the four so-called "employer" spots on the advisory committee.

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In discussing the formation of the advisory committee with John O'Neill of the OSHA Standards Development Section, we were asked to add a couple of names to the list so that OSHA would have more of a selection to choose from. This we have agreed to do.

The committee will be given up to nine months to complete its deliberations and prepare for OSHA a revised standard package. This will be followed by public hearings, approximately a year from now. We do not expect to see a new standard promulgated before the Fall of 1974.

It is of course impossible to determine at this time what the new standards will look like, however, I would venture to say that they will certainly not be less strict than the ones we have today, although they will probably be less confusing and leave less room for employer interpretation. Something will unquestionably be done to improve the current difficulties with the monitoring requirements.

The main function of the National Institute for Occupational Safety and Health is to conduct research and to prepare so-called Criteria Packages, which are essentially recommendations to OSHA for standards on various materials, chemicals and activities. Such a package on asbestos was prepared by NIOSH at the time of the OSHA proceedings last year. NIOSH will not be preparing a new or revised criteria package for the upcoming review of the asbestos standards.

I do not believe it would be unfair to say that of all the agencies in Washington dealing with asbestos, Dr. Selikoff has had his greatest influence on the young idealistic scientists and doctors at NIOSH. Consequently, industry influence is weakest in this agency. It was NIOSH, after all, that made the original recommendation for a two fiber standard in the United States asbestos industry.

Next to OSHA, the Environmental Protection Agency has the greatest potential of any federal agency for adversely affecting the future of the asbestos industry in this country. Not only is the EPA responsible for developing and enforcing air and water pollution standards, but the Toxic Substances Control Act, now pending in Congress, will also become an EPA function after passage.

For this reason, I am pleased to be able to say that the asbestos industry has an excellent relationship with the EPA. No finer proof of this exists than the fact that there was not a single major industry recommendation made to the EPA at the public hearings on the proposed asbestos emission regulations that was not accepted either in toto or in principle in the final standards, which were published in early April of this year.

We are presently working with the EPA on the development of waste water effluent standards for asbestos manufacturing plants. We

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certainly hope that these standards will turn out to be as reasonable as the air pollution regulations. The proposed effluent standards are scheduled to be published in the Federal Register sometime this Summer, to be followed by public hearings, with the final standards being promulgated in the Fall, perhaps as early as October.

We are also planning, in the near future, to meet in Washington with representatives from the standards development and enforcement branches of the EPA to discuss with them questions of interpretation and compliance policy with regard to the new air pollution regulations.

We have already resolved one interpretation question that is of special interest to the asbestos textile industry. Approximately two weeks ago I was asked by a member company of the Association to find out whether the EPA was planning to require the manufacturers of asbestos safety clothing to register as potential emission sources under the law.

In discussing the situation over the phone with EPA compliance officials, I argued that the producers of asbestos safety clothing were not manufacturers as defined in the regulations but were instead only fabricators of an asbestos product, and as such, should not have to register as potential emission sources.

After our phone conversation ended, a brief meeting was held among the EPA compliance people. I was then called back and informed that they agreed with me that the safety clothing producers should not be required to register.

While this rather minor problem took approximately an hour and a half and two or three phone calls to resolve, it is indicative of the type of day-to-day services that the Association provides for its member companies.

Over the past year the Food and Drug Administration has shown an increased interest in asbestos as a possible hazardous contaminant in various foods, beverages and drugs. Late in 1972 they set up an asbestos task force to review the situation and to propose regulations and guidelines where appropriate.

Thus far they have concentrated their efforts in two areas -- on the use of asbestos-contaminated talc in food packaging and in cosmetics, and secondly, on the use of asbestos cellulose filter pads in the beverage and drug industries.

In our first meeting with the FDA task force last November on the filter problem, they demonstrated and admitted to an appalling ignorance about the health hazards of asbestos. Since then, they have gotten one heck of a lot smarter, due at least in part to the tremendous amount of data and information which the Association

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has been supplying to them. As a consequence, the FDA is today less panicky about asbestos and therefore less likely to propose foolish, unsupportable regulations. Spokesmen from the FDA have, in fact, defended the filter industry against environmentalist attacks in the press and elsewhere in recent months. This is, quite obviously, a healthy sign.

Our activities in the area of Congressional relations have been quite minimal to date, although we are preparing for the upcoming struggle in Congress over workmen's compensation reform, at which time asbestos is unquestionably going to be racked over the coals by Dr. Selikoff and by representatives of organized labor.

Unfortunately, the Association has neither the manpower nor the time to embark on a full-scale legislative information program. We have met on occasion with the legislative and legal assistants to various Senators who have attacked asbestos, however much more needs to be done in this area and I am afraid individual member companies are going to have to be the prime ball carriers and not the Association.

For essentially the same reason, our government activities at the state and local level have declined to essentially zero over the past year and a half. This has not been too serious a deficiency as most of the authority of the cities and states in asbestos control has been usurped by various Federal regulatory agencies. Nonetheless, more individual company activity is required at these levels of government.

In conclusion, I think we can all be justifiably pleased with what we have been able to accomplish in the past few years in resolving the cornucopia of interrelated problems that constitute the asbestos-health situation.

Our plants are cleaner and our workmen better protected. The general public has been shown to be in no danger from asbestos, if it ever was. While we have been regulated extensively, for the most part the standards that have been developed have not been as bad as we feared they might be, and in some cases they turned out far better than we ever dared hope. In addition, while we are still taking our lumps in the public press, the net effect of all this adverse publicity has been shown to be surprisingly small.

We have sweated a lot and we have groaned a lot, but we are still standing and we are still viable. I sense today within the industry a greater feeling of confidence in the future than at any time in the past few years. But we must not rest contented.

We must remember that Dr. Selikoff has to date been far less successful than our industry has in influencing the decisions of the various governmental regulatory agencies. This will make him try