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**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"**

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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-ClaimsTM") 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%
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 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%
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%
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.