FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2012

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

H.R. 4369

MAY 10, 2012

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MAY 10, 2012

OFFICIAL HEARING RECORD

MATERIAL SUBMITTED FOR THE HEARING RECORD BUT NOT REPRINTED

GAO Report, GAO–11–189, entitled Report to the Chairman, Committee on the Judiciary, House of Representatives, September 2011, Asbestos Injury Compensation, The Role and Administration of Asbestos Trusts, submitted by the Honorable Ben Quayle, a Representative in Congress from the State of Arizona, and Member, Subcommittee on Courts, Commercial and Administrative Law. This report is available at the Subcommittee and can also be accessed at:

http://www.gao.gov/new.items/d11819.pdf

FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2012

THURSDAY, MAY 10, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:34 a.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Quayle, Cohen and Watt.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Travis Norton, Counsel; Johnny Mautz, Counsel; Beth Webb, Counsel; Rachel Dresen, Professional Staff Member; Ashley Lewis, Clerk; (Minority) James Park, Subcommittee Chief Counsel; and Susan Jensen-Lachmann, Counsel.

Mr. COBLE. Good morning, ladies and gentlemen. The Subcommittee on Courts, Commercial and Administrative Law will come to order.

Today's hearing is a legislative hearing on H.R. 4369, the "Furthering Asbestos Claim Transparency Act," popularly known as the "FACT Act of 2012," introduced by Representatives Quayle, Ross—Quayle from Arizona, Ross from Florida—and Matheson from Utah.

Nearly 15 years ago in *Amchem v. Windsor*, the Supreme Court struck down a massive class action settlement which many considered to be the turning point in asbestos litigation. In its opinion, the Court described asbestos litigation as an elephantine mass that may be best resolved by the Legislature.

While I think no one in the House or Senate disputed the Court's elephantine description, years were spent in this Committee and in the Senate trying to craft some replication of the *Amchem* settlement to help resolve claims and prevent a wave of bankruptcies due to asbestos litigation.

As everyone or as most everyone is well aware, efforts in the House and Senate were unsuccessful, and for many defendants the only recourse had been to seek bankruptcy protection. Fortunately, section 524(g) of the Bankruptcy Code had already been enacted and has served a vital tool for asbestos victims, defendants, and plaintiffs. Needless to say, 524(g) has not been without its problems, which resulted in the creation of H.R. 4369 and today's hearing.

Virtually every aspect of the asbestos litigation has been tragic. At its inception asbestos was a miracle product used in construction and by our military throughout the country, only to become a national pariah after thousands of Americans became deadly ill or sick due to exposure. The symptoms of asbestos exposure are uncanny. There are long latency periods and a myriad of symptoms. While liability for asbestos exposure was fiercely contested initially, it has become so prevalent that many defendants simply settle claims rather than assume the risk.

Most of the original big-name defendants have filed for bankruptcy protection, and I am told that the number of new claims is holding steady, which means that the growing pool of plaintiffs will have to seek compensation from a shrinking pool of money unless there are new defendants to pay claims.

The tragic twist is that asbestos litigation has not concluded. It has simply moved from notorious big-name defendants to lesser-known entities and asbestos trusts. I look forward to today's hearing and learn how H.R. 4369 will help protect the pool of funds for asbestos victims and prevent fraud against asbestos trusts. Anyone who is missing or wrongfully taking money from these trusts is simply compensating from victims that should be held accountable.

Also I am interested in how the bankruptcy trustee and the trusts help protect the money for victims. Finally, I am concerned and interested to learn more about the ethical responsibilities and duties of attorneys who bring or initiate cases against asbestos trusts.

Now that I have concluded my opening statement, I will recognize the distinguished gentleman from Utah, Mr.—I stand corrected, Arizona. All those Western States look alike. I say that with tongue in cheek, of course. The distinguished gentleman from Utah, Mr. Quayle, for his opening statement.

[The bill, H.R. 4369, follows.]

I

112TH CONGRESS
2D SESSION

H. R. 4369

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 the filing of such reports with the Executive Office for United States Trustees.

IN THE HOUSE OF REPRESENTATIVES

APRIL 17, 2012

Mr. QUAYLE (for himself, Mr. MATHESON, and Mr. ROSS of Florida) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

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

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Furthering Asbestos Claim Transparency (FACT) Act of 2012".

SEC. 2. AMENDMENTS.

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

"(8) A trust described in subsection (2) shall—

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

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

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

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

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

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

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

○

Mr. QUAYLE. Thank you, Mr. Chairman. And it is part of the Four Corners, so we are good to go.

I want to thank you, Mr. Chairman, and thank you for calling this hearing to consider H.R. 4369, the "Furthering Asbestos Claim Transparency Act," or "FACT Act," which I recently introduced with my Democratic colleague, Jim Matheson from Utah, and my colleague on the Subcommittee, Dennis Ross from Florida. This bill is about transparency so that funds will remain available for those who are truly injured and not exhausted by those filing fraudulent claims.

The problem with fraud in the asbestos compensation system has been well documented. In September of last year, my Judiciary colleagues on the Constitution Subcommittee held a hearing to examine the occurrence of fraud within the asbestos compensation system and its effects on businesses and the economy. That hearing addressed the problem. This hearing explores a much-needed solution.

In 1994, Congress amended the Bankruptcy Code to allow a Chapter 11 debtor to create in its plan of reorganization a trust that would handle all future liability claims based on the debtor's manufacture, sale, or other involvement with asbestos-containing products. These trusts, created under section 524(g), came into existence when the debtor exits bankruptcy. In exchange for providing recourse to future asbestos claimants through the trust, the debtor receives a channeling injunction, preventing future claimants from suing the reorganized debtor.

Under current law there is no statutory requirement that asbestos bankruptcy trusts provide any disclosure to anyone about who is filing claims, who is getting paid, and why. Essentially they operate in secret. There is evidence that this secrecy allows fraud to occur. Plaintiffs will present one set of facts in public complaints filed in the State tort system, then give a contradictory set of facts when they make a demand from the trust, and there is no communication or transparency between the two systems.

The FACT Act shines light on the asbestos compensation system. It requires the trust to publish quarterly reports detailing the identity of claimants, the amount they are paid, and the basis for the payment. It is important to note that this disclosure will provide no more information than is currently available in the claimants' pleadings in the State tort system from the local courthouse.

Make no mistake, I believe that victims of asbestos exposure are entitled to just compensation. This bill does nothing to hinder their receipt of damages. Instead the bill attempts to root out fraud through public disclosure of important information. The savings to the trusts that result from the reduction of fraud, waste, and abuse will ensure that the trusts will have adequate capital for future claimants.

The FACT Act is a light touch. It does not tell claimants how and where they must file their claims or foreclose them from recovery. Instead, it brings much-needed transparency to a compensation system replete with abuse.

I appreciate the support of Congressman Matheson and Congressman Ross on this measure, and I look forward to the testimony of the witnesses.

Thank you, and I yield back.

Mr. COBLE. I thank the distinguished gentleman from Arizona.

Ladies and gentlemen, I am told that a vote is imminent, there will probably be a vote on or about 10:25, so we will move along, and I hope we—without keeping you all in an undue tone, we will try to wrap this up, but if not, we will come back after the vote.

We have a very distinguished panel before us this morning. Our first witness today is Leigh Ann Schell, a founding partner of the law firm of Kuchler—is that correct? Did I pronounce that correctly?

Ms. SCHELL. It is actually Kuchler, Mr. Chairman.

Mr. COBLE. I wasn't even close. Kuchler Polk Schell Weiner & Richeson in New Orleans. She practices in the areas of toxic tort litigation, environmental litigation, product liability, and other legal fields relevant to asbestos. Ms. Schell also serves as chairwoman of the International Association of Defense Counsel's Legislative, Judicial, and Government Affairs Committee.

Ms. Schell received her law degree from Loyola University Law School and her undergraduate degree from the University of New Orleans. She is also a marathon runner. According to her firm's Web site, the legislative process is frequently a marathon and not a sprint.

Good to have you with us, Ms. Schell.

Ms. SCHELL. Thank you, Mr. Chairman.

Mr. COBLE. Professor Steven Todd Brown is an associate professor of the SUNY Buffalo Law School, where he also serves as director of the school's Center for the Study of Business Transactions. Professor Brown's research and teaching draws on his experience managing a small business and his practice at a major D.C. law firm. His recent academic work focuses on the constitutional limits and institutional dynamics of aggregate litigation, including bankruptcy and procedural devices for consolidating mass tort cases.

Professor Brown received his J.D. From the Columbia School of Law and LL.M. From the Beasley School of Law at Temple University, and his undergraduate degree also from Loyola University in New Orleans.

Mr. Charles Siegel is a professor and the head of the appellate practicing the law firm of Waters & Kraus in Dallas. His practice focuses on asbestos and toxic tort litigation, among other fields. He is an experienced litigator and appellate advocate, having argued cases in most of the courts of appeal and before the Supreme Court of Texas. Mr. Siegel is furthermore a member of the Texas Lawyers Association and the American Bar Association.

Mr. Siegel received his law and undergraduate degrees from the University of Texas at Austin, where he is a sometimes guest lecturer.

Finally, Mr. Marc Scarcella—am I close?

Mr. SCARCELLA. Very close. Scarcella.

Mr. COBLE. Thank you, sir.

Mr. Scarcella is a manager of Bates White economic consulting firm here in Washington, D.C. He has more than 10 years experience as an economic consultant for litigation. He specializes in

quantitative methods and their applications in dispute resolution, settlement negotiations, and litigation management and strategy.

Prior to joining Bates White, Mr. Scarcella was managing director at an analysis and research planning corporation where he provided economic analysis and consultive services in 524(g) Chapter 11 bankruptcy for Fortune 500 companies. Specifically he has advised clients on matters of liability estimation and cash flow management, as well as on asbestos trust claims, processing procedures, policies, reporting, and valuation.

Mr. Scarcella holds a master's degree in financial economics and two bachelor's degrees from the American University.

It is good to have all of you with us this morning. Folks, we try to comply with the 5-minute rule. There will be a panel on your desk that will show a green light, and when the amber light appears, that means that you have 1 minute. And you won't be keelhauled if you violate the 5-minute rule, but if you can wrap it up on or about 5 minutes, particularly in view of an imminent vote, we would be appreciative to you. We try to apply the 5-minute rule to ourselves when it comes our time to question you as well.

Ms. Schell, why don't you kick us off.

Good to have all of you with us.

TESTIMONY OF LEIGH ANN SCHELL, ESQ., KUCHLER POLK SCHELL WEINER & RICHESON, LLC, NEW ORLEANS, LA

Ms. SCHELL. Thank you.

Good morning, Chairman Coble and Members of the Subcommittee. Thank you for holding a hearing today on the FACT Act, which is good, commonsense, bipartisan legislation that is looking for a solution to an asbestos compensation system that is broken. And the solution proposed by the FACT Act is for transparency and accountability.

Now, during the course of my practice, I have been involved in asbestos litigation for approximately 15 years. This is not a solution in search of a problem. Instead, based on my own experience and from that that is seen around the country, this is a national problem that needs a national solution.

For example, my firm recently handled the Robeson case, which was filed in New Orleans. In Robeson, the plaintiffs had filed on behalf of Mr. Robeson 16 trust claims. Now, Mr. Robeson's deposition was taken in Texas solely for the purpose of exploring the 16 trust claims filings, and throughout the course of the deposition, which was submitted as an exhibit for my testimony, Mr. Robeson repeatedly affirmed that misstatements and misrepresentations had been made in each of the 16 claims filings. In fact, it was noted that the claims filings were inconsistent even among themselves as to the exposure histories that were listed.

Another example is a case that I am currently involved in in which—it is the Oddo case also pending in New Orleans. And we filed written discovery to the plaintiff seeking information on whether or not any trust claims had been made. The interrogatories were answered, stating that, no, no trust claims had been made. We filed a subpoena and issued it to the Johns Manville trust, but were met with a motion to quash. During the course of arguing on the motion to quash, we received information, in fact

it was received by letter on April 5th of this year, from the Johns Manville trust affirming that the plaintiff not only had made a trust claim with Johns Manville, but he, in fact, had actually been paid.

Now, these are just two examples from my law firm and my practice, and I am from a small firm in New Orleans with only about 24 lawyers in it.

In the written information that I have submitted to the Subcommittee, I have cited a number of other examples from States around the country, including Ohio, Oklahoma, New York, Virginia, and Maryland, and in all of those instances, courts have noted areas of inconsistent statements made in trust claim forms and inconsistent information given to the trust claims system and in the tort system. In fact, as the Subcommittee is likely aware, in the Kananian case, Judge Hanna stated that it was the worst case of fraud that he had ever seen, and that, in fact, what was before him was lies upon lies upon lies.

In the Virginia case that is cited in the paper, Judge Horne said that in his 22 years on the bench, he had never seen such abuses in the discovery process. He went on in that case to dismiss the plaintiff's claim with prejudice, and commented that it was a fraud upon the court.

Through the examples cited from the States around the country, it is apparent that this is a large problem. In fact, looking to the compensation systems that the government has set up, those being for BP, 9/11, Katrina, with both BP and Katrina being in my own backyard, misstatements and specious claims have been discovered time and time again. I think that we would be naive not to recognize that in a trust compensation system funded with over $36 billion, that there would not be instances of misstatements and specious claims that are filed in that system.

So what we are asking for today is the transparency and accountability that is established in all those other kinds of compensation systems, and we can do that through the FACT Act, which calls for transparency in the asbestos trust compensation system.

I see that my time is up, and I thank you for the time today and the opportunity to speak before the Subcommittee about this problem.

[The prepared statement of Ms. Schell follows:]

TESTIMONY OF LEIGH ANN SCHELL, ESQ.

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TESTIMONY IN SUPPORT OF H.R. 4369, THE "FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2012"

BEFORE THE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

MAY 10, 2012

TESTIMONY OF LEIGH ANN SCHELL, ESQ.
KUCHLER POLK SCHELL WEINER AND RICHESON, L.L.C.

Chairman Coble, Ranking Member Cohen, and members of the subcommittee, thank you for holding today's hearing on H.R. 4369 -- the Furthering Asbestos Claims Transparency (FACT) Act of 2012. I urge the subcommittee to support this good, common sense legislation that would ensure transparency and accountability for an asbestos compensation system that is broken. The first step toward remedying this broken system is to provide for transparency through reporting by the trusts and by providing a mechanism through which defendants can obtain information from the trusts. The FACT Act does just that.

I have practiced law in New Orleans for 23 years in the areas of product liability, environmental exposure and commercial litigation. I currently serve as Chairman of the International Association of Defense Counsel's (IADC) Legislative, Judicial and Governmental Affairs Committee. I am not being paid for my travel expenses or for my time. The views and observations that I express today are my own and not those of my clients or any other group.

I have been involved in asbestos litigation for over 20 years. During that time, I have watched the face of asbestos litigation change as companies sought bankruptcy protection. Due to the large number of bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."[1] One former plaintiffs' attorney described the litigation as an "endless search for a solvent bystander."[2] I have observed this process firsthand. The names and faces of the defendants have shifted dramatically from those who sold raw asbestos and manufactured asbestos insulation which contained the most

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[1] Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract at* 2001 WLNR 1993314.
[2] 'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig. Rep: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

dangerous asbestos fiber type,[3] to makers of equipment such as valves, pumps and engines some of which did not contain any asbestos at the point of sale and some of which incorporated gaskets and packing material made by others. And now, with the recent bankruptcy of Garlock Sealing Technologies, a major gasket manufacturer is no longer a viable defendant.

Before over 100 asbestos defendants sought bankruptcy protection,[4] those defendants, including the "traditional defendants" such as Johns-Manville[5], W.R. Grace and Owens Corning, bore 95% of the tort liability to asbestos plaintiffs, leaving only 5% of the tort liability to be shared among other companies.[6] Now, the once peripheral, solvent defendants remaining in the tort system are left with 100% of the tort liability rather than 5% even though their actual roles in the history of asbestos exposure have not changed. The shift in the burden of bearing the tort liability is not due to a shift in culpability, but rather due to removing those most culpable from the tort playing field through the protection of bankruptcy.

While no longer available to share the tort burden, over 60 bankrupt defendants established trusts which are currently funded with approximately 36 billion dollars for the benefit of asbestos claimants.[7] Yet the trust system operates independently of the tort system and the

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[3] In the United States, amosite (an amphibole) is the most common fiber type in lung tissue in mesothelioma cases, and is considered responsible for most mesothelioma cases. Dodson, R. F., O' Sullivan, M., Corn, C.J., McLarty, J.W., Hammar, S.P, *Analysis of Asbestos Fiber Burden in Lung Tissue from Mesothelioma Patients*, Ultra Pathol, 21:321-336 (1997); Roggli, V. L., Sharma, A., Butnor, K., Sporn, T., Vollmer, R., *Malignant Mesothelioma and Occupational Exposure to Asbestos: A Clinicopathological Correlation of 1445 Cases*, Ultra Structural Pathology, 26: 55-65 (2002).

[4] Over 100 companies have filed for bankruptcy protection to discharge asbestos liabilities. *See* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011), available at http://www.rand.org/pubs/monographs/MG1104.html p. 25.

[5] Johns-Manville was the largest manufacturer and seller of asbestos-containing products in the world and the holder of a substantial share of liability in the asbestos litigation system until it declared bankruptcy in 1982.

[6] See James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 236-37 (2006); *See also*, Testimony of James L. Stengel, Esq., Hearing on Asbestos Litigation Fraud and Abuse, House Judiciary Committee: Subcommittee on the Constitution, September 9, 2011 at 10.

[7] See Lloyd Dixon et al., Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts 25 (2010 Rand Corp.), at http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf. See also, U.S. Government Accountability

individual trusts act independently of each other. With such a staggering amount of money available to asbestos claimants in the trust system, it makes no sense to require the solvent, peripheral defendants to bear full tort liability without reference to and credit for the funds available from the trusts.[8] And it makes no sense for the trusts not to share claims information to avoid duplicate or inconsistent recovery from the trusts themselves. The separation of the trust and tort systems not only creates a misallocation of fault to solvent defendants, it drains trust resources by allowing some claimants double recovery. Some made whole in the tort system also seek payment through the trust system. And, some file trust claims ripe with misstatements. Overpayment by the trusts and payment to those not truly entitled depletes trust funds which should be reserved for future claimants and not used to over pay or wrongly pay current claimants. Recently, the chance of double recovery has been made easier by trusts allowing claimants to delay their trust filings or to defer resolution of a filed claim.

I. THE SOLUTION IS TRANSPARENCY

The U.S. Government Accountability Office (GAO) issued a report in September, 2011 in the wake of growing concern about trust transparency issues.[9] According to the GAO, nearly all of the asbestos trusts were created pursuant to section 524(g) of the Bankruptcy Code. The GAO observed that while federal law authorizes creation of the trusts, it provides no mechanism to ensure that the trusts operate in a manner consistent with Congressional intent.[10] The report noted that trusts do not make claimant information, including exposure allegations, publically

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Office, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts (GAO Report), GAO-11-819. (Sept. 2011), at http://www.gao.gov/products/GAO-11-819 at p. 3.

[8] While the states address credit for bankrupt shares differently, one thing is the same: the burden of proving the fault of a bankrupt entity or payment by a bankrupt entity to obtain a reduction in liability shifts to the solvent defendants whereas absent the bankruptcy the burden of proving fault would have been with the plaintiff.

[9] See GAO Report, *supra*.

[10] *Id.* at 3.

available. In fact, 65% of the trusts have included procedures in their trust distribution plans intended to prevent production of exposure allegations and other claims information.[11]

These Trust Distribution Procedures (TDPs) have been modified post-confirmation to include a "confidentially" provision that generally states that all information submitted to the respective trust 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. Second, a large number of these TDPs have been modified post-confirmation to include a "sole benefit" provision that generally states that evidence submitted to the respective trust to establish proof of an asbestos-related claim is for the sole benefit of the trust, not third parties or defendants in the tort system.

For example, the Babcock and Wilcox Personal Injury Asbestos Settlement Trust's plan now provides:

> 6.5 **Confidentiality of Claimants' Submissions.** All submissions to the PI Trust by a holder of a PI Trust Claim of a proof of claim form and materials related thereto shall be treated as made in the course of settlement discussions between the holder and the PI Trust, and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including but not limited to those directly applicable to settlement discussions. **The PI Trust will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only in response to a valid subpoena of such materials issued by the Bankruptcy Court. The PI Trust shall on its own initiative or upon request of the claimant in question take all necessary and appropriate steps to preserve said privileges before the Bankruptcy Court and before those courts having appellate jurisdiction related thereto.**[12]

Not only does the Babcock and Wilcox Trust require a subpoena for production of claims information, it requires that the subpoena issue from the Bankruptcy Court. And, the Trustee is ordered to take the initiative to challenge the subpoena. Such constraints are not surprising given

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[11] *Id.* at 26 and 28.

[12] *See* The Babcock & Wilcox Co., Asbestos Personal Injury Settlement Trust Distribution Procedures, Exhibit B to Plan of Reorganization, at 47-48. *at* http://www.bwasbestostrust.com/files/Revised%20B%20W%20TDP%201.pdf (emphasis added).

that plaintiffs' firms often are part of the group responsible for developing the trust's distribution procedures.[13]

This limitation on production is contrary to recognition by the courts of the propriety of discovery of trust materials.[14] For example, in New York, the Court ordered production of claims materials, reasoning that:

> [W]hile the proofs of claim are partially settlement documents, they are also presumably accurate statements of the facts concerning asbestos exposure of the plaintiffs. While they may be filed by the attorneys, the attorneys do stand in the shoes of the plaintiffs and an attorney's statement is an admission under New York law. Therefore, any factual statements made in the proofs of claim about alleged asbestos exposure of the plaintiff to one of the bankrupt's products should be made available to the defendants who are still in the case.[15]

In spite of the common sense conclusion that factual statements in trust filings are relevant in tort cases, the written discovery propounded to plaintiffs related to bankruptcy trusts is almost always met with objection.[16] Second, even attempts to issue subpoenas to the trusts are vigorously opposed by plaintiffs' counsel.[17] Indeed, on December 28, 2011, the "three plaintiffs' firms representing all plaintiffs within the Rhode Island Asbestos Docket" filed a blanket, joint motion for a 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

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[13] *See* GAO Report, *supra* at 22-23, noting that Trust Advisory Committees (TACs) are dominated by a small group of plaintiffs' firms and that TAC approval is needed to set payment percentages, modify payment percentages and approve audit methods.

[14] *See, e.g., In re Asbestos Litig.*, MDL No. 2004-03964 (Tex. Harris County Cir. Ct. Jan. 16, 2009) (letter ruling); *see also Volkswagen of Am., Inc. v. Superior Ct. of San Francisco*. 43 Cal. Rptr. 3d 723 (Cal. Ct. App. 1st Dist. 2006).

[15] *See* Shelley et al., *supra*, at 274 (quoting *Negrepont v. A.C.&S., Inc.*, No. 120894/01 (N.Y. Sup. Ct. Dec. 11, 2003)).

[16] See, e.g. Plaintiffs' Responses to Defendant's First Set of Interrogatories, Requests for Admission and Requests for Production at pp. 6-10, Attachment A.

[17] Plaintiffs' Motion to Quash Ford's Subpoena to the Johns-Manville Bankruptcy Trust and Opposition to Letters Rogatory with Incorporated Memorandum in Support, William Oddo, Jr. v. Asbestos Corporation LTD, et al., No. 2011-058853, Civil District Court for the Parish of Orleans, Div. 14-1 filed January 13, 2012, Attachment B.

named or unnamed defendant or bankruptcy trust."[18] And, finally, if any information is successfully gathered through traditional discovery, it is only available to the defendants in that particular case and is not available to other trusts or to other interested parties.

A. ACCESS TO TRUST INFORMATION IS NEEDED BY PLAINTIFFS, DEFEDANTS AND THE TRUSTS THEMSELVES.

A look at recent examples from my law firm, as well as those from around the country, shows that supplying inconsistent information to the trusts and to the tort system is both widespread and detrimental to plaintiffs and defendants alike. In one of our cases, misrepresentations were made on behalf of the plaintiffs in 16 trust claim forms. In *Mary A. Robeson, et al v. Amatek, Inc. et al*, the forms were completed by counsel on behalf of Mr. Robeson's son, David Thomas Robeson, Sr. Most of the claims forms denied that David Robeson's father had been a smoker. The forms also gave details of numerous exposure situations complete with identification of specific products by brand name. On January 24, 2011, David Robeson was deposed solely related to his knowledge of the contents of the bankruptcy trust claims forms. In stark contrast to the information submitted on the claims forms, Mr. Robeson testified affirmatively that his father had in fact been a smoker; that he had no knowledge about the exposures claimed; and that plaintiffs' counsel had never had contact with his father to obtain information.[19]

Currently, in the *Oddo* case pending in Orleans Parish, there has been significant obfuscation of Mr. Oddo's application to the Johns-Manville trust. We issued discovery on the matter, and Plaintiffs stated in Answers to Interrogatories that no application had been

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[18] Plaintiffs' Joint Motion for a Protective Order Regarding Settlements and Bankruptcy Claims, State of Rhode Island Superior Court, *In Re Asbestos Litigation*, filed December 28, 2011, Attachment C.

[19] See Transcript of Deposition of David Thomas Robeson, Sr. taken January 24, 2011 in *Mary A. Robeson et al v. Ametek et al*, Civil District Court for the Parish of Orleans, No. 2004-15722, Div. E, Attachment D. (Exhibits available upon request.)

made. When we issued a subpoena to Johns-Manville, Plaintiffs (successfully) moved to quash it.[20] Our writ application is pending before the Fourth Circuit Court of Appeal. On appeal, Plaintiffs represented in their briefing that no application had been made to Johns-Manville. Contrary to this assertion, we obtained written correspondence from Johns-Manville confirming that not only had a claim been made, but that it had been settled and paid.[21]

These experiences are not limited to my office or to Louisiana. Recently, in Oklahoma, CertainTeed Corporation (CertainTeed) moved to strike the testimony of a witness, moved for sanctions and moved to delay a trial until the Plaintiff, Lorraine Bacon, could complete all bankruptcy trust filings because she had failed to disclose 19 bankruptcy trust claims and the 11 signed affidavits from product identification witnesses submitted with them until ordered to do so by the Court. The 11 affidavits from witnesses were relevant to accurately assess Mr. Bacon's exposure history. Further, Ms. Bacon had made 14 additional trust claims but "deferred" resolution of those claims. CertainTeed argued that resolution of the 14 claims was necessary prior to trial because Oklahoma law (O.S. Sec. 832(H)) provides that the tort claim should be reduced to the extent of any amount stipulated in a release or covenant. CertainTeed introduced an affidavit stating that Ms. Bacon would receive an additional $313,000 if she elected to receive the minimum amounts available from the 14 claims she deferred.[22] If that amount is sought after Ms. Bacon is made whole by the tort judgment, the payment to her is an overpayment which depletes trust assets that should remain available for future claimants.

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[21] April 5, 2012 letter from Claims Resolution Management Corporation attached to Second Motion to Supplement the Record, No. 2012-C-0415, Louisiana Fourth Circuit Court of Appeal, Attachment E.

[22] See, Memorandum in Support of Defendant CertainTeed Corporation's Motion to Strike the Testimony of Jasper Hubbard and for Sanctions Due to Plaintiff's Discovery Abuses, Memorandum in Support of Defendant CertainTeed Corporation's Motion to Delay Trial until Plaintiff Completes her Bankruptcy Trust Claims, and Affidavit of Bradley Drew, Managing Director at PACE Claims Service, a subsidiary of Navigant Consulting, Inc. dated December 21, 2011, all from *Lorraine Bacon v. Ametek, Inc. et al*, No. CJ-08-238, In the District Court for McIntosh County, State of Oklahoma, Attachment F. (Exhibits available upon request.)

In 2010, Garlock objected to the confirmation of Pittsburgh Corning Corporation's bankruptcy plan moving for access to 2019 statements filed by plaintiffs' firms with the goal of determining whether plaintiffs who had sued Garlock but did not identify exposure to a Pittsburgh Corning product were participating in the bankruptcy. Garlock was denied access to the statements but was allowed to view ballots cast by personal injury plaintiffs on Pittsburgh Corning's proposed plan. The master ballot required the filing attorney to certify under penalty of perjury that the claimants he listed had been exposed to a Pittsburgh Corning product. Garlock reported that a random sampling of discovery responses by asbestos plaintiffs who sued Garlock showed significant inconsistencies in the plaintiffs' tort claims versus their bankruptcy filings. Of 255 Garlock mesothelioma plaintiffs who filed claims with Pittsburgh Corning's bankruptcy trust, only nineteen had disclosed their exposure to Pittsburgh Corning products to Garlock in tort suits.[23] In its own bankruptcy filing, Garlock advised that it had entered settlements of over $100,000 each with 37 of the sampled plaintiffs. Only 6 of those plaintiffs had mentioned exposure to a Pittsburgh Corning product in their tort suit. Yet the attorneys for each of the 37 plaintiffs certified in the Pittsburgh Corning bankruptcy that their client did have such exposure.

While the *Kananian* decision has been talked about for some time, it illustrates that abuse of the trust process has the potential to impact both defendants and bankruptcy trusts.[24] In that case, Cleveland, Ohio Judge Harry Hanna barred a prominent California asbestos personal injury law firm from practicing before his court after he found that the firm and one of its partners

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[23] *See* Steve Korris, *Asbestos Exposures Contradict in Civil and Bankruptcy Courts, Garlock Says*, LegalNewsline.com, Feb. 7, 2011, *at* http://www.legalnewsline.com/spotlight/230977-asbestos-exposures-contradict-in-civil-and-bankruptcy-courts-garlock-says.

[24] No. CV 442750 (Ohio Ct. Com. Pl. Cuyahoga County).

violated rules of the court forbidding dishonesty, fraud, deceit, and misrepresentation.[25] Judge Hanna concluded that the lawyers had "not conducted themselves with dignity" and had "not honestly discharged the duties of an attorney in this case."[26] An Ohio Court of Appeals and the Ohio Supreme Court let Judge Hanna's ruling stand.[27] Judge Hanna said later, "In my 45 years of practicing law, I never expected to see lawyers lie like this."[28] Judge Hanna added, "It was lies upon lies upon lies."[29]

Judge Hanna's ruling received national attention for exposing "one of the darker corners of tort abuse" in asbestos litigation: inconsistencies between allegations made in open court and those submitted to trusts set up by bankrupt companies to pay asbestos-related claims.[30] As the *Cleveland Plain Dealer* reported, Judge Hanna's decision ordering the plaintiff to produce proof of claim forms "effectively opened a Pandora's box of deceit . . . . Documents from the six other compensation claims revealed that [plaintiff's lawyers] presented conflicting versions of how

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[25] *See Ohio Judge Bars Calif. Firm from His Court*, Nat'l L.J., Jan. 22, 2007, at 3 ("An Ohio state court judge has barred Novato, Calif.-based Brayton Purcell and one of its lawyers from appearing in that court due to their alleged dishonesty in litigating a mesothelioma case."); Thomas J. Sheeran, *Ohio Judge Bans Calif. Lawyer in Asbestos Lawsuit*, Cincinnati Post, Feb. 20, 2007, at A3 ("A low-key judge fed up with disrespectful behavior and alleged lies by an attorney created a stir with a courtroom ban on the lawyer from a nationally known San Francisco-area law firm that handles asbestos-related lawsuits coast-to-coast."); *see also* Editorial, *Going Too Far*, Columbus Dispatch, Feb. 7, 2007, at 8A (praising Judge Hanna for "draw[ing] nationwide attention to such underhanded behavior.").

[26] *Kananian v. Lorillard Tobacco Co.*, No. CV 542750, slip op. at 19 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 19, 2007), *at* 2007 WL 4913164; *see also* Paul Davies, *Plaintiffs' Team Takes Hit on Asbestos*, Wall St. J., Jan. 20, 2007, at A4 ("In a harshly worded opinion . . . Judge Harry Hanna listed more than a dozen instances where attorneys . . . either lied to the court, intentionally withheld key discovery materials, or distorted the degree of asbestos exposure alleged.").

[27] *See Kananian v. Lorillard Tobacco Co.*, No. 89448 (Ohio Ct. App. Feb. 21, 2007) (dismissing appeal as moot, sua sponte), *review denied*, 878 N.E.2d 34 (Ohio 2007).

[28] James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court over Deceit*, Cleveland Plain Dealer, Jan. 25, 2007, at B1.

[29] *Id.*

[30] Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14; *see also* Kimberly A. Strassel, Opinion, *Trusts Busted*, Wall St. J., Dec. 5, 2006, at A18 ("[One] law firm filed a claim to one trust, saying Kananian had worked in a World War II shipyard and was exposed to insulation containing asbestos. It also filed a claim to another trust saying he had been a shipyard welder. A third claim, to another trust, said he'd unloaded asbestos off ships in Japan. And a fourth claim said that he'd worked with 'tools of asbestos' before the war. Meanwhile, a second law firm, Brayton Purcell, submitted two more claims to two further trusts, with still different stories. . . . [Brayton Purcell then] sued Lorillard Tobacco, this time claiming its client had become sick from smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s.").

Kananian acquired his cancer."[31] Emails and other documents from the plaintiff's attorneys also showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was "completely fabricated."[32] The *Wall Street Journal* editorialized that Judge Hanna's opinion should be "required reading for other judges" to assist in providing "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts."[33]

The situation is no different in New York where DaimlerChrysler Corporation (Chrysler), sought leave to renew its post-trial motions after discovering almost one year after a jury verdict was rendered that the plaintiff had made sworn admissions to five asbestos bankruptcy trusts certifying exposure to products made by Johns-Manville (brakes), Amatek, Celotex, Eagle-Picher and Combustion Engineering. At trial, plaintiff denied exposure to Amatek, Celotex, and Eagle-Picher products and mentioned only one category of Johns-Manville product (building material).[34] Chrysler argued that the verdict should be overturned and the case re-tried because the concealed exposure should have been considered by the trial court.

In a Maryland case, *Warfield v. AC&S, Inc.*,[35] defendants aggressively pursued discovery of trust claims. They were forced to file motions to compel, despite the fact that prior rulings made it clear that trust claims materials must be produced.[36] At a hearing on the matter, plaintiff's counsel explained that he had been slow in producing the trust materials because he disagreed with the Court's prior ruling, some two years previously, and went on to complain that

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[31] McCarty, *supra*, at B1.
[32] Daniel Fisher, *Double-Dippers*, Forbes, Sept. 4, 2006, at 136, 137.
[33] Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14.
[34] See, *D'Ulisse v. Amchem Products, Inc., et al.*, Index No. 113838104, Supreme Court, State of New York, Attachment G.
[35] No. 24X06000460, Consolidated Case No. 24X09000163, Jan. 11, 2011 Mesothelioma Trial Group (M 112).
[36] *See* Defendant Union Carbide's Emergency Motion for Sanctions and/or Related Relief and to Shorten Time for Response, filed Jan. 10, 2011, in *Warfield*, Case No. 24X06000460; *see also* April 14, 2009 transcript of hearing in *Smith*, Consolidated Case No. 24X08000004, at 65:8 – 77:10 (finding that bankruptcy forms and the information contained therein was "clearly" discoverable and relevant to the case).

the court had "opened Pandora's Box" by requiring their disclosure.[37] The reason for the counsel's reluctance to produce the trust materials became clear when the documents were produced shortly before trial—there were substantial and inexplicable discrepancies between the positions taken in court and before the trusts. Despite specific and explicit discovery requests, the plaintiff had failed to disclose nine trust claims. In addition, the exposure period alleged in the litigation was significantly and materially different from the exposure period alleged in the trust claims. In the tort system, Warfield claimed under oath that his he was exposed to asbestos between 1965 and the mid-1970's only. This time period focused liability on the solvent defendants in the case and conveniently avoided the application of a Maryland statutory damage cap that would apply to later exposures. Before Warfield's testimony limiting the time frame of his alleged exposure, he had submitted 8 of his 9 trust claims certifying exposure from 1947 to 1991, which if claimed in the tort suit would have triggered the statutory damage cap.[38]

In another Maryland case, "*Edwards*, the plaintiff had, prior to trial, failed to disclose whether or not he had filed any claims with bankruptcy trusts. In addition, as trial drew near, plaintiff amended his discovery responses to assert that the only asbestos-containing material to which he had been exposed was that of the only remaining solvent defendant."[39] Two weeks prior to trial, however, the plaintiff produced claims materials relating to trusts. "Again, there was a clear inconsistency in the alleged exposure. Significantly, most of the trust forms had been filed in 2008, before the initial discovery responses."[40]

In Virginia, Judge Thomas D. Horne described an asbestos case pending before him as the "worst deception" used in discovery that he had seen in his 22 years on the bench. In *James*

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[37] January 11, 2011 transcript of hearing in *Warfield*, at 66:5 – 109.8.
[38] *See* Sept. 9, 2011 Statement of James L. Stengel at 2011 WLNR 24791123.
[39] *Id.*
[40] *Id.*

L. Dunford v. Honeywell Corp., et al, No. CL-25113, Circuit Court County of Loudoun, three US automakers presented multiple examples of misrepresentations made in a case in which the plaintiff asserted that his illness was due to exposure only to friction products. It turned out, however, that the plaintiff had made numerous trust claims certifying exposure to products made by many of the traditional defendants and had even filed a separate tort suit against the traditional defendants. After hearing the evidence, Judge Horne dismissed the plaintiff's claim with prejudice finding it a fraud upon the Court.[41]

The examples above show that incidents of false claims and lack of necessary information are not isolated. Trust claims information sought by the FACT Act is not privileged nor is it work product. Submissions to the trusts are not prepared in anticipation of litigation nor are they private communications between an attorney and his client. They are claims for payment. The limited reporting requirement in the FACT Act does not require reporting medical information or confidential social security numbers—only the claimant's name, exposure history and basis for any payment from the trust. That information should be made available.

II. ASBESTOS LITIGATION IS A BIG BUSINESS IN WHICH OVERSIGHT AND TRANSPARENCY ARE NEEDED.

The asbestos litigation is the longest-running mass tort in U.S. history. And, it's not going away anytime soon. In 2011, a number of insurers substantially increased reserves for asbestos litigation.[42] According to the GAO Report, without oversight, trusts paid approximately $17.5 billion to 3.3 million claimants through 2010.[43] And currently, the trust system is funded with in excess of $36 billion.

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[41] See Transcript of Hearing on Motion for Sanctions, *James L. Dunford v. Honeywell Corp., et al*, No. CL-25113, Circuit Court County of Loudoun, December 10, 2003, Attachment G.

[42] Ben Berkowitz, *Travelers Latest to Add to Asbestos Reserves*, Ins. J., Oct. 19, 2011, *at* http://www.insurancejournal.com/news/national/2011/10/19/220721.htm.

[43] *See* GAO Report, *supra* at 3.

Seeking a share of the pie, plaintiffs' firms are advertising night and day on television and on the internet for clients to make trust claims and file tort suits. An online advertising study found "mesothelioma" to be the most expensive Google AdWord, with the phrase "asbestos law suits" ranked number three, and "asbestos law firm" ranked number nine.[44] The financial wherewithal of the trial bar to afford an unending stream of television advertisements and readily spend almost $100 every time someone clicks on a "mesothelioma" link on Google is proof that the asbestos litigation business is booming.

The history of abuse in the asbestos compensation system is long. It began with the onslaught of unimpaired claims which were curbed when the abuses of the mass screening facilities were discovered. This multi-billion dollar industry should be regulated starting with transparency so that we can begin to reconcile the tort and the trust systems to fairly compensate entitled claimants for their injuries while preserving assets for future claimants.

[44] *Search Engine Optimizer (SEO): What Are the Most Expensive Keywords in Adwords?* (2009), *available at* http://www.quora.com/Search-Engine-Optimization-SEO/What-are-the-most-expensive-keywords-in-AdWords.

The exhibits submitted with this statement are not printed in this hearing record but are on file with the Subcommittee.

Mr. COBLE. Thank you, Ms. Schell. You even beat the—you concluded before the red light illuminated, so you get a gold star for that.

We have an obvious New Orleans climate on the panel today. Professor Brown, you are now recognized for 5 minutes.

TESTIMONY OF S. TODD BROWN, PROFESSOR, SUNY BUFFALO LAW SCHOOL, BUFFALO, NY

Mr. BROWN. Thank you, Chairman Coble and Members of the Committee. I really appreciate the opportunity to come and speak in support of the FACT Act today.

I testify as an academic who studies mass torts and bankruptcy. I also speak from my own experience as a practicing bankruptcy lawyer. And in this experience the idea, the very idea that ensuring bankruptcy transparency would be in any way controversial is surprising. That is the default in bankruptcy, particularly with respect to the debtors' dealings with their creditors and the way that they settle claims. This makes sense. Most bankruptcies involve a limited fund where the value of claims asserted exceeds the assets available. Claimants are in competition for these limited assets, and experience shows that without transparency, repeat players and those they favor will enjoy undue recoveries at the expense of the claim pool.

There is nothing special here about asbestos trusts. They manage a limited fund created at the discretion of Congress to fulfill a policy established by Congress, the equitable compensation for comparable claims over time. Moreover, nothing, nothing in the FACT Act requires more information than thousands and thousands of creditors file in bankruptcy cases across the country every day.

Second, our experience shows that we cannot just defer to fiduciary duty standing alone to advance public policy. Some may take their roles more seriously than others, but those who sit idly by and collect paychecks face little risk for doing so. Moreover, in this context future claims representatives and trustees are never wholly independent. They owe their existing and future appointments to the goodwill of their nominal adversaries, leading attorneys advancing current claims. This dependency has a clear punch-pulling effect. This is why we do not allow potential adversaries to appoint a guardian ad litem. It is why creditors' committee and trustee appointments are today left to the United States Trustee. Yet here the one group that is not by definition able to monitor the representative in the case has that representative chosen by its adversaries and rubber-stamped by bankruptcy courts.

Even those fiduciaries who are vigilant have the deck stacked against them. The TDP design is dominated during the course of the bankruptcy by the asbestos claimants committee. Any significant modification of TDP terms requires approval of some of these same lawyers who now serve on the trust advisory committee. In most trusts any audit plan can only be put into effect with the consent of this same trust advisory committee.

The effects of this approach are readily apparent. First, the trust representations to the GAO about the results of their internal audits tell us far more than meets the eye. Every global compensation scheme that has been created by Congress, every global asbestos

compensation scheme of the last three decades has been plagued by what most of us would characterize as fraudulent claims, yet the trusts self-reported, among other things, that they have discovered no fraud, none. We can conclude one of two things from this. Either asbestos trusts are somehow magically different from every other grid and matrix compensation scheme in history, or the audits are not what they appear to be.

There is reason to believe that it is the latter. First, there are clear examples of claim filings that most of us would characterize as fraudulent, even if they might not qualify as fraudulent legally, as a legal term. Take the Kananian case. The lawyer responsible for that case acknowledged, and I quote, we overstate Mr. Kananian's exposure by indicating he was exposed as some type of shipyard worker, and then in parentheses in that same email to his partner, he was there one day to pick up his ship. Is this the kind of claim we want to have paid by trusts with limited funds at the expense of true victims who come later in time?

Or take the Garner case I referred to in my written statement. Four trusts accepted this claim and paid over $100,000 in spite of the fact that the sole medical evidence was a photo of an X-ray taken more than three decades earlier, and a doctor who said, well, maybe, possibly it was mesothelioma. Is this the kind of claim we want paid out of limited funds?

The faults of this system were laid bare in Silica MDL. Many of the claims that Judge Jack called manufactured in that case used the asbestos-screening approach and many of the same screening companies and lawyers. The Manville Trust tried to do something in the late 1990's about these type of claims and lost that battle, and yet suddenly trusts one by one adopted narrow policies to exclude these doctors and screening companies only after Judge Jack's opinion in Silica MDL.

Why then? If they did not know that such rampant claim manufacturing was taking place before that, why did they not know? If they did, how did Judge Jack's opinion change the rationale for ignoring it? It is because, I submit, the truth was laid bare publicly, and that is the great fear with the FACT Act. It tells us what those with a vested interest in secrecy have to lose with transparency.

Thank you for your time.

Mr. COBLE. Thank you, Mr. Brown, Professor Brown.

[The prepared statement of Mr. Brown follows:]

WRITTEN STATEMENT OF PROFESSOR S. TODD BROWN

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HEARING ON THE FURTHERING ASBESTOS CLAIMS TRANSPARENCY ACT OF 2012

HOUSE JUDICIARY COMMITTEE:
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

MAY 10, 2012

Chairman Coble, Ranking Member Cohen, and members of the committee, thank you for this opportunity to testify in support of H.R. 4369, the Furthering Asbestos Claims Transparency Act (the FACT Act) of 2012.

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

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

Introduction

As a matter of bankruptcy policy, the very idea that a bill intended to advance transparency would be in any way controversial is striking. If history teaches us anything about bankruptcy law and practice, it is that transparency and safeguarding the interests of absent parties go hand-in-hand. In 1929, for example,

the corruption that had become common under the Bankruptcy Act of 1898 came to a head when twelve bankruptcy attorneys in the Southern District of New York were indicted for theft of bankruptcy estate assets. The subsequent Donovan Report, which looked at bankruptcy administration in six cities, determined that, "fundamental defects in administration are not restricted to New York, but exist generally throughout the country."[1] This report recommended, among other things, greater uniformity in bankruptcy administration and emphasized the need for more empirical data and studies on bankruptcy administration. A full recitation of the history between the Donovan Report and the adoption of the Bankruptcy Code of 1978 is beyond the scope of my testimony today; it is sufficient to note that the modern emphasis on transparency and oversight in bankruptcy administration are grounded in our experience with practices that emerged without these safeguards.

The need for comparable transparency in the asbestos bankruptcy trust context is compelling. As the assets under trust control approach $40 billion – a considerable portion of which might remain available in the tort system in the absence of Section 524(g) – other defendants, many of whom were peripheral defendants until recently, find themselves exposed to far greater defense costs and tort liability. Early trusts were flooded with specious unimpaired claims, and though state courts and legislatures have taken steps to reign in the perceived abuses in asbestos litigation, new trusts continue to be flooded with unanticipated claim volumes. We know that dubious claims continue to slip through the cracks,

[1] *See* House Comm. on the Judiciary, Report on the Administration of Bankruptcy Estates, 71st Cong., 3d Sess. 3-4 (1931).

and the lack of communication between the trusts and state tort systems fuels concerns that some lawyers may be gaming the system to obtain unwarranted recoveries either in state court or from the trusts. The extent to which these complaints may reflect pervasive problems, however, remains uncertain in large part because trust operations are largely shielded from public scrutiny. These are significant policy questions, and the need to advance intelligent and informed debate on asbestos bankruptcy policy strongly favors adoption of the FACT Act.

I begin this discussion with a brief history of asbestos litigation and bankruptcy trusts. From there, I outline the current state of asbestos bankruptcy trust administration and its relationship to the tort system. I conclude with an analysis of the arguments for and against the disclosures required under the FACT Act.

A Brief History of Asbestos Litigation and Bankruptcy Trusts

Asbestos personal injury litigation – the largest and longest running mass tort litigation in history – may be viewed as progressing across distinct stages. Initially, asbestos litigation was unremarkable; a series of discrete cases brought on behalf of plaintiffs with both substantial histories of exposure to airborne asbestos fibers and the most severe forms of asbestos related disease. Given the difficulties associated with establishing a connection between asbestos disease and exposure to specific defendants' products, many of these early cases failed. Some courts adopted modifications to tort law and procedural rules in an effort to lower the barriers to compensation and reduce the transaction costs of litigation. These changes, and the discovery of evidence suggesting a conspiracy to conceal the risks associated with

asbestos exposure, dramatically altered the litigation exposure of first line asbestos defendants.[2]

By the early 1980's, it became clear that some of these first line asbestos defendants would not survive over the long term; leading to the first asbestos bankruptcies in 1982. Many plaintiffs' attorneys and commentators were particularly critical of the bankruptcy of Johns Manville, the most commonly named asbestos personal injury defendant at the time, but the bankruptcy court concluded that the inevitable alternative – liquidation – "would preclude just compensation of some present asbestos victims and all future asbestos claimants" in contravention of bankruptcy policy.[3] To preserve this value for the benefit of both current and future victims, the parties to the Manville bankruptcy established a groundbreaking solution: establishing and channeling all asbestos claims against Manville to a trust intended to process claims and compensate victims in a prompt, efficient and equitable manner over time.

Even as the Manville bankruptcy wound its way toward conclusion, a segment of the asbestos plaintiffs' bar recognized an opportunity to recruit and advance large volumes of "unimpaired claims"[4] through litigation-focused screenings. The unanticipated influx of these new claims quickly overwhelmed the

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[2] For the sake of brevity and clarity, I refer to the defendants who were most active in the asbestos industry and, accordingly, named most frequently in asbestos litigation at this early stage as "first line asbestos defendants."

[3] In re Johns-Manville Corp., 36 B.R. 727, 736 (Bankr. S.D.N.Y. 1984).

[4] Findley v. Trs. of the Manville Pers. Injury Settlement Trust (In re Joint E. & S. Dists. Asbestos Litig.), 237 F. Supp. 2d 297, 306 (E.D.N.Y. 2002)("A characterizing feature of the recent acceleration in asbestos litigation is the number of claims being filed by plaintiffs who are functionally unimpaired.").

Manville Trust,[5] taxed the resources and imagination of the state courts that struggled to manage the emerging "elephantine mass"[6] of asbestos claims, and "led to an unprecedented wave of asbestos bankruptcies."[7] Just as other first line defendants shouldered greater liability in state court following the Manville bankruptcy, second and third line defendants shouldered greater liability in state court when the remaining first line defendants left the tort system.[8] As the dominoes fell and the volume of new claims continued to rise, plaintiffs' lawyers searched for "other deep pockets"[9] in what one former plaintiffs' attorney called an "endless search for a solvent bystander."[10]

As this second era of asbestos litigation – an era dominated by unimpaired asbestos claims – reached full stride, Congress passed the 1994 amendments to the Bankruptcy Code, which included 11 U.S.C. §§ 524(g) and 524(h). Sparked by concerns over the validity of the trust-injunction mechanism employed in the Manville plan of reorganization, and the resulting effect of these concerns on future

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[5] *See* Stephen Labathon, *The Bitter Fight Over the Manville Trust*, N.Y. TIMES, July 8, 1990, at F1 (noting how the Manville Trust was effectively "looted" within two years after its inception); see also RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 75 (2007) ("The Manville trust proved to be a perilous institution . . . with large numbers of claims quickly overwhelming its initial capitalization.").

[6] Ortiz v. Fibreboard, 527 U.S. 815, 821 (1999).

[7] *See* Patrick Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 547 (2007).

[8] *See* NAGAREDA, *supra* note 5, at 167.

[9] *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 55 (2003).

[10] See James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 20-23 MEALEY'S LIT. REP. ASB. 19 (2006)(quoting Dickie Scruggs).

asbestos victims,[11] Section 524(h) amounted to a Congressional blessing of existing asbestos trusts, while Section 524(g) expressly authorized the growing number of companies facing enterprise-threatening asbestos liability to establish their own bankruptcy trusts.

At the same time, some leading plaintiffs' attorneys, defendants and insurers attempted to address the increasingly unmanageable asbestos claim volumes through global class action settlements under Rule 23 of the Federal Rules of Civil Procedure. In its 1996 opinion in the *Amchem* case, the Supreme Court rejected one such settlement under Rule 23(b)(3) on the grounds that the class could not satisfy the requirements of common issue predominance and adequacy of representation.[12] Three years later, in *Ortiz*, the Court likewise rejected a similar settlement under Rule 23(b)(1)(B).[13] In both cases, the Court stressed, among other things, the conflicts of interest inherent in any settlement involving current and future claims.

A small group of leading asbestos lawyers – including some of the key plaintiffs' lawyers behind the failed class action settlements – subsequently turned their attention to establishing global settlement plans under Section 524(g) that

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[11] The Manville Trust was funded, in part, by stock in Reorganized Manville. Lingering concerns about the validity of the trust-injunction mechanism weighed heavily on the value of this stock to the detriment of asbestos claimants seeking compensation from the trust. 140 Cong. Rec. S4521, S4523 (daily ed. Apr. 11, 1994) (statement of Sen. Brown) ("Without 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."); see also Elihu Inselbuch, *Some Key Issues in Asbestos Bankruptcies*, 44 S. TEX. L. REV. 1037, 1040 (2003) ("The enactment of Section 524(g) removed the uncertainty surrounding Johns-Manville and made it possible to transmute the equity value of that company into money so that claimants could be paid.").

[12] Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1996).

[13] Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

were substantively the same as those rejected by the Court in *Amchem* and *Ortiz*. Under the prepack asbestos bankruptcy model that emerged, a defendant could obtain peace from future asbestos litigation – usually without sacrificing much, if any, of equity's position in the company – in return for giving plaintiffs' counsel effective control over the design and operation of the resulting trust. Leading plaintiffs' lawyers thus obtained control of every critical aspect of these cases, including the appointment of the legal representative demanded under Section 524(g) and the parties who would be responsible for processing and paying claims going forward. The only parties likely to object to this arrangement – the insurers whose policies with defendants were to be the primary source of funding for most of these trusts – were frequently denied standing to appeal orders confirming the resulting plans due to the unique prudential standing rules applied to bankruptcy matters.[14] Where the class action settlement approach failed, efforts to establish comparable settlements under Section 524(g) have yielded an astounding 44 asbestos bankruptcy trust since 2000.[15]

Around the time that these asbestos bankruptcies were gaining traction, a number of news reports,[16] medical experts,[17] and legal experts[18] increasingly

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[14] I discussed the evolution of these rules and their application in asbestos bankruptcy cases in: S. Todd Brown, *Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy*, 59 BAYLOR L. REV. 569 (2007).

[15] Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts, United States Government Accountability Office, Sept. 2011 (noting that the number of asbestos personal injury trusts rose from 16 in 2000 to 60 in 2011)[hereinafter, "GAO Report"].

[16] *See, e.g.*, Eddie Curran, *Diagnosing for Dollars?*, MOBILE REGISTER, Apr. 4, 2004, at A1; Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, CLEVELAND PLAIN DEALER, Nov. 5, 2002, at 1; Roger Parloff, *The $ 200 Billion*

focused on evidence that the practices used to generate this "elephantine mass" of unimpaired claims were, at best, suspect. Relying upon this wealth of information – including data that, until recently, was voluntarily disclosed by the Manville Trust – Professor Lester Brickman published a series of articles that revealed the extent to which litigation screenings were flooding asbestos tort litigation and bankruptcy trusts with "specious claims."[19] And in 2005, following an extensive review of the litigation screening practices employed to develop a majority of the claims presented in the Silica MDL – practices largely borrowed from, and carried out by regular participants in, asbestos litigation screenings – Judge Janis Jack issued a detailed and scathing opinion that, among other things, aptly characterized the resulting claims as "manufactured for money."[20]

Miscarriage of Justice; Asbestos Lawyers Are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff - and Extracting Billions for Themselves, FORTUNE, Mar. 4, 2002; Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36.

[17] *See, e.g.*, David Egilman & Susanna Rankin Bohme, *Attorney-Directed Screenings Can Be Hazardous*, 45 AM. J. OF INDUS. MED. 305 (2004); Joseph N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843 (Aug. 2004); David Egilman, *Asbestos Screenings*, 42 AM. J. OF INDUS. MED. 163 (2002).

[18] *See, e.g.,* Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2003).

[19] Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833 (2005); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33 (2003); Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM & MARY ENVTL. L. & POL'Y. REV. 243 (2001).

[20] 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005)("[T]hese diagnoses were about litigation rather than health care. And yet this statement, while true, overestimates the motives of the people who engineered them. The word 'litigation' implies (or should imply) the search for truth and the quest for justice. But it is apparent that truth and justice had very little to do with these diagnoses--otherwise more effort

Asbestos Bankruptcies Today

These combined events bring asbestos litigation and bankruptcy to an important crossroads. In the aftermath of the Silica MDL and a variety of state reforms intended to correct the perceived abuses of repeat players in asbestos litigation, unimpaired claim filings – which once accounted for more than 9 out of every 10 new asbestos claims – have fallen dramatically and remain well below their peak.[21] At the same time, "the number of asbestos personal injury trusts increased from 16 trusts with a combined total of $4.2 billion in assets in 2000 to 60 with a combined total of over $36.8 billion in assets in 2011."[22] Collectively, these factors suggest that we should be entering an era in which asbestos trusts are finally able to predict future claiming patterns effectively and the victims of asbestos personal injury have access to full and speedy recoveries for years to come.

Unfortunately, claim filings continue to exceed projections and trust assets continue to be depleted rapidly, so much so that it appears unlikely that any of the trusts operating today "will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner."[23] In its 2010 report on asbestos bankruptcy trusts, RAND Corporation found that only one of the 29 trust-claim-class combinations it analyzed, the T.H.

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would have been devoted to ensuring they were accurate. Instead, these diagnoses were driven by neither health nor justice: they were manufactured for money.").

[21] *See* Snapshot or Recent Trends in Asbestos Litigation, NERA Economic Consulting, July 21, 2011.

[22] GAO Report, *supra* note 15, at 3.

[23] 11 U.S.C. § 524(g)(2)(B)(ii)(V).

Agriculture & Nutrition Trust (THAN Trust), applied a 100% payment percentage,[24] and that trust had not paid any claims through 2008.[25] Indeed, claims against the then newly established THAN Trust exceeded projections so quickly that it was forced to reduce its payment percentage to a mere 30% in 2011.[26] Another trust that previously applied a 100% payment percentage, the Shook & Fletcher Asbestos Settlement Trust, likewise reduced its payment percentage to 70% on March 1, 2012.[27] Recent adjustments to the payment percentage in other trusts reflect a similar pattern:[28]

- The C. E. Thurston & Sons Asbestos Trust *increased* its payment percentage from 40% to 80% in January 2011, only to suspend new offers altogether in January 2012 after experiencing "claims filings significantly in excess of levels projected" following the adjustment.[29]
- In November 2011, the NGC Bodily Injury Trust, noting that filings from 2007 through October 2011 were 308% higher than projected, reduced the payment percentage to 18%. The trust previously reduced the payment percentage from 55.6% to 41% in July 2011.[30]

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

[25] Lloyd Dixon, Geoffrey McGovern & Amy Coombe, ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 36-38 (2010) (range from 1.1% to 100%, with a median payment percentage of approximately 25%).

[26] http://www.thanasbestostrust.com/Files/20110321_THAN_Payment_Percentage_Notice.PDF.

[27] http://www.mfrclaims.com/shook_PP.pdf.

[28] This survey is not exhaustive; it reflects only the payment percentage adjustments for some of the trusts that I follow regularly in the course of my research.

[29] http://www.claimsres.com/documents/CET/Notice%20of%20Offer%20Suspension%20-%20January%202012.pdf.

[30] https://www.ngcbitrust.org//.

- The Babcock & Wilcox Asbestos PI Trust reduced its payment percentage to 11.9%, or roughly one-third of the payment percentage in place in July 2009.[31]
- The payment percentage for the United States Gypsum Asbestos Personal Injury Settlement Trust, which was reduced from 45% to 35% in April 2009, was further reduced to 30% in January of last year.[32]
- The Celotex Asbestos Settlement Trust reduced its payment percentage from 14.1% to 9.4%.[33]
- Citing an "unanticipated significant increase in claim filings," the UNR Asbestos-Disease Claims Trust reduced its payment percentage to 0.82% in March 2011.[34]

What accounts for this continuing pattern? If, as we are told, the unimpaired claims that once dominated asbestos dockets are no longer recruited through screening mills of the sort exposed in the Silica MDL, how are we to account for the fact that even recently established trusts are overwhelmed with tens of thousands of new claims from parties who never pursued them or even suggested that they had a basis for pursuing them in the tort system? Are we seeing old claims recycled for new bankruptcy trusts, or have we seen a dramatic shift in recruiting tactics to generate far more cancer claims? If the former, why have so many named new defendants years after the statute of limitations should have run? If we are simply seeing far more cancer claims than in the past, why are we only now seeing so many new filings when asbestos-related cancer rates have been steady or declining?

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[31] http://www.bwasbestostrust.com/files/B%20W%20Payment%20Percentage%20Notices%20to%20claimants%20counsel%20and%20pro%20se%20claimants%20(P0224314).PDF.

[32] http://www.usgasbestostrust.com/files/USG%20TAC_FCR%20Consent%20letter%20on%20payment%20percentage%201_06_11%20P0191773.PDF.

[33] http://www.celotextrust.com/files/Celotex%20Pmt%20Percentage%20Change%20Letter%2012_20_2010.pdf.

[34] http://www.cpf-inc.com/upload/temp/UNRPaymentPercentageDecreaseMarch2011.pdf.

The answers to these questions are exceptionally difficult to establish with certainty given the opacity of trust submission and payment data today. Asbestos trusts aggressively contest efforts by third parties to obtain information that may allow them evaluate and identify filing trends, even though this information is undoubtedly useful in designing new trusts so that they avoid the rampant oversubscription and unduly optimistic projections that have persistently plagued their predecessors. It remains unclear how often, if at all, individual trusts share information that may allow them to identify inconsistent factual representations, and the current framework allows lawyers to avoid disclosure of trust submissions altogether by delaying filing.[35]

What we do know notwithstanding this veneer of secrecy is troubling. In addition to financial information showing that claims continue to exceed projections, anecdotal reports suggest that trusts continue to pay specious claims. In the well-publicized *Kananian v. Lorillard Tobacco Company*[36] case, for example, one plaintiffs' firm apparently attempted to exploit the secrecy of trust submissions to make factual representations under penalty of perjury that not only conflicted with each other but also with the plaintiff's representations in the state court proceedings.[37] Similar discrepancies between factual representations in state court

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[35] LLOYD DIXON & GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION (2011).

[36] Order & Opinion, Case No. CV 442750 (Ohio Ct. Com. Pl Cuyahoga Cty., Jan. 18, 2007).

[37] *Id.* at 5-6.

and on claims submitted under penalty of perjury to asbestos trusts have been reported.[38]

In another matter, the daughter of a stomach cancer victim who died in 1966 obtained more than $130,000.00 from four bankruptcy trusts beginning in 2003.[39] Setting aside the fact that the claim was first brought nearly four decades after her father's death,[40] this case presents a number of questions about settlement practices at some trusts. First, it was unclear whether Ms. Garner was the appropriate representative of her father's estate.[41] Second, there was no medical diagnosis of mesothelioma, nor could there be given the enormous passage of time since his death; the only medical evidence supporting the claim was a speculative evaluation based on a photo of an X-ray.[42] Third, although the Manville arbitrators rejected the

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[38] Written Statement of James L. Stengel, Esq., Hearing on Asbestos Litigation Fraud and Abuse, House Judiciary Committee, Sept. 9, 2011, at 17-18 (discussing inconsistencies in factual representations in cases litigated in Baltimore).

[39] *See Garner v. DII Industries, LLC Asbestos Trust*, No. 08-06191 (W.D.N.Y. Apr. 25, 2008)(Complaint and exhibits including correspondence with bankruptcy trust administrators and checks from the Manville, Celotex, and Eagle-Picher trusts totaling $131,426.00)[hereinafter *Garner Complaint*]. The H.K. Porter trust also offered a settlement of $40,000.00 to Ms. Garner. *See Garner v. DII Industries, LLC Asbestos Trust*, No. 08-06191 (W.D.N.Y. Sep. 29, 2008)[hereinafter *Garner Plaintiff's Response*].

[40] *See Garner v. DII Industries, LLC Asbestos Trust*, No. 08-06191 (W.D.N.Y. Aug. 26, 2009)(Brief in support of defendant's motion to dismiss highlighting numerous statute of limitations issues).

[41] *See Garner v. DII Industries, LLC Asbestos Trust*, No. 08-06191 (W.D.N.Y. Oct. 17, 2008)(order concluding that Ms. Garner had not established her power to sue on behalf of her father's estate). Indeed, it remains unclear how Ms. Garner, as opposed to her mother (who was still living) or someone else, was the proper estate representative, and it does not appear that any of the trusts questioned her authority to represent her father's estate.

[42] *See Garner Plaintiff's Response*, *supra* note 39 (noting physician's report that it was "quite possible" that Ms. Garner's father had mesothelioma and Manville Trust arbitrator's initial rejection of this statement as speculative). Indeed, the doctor

claim three times, it was finally approved by an "extraordinary claims panel", which approved a payment – in spite of acknowledging its weaknesses – far in excess of the scheduled value for mesothelioma claims.[43]

It remains difficult to evaluate the extent to which these examples are representative of the claim submission, review and payment practices across trusts precisely because the trusts have become so opaque. Our collective experience in asbestos litigation and bankruptcy trust administration, however, strongly suggests that the trend toward less transparency will create opportunities for manipulation and abuse. Some trusts may be extremely vigilant in reviewing claims, and others appear to be far less so. If we are to have a system that holds all trusts to the policy objectives of Section 524(g), however, greater transparency is essential.

Asbestos Bankruptcy Trusts and Transparency

Transparency has been a critical component of reforms aimed at unwinding and preventing abuse; allowing creditors, the United States Trustee, courts, other parties in interest and, ultimately, Congress to identify and address these shortcomings and preserve the integrity of the bankruptcy process. The absence of comparable transparency in asbestos bankruptcy proceedings and trust

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involved also noted the poor quality of the photograph he was reviewing in the next sentence, and the plaintiff acknowledged this fact in her pleading. *Id.* In short, it is unimaginable that this "evidence" would have been remotely sufficient to satisfy medical and scientific standards in civil litigation, and it is unclear how it was sufficient under the applicable trust distribution procedures.

[43] *See Garner Complaint, supra* note 39 (Manville extraordinary claim panel decision); *Garner Plaintiff's Response, supra* note 39 (noting that the $75,000.00 received from Manville far exceeds the scheduled amount).

administration necessarily raises concerns about whether these funds are, in practice, administered in a manner consistent with the objectives of Section 524(g).

The question, then, is whether there is some unique consideration with respect to asbestos personal injury trusts that justifies the abandonment of this policy favoring transparency. This section addresses potential justifications for abandoning the bankruptcy preference for transparency.

A. The FACT Act is an Appropriate Exercise of Legislative Authority.

The vision of asbestos bankruptcy trusts as beyond bankruptcy oversight conflates and thereby confuses the means of organizing asbestos trusts with their function in the asbestos bankruptcy process. Any trust established to fulfill the objectives of Section 524(g), just like a reorganized debtor incorporated as a new entity under the terms of a plan, will be organized under state law. But this necessity is merely a product of the fact that the specific steps of corporate or trust formation are left to state law; it does not obviate the need for these entities to comply with their obligations under the plan, the Bankruptcy Code or other applicable federal law.[44]

The Bankruptcy Code's recognition of the distinction between state law organization and the obligations that arise under federal bankruptcy law is consistent with even the most restrictive conception of the Bankruptcy Power. Although the precise reach of this power remains poorly defined, it is well settled that it applies to questions concerning the restructuring of a debtor's relations with

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

its creditors.[45] When trusts are established under Section 524(g), they assign critical aspects of this power to private entities going forward, but this assignment does not strip Congress of its power to regulate these entities to ensure that they are acting in a manner consistent with the objectives they are established to advance.

B. The FACT Act is Consistent With Disclosure Obligations in Bankruptcy.

The characterization of trust claim submissions as "settlement negotiations" that should be confidential stretches credulity when contrasted with the general disclosure obligations in bankruptcy.

Filing a claim form with a trust – just like the filing of a complaint in civil litigation[46] or a proof of claim in bankruptcy – is the assertion of a legal right and requires representations under penalty of perjury. Debtors provide information about their creditors' claims and payments made to their creditors in the year preceding the bankruptcy filing under Section 521. Official Form B10 (the proof of claim) requires creditors to disclose their names, addresses, email addresses, telephone numbers, the legal and factual foundations for their claims, and "copies of any documents that support the claim[s]" – including previously non-public documents – and other personal information. Although debtors and asbestos plaintiffs have structured asbestos bankruptcy cases to avoid proof of claim filings – apparently to avoid potential objections to individual asbestos claims under Section

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

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

502 of the Bankruptcy Code[47] – this information is readily produced by most creditors in bankruptcy.

If negotiations take place thereafter, the various offers and counter-offers are generally entitled to confidential treatment in litigation and bankruptcy, but final settlement terms must be disclosed. Private settlements between the estate and a creditor require court approval, after full disclosure of their terms and providing parties in interest notice and the opportunity to be heard.[48] This makes sense in a traditional bankruptcy case, where multiple creditors are most often asserting claims against an estate with insufficient funds to pay all claims in full. If the debtor in possession or trustee is too generous in accepting and assigning value to competing claims, the assets available to compensate the rest of the claim pool are necessarily reduced. In the absence of this transparency, powerful repeat players could readily distort the process, walk away with distributions far beyond their statutory entitlement, and leave the rest of the claim pool with little or no recovery.

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

[48] Fed. R. Bankr. P. 9019(a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustee as provided in Rule 2002 and to any other entity as the court may direct."). The policy behind Bankruptcy Rule 9019 is to prevent the debtor from entering into secret agreements and provide interested parties the ability to review the proposed settlement and object. Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452 (2d Cir. 2007); In re Masters, Inc., 141 B.R. 13, 16 (Bankr. E.D.N.Y. 1992) ("The clear purpose of Rule 9019 is to prevent the making of concealed agreements which are unknown to the creditors and unevaluated by the court.").

Creditors lose the potential for secret settlements in bankruptcy, but the trade off is that they are protected against secret agreements and manipulation by other creditors. These risks, as seen throughout the history of asbestos bankruptcies, is likewise present with respect to claims paid with the limited funds controlled by bankruptcy trusts.

C. The FACT Act is Necessary and Cost-Effective.

Even modest mandatory disclosure requirements, such as those found in the FACT Act, will inevitably draw complaints that they are unnecessary and a waste of resources. In the case of asbestos bankruptcy trusts, after all, trustees and future claimants representatives have fiduciary duties to preserve trust assets for the benefit of claimants. Moreover, nearly all of the trust distribution procedures covering active asbestos bankruptcy trusts incorporate some form of authorization for claim audits,[49] though most of these provisions require the advance consent of the trust advisory committee (TAC),[50] to verify that the claims submitted are not fraudulent and otherwise comply with the terms of the TDP. Finally, trust officials frequently note that they will comply with a valid subpoena demanding production of individual claimant information. Thus, it may be argued that the FACT Act will not protect trust assets or allow defendants to obtain relevant trust information any more than the current framework. I will address each of these concerns in turn.

[49] GAO Report, *supra* note 15, at 22.

[50] As noted in the GAO Report and the 2010 RAND Report, TAC's represent the interest of current claimants and tend to be comprised of leading plaintiffs' lawyers.

1. Fiduciary Duties of Trustees and Future Claimants Representatives.

During a typical asbestos bankruptcy case, the leading plaintiffs' lawyers will enjoy "largely unchecked control over key settlement terms and the selection of critical players in the process, including the appointment of the future claimants' legal representative and certain of the debtors' counsel."[51] The Bankruptcy Code does not provide direct guidance on the criteria for appointing a claimants' representative, and "Courts that have considered the question have focused more on how their different options may delay confirmation than which of these options will best protect future claimants."[52] The work performed by futures representatives during the case or post-confirmation is not supervised by the court or otherwise subjected to scrutiny. Indeed, "bankruptcy plans routinely shield legal representatives from liability to future claimants for all but the most egregious misconduct."[53]

In sum, lawyers for current claimants and debtors have strong incentives to appoint "a weak futures representative,"[54] and those who are appointed are well compensated and face little risk if they are, in fact, poor representatives of future claimants' interests. Thus, as one commentator noted, "As an institution for the

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[51] Brown, *supra* note 47, at 862, 899 ("the prevailing practice in recent years has been for courts to appoint the representative that is hand-picked by counsel for current claimants and the debtor—the very parties who stand to lose the most if a strong, independent representative is appointed").

[52] *Id.* at 898.

[53] *Id.* at 899.

[54] Francis E. McGovern, *Asbestos Legislation II: Section 524(g) without Bankruptcy*, 31 PEPP. L. REV. 233, 248 (2004) ("The selection of the futures representative is problematic because having a weak futures representative is in the interests of both the debtor and the current claimants.").

representation and protection of future claimants, the FCR device is underinclusive. Its use suggests not so much a concern for otherwise unrepresented claimants, but instead a need to provide due process cover in order to bind future claimants to a reorganization plan."[55]

The legal representative who is so appointed during the bankruptcy case most often serves in the same role in the resulting asbestos bankruptcy trust. Here, too, the future claimants' representative "has principals only as a conceptual matter"[56] both as a result of the protections against liability provided in the reorganization plan and the limited public information available to individual claimants. Indeed, given the secrecy of trust operations today, it is implausible that even a representative who is grossly negligent or actively colludes with counsel to loot the trust will be discovered and held accountable.

Moreover, once Trustees and future claimants' representatives are in place, TDP terms that govern distributions have already been finalized. TDPs provide the plaintiffs' lawyers who sit on trust advisory committees with veto power over key decisions – including any proposed amendments to TDP standards and criteria and proposed audit plans – that may effectively undermine the efforts of even the most diligent trustee or future claimants representative. Indeed, the Manville Trust's experience with its efforts to audit claims in the late 1990's and the stern rebuke it

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[55] Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 64 (2000).

[56] *Id.*, at 60 ("The terms and quality of the FCR's representation are not subject to oversight by her ostensible 'clients.'").

received as a result of this effort,[57] suggests that fiduciaries that take their duties too seriously will find more resistance than support for their efforts.

This may also explain why, in spite of the warnings concerning the legitimacy of claims generated in asbestos litigation screenings, the trusts' knowledge that a large percentage of claims were generated by them, and the involvement of numerous repeat players – including trustees, future claimants representatives, and claim processors – whose roles might suggest a duty to be proactive in derailing these practices, several thousand claims that were "manufactured" through the practices criticized by Judge Jack in the Silica MDL were accepted and paid by asbestos bankruptcy trusts for more than a decade. Only *after* Judge Jack's indictment of these practices did the trusts take steps to blacklist the doctors and screening companies involved. And notwithstanding these blacklists, the available evidence does not suggest that the institutional weaknesses that allowed litigation screenings to drain trust assets over such an extended period of time have been resolved.

2. Defendant Access to Information and Efficiency.

Although defendants may be able to obtain trust claim forms plaintiffs filed prior to the close of discovery, the current discovery-centered model is both inefficient and subject to manipulation. To date, many jurisdictions do not require

[57] Brickman, *supra* note 9, at 128-37 (discussing the Manville Trust audit, mobilization of the plaintiffs' bar against the audit, the resulting litigation and rebuke from the district court). Professor Brickman also suggests that this failure emboldened lawyers and screening companies, and thus contributed to the surge in specious claim filings against bankruptcy trusts in the early part of the last decade. *Id.*, at 135.

plaintiffs to file claims with trusts prior to the close of discovery, which creates opportunities for firms to delay filings and thereby defeat efforts to discover inconsistent factual representations made to trusts. Even if claims have been filed prior to the close of discovery, defendants must either predict where they were filed and submit a subpoena to each trust individually or blanket each trust with a subpoena.[58] After receiving a subpoena, a trust must devote time to determining whether the plaintiff submitted a claim and, in most cases, will then contact the filing firm for instructions.

As one might expect, this approach to discovering relevant bankruptcy trust claim submissions leaves trusts responding to many inquiries concerning claims that have not been submitted. Although the volume of such unnecessary claim inquiries is not publicly disclosed, the GAO Report noted that at least one trust's annual reports include plaintiff names and payments precisely to avoid these costs.[59] Many other trusts, however, take the position that their TDP's – either as a result of terms put in place prior to confirmation of the relevant bankruptcy plan or as part of post-confirmation efforts to thwart discovery – do not allow them to make such disclosures.

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[58] My understanding is that defendants target trust inquiries according to their understanding of the plaintiff's work history, but this approach assumes that there have not been any of the "mistakes" of the sort discovered in *Kananian*.

[59] GAO Report, *supra* note 15, at 25 ("Of the annual reports we reviewed, one trust reported information on the amount paid to each individual and listed these individuals' names. According to officials from this trust, they included individual's names to reduce the number of external requests for claimant payment information and, therefore, reduce the trust's operating expenses associated with addressing such requests.").

As we have seen in asbestos litigation and elsewhere, the expectation of secrecy encourages the rapid development of claim recruiting and development practices that exploit weaknesses in the system. Although we cannot be certain how far the FACT Act might have gone toward deterring or uncovering the claim patterns that depleted trust assets so rapidly through the 1990's and early 2000's, it is clear that, without such requirements, those who were inclined to manipulate the system were largely effective at doing so without significant risk of discovery. Avoiding the modest costs associated with the going forward disclosures required by the FACT Act are, at best, penny-wise but pound-foolish. At worst, rejecting the effort to shine a light on asbestos trust operations may not even be penny-wise.

Conclusion

In 1929, revelations of serious abuses in the administration of bankruptcy cases in the Southern District of New York ultimately led to the investigations that formed the basis for the Donovan Report. Then, as now, supporters of the *status quo* opined that these glimpses of institutional failures were isolated and anecdotal – there was no empirical evidence of widespread corruption, fraud or other abuse across other jurisdictions. Then, as now, it may have been convenient to assume that further inquiry would prove to be a fruitless waste of resources; and the underlying risk was that the inquiry would prove these failures to be pervasive and demand far-reaching change. The risk of preserving the secrecy that prevails today is likewise the same as it was then: the further erosion of the integrity of the bankruptcy process at the expense of absent and less influential stakeholders.

Our predecessors had the courage and resolve to look behind the curtain, and the bankruptcy process has benefited greatly for it. The FACT Act continues this tradition and, if adopted, will reinforce our nation's and this esteemed body's commitment to preserving the integrity of the bankruptcy process.

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

Mr. COBLE. Mr. Siegel.

Mr. SIEGEL. Thank you, Chairman——

Mr. COBLE. Strike that, Mr. Siegel. We have been joined by the distinguished gentleman from North Carolina Mr. Watt.

Good to have you with us, Mel.

Mr. WATT. Thank you.

Mr. COBLE. Mr. Siegel, you are recognized for 5 minutes.

TESTIMONY OF CHARLES S. SIEGEL, PARTNER, WATERS & KRAUS LLP, DALLAS, TX

Mr. SIEGEL. Thank you, Chairman Coble, and I want to thank the Subcommittee for the opportunity to testify today.

I am a partner in Waters & Kraus. For 25 years I have represented families who have been tragically affected by asbestos disease, and I am proud to do that.

The way I see this is as simply a continuation of what I have seen for 25 years. The asbestos industry for decades waged a war first to keep the hazards of asbestos secret, and then to immunize themselves from liability in any way possible, and this is just the latest effort in that campaign.

The real problem we have here is that 10,000 people continue to die every year in the United States from asbestos disease, and I suggest respectfully that if we are going to hold congressional hearings, that perhaps that is what we ought to be looking at.

We have to remember that when we talk about asbestos plaintiffs in the abstract, we are actually talking about real people, and I just want to use one example of clients my firm represents from just outside your district, Chairman, they live in Lincolnton, the Mattox family. Evelyn Mattox is the widow of William Mattox, who was exposed to asbestos while serving his country in the Navy and later as an electrician at Duke Power. He died at age 59 of mesothelioma, and I guess Ms. Mattox had the temerity to file a claim for that for compensation.

Why do we have asbestos claims? We have them because there was fault. State judges and juries have consistently heard evidence of how corporations hid the dangers of asbestos and knowingly exposed their workers and their families to a substance that could kill them. A corporate official for Bendix, for example, said, if you have enjoyed a good career working with asbestos, why not die from it? There has got to be some cause for death, why not die from it?

Now, you know, I think that Ms. Mattox, a widow at 59, would find the talk of transparency ironic. She could have used, he could have used, Mr. Mattox could have used some transparency about the hazards of asbestos while he was being exposed to it. There wasn't any of that. But, you know, this corporate conduct and the vast legacy of death that ensued has resulted in decades of litigation. It should be emphasized that most of that litigation occurs and has always occurred in State court, and it is dwindling.

In 1994, Congress amended the Bankruptcy Code, as we know, to create section 524(g) to address asbestos-related bankruptcies. This resolution, 4369, would place new burdens on the trusts that have been created pursuant to that statute, but would only serve

solvent defendants' interest in denying and delaying fair compensation to victims.

First of all, there has been a suggestion that asbestos victims are double-dipping. I think Ms. Mattox would find that offensive. She is not double-dipping. She is seeking compensation from every company who manufactured an asbestos product to which her husband was exposed.

The double-dipping charge, I think, reflects a basic fundamental misunderstanding of the way the bankruptcy system operates, the way State court lawsuits operate. Claimants do not recover the full value of their claims from bankruptcy trusts. Most of these trusts pay pennies on the dollar for their scheduled claim. They may list the value of a mesothelioma claim at $100,000, but the typical actual payment may be $15- or $20,000. Many trusts pay less than 1 cent on the dollar for the scheduled claim. Every claimant, in order to receive even the most small claim from the smallest trust, must establish entitlement to payment from that trust according to that trust's procedures.

This bill is designed simply to slow down the payment of claims and deny compensation entirely in some instances. Mesothelioma victims, as I am sure the Members of the Subcommittee know, only have a few months to live. Time is the one thing they don't have. Defendants argue that, you know, they are being unfairly disadvantaged because they can't get individual information from the trusts, but State court discovery rules always allow the discovery of relevant information. We are in the process of looking at the facts of each of the claims that Ms. Schell has talked about in her written statement, and we will be pleased to submit the details of those to the Subcommittee. I think the Members of the Subcommittee will see that the story is a little bit different.

The last thing I would like to talk about is this contention about transparency and how no one could be opposed to that. It is important to realize that every single defendant in asbestos litigation, including Ms. Schell's clients, absolutely insist on complete confidentiality when they address and settle claims in the tort system. Ms. Schell would be horrified if her clients—and she would never let her clients pay us a dime without an absolute ironclad confidentiality guarantee. That is an absolute condition of the way they participate in the tort system, but they are asking the opposite of the trusts.

Thank you.

Mr. COBLE. Thank you, Mr. Siegel.

[The prepared statement of Mr. Siegel follows:]

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Hearing: May 10, 2012
H.R. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012"

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

I would like to thank the Subcommittee for the opportunity to testify on H.R. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012". My name is Charles Siegel. I live in Dallas and I am a lifelong resident of Texas. I am a partner in the firm of Waters and Kraus, and for 25 years I have had the privilege of representing persons seriously injured by exposure to asbestos, or their survivors.

The asbestos industry has for decades waged a campaign to minimize their asbestos liability in every way possible, with the ultimate goal of avoiding accountability and decreasing compensation to victims. HR 4369, the so-called "Furthering Asbestos Claim Transparency (FACT) Act of 2012," is just the latest effort in this campaign and must be opposed.

The bill represents a new attempt by the asbestos industry to delay and deny compensation to asbestos victims and to cripple the operation of the asbestos trusts that have been established for the sole purpose of compensating victims and their families. The bill is premised on the notion that a lack of transparency in the trust system permits victims to obtain more compensation than they should receive. This is completely incorrect. First, the trust system is already transparent. The claim values for each disease are publicly available and the trusts publicly report the value of the claims paid on an annual basis. Second, a fundamental principle of American law is that a person can recover from every defendant who substantially contributed to their injury. Thus, when an asbestos victim recovers from each defendant whose product contributed to his disease, that victim is in no way "double-dipping;" rather he is recovering a portion of his damages from each of the corporations that harmed him. In the case of asbestos litigation, some of those defendants will be responsible through the tort system and others will be responsible through the operation of their trust. Third, it is important to distinguish between the openness of the jury system and the confidentiality of settlements. Asbestos defendants in the tort system typically demand confidentiality of settlements because they don't want other victims to learn how much they've paid, yet these same defendants are now trying to force disclosure of a victim's settlement information with the trusts. Further, defendants are currently able to learn about all information relevant to a claim against it, including information about a victim's trust claims, under state rules of discovery.

The real problem with asbestos is that nearly 10,000 people are still dying every year of asbestos disease and the product is still legal in the United States. I respectfully request that Congress focus on solving the public health crisis caused by asbestos exposure rather than spending limited Congressional resources looking at problems that don't actually exist and that are being proposed by asbestos companies, the very industry that caused the crisis.

The Tragedy of Asbestos Disease

I am proud to represent people such as Evelyn Mattox, Patricia Mattox and Sonya Mattox, the widow and daughters of William Mattox. Evelyn Mattox lives in Lincolnton, North Carolina, just outside Chairman Coble's district. Mr. Mattox proudly served in the U.S. Navy and was an electrician by trade and regularly used to help out his neighbors with everything from electrical work to money to simply helping them cut their lawns. He was a quiet man in general but very large in stature until his asbestos cancer took hold. Mr. Mattox died at 59 of

mesothelioma. He was exposed to asbestos during his time in the Navy and then later working at Duke Power. When my law partner went to visit the family, Mrs. Mattox surprised him with a home-cooked meal. His daughters said that was the first time their mother had prepared a meal since her husband passed. He died in his home surrounded by his wife and children. Unable to breathe, he simply held on to his youngest daughter's hand and whispered "keep an eye on the family for me."

Another client we were proud to represent was Mark Smith, from Chairman Lamar Smith's district. Mr. Smith lived in San Antonio. He was exposed to asbestos through his father, who worked as a contactor installing siding and roofing materials that contained asbestos. Mr. Smith's father would come home with asbestos on his clothes that young Mark would breathe. Mark Smith died at the age of 50, leaving a wife and a twelve-year-old son.

Our firm also represented Terry McCann. Terry was a gold medalist in wrestling at the Rome Olympics in 1960. He served on the boards of numerous charities and sports clubs, and belonged to five Halls of Fame. He was an Executive Director of Toastmasters International. He died at age 72 of mesothelioma.

Tommie Williams was another of our clients. He grew up the son of a Mississippi sharecropper. He lost the use of one hand as a child; after an accident, his parents couldn't afford to take him to a doctor. Nonetheless, he moved to Los Angeles and worked for decades in the shipyards there despite only having the use of one hand. He died of mesothelioma at the age of 62.

Barbara Navarro died of mesothelioma at 55. She was exposed to asbestos as a child, while volunteering at church projects.

Richard Ontiveros died of mesothelioma at 32. His only exposure was through his father, who would come home with asbestos dust on his work clothes; as a baby, Ontiveros breathed in this dust.

Yet another of our clients, Katherine Lopez, is dying of mesothelioma at the age of 49. She has a few months left to live.

These stories are very poignant, but they are merely a few of many hundreds of thousands of similar stories. Asbestos is widely agreed to be the greatest public health disaster of the 20th century, and it continues unabated in the 21st century. Hundreds of thousands, perhaps millions, of persons have died of asbestosis, lung cancer and mesothelioma in the last several decades. Even today, seven or eight persons continue to die of mesothelioma every day in the United States, and these deaths are projected to continue at a slowly decreasing rate for 40 to 50 more years. Professor Lester Brickman, a paid consultant for asbestos companies, has described mesothelioma as a "particularly virulent cancer, which is gruesome to behold and always results in death." Many other victims also continue to die and will continue to die of lung cancer and other cancers.

According to the National Institute for Occupational Safety and Health, the leading

occupations for deaths due to asbestos exposures are plumbers, pipefitters and steamfitters.[1] Many were exposed while serving in the U.S. military. Others were exposed as a result of working in an industry in which asbestos was utilized. Examples of such industries are construction, shipbuilding, asbestos mining and processing, chemical manufacturing and metalworking. Because the latency period between the first exposure to asbestos and clinical disease is typically 20 to 40 years, many are not yet identified.

There is an international consensus that asbestos causes mesothelioma (a cancer of the lining of the lung), lung cancer, and asbestosis, and is associated with an increased risk of other cancers, including stomach, colon, and esophageal cancer.[2] Victims of mesothelioma typically only live for 4 to 18 months after their diagnosis.[3] The Occupational Safety and Health Administration ("OSHA") first regulated asbestos exposures in 1972.[4] EPA adopted a regulation, later overturned in Court, banning asbestos use. Almost two decades ago, OSHA observed that "it was aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." 51 Fed. Reg. 22,615 (1986).

The states with the highest number of mesothelioma cancer victims (> 500) between 1999-2005 are: California, Pennsylvania, Florida, New Jersey, New York, Texas, Illinois, Virginia, Ohio, Massachusetts, Washington, and Michigan.[5] During 1999-2005 the national rate of mesothelioma deaths was about 11.5 per million population per year, but more than half the states had higher rates. The states with the highest rate of mesothelioma deaths are: Maine, New Hampshire, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, West Virginia, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Louisiana, Wisconsin, Minnesota, Utah, Wyoming, Montana, Idaho, Alaska, Washington, and Oregon.[6] In addition, asbestosis was a contributing cause in over 1400 deaths between 2000-2005, a sharp rise from the rate of death in 1998.[7]

The Asbestos Tragedy was Caused by Corporate Misconduct

We are here because these deaths have a cause. The courts and Congress have wrestled with asbestos litigation for decades because litigation was necessary, and litigation was necessary because there was fault. Juries and judges hearing these cases in state courts around the country for the last 40 years have consistently heard evidence of corporate concealment of the dangers of asbestos exposure. A corporate official for Bendix Co., for example, wrote to Johns-Manville in 1966 that "if you have enjoyed a good life while working with asbestos products why not die from it? There's got to be some cause."

Another example is provided by the conduct of Union Carbide Corporation. Union Carbide actually mined and marketed raw asbestos. It touted its own asbestos as being safe while questioning the safety of other forms of the mineral.

This corporate conduct, and the vast legacy of death and disease that resulted, have led to decades of litigation. The overwhelming majority of this litigation has occurred in state courts, and continues to occur there. As we move further away in time from the years of the heaviest

asbestos exposure, the number of cases is fortunately slowly decreasing. At the beginning of this year, the Judicial Panel on Multidistrict Litigation concluded that the federal centralized asbestos court had largely achieved its mission, and so dissolved that court for most purposes. As of this year, then, the federal system is largely finished with asbestos litigation.

As a result, all except a handful of cases will be heard in state court. This continues a trend that has prevailed for the last 20 years, in which the vast majority of asbestos cases have been resolved in state court, under state substantive law and state procedural rules.

The substantial majority of these state-court cases involve mesothelioma and lung cancer. Victims were exposed in a variety of ways, but each case typically involves claims against companies that made asbestos-containing products or machinery, or premises owners or contractors responsible for a worker's exposure. State law provides that a claimant may recover from each party found by the jury to have been responsible for exposure, and to have behaved negligently or to have supplied an unreasonably dangerous product. In New York, Pennsylvania, for the most part in Texas and California, and in nearly all the jurisdictions with any significant number of cases, there is no joint and several liability, and so the jury simply assigns a percentage of responsibility to each company it finds to be liable.

The Asbestos Bankruptcy Trust System

In addition to claims made against defendants in state courts, plaintiffs also can make claims against asbestos bankruptcy trusts. These trusts have been set up to pay claims against companies that declared bankruptcy at some point in the past and many companies have used this device to avoid defending asbestos lawsuits.

In 1994, Congress amended the Bankruptcy Code to create Section 524(g) to specifically address asbestos-related bankruptcies. Among other things, the provision allows a bankruptcy court to bind future asbestos injury claimants to a plan of reorganization through the appointment of a futures representative to represent their interest in the negotiation of the plan. Because of the long latency period between exposure to asbestos and manifestation of a disease, Congress recognized that provisions must be made for the compensation of future asbestos victims and determined that a trust would be the best vehicle for handling claims against a bankrupt defendant. Section 524(g) basically codified the approach to dealing with asbestos claims that the court had approved in the Johns-Manville bankruptcy.

A trust that is created pursuant to Section 524(g) assumes the asbestos-related liabilities of the debtor company and must use all of its assets and income to pay qualifying asbestos claims. The trust must treat future claimants substantially the same as present claimants, and at least 75 percent of present asbestos claimants must vote to accept the plan. If all of the requirements of Section 524(g) are met, the bankruptcy courts will issue a channeling injunction directing that asbestos claims may be brought only against the trust. In addition to creating Section 524(g), Congress also amended the Bankruptcy Code to add section 524(h), a provision that allows certain injunctions that existed on the date of the enactment of Section 524(g) to be treated as Section 524(g) injunctions.

When a company files for bankruptcy protection, there is a popular perception that the factories and company offices are closed, the plants are padlocked and all the employees lose their jobs. This is not true in the asbestos context. Almost every company that has sought bankruptcy protection due to asbestos liabilities has been able to recover their economic health while also compensating victims of asbestos disease.[8] The asbestos trust system acts to preserve the assets of the company, compensates present and future claimants, and allows the company to resume economic activity free of all future asbestos liability.

Halliburton is a prime example of how 524(g) works in the context of a bankruptcy. According Halliburton's own statement: "European bankruptcy laws, as in many countries, are very different from the laws in the U.S. Chapter 11 has been created so that a filing company can restructure its debt (or in our case resolve its asbestos and silica liability) and remain in business. It is not liquidation; it is reorganization. Halliburton and all of its subsidiaries, including DII Industries and KBR, will continue in business and will continue to provide all the excellent services our customers expect from us. The Chapter 11 petitions have been filed for the sole purpose of facilitating a settlement of Halliburton's personal injury asbestos and silica litigation claims. In other words, outside of the asbestos and silica settlement, it will be business as usual." (Environmental Working Group: http://www.ewg.org/sites/asbestos/facts/fact2.php, quoting Halliburton: www.halliburton.com/ir/asbestos_faqs.jsp.)

524(g) of the Bankruptcy Code exists precisely so that companies facing substantial asbestos claims can compensate victims while continuing normal operations. The trusts are set up by the companies after a period of negotiation and, if necessary, litigation of certain issues in bankruptcy courts. They are approved by federal bankruptcy judges, with a right of appeal by any interested party. Interested parties may include solvent co-defendants, insurers, victims, and other commercial and financial creditors.

Trusts are governed by one or more independent trustees, many of whom are retired judges. These trustees have the authority, and the responsibility, to manage the trusts in accordance with the terms of the trust documents. These documents were, of course, approved during the course of the bankruptcy case by the bankruptcy courts and federal district and appellate courts. Plaintiffs' lawyers have no involvement in the trusts' determinations of whether to pay any particular claim, nor do they have any control over trustees' decisions. If plaintiffs' lawyers are opposed to a particular decision by trustees, the question may be submitted to arbitrators, and eventually to the federal court which oversaw the particular bankruptcy proceeding. It is ultimately that court which resolves any disputes between trustees and claimants' lawyers.

Asbestos Victims are not Fully Compensated by Asbestos Trusts

Now defendants have started arguing 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 misunderstanding 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.

The assertion is that large amounts of money are recoverable from bankruptcy trusts, and that plaintiffs routinely game the system so that they receive a full recovery in the bankruptcy system, and then a second, "double" recovery in the tort system. Neither premise is correct: there is no windfall of money available to claimants, and plaintiffs cannot and do not "game the system" such that solvent tort defendants pay the liability shares of bankrupt companies.

The proponents of this assertion describe an imaginary asbestos bankruptcy trust system awash in cash, in which mesothelioma victims need only file a few forms to recover large sums of money. This is entirely false; trusts are only able to pay a fraction of the scheduled value of a claim. A "scheduled value" of a particular disease claim is what the approved trust documents provide for as the sum available to a plaintiff who meets the trust criteria; a "payment percentage" is what the plaintiff actually receives. So, for example, while a certain trust may officially "value" a mesothelioma claim at, say, $100,000, the payment percentage may be 15%, resulting in an actual payment of only $15,000. An asbestos industry funded study by The RAND Institute for Civil Justice finds that "[m]ost trusts do not have sufficient funds to pay every claim in full and, thus, set a payment percentage that is used to determine the actual payment a claimant will be offered." The median payment percentage is 25%, but some trusts pay as low as 1.1 percent of the value of a claim.[9][i]

It must also be borne in mind that no claimant would ever qualify for payment from all, or even close to all, of the trusts. For example, a Navy seaman might well have worked around a Babcock & Wilcox boiler, but would not have worked with U.S. Gypsum joint compound. A plasterer, conversely, would have used joint compound but would not have worked on marine boilers. It is certainly true that a number of bankruptcy trusts exist, and that a typical qualifying claimant might receive significant compensation from them. But the description of the bankruptcy system as simply churning out bags of money to claimants is an outright lie.

The Existence of Asbestos Bankruptcy Trusts does not Disadvantage Solvent Defendants

A related argument is that in asbestos trials today, defendants are paying an unfair share of the damages awarded to plaintiffs. This is supposedly because solvent defendants are prevented from learning the true facts about a plaintiff's asbestos exposure, since plaintiffs are also filing bankruptcy claims, but in secret. This argument betrays a hopeless lack of awareness about how asbestos cases are actually litigated.

First, of course, there is no "fair share" for a defendant in asbestos litigation; there is only whatever percentage of causal responsibility is assigned by a jury in any particular case, and each case turns on its own facts. Moreover, the fact that other parties may share responsibility for causing injury is not a ground for avoiding liability. To quote a California case, "[E]ach tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury." *American Motorcycle Ass'n v. Superior Court* (1978) 20 Cal.3d 578, 582. The fact that others may also have been negligent or at fault for the injury, is no defense. "A tortfeasor may not escape this responsibility simply

because another act, either an 'innocent' occurrence such as an 'act of God' or other negligent conduct, may also have been a cause of the injury." (*Id.* at 586.) It is further immaterial that others that may have contributed to causing the injury are bankrupt or immune from suit. "When independent negligent actions or a number of tortfeasors are each a proximate cause of a single injury, each tortfeasor is thus personally liable for the damage sustained, and the injured person may sue one or all of the tortfeasors to obtain a single recovery for his injuries; the fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused." (*Id.* at 587.). This is a California case, but the same rule holds in all 50 states.

Defendants routinely and vigorously assert their rights to place other responsible parties on the verdict form that is filled out by jury, including bankrupt entities. The critics of state courts' handling of asbestos cases are apparently unaware that defendants in civil lawsuits can conduct discovery to vindicate these rights. Such discovery includes interrogatories and requests for production of documents and admissions to the plaintiff, and depositions of the plaintiff, his family members and any co-workers. Materials submitted by plaintiffs to bankruptcy trusts are discoverable. See e.g. *Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481. Defendants obviously conduct their own unilateral investigation into plaintiffs' claims as well.

Does this discovery work, or have plaintiffs so gamed the system that the solvent asbestos defendants are routinely paying the bankrupt companies' "fair share"? In jurisdictions with several liability, defendants are liable only for the proportional harm they caused. The results in trials show that solvent defendants are not being disadvantaged by the asbestos trusts. Less than two months ago, in a case tried by our firm, a jury allocated 5% responsibility to the trial defendant, and a total of 34% to four different bankruptcy companies.[10] In another, a recent case tried to verdict by our firm, the jury evaluated the alleged fault of the trial defendant, Kaiser Gypsum, as well as 32 other entities, and five additional generic categories of products (e.g. "pipe covering" or "asbestos felt"). Of the 32 entities, at least 20 had bankruptcy trusts at the time of trial, and of these 20 entities, the jury determined that 18 of them were at fault. These 17 entities were assigned percentages of responsibility ranging from 1.5% to 8%. The trial defendant itself was assigned a 4% share, with the trust entities cumulatively receiving 61%.[11]

In another recent trial, the jury was presented with evidence to evaluate the liability of several entities and assessed a .5% share to Crane, an 85% share to the Navy, a .5% share to the bankrupt entity Babcock & Wilcox, and a 10% share to "Insulation Manufacturers," which includes trust entities such as Johns-Manville. In other words, presented with evidence of all of the plaintiff's exposures, the jury allotted 21 times the responsibility to trust entities as it did to the trial defendant Crane Co.[12]

In another California case that went to verdict in July 2006, the jury was also able to evaluate evidence against trial defendants and numerous third-party entities, assigning 8% responsibility to each of the two trial defendants, 8% responsibility to the bankrupt entity USG, 8% responsibility to the bankrupt entity National Gypsum Company, and 44% responsibility to Johns-Manville Corporation. Again, each of the trial defendants was assessed 8% of the

liability, while the bankrupt entities were assessed more than seven times that amount—60% of the liability.[13]

A pair of recent trials in Wisconsin demonstrate the same thing. In a case tried last year in Milwaukee, 72% of the responsibility was allocated to bankrupt entities. In another case tried in Milwaukee in 2006, 66% of the responsibility was allocated to bankruptcy companies.[14] It is thus absurd to suggest that defendants are somehow handcuffed in defending themselves in these cases, or that the results unfairly burden them.

Nor do plaintiffs in states with joint and several liability obtain a "double recovery" when they are compensated both in the tort system and from the trusts. Under the "one satisfaction" rule, a plaintiff is entitled to only one recovery for a particular injury. Thus, after a verdict is entered, the non-settling defendants are entitled to discover the amount of settlements after the verdict is entered, and will be given a set-off equal to the settlements – including any settlements with trusts. Further, if the plaintiff did not obtain a settlement from the defendant's co-tortfeasor, the defendant can seek contribution directly from that co-tortfeasor or the asbestos trust that has assumed its responsibilities. In a pure several liability jurisdiction, of course, neither set-offs nor contributions are necessary, as the verdict will reflect only the defendant's portion of the liability.

H.R. 4369: A Solution in Search of a Problem

The bill's provisions have no other intended consequences than to grant solvent asbestos defendants new rights and advantages to be used against asbestos victims in state court and to add new burdens to the trusts, such that their ability to operate and pay claims is severely crippled. Further, the bill is intended to help defendants skirt state laws regarding rules of discovery and joint and several liability. HR 4369 would require the trusts to publicly disclose extensive, individual and personal claim information, including information about a victim's exposure and work history, and would allow asbestos defendants to demand any additional information from the trusts at any time and for virtually any reason.

Under Section 2 of the bill, Sections 8(A) and 8(B) operate together to put burdensome and unnecessary reporting requirements on the trusts, giving asbestos defendants informational advantages while also slowing down the ability of trusts to pay claims. Section 8(A) of the bill would force trusts to publicly report highly personalized, 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 this provision weren't enough information for asbestos defendants to use to deny liability, section 8(B) requires the trusts to "provide in a timely manner *any* information related to payment from, and demands for payment from, such a trust, subject to appropriate protective orders, to *any party to any action* in law or equity if the subject of such action concerns liability for asbestos exposure." (Emphasis added.) Section 3 of the bill makes the bill's provisions retroactive and would force every trust to look at and report on every claim it ever paid.

First, the bill would slow down or stop the trust process such that many victims would die before receiving compensation since victims of mesothelioma typically only live for 4 to 18

months after their diagnosis.[15] The bill's new burdens will require the trusts to spend time and resources complying with these requirements, causing trust recoveries to decrease and be delayed.

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

It is also important to note that the bill only changes what the trust must report on 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 they paid. Trust payments represent settlements of former asbestos defendants. These same defendants now want the trusts to disclose specific settlement amounts that they do not themselves provide nor would have provided before the trusts were created.

Furthermore, the bill seemingly ignores the fact that 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 ("TDP") for that trust. Trusts also file annual reports with the Bankruptcy courts and publish lists of the products for which they have assumed responsibility.

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

Conclusion

Almost two decades ago, OSHA observed that "it was aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." 51 Fed. Reg. 22,615 (1986). Asbestos was a preventable tragedy that poisoned hundreds of thousands of workers and their families. Many were poisoned while serving our country in the military. They have suffered painful, debilitating injuries and deaths, their families have suffered grievous losses. State law provides a remedy to these families and asbestos victims should not have to apologize for seeking compensation for their injuries.

Ever since the asbestos tragedy first came to light, the companies that are responsible for this tragedy have tried to avoid paying for the harm they caused and have tried to shift blame to other parties and to the victims and their families. The complaints about the lack of transparency

in the system are, in reality, just the latest tactic in a decades-long effort to delay and avoid compensating victims of asbestos disease.

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[1] National Institute for Occupational Safety and Health, Division of Respiratory Disease Studies, *Work-Related Lung Disease Surveillance Report 2002*, page 9 (May 2003); Available at: http://www.cdc.gov/niosh/docs/2003-111/pdfs/2003-111.pdf.

[2] National Institute of Occupational Safety and Health, Division of Standards Development and Technology Transfer, *Occupational Health and Safety Guideline for Asbestos: Potential Human Carcinogen* (1988); available athttp://www.cdc.gov/niosh/docs/81-123/pdfs/0041.pdf

[3] Mesothelioma Applied Research Foundation, *Mesothelioma Information: Disease Development and Progression*, available at: http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.4023387/k.643A/Mesothelioma_Information.htm#whatismesothelioma

[4] *Building and Construction Trades Dept. v. Brock*, 838 F.2d 1258, 1262 (D.C. Cir. 1988)

[5] National Institute of Occupational Safety and Health, Work-Related Lung Disease (WoRLD) Surveillance System *Table 7-4. Malignant mesothelioma: Number of deaths by state, U.S. residents age 15 and over, 1999-2005*, (March 2009); available at http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=894&GroupRefNumber=T07-04.

[6] National Institute of Occupational Safety and Health, Work-Related Lung Disease (WoRLD) Surveillance System *Table 7-5. Malignant mesothelioma: Number of deaths, death rates (per million population), and years of potential life lost (YPLL) by state, U.S. residents age 15 and over, 1999-2005* (March 2009); charts available at: http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=895&GroupRefNumber=T07-05.

[7] National Institute of Occupational Safety and Health, Work-Related Lung Disease (WoRLD) Surveillance System Table 1-4. Asbestosis: Number of deaths by state, U.S. residents age 15 and over, 1996-2005 (March 2009) available at: http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=493&GroupRefNumber=T01-04.

[8] These include Johns-Manville, United States Gypsum, Owens-Corning Fiberglas, Pittsburgh-Corning, W. R. Grace, Halliburton, Armstrong World Industries, Federal Mogul Corp., McDermott Industries (Babcock & Wilcox), and National Gypsum.

[9] *Supra*, Dixon, RAND INSTITUTE FOR CIVIL JUSTICE at page xv (2010).

[10] See verdict form in *Mansir v. Air & Liquid Systems Corp., et al*, No. 37-2010-00104112-CU-AS-CTL (San Diego County, Superior Court), exhibit 1.

[11] See attached excerpts from the verdict form in *Silvestro v. AC&S, Inc., et al.* (Aug. 3, 2010) Case No. BC 253974, Los Angeles County Superior Court, exhibit 2.

[12] See attached excerpts from the verdict form in *Woodard v. Crane Co. and Sepco Corporation* (Feb. 2, 2009) Case No. BC 387774, Los Angeles County Superior Court, exhibit 3.

[13] See attached excerpts from the verdict form in *Hall v. Bondex Int'l, Inc.* (Jul. 10, 2006) Case No. BC 340466, Los Angeles County Superior Court, exhibit 4.

[14] See verdict forms in *Gosz v. Building Service Industrial Sales Co.*, No. 05-CV-9218 (Milwaukee County Circuit Court) and *Eske v. Fleming Materials Co.*, No. 07-CV-10206 (Milwaukee County Circuit Court, attached as exhibit 5.

[15] Mesothelioma Applied Research Foundation, *Mesothelioma Information: Disease Development and Progression*, available at: http://www.curemeso.org/site/c.kkLUI7MPKtH/b.4023387/k.643A/Mesothelioma_Information.htm#whatismesothelioma

Mr. COBLE. Mr. Scarcella.

TESTIMONY OF MARC SCARCELLA, BATES WHITE, LLC, WASHINGTON, DC

Mr. SCARCELLA. Thank you, Chairman Coble and Members of the Subcommittee. My name is Marc Scarcella, and I appreciate the opportunity to provide testimony in support of this commonsense bipartisan legislation.

As an economist who has been studying trends in asbestos claims filings and compensation for over 10 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 the accountability in claiming behavior as a deterrent to potential specious or fraudulent claiming practices.

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

After reviewing provisions outlined in the bill, I believe that it will serve as an effective and necessary step toward bridging the transparency gap that currently exists between asbestos bankruptcy trusts and the civil tort system, and will do so in an efficient and cost-effective manner. Moreover, the reporting requirements of the bill will serve as a deterrent to potential fraudulent claiming practices across bankruptcy trusts.

The key takeaway points from my testimony are quite simple. First, the FACT Act will advance transparency within the asbestos bankruptcy trust system. The FACT Act will mandate that each trust provide quarterly disclosures, showing who has filed a claim against the trust seeking payment and what the exposures are that they are alleging in seeking that payment.

This information is akin to what is already publicly available in the civil tort system. 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 from 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. In addition, publicly available case dockets will typically provide status information on each defendant named in the lawsuit.

In sum, the FACT Act is simply looking to disclose the same level of information on trust filings as is already available on public tort claims.

The second takeaway point, the FACT Act will act as a deterrent to potential fraudulent claiming across trusts. Currently billions of dollars in claim payments are distributed by asbestos bankruptcy trusts each year with virtually no external oversight or public ac-

countability. Individual trusts operate in vacuums. This is how the procedures are written. So not only are the claimant demands made across trusts not publicly available to solvent defendants in the civil tort system, but they are also not available within the trust system. In most cases the only individuals who know the full breadth of claims made in corresponding alleged exposures are the plaintiff's counsel.

To the extent that this lack of transparency and accountability may incentivize specious and inconsistent claiming across the tort and trust systems, it may result in trust funds being depleted by erroneous payments, which in turn takes funds away from those asbestos victims who are most deserving in the future.

In sum, the FACT Act will add a level of accountability that will act as a deterrent to inconsistent, specious, and potentially fraudulent claiming activity in the future.

The third takeaway. Quarterly reporting requirements of the FACT Act will not result in overly burdensome efforts or costs to the trusts. Asbestos bankruptcy trusts receive and collect claim-level data electronically. They store and process this data electronically, and track the claim status and payments electronically at the claim level. As a result, extracting quarterly summary tables at the claim level is an efficient process and an exercise requiring basic database programming skill.

In sum, as someone who has worked for and with processing facilities on issues of data management and reporting, I can say with confidence that the trust and facilities are well equipped to produce these quarterly reports at minimal cost.

My final takeaway point has to deal with the burden on third-party disclosures that the FACT Act points to. Third-party disclosure requirements of the FACT Act will not result in overly burdensome efforts or cost to the trust. The bill requires that trusts provide filing and payment information upon request of a third party under appropriate protective orders. This is already being done today by a lot of trusts. Some trusts respond to third-party requests by searching their claims database for particular individuals and providing information as to whether or not that individual has filed a claim with the trust. They will do this for costs ranging from zero dollars to maybe $100. Once that search has been completed, it is minimal additional effort to produce additional information about that claim.

In closing, the FACT Act is seeking a reasonable level of bankruptcy trust claim transparency akin to what is already being provided in the tort system, and it is doing so in a cost-effective and efficient manner, and that is why I support the bill.

Thank you.

[The prepared statement of Mr. Scarcella follows:]

United States House of Representatives

Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law

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Hearing on H.R. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012"

May 10, 2012

Summary

Chairman Coble, Ranking Member Cohen, and members of the subcommittee, thank you for holding today's hearing on H.R. 4369 -- the Furthering Asbestos Claims Transparency (FACT) Act of 2012. My name is Marc Scarcella, and I appreciate the opportunity to provide testimony in support of H.R. 4369. As an economist who has been studying trends in asbestos claim filings and compensation for over ten years, I believe that transparency between the asbestos civil tort and bankruptcy trust systems is critical for the proper allocation of indemnification to asbestos claimants, and necessary for ensuring accountability in claiming behavior as a deterrent to potential specious claiming practices.

During the past decade, I have had the opportunity to work with both defendants 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 that 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 other, or in some instances, fail to interact with each other.

After reviewing the provisions outlined in H.R. 4369, I believe that this bill will serve as effective step towards bridging the transparency gap between asbestos bankruptcy trusts and civil tort system, and will do so in an efficient and cost-effective manner. The reporting requirements of H.R. 4369 will also serve as a deterrent to specious claiming across bankruptcy trusts.

The key takeaway points from my testimony are:

1. **H.R. 4369 will advance transparency within the asbestos bankruptcy trust system.** H.R. 4369 will mandate quarterly reports disclosing: (i) who has filed a claim against the trust; and (ii) what exposures have been alleged in each claim. This information is akin to what is publically available for civil tort claims through a complaint listing all the defendants named in the lawsuit in addition to general allegations of exposure, and the case docket providing status information on each defendant.

2. **H.R. 4369 will act as a deterrent to potential fraudulent claiming across trusts.** Currently, billions of dollars in claim payments are distributed by the asbestos bankruptcy trusts each year, with virtually no external oversight or public accountability. Individual trusts operate in vacuums, so not only are the claimant demands made across trusts not publically available to solvent defendants in the civil tort system, but also not available to other trusts. In most cases, the only individuals who know the full breadth of claims made and corresponding alleged exposures are plaintiffs' counsel. To the extent that this lack of transparency and accountability may incentivize specious and inconsistent claiming across the tort and trust systems, it may result in trust funds being depleted by erroneous payments, which in turn takes funds away from those asbestos victims who are most deserving in the future.
3. **The quarterly reporting requirements of H.R. 4369 will not result in overly burdensome efforts or costs to the trusts.** 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 is an efficient process and an exercise that is well within the average competencies of database programmers already employed or contracted with by the trusts and claim processing facilities.
4. **The third party disclosure requirements of H.R. 4369 will not result in overly burdensome efforts or costs to the trusts.** H.R. 4369 will require the trusts to provide filing and payment information upon request from a third party under appropriate protective orders. Some trust 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. Once the search has been conducted, producing the additional claim information that may be required under H.R. 4369 would require a minimal level of additional effort.

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

Experience specific to asbestos bankruptcy trusts and claim processing systems[1]

During my time with CRMC, the facility was in the process of developing an electronic claim filing system ("E-Claims™") to allow claim filers to not only submit individual claim forms electronically, but also to upload thousands of claim forms at one time. Similar technology has since been adopted by other claim processing facilities.[2] These technologies have been designed to be compatible with the electronic claim databases that claimant law firms may have developed for internal

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[1] 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

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

use, thus minimizing the administrative cost and burden of transferring claim and claimant data to the facility.[3]

The system used by CRMC, as well as other similar systems are designed to not only receive and maintain an electronic database of claim and claimant information, but to also allow for the ability to efficiently extract and analyze data as needed. For example, during my time with the CRMC, I maintained a monthly data extract of individual claim filing, processing, and settlement data that was produced for internal analytical and claim management tasks. Additionally, upon third party requests for data, CRMC would provide a similar extract for minimal cost, including expansive medical and exposure data extracts.[4]

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.[5] In addition to the firm's role as advisor to Trusts

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

[4] 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

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

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

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.[6]

Assessment of H.R. 4369

After reviewing the provisions outlined in H.R. 4369, 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 H.R. 4369 will also serve as a deterrent to fraudulent claiming across bankruptcy trusts. This opinion is based on my experience and general industry knowledge with respect to the construction and functionality of electronic claim databases, and the ability to query and extract subsets of those databases.

H.R. 4369 will advance transparency within the asbestos bankruptcy trust system

Currently, the asbestos civil tort system provides a level of claiming and resolution transparency that the asbestos bankruptcy trust system lacks. Each lawsuit that is filed in the tort system includes a publically available complaint that identifies the plaintiff and each defendant from which compensation is sought. In most cases, the complaint also provides general exposure allegations that resulted in the alleged asbestos-related injury and, in some cases, a detail work history and alleged exposure sites. Furthermore, as the case progresses, publically available dockets track the status of each named

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

[6] *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."

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.[7] 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. H.R. 4329 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.

H.R. 4369 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. 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. In the absence of a mechanism that will allow trusts to cross-reference the claiming allegations made to other trusts, inconsistent and specious claiming may go unchecked. By establishing transparency across trusts as it relates to the demands and corresponding exposure allegations supporting those claims, H.R. 4369 will offer as a the 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.

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

The quarterly reporting requirements of H.R. 4369 will not result in overly burdensome efforts or costs to the trusts

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.[8] 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. Furthermore, any computer program used to create these quarterly summary tables can easily be limited to the specific fields of data mandated in H.R. 4369 while avoid the production of any privileged medical information or revelation of any proprietary trade secrets or confidential information belonging to the Claim Facilities.[9]

The third party disclosure requirements of H.R. 4369 will not result in overly burdensome efforts or costs to the trusts.

H.R. 4369 will require the trusts to provide filing and payment information upon request from third parties under appropriate protective orders. Some trusts already respond to third party requests by searching their claims database for the individual claimant and providing information as to whether or not a claim on behalf of the individual has been made. 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

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[8] *Supra* 6.

[9] 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.

limited to whether or not a claim has been filed.[10] Once the search has been conducted, producing the additional claim information that may be required under H.R. 4369 would require little additional effort.

Furthermore, 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.

Need for asbestos bankruptcy trust transparency

The issue of asbestos bankruptcy trust transparency that sits at the heart of H.R. 4369 has been the focus of academic, judicial, and legislative debate across the country in recent years. Even though asbestos bankruptcies and resulting bankruptcy trusts have been around for decades, it's only been in the past few years that the trust system as a whole has become a substantial source of plaintiff compensation. Until 2000, there were only a handful of confirmed trusts actively processing and paying claims.

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

[10] 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

substantial source of plaintiff compensation. In fact, some analysts believe that these primary defendants were responsible for upwards of 80% of what plaintiffs were receiving as compensation in the tort system during the late 1990s.

As one can imagine, this marked a significant shift in the asbestos litigation as plaintiff attorneys were faced with having to fill the massive void in compensation left behind by these bankruptcy defendants. Plaintiff attorneys had to refocus their litigation strategy, and begin pursuing more actively those solvent defendants whom to that point had been peripheral sources of plaintiff compensation. In addition to peripheral defendants, plaintiff attorneys also began developing exposure cases against new defendants that had rarely, if ever, been named in the tort system prior to 2000.

As a result, these peripheral and new defendants experienced a dramatic increase in both the number lawsuits in which they were named, and the overall settlement demands that plaintiff attorneys were seeking as new sources of compensation. And because of joint and several liability, and allocation rules that govern the asbestos tort in many jurisdictions, the absence of the primary defendants, whom for decades were considered the most culpable contributors to the onset of asbestos-related disease, placed an extraordinary level of liability risk on the peripheral and new defendants. This is a key component to the current issues of asbestos bankruptcy trust transparency that H.R. 4369 is addressing. Joint and several liability rules and allocation of liability to "empty chair" defendants such as 524(g) trusts are designed to ensure that plaintiffs and victims can still be fully compensated for their injuries even when certain culpable defendants are insolvent or otherwise unavailable to pay their share.

This raises the question of whether the peripheral and new defendants did in fact pick up the liability share(s) of companies who have entered reorganization. Certain experts claim that the average award a mesothelioma victim receives from defendants in an asbestos tort action has stayed the same or gone up marginally since 2000. You will hear other experts and professionals claim that average compensation has increased by multiples. It is rare that you will hear anyone, if ever, say that average claim compensation has gone down. What that tells me as an economist viewing this litigation as a whole is that the joint and several liability and allocation systems worked just as they were designed to. Even

with the traditional sources of significant plaintiff compensation leaving the tort system in the early part of the 2000s, asbestos plaintiffs were still being paid as they were before the increase in bankruptcies. And that's because the peripheral and new co-defendants that remained in the asbestos tort system were forced to stand in the shoes of those defendants who sought bankruptcy reorganization.

What's happened in recent years, however, is that many of the bankruptcy reorganizations filed in the early 2000s have been confirmed and trusts have been created to pay current and future claims. Under section 524(g), trusts are established to assume the legal responsibility of the debtor's asbestos-related liability post-confirmation. Since 2006, 24 asbestos bankruptcies have been confirmed, funding trusts with $20 billion in assets to pay present and future qualifying claimants, with an additional $10 billion in proposed trust assets currently pending bankruptcy confirmation. To show how fast the trust compensation system has grown, as of year-end 2005, the entire trust system only had $8 billion in assets. From 2007 through 2010, asbestos claimants have received nearly $12 billion from trusts and an additional $5.5 billion from bankruptcy negotiated settlements paid by debtors as part of their reorganizations.

Part of the reason why payments have been so large since 2007 is because the recently confirmed trusts had to clear out claim inventories, some of which dated back to the late 1990s prior to filing for bankruptcy. Taking that fact into consideration if you total up all the trust claim payments beginning in 2000, claimants have been paid a total of $15 billion. When you add the $5.5 billion from the bankruptcy negotiated settlements it totals over $20 billion in payments, all of which occurred outside the tort system. That's an annual average of $1.9 billion in aggregate claim payments over that eleven year span. Now, you may hear that individual trusts only pay cents on the dollar to individual claims, but with billions being paid out each year, it's hard to believe that individuals aren't receiving substantial compensation in addition to what they receive in the tort system. Moreover, the compensation available to plaintiffs from the trust system is available without having to engage in a time-consuming lawsuit, and the significant costs associated therewith, including legal fees.

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

Mr. COBLE. Thank you, Mr. Scarcella, and thank each of you for your very timely presentation of your evidence. I appreciate that.

We have been joined as well by the distinguished gentleman from Tennessee, the Ranking Member of the Subcommittee, Mr. Cohen, whom I will now recognize for his opening statement.

Mr. COHEN. Thank you, Mr. Chairman. I won't take the time to give my opening statement. I would like to ask that it be entered in the record.

I would like to say this: I have done a little study on this, not enough, and I really regret having missed your statements. I had some other issues I had to deal with this morning.

This issue is personal to me in that one of my absolute best friends in the world was a great, great, great singer/songwriter by the name of Warren Zevon. Warren Zevon succumbed to mesothelioma in September of 2003. He didn't know the genesis of the disease, but he was diagnosed with such, and because of that, I am real concerned about these illnesses.

He did not seek a lawyer, didn't want damages. I had a few parasites; I am an attorney, but I had a few people call me and talk to me, quote/unquote friends of mine, friends because they wanted to get to Warren to take his case, and Warren was good and didn't do it.

But I am concerned about victims, and I am prejudged to look at it from that perspective. From what I look at on first blush, this is a solution looking for a problem, and the expense to the trust of having to go through all of this material is going to be to the detriment of the beneficiaries of the trust, and it is the beneficiaries of the trust to whom I think I owe a—my perspective and my judgment.

With that, I ask that my statement be entered in the record and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman from Tennessee, and, without objection, the Ranking Member's complete statement will be inserted and made a part of the record.

[The prepared statement of Mr. Cohen follows:]

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

On its face, H.R. 4369, the "Furthering Asbestos Claim Transparency Act of 2012," or "FACT Act," seems like a reasonable measure. After all, who could possibly be against greater "transparency?"

Yet the more that I learn about this bill and about the broader issue of what the appropriate level of compensation for victims of asbestos exposure should be, the more I am beginning to think that this bill may be a solution in search of a problem.

H.R. 4369 would impose a number of new reporting and other information-sharing requirements on trusts that have been established under section 524(g) of the Bankruptcy Code. These trusts are designed to compensate current and future plaintiffs in civil actions against those asbestos manufacturers and other related defendants that have filed for bankruptcy.

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

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

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

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

While not perfect, the trusts have worked reasonably well.

Yet H.R. 4369's proponents assert that its additional reporting and information-sharing requirements for 524(g) trusts are needed to prevent fraud by asbestos victims and to eliminate the risk that such victims will be over-compensated.

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

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

But even accepting that fraud by asbestos victims is a real problem with respect to asbestos trusts, I fear that H.R. 4369's additional requirements on trusts will raise their administrative costs significantly. Money used to pay these costs ultimately means less money to compensate asbestos victims.

In light of this risk, I would like to know from H.R. 4369's proponents why defendants who are concerned about potential fraud by asbestos victims could not simply seek trust payment information using procedures allowed under existing discovery rules.

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

Finally, the reporting requirement in H.R. 4369 raises privacy concerns.

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

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

I hope the witnesses can shed more light on the merits of H.R. 4369, and I look forward to a fruitful discussion.

Mr. COBLE. Folks, we try to comply with the 5-minute rule here as well, so if you all can keep your answers in a terse manner, I would appreciate that.

Professor Brown, some opponents of this legislation claim that Congress lacks the authority to enact this legislation because these trusts are governed by State law. What say you to that?

Mr. BROWN. Thank you for the question, Chairman Coble. These trusts a.

Re created solely because of an act of Congress. They carry out a function that has been dictated by this same act of Congress. They are no more a creature of State law just because they incorporate there, because they are formed there, than any other organization that is performing a function that has been dictated by an act of Congress.

And, in fact, the Bankruptcy Code already acknowledges that entities that are created through the bankruptcy process are still subject to Bankruptcy Court orders; they are still subject to what is expected of them under the Bankruptcy Code. This is not surprising. Moreover, as I mentioned in my written statement, this is firmly within the bankruptcy power, which even under the narrowest definition relates to regulation of the relations between the debtor and its creditors.

This act, the amendments in 1994, section 524(g) regulate those relations going forward, and all that we can really expect here, all that we ask, all that I would ask for here is that we make sure that parties, whether they are private or public, if they are performing a function under the Bankruptcy Code, that they do it in a transparent way.

Mr. COBLE. Thank you, Professor.

Mr. Siegel, what provision of the FACT Act will impede claimants from filing a claim with or receiving compensation from a trust?

Mr. SIEGEL. Well, the act will not prevent a claimant from filing a claim with the trust, but what the act will do inevitably is impose onerous administrative burdens on the trust, which will slow down the payment of claims and will deplete the funds of those claims.

As I said, the claims are already paying pennies on the dollar, and to impose upon them the costs that are already being—the costs of an enterprise or an exercise that is already being handled in the State court discovery system is sort of just asking Congress to shift the defendants and the State court's work on to the trust, and again, as I said, they are already strained to the maximum. They don't have any spare personnel or dollars to devote to these tasks of essentially relieving defendants in the tort system from their discovery burdens.

Mr. COBLE. Thank you, Mr. Siegel.

Mr. Scarcella, very briefly. I want to get to Ms. Schell. If you will, go ahead very briefly.

Mr. SCARCELLA. I just wanted to add something to that question if I may. As somebody who worked at a trust, the largest asbestos trust, the Manville Personal Injury Trust, back in 2001 as their quantitative data analyst and statistician, I can tell you that I understand Mr. Siegel's concern, and I think it is a legitimate concern, but I can assure everybody that it is not a problem.

When I worked at Manville, my sole function was to manage data for internal analysis and respond to third-party requests for external information. My role and job functions relating to reporting requirements similar to what is in the FACT Act had no bearing on the work that was being done by claim reviewers and claim managers whose job is to review, qualify, and get claimants paid. It is a split, you know, level of authority and split level of responsibility that will not impede how fast an individual can get paid when they call a trust fund.

Mr. COBLE. Thank you.

Let me get one more question in for Ms. Schell. Ms. Schell, the September 2011 GAO report notes, and you highlight this in your testimony, that 65 percent of trusts have included procedures in their trust distribution plans that are intended to prevent the disclosure of claims information. Why do you think this is the case?

Put your mic on, if you will.

Ms. SCHELL. Thank you for your question, Mr. Chairman.

I included that information because I think it is significant that now postconfirmation the committees that make up the rules for the Administration of the trust funds are building in confidentiality provisions into those trusts to keep information from the public, and it is problematic for a number of reasons.

First, it doesn't make much sense to keep the information confidential. It should be information that should be reported. And the fact that it is being done postconfirmation raises questions in and of itself, and that it is being done by committees that are in large part made up by or at least in part made up by plaintiffs' firms from around the country.

The confidentiality provision sometimes—and I gave the example of Babcock and Wilcox in my paper—also set out the method by which the information can be obtained, and in that particular instance it requires a subpoena from a Bankruptcy Court. So that trust is moving the question out of the State court arena and putting it in front of the Bankruptcy Court in which none of the tort players are actually involved. And so it sets up an unworkable step.

And really to go down the path of whether or not defendants can get discovery through State court proceedings strays from the point of the FACT Act. The point of the FACT Act is to require widespread reporting of claims made in all the trusts; not just to provide information to one single defendant in one single case, but instead to provide information that then can be reviewed by those seeking clarity and those——

Mr. COBLE. Ms. Schell, my time has expired, but if you could wrap up very quickly.

Ms. SCHELL. And by those seeking clarity and those that are just simply looking to make this compensation procedure and process like all the others with oversight.

Mr. COBLE. Thank you, Ms. Schell. I appreciate that.

The distinguished Ranking Member from Tennessee is recognized for 5 minutes.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. Siegel, how do you look upon this law as it affects people who have been affected by asbestos claimants? Is this adverse to their interests?

Mr. SIEGEL. It is entirely adverse to their interests. Even though, oddly enough, it is an act that is directed at bankruptcy trusts and the claimants of those bankruptcy trusts, it serves only the interest of third parties, and that is the defendants in the tort system.

The defendants already get and are able to get all of this information through State court discovery. We know that from the results of trials, and that is all in my written statement, because in trial after trial after trial, juries assign liability to bankrupt defendants, so the defendants in the tort system get all the information they need.

This is simply an effort to take that discovery burden away from them which they are already satisfying and put it on the claimants, and it has to be recalled. As I said, some trusts are paying less than 1 cent on the dollar for scheduled values of claims, and to add all of a sudden a quarterly reporting requirement that requires them to produce and report on every—but also redact information from every single claim that they have received in the last quarter is really undue and onerous.

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.

So there is no need for this, number one; and, number two, it is terribly against claimants' interest because it will just deplete the time and money left that the trusts are already straining with.

Mr. COHEN. I probably in my opening gave too strong a term in describing the attorney who sought my intervention to get my friend to enlist his counsel, because if it weren't for trial lawyers, probably the defendants in these cases, the agents of this illness, would not be as careful as they are now for they wouldn't have liability.

People maybe don't understand the effect of tort law and how it does police agents that are harmful to human beings. Who are some of these folks that are dispensers of the asbestos problem?

Mr. SIEGEL. Well, they are companies large and small, but I think it is well to recognize that, you know, there is a sense from the written statements that we are now dealing only with so-called peripheral defendants or defendants that don't really have to do much with the real problem caused by asbestos, and that the people who really caused the problem are all in bankruptcy. Nothing could be further from the truth, and I think the best example of that is Ms. Schell's client, Union Carbide Corporation, which is hardly a mom-and-pop operation. Union Carbide mined raw asbestos. They are about as close to the original problem as you can get. They mined raw asbestos and sold it by telling people that it—well, the stuff that comes from our mine is somehow safer; we are the safe asbestos, not the dangerous asbestos.

So to suggest that we are in the era of—we are only suing defendants that had nothing to do with the problem is wrong, simply flat wrong.

Mr. COHEN. When was it discovered that there was a connection with asbestos and lung disease? Was that something in the last 20, 30 years?

Mr. SIEGEL. No, no. There are indications in the—I mean, it goes back a long time. The Romans noticed that their slaves who were delegated to work with asbestos were dying at a much earlier age than their other slaves.

Mr. COHEN. And did the Romans—the Romans didn't hire trial lawyers to——

Mr. SIEGEL. No, they didn't.

Mr. COHEN. They wore the toga, so they didn't have to do anything.

Mr. SIEGEL. That is true. That is true.

But as far as the medical literature goes, there are indications in the late 1890's and certainly in the early 1900's of lung problems, lung diseases and death caused or occurring in people who worked occupationally with asbestos. I mean, we have in the 1930's——

Mr. COHEN. And when were the first lawsuits brought, do you know, that were successful?

Mr. SIEGEL. The first lawsuits in the modern era were brought in the late 1960's, and the first one that really became prominently known is a case called Burrell from Texas in the early 1970's.

And the nature of the claimants has changed. It is true that back in the 1970's and 1980's, what you were dealing with in terms of claimants was insulators and pipefitters, people whose day-to-day work exposed them over and over to massive quantities of asbestos. What you have now, you tend to have people who weren't exposed to overwhelming quantities on a day-by-day basis, but still sus-

tained very severe, serious occupational exposure in a myriad of ways, and that is causing them mesothelioma and lung cancer. As I said, they are seeking compensation not from every company in the phone book, but simply from companies who made products that they worked with.

Mr. COHEN. Thank you, sir, and I thank the Chairman.

Mr. COBLE. Mr. Cohen, thank you.

The distinguished gentleman from Arizona Mr. Quayle is recognized for 5 minutes.

Mr. QUAYLE. Thank you, Mr. Chairman.

Before I get into my questions, I would like to ask unanimous consent to enter into the record a memo by Paul Clement regarding the authority to enact this legislation, and also a GAO study* about the role and administration of asbestos trusts.

Mr. COBLE. Without objection.

[The information referred to follows:]

*The study, a GAO Report, GAO–11–189, entitled Report to the Chairman, Committee on the Judiciary, House of Representatives, September 2011, Asbestos Injury Compensation, The Role and Administration of Asbestos Trusts, is not reprinted in this record but can be accessed at http://www.gao.gov/new.items/d11819.pdf

Bancroft PLLC

MEMORANDUM

From: Paul D. Clement

Date: March 30, 2012

Re: The Tenth Amendment and Legal Reform

Some opponents of federal legal reform have suggested that there are unique federalism or Tenth Amendment difficulties with such efforts at the federal level. Needless to say, each effort needs to be evaluated individually, but without reference to any particular legislative proposal, the Supreme Court's cases give Congress wide latitude to address and remove obstacles to interstate commerce and generally do not support the notion that there are unique Tenth Amendment problems when Congress addresses obstacles created by state law, whether judge-made common law or state positive law. This legal backgrounder examines those precedents and principles.

The Supreme Court has recognized that the Commerce Clause allows Congress to address obstacles to interstate commerce even when the obstacles arise from state tort law or state court rules. What is more, the Court's cases do not support the contention that the Tenth Amendment is an obstacle to federal efforts to legislate in areas that touch on state tort systems. Indeed, if anything, the Court has suggested that the Supremacy Clause gives Congress a freer hand in displacing the rules applied by state judges. Finally, it bears emphasis that Congress is not limited to its commerce power in addressing distortions created by state law; exercises of narrower federal powers, such as the bankruptcy power, also provide Congress with the authority to override state law in valid service of the federal objective.

1. Background Principles

Congress, of course, may act only pursuant to its enumerated powers. While debate continues over the boundaries of Congress' Commerce Clause power, the Supreme Court has long held that "Congress has the power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). And there is no dispute that the Commerce Clause grants Congress considerable authority to remove obstacles to interstate commerce. *See Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 150 (1979); *cf. Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005). Legal reform legislation may also be authorized by other enumerated sources of congressional power, such as the Bankruptcy Clause and the Necessary and Proper Clause. *See United States v. Comstock*, 130 S. Ct. 1949, 1956-57 (2010); *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 379 (2006).

The Supreme Court has also recognized that neither Congress' enumerated powers nor

the Tenth Amendment permit Congress to "commandeer" state legislative processes or executive officials to carry out federal regulatory schemes. Thus Congress cannot "issue directives requiring the States to address particular problems," nor can it "command the States' officers . . . to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). The Supreme Court has twice invalidated federal law on "commandeering" grounds. *See id.* at 935; *New York v. United States*, 505 U.S. 144, 188 (1992).

Importantly, both those cases and the Constitution itself exempt state courts and judges from this anti-commandeering principle. Because the Supremacy Clause mandates that "the Judges in every State shall be bound" by federal law, Congress has the power to require state courts to enforce federal causes of action. *New York*, 505 U.S. at 178-79; *Printz*, 521 U.S. at 928-29; *Testa v. Katt*, 330 U.S. 386 (1947). Congress may also prescribe procedural rules that state courts must follow in enforcing federal causes of action, if those rules are "part and parcel" of the federal cause of action. *See Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952). And in the context of federal preemption of state law, the Supreme Court has steadfastly refused to distinguish between state judge-made common law and state positive law, permitting preemption of both so long as applicable federal law evinces such an intent. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63, 69-70 (2002). Thus, although the Supreme Court has sidestepped the specific question of whether the Tenth Amendment prevents Congress from prescribing a rule that would trump the operation of procedural rules in state courts' adjudication of state-law claims, its precedents provide support for that position. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 464 (2003); *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984).

II. Legal Reform and Federalism

While each particular piece of federal legislation naturally requires its own evaluation, Supreme Court authority suggests that as a general matter, Commerce Clause and Tenth Amendment challenges to federal legal reform measures are not likely to succeed.

Indeed, even many critics of legal reform acknowledge the breadth of Congress' authority to address the subject pursuant to the Commerce Clause under the Supreme Court's jurisprudence. *See, e.g.*, Mike Dorf, *Tort Reform Versus the 10th Amendment*, Dorf on Law (Feb. 10, 2011), http://www.dorfonlaw.org ("Folks like me, who think that Congress has broad latitude to regulate under the Commerce Clause, have no difficulty seeing the package of federal limits as constitutional, even if we don't think it's desirable policy."). To survive a Commerce Clause challenge, federal legislation need only "substantially affect interstate commerce." *Raich*, 545 U.S. at 17. One can readily surmise that condition is met by legislative measures that are designed to reduce litigation costs for multistate or multinational defendants, or efforts that will almost certainly have an economic effect on interstate insurance carriers. Furthermore, to the extent legal reform measures are designed to address situations where Congress believes state law poses an obstruction to interstate commerce, that is perhaps the classic use of the commerce power. *See id.* at 16; *Snead*, 441 U.S. at 150. And, indeed, the Supreme Court has held federal legislation containing legal-reform-like elements valid under the Commerce Clause, even when federal law had the effect of trumping the operation of state-law rules in state court. *See Pierce Cnty. v. Guillen*, 537 U.S. 129, 146-48 (2003) (upholding 23 U.S.C. § 409, which prohibits admission of certain safety data in state-court proceedings); *Southland*, 465 U.S. at 11 (observing

that Federal Arbitration Act is valid exercise of commerce power) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967)).

Pierce County is a particularly important precedent for evaluating Commerce Clause objections to legal reform. That case considered the constitutionality of a federal law that prohibited the disclosure of traffic safety data collected by local authorities in order to qualify for federal funding, even if state privilege law would otherwise compel its disclosure in state court proceedings involving tort and other state-law claims. The Supreme Court unanimously held that this provision was a valid exercise of the Commerce Clause. The Court did not reach the state-law plaintiffs' Tenth Amendment objection to the law, but the Court's recent Tenth Amendment cases have all involved situations where Congress lacked a valid enumerated power to enact the legislation. *See New York*, 505 U.S. at 174-77; *Printz*, 521 U.S. at 923-24; *see also Bond v. United States*, 131 S. Ct. 2355, 2366-67 (2011). Thus, a rejection on Tenth Amendment grounds of a law that is concededly valid under the Commerce Clause (and did not involve the state as employer, a context in which the Court has vacillated) would take the Court into uncharted territory. Finally, the fact that the Supreme Court's unanimous decision in *Pierce County* was authored by Justice Thomas—the Court's leading critic of the breadth of the Court's modern Commerce Clause jurisprudence—is particularly telling. It underscores that when Congress acts to protect the channels of interstate commerce or eliminates obstacles to interstate commerce, it is exercising the core of its classic commerce power.

Likewise, the Court's cases do not suggest that the Tenth Amendment would provide a basis for invalidating federal legal reform efforts. Only twice in recent decades has the Supreme Court relied on the Tenth Amendment in invalidating federal legislation, and in both cases the improper legislation involved Congress' "commandeering" of State legislatures or executives. *See Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 188. Efforts to invoke the Tenth Amendment as a defense simply because federal law has interfered in a matter of "traditional state concern" have failed. *See, e.g., Reno v. Condon*, 528 U.S. 141, 149-50 (2000). Thus, the courts of appeals have uniformly rejected Tenth Amendment claims where a party simply contends that an otherwise valid federal law infringes on an area of traditional state concern—an argument frequently invoked by opponents of federal legal reform. *See, e.g., Richardson v. Comm'r*, 509 F.3d 736, 743 (6th Cir. 2007); *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 195 (2d Cir. 2002); *Herrera-Inirio v. INS*, 208 F.3d 299, 307 (1st Cir. 2000); *Sw. Bell Wireless Inc. v. Johnson Cnty. Bd. of Cnty. Comm'rs*, 199 F.3d 1185, 1993 (10th Cir. 1999).

That federal legal reform legislation may affect matters in state courts does not materially alter the Tenth Amendment analysis. The two cases in which the Supreme Court has struck down legislation on "commandeering" grounds have specifically recognized that because the Supremacy Clause mandates that "the Judges in every State shall be bound" by federal law, the "commandeering" test is inapposite to state judges. *See Printz*, 521 U.S. at 928-29 (observing that "state courts cannot refuse to apply federal law"); *New York*, 505 U.S. at 178-79 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."). Because the "commandeering" test is the only basis under the Supreme Court's current jurisprudence for invalidating legislation under the Tenth Amendment, a decision applying that provision to invalidate federal law affecting state courts would require another basis for its

holding—and would accordingly be unprecedented. Moreover, as noted, both *New York* and *Printz* emphasized that the invalid laws there were not proper laws and so did not come within the Necessary and Proper Clause, or any other enumerated power. Indeed, the Court, citing *Printz*, has upheld against a "state sovereignty" challenge 28 U.S.C. § 1367(d), which tolls statutes of limitations in state courts while a federal court exercises supplemental jurisdiction. *See Jinks*, 538 U.S. at 464-65. *Jinks* was, like *Pierce County*, a unanimous decision and was authored by Justice Scalia.

There does remain an open question as to whether the Tenth Amendment prevents Congress from "prescrib[ing] procedural rules for state courts' adjudication of purely state-law claims," *id.* at 464. While expressing some doubt about whether "a principled dichotomy" could be drawn between substantive and procedural rules, *Jinks* avoided that question by deeming 28 U.S.C. § 1367(d) to affect the "'substance' of state-law rights of action," *id.* at 464-65, and stated, "we need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts," *id.* at 465. But even assuming that Congress lacks "unlimited power to regulate practice and procedure in state courts," the Supreme Court's cases provide little reason to suspect that the Tenth Amendment would limit an otherwise valid exercise of Congress' commerce power, just because of its impact on state tort law or state court procedural law. As noted, the Court's only recent decisions involving successful "Tenth Amendment" claims have been its anti-commandeering cases, which expressly recognize that the Supremacy Clause permits a greater degree of "commandeering" of state judges than state legislatures or executives. *See Printz*, 521 U.S. at 928-29; *New York*, 505 U.S. at 178-79. What is more, both *Printz* and *New York* disclaimed exclusive reliance on the Tenth Amendment, but also emphasized that Congress' enumerated powers, including the Necessary and Proper Clause, did not authorize the challenged legislation. Thus, a holding that federal legislation that is valid under the Commerce Clause or other enumerated power would nonetheless violate the Tenth Amendment because it interfered with state courts or state tort law would be doubly unprecedented. Moreover, Congress has passed a number of laws regulating state-court procedures for state-court claims, *see* 23 U.S.C. § 409 (prohibiting admission of certain safety data in state-court proceedings); 15 U.S.C. §§ 6601-6617 (establishing procedural requirements for "Y2K"-related actions in state court), and there has been no significant, let alone successful, challenge to their constitutionality. Indeed, without specific reference to the Tenth Amendment, the Court has held constitutional the use of the Federal Arbitration Act for state-law claims in state courts, notwithstanding that the Act requires courts to undertake certain procedures. *See Southland*, 465 U.S. at 10-16.

Beyond the Commerce Clause, Congress possesses other, more specific powers enumerated in Art. I, sec. 8, to enact legal reform legislation. When Congress legislates under those powers, the foregoing framework does not change; the law still must be a valid exercise of an enumerated power and must satisfy the Tenth Amendment. While the Supreme Court has never squarely held that, as a general matter, laws enacted pursuant to more specific powers than the Commerce Clause present reduced Tenth Amendment concerns, its case law supports that proposition as to certain specific enumerated powers. For example, if Congress validly acts pursuant to its spending power, the Tenth Amendment is not implicated, even if the purpose of the law is to regulate state conduct. *See New York*, 505 U.S. at 167.

The Supreme Court has also suggested that laws enacted pursuant to the Bankruptcy Clause are particularly unlikely to fail Tenth Amendment scrutiny. In a case predating—but consistent with—its modern Tenth Amendment jurisprudence, the Court observed that when a "law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment." *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 516 (1938). More recently, the Court has held that laws enacted pursuant to the Bankruptcy Clause, unlike those enacted under the Commerce Clause, may abrogate States' sovereign immunity from private suits. *See Katz*, 546 U.S. at 363. In so ruling, the Court expressly recognized that the Bankruptcy Clause was a "grant of legislative authority to Congress" and emphasized its "unique history" and the "singular nature of bankruptcy courts' jurisdiction." *Id.* at 363, 369 n.9. And it squarely rejected the contention "that the word 'uniform' [in the Bankruptcy Clause] represents a limitation, rather than an expansion, of Congress' legislative power in the bankruptcy sphere." *Id.* at 376 n.13.

Finally, when Congress acts to revisit pre-existing laws to fine-tune provisions that have proven to pose obstacles to commerce, courts would seem particularly unlikely to find a Tenth Amendment difficulty. In *Pierce County*, for example, Congress adopted the law privileging information from disclosure in state-court proceedings after the underlying program had been in existence for approximately ten years and some states had expressed concerns about information collected for federal purposes being used against them in state-court proceedings. 537 U.S. at 133-34. And then, after the law had been in effect for a few years, Congress acted again to broaden and clarify the scope of the provisions. *Id.* at 134-36. In upholding the law, the Court concluded the Congress acted reasonably in "adopting a measure eliminating an unforeseen side effect" of its initial legislation. *Id.* at 731-32. Thus, where Congress has already enacted valid legislation under an enumerated power like the Commerce Clause or the Bankruptcy Clause, it possesses substantial authority to fashion rules to make those programs operate more effectively. The preceding is intended not to address the constitutionality of any specific proposals, but simply to underscore the broader point that Congress' use of other enumerated powers to enact legal reform legislation or adjust previous legislation may increase the already substantial case for the validity of such law.

Mr. QUAYLE. Thank you, Mr. Chairman.

Mr. Scarcella, I kind of want to get back to something that you were talking about earlier. And Mr. Siegel was talking about the undue burden, financial costs on the trusts from having to provide

this information, and I was just trying to—you testified that you already have an electronic claim processing that exists, the trusts do, or at least some trusts do, and I was just wondering if you would agree that fraudulent claims actually impose a greater cost to the trust than the cost of the disclosure requirements that are in this bill.

Mr. SCARCELLA. Thank you, and that is a very good question, and I think that all depends on the level of potential fraudulent claiming as to whether or not that financial strain outweighs any other related cost in identifying that fraud.

I really can't speak to the level of potential fraud. I think that is what we are here today to try and figure out is if there is a cost-effective way to provide that type of accountability and public disclosure to help keep in check potential fraud and at least identify it.

What I can tell you with confidence is that the cost associated with trusts meeting the requirements of the FACT Act are not that great. They are de minimis. In fact, in general, asbestos trusts since 2008 probably spend less than 2 percent of total dollars on their processing operations relative to their claim payments obviously, and that is by design.

They are designed to be administrative by nature. It is supposed to be a process in which people get paid very quickly, and they do, the point I really hope everybody understands. Because this idea that Mr. Siegel brings up, like I said, it is a legitimate concern, and I am here to tell you that it is not a problem. Because of the way these trusts function, because most of them, if not all of them, maintain this data electronically, the ability to extract reports is something that could take a matter of minutes to a few hours. We are talking about a computer program that is a few lines of code that anybody with basic programming skills could write that could generate these quarterly reports. And the beauty of it is that once you write that code one time, you don't have to rewrite it 3 months later when you have to produce the report again.

It is very, very efficient, and because trusts operate with distinct responsibilities where they have people reviewing claims and processing claims and getting people paid, and they have people—like what I used to do and some of the people I used to work with when I was a consultant—and other claims facilities who can handle the day-to-day operations of managing the data and responding to third-party requests.

So I guess in answer to your question, it is hard for me to know what the potential financial strain of fraudulent claiming could be. This bill could help tell us that. What I can tell you with confidence is that the cost associated with that level of transparency and accountability is not great at all.

Mr. QUAYLE. Okay. Thank you very much.

Ms. Schell, I want to ask, why should the trusts have to produce this information on written request instead of going through the courts? And kind of why isn't the State court discovery adequate in this regard?

Ms. SCHELL. Well, for a number of reasons. The State court's discovery obligation is challenged time and time again by the plaintiffs. And oddly enough, one of the points that Mr. Siegel makes is

that State court discovery is where this should lie, but State court discovery and that effort to produce actually does fall upon the plaintiffs' attorney and the plaintiffs taking some time, but instead what the FACT Act is looking for is reporting from the trust. It doesn't impose an obligation on the plaintiffs at all.

And so this isn't an issue that would cause any kind of delay. In fact, the only delay I am aware of is the delay caused by the plaintiffs in making their trust claims, because they are now allowed, in essence, just to defer the claims until some future date to collect on them.

And the discovery system in State courts is a problem. For one, the State in which the tort case is pending is usually not the State in which the trust is formed, and so issuing a subpoena cannot be done by the State court sitting over the tort suit. Instead it has to be done through a court in the jurisdiction where the trust is, and also, as I mentioned, that is often just met with opposition.

Mr. QUAYLE. Okay. Thank you.

And, Mr. Siegel, I have like about 15 seconds, but you said that the FACT Act is adverse to the interests of claimants, but opening this up to transparency and actually protecting the trusts and the trust assets from fraudulent claims, isn't that in the best interest for future claimants who may not have yet actually experienced the symptoms of some of the things that are coming from the asbestos-related injuries?

Mr. SIEGEL. Well, I don't think that the point of this bill is to protect trusts from fraudulent claims. That is already the trustees' job. Their job is to conserve, is to pay——

Mr. QUAYLE. Lack of transparency makes it much easier for fraudulent claims to go through, which is why this is actually the main focus of the bill so the trust assets are actually protected.

Mr. SIEGEL. These defendants have no interest in saving the trust money to pay claimants. They are using this data solely for their own purposes in the tort system. Ms. Schell's clients are not going to authorize her to spend money to make sure that some unrelated trust pays out only to certain claimants and not others. That is not in their interest. Their interest is only to get this data to use it in their own private State court litigation, and we know that because that is—the asserted problem is that the plaintiffs are somehow hiding the ball from the tort system.

Mr. QUAYLE. Well, I am sure that they would disagree with your statement on that.

Mr. Chairman, I yield back.

Mr. COBLE. I thank the gentleman.

Let me say, Mel, we can either adjourn and come back.

Mr. WATT. I am not coming back, Mr. Chairman. I would like to do my questioning now. You all are welcome to come back.

Mr. COBLE. Well, let me see if they will hold this vote. We are well into this vote.

Mr. WATT. You are not but 5 minutes into the vote.

Mr. COBLE. Why don't you go ahead then, Mel.

Mr. WATT. Thank you.

Mr. Chairman, I am here because I got requests from both sides of this issue to be here. I have come in with no bias on one side or the other. And I have to say I am disappointed by the hearing,

because instead of witnesses who came to inform us about the pros and cons of legislation, we seem to have four advocates here. And so I have not gotten much enlightenment as to which side of this issue I should be on because the hearing is not serving its useful purpose, which is why I have no interest in coming back.

I just came in in the middle of Professors Brown's testimony. He is the one I was hoping would be the most enlightening since he was coming from an academic perspective, but seemed to be the most strident on one side or the other.

I picked up testimony of Ms. Schell, who says this testimony is in support of H.R. 4369 rather than to inform the Committee about the pros and cons of the legislation.

So, you know, it has not been very helpful. To the extent I have a bias, I come out of a litigation background and have always thought that information related to litigation is information that is the parties' litigation. But somebody told me that this was distinguishable from that set of facts because there were some other considerations.

I haven't heard them. Maybe Ms. Schell can enlighten me about how this is different from any other litigation. I take it that parties to other litigation can have resolutions of that litigation as private settlements, and they are able to do that. I suspect, as Mr. Siegel said in his testimony, that if you were representing a defendant in litigation, you would want a privacy agreement and not to disclose either that you were at fault or that—or the terms of settlement.

How is this different from that?

Ms. SCHELL. Thank you, Congressman Watt. First of all, I am not here today on behalf of any client.

Mr. WATT. Well, I didn't see say you were here on behalf of a client, but when I pick up your testimony and it starts "testimony in support" of as opposed to testimony to inform this Committee about the pros and cons of legislation, I—I mean, we are here to—I didn't come in as an advocate on one side or the other, and I don't expect the witnesses to be here as advocates on one side or the other of a piece of legislation.

Tell me what the facts are, and, you know, I will make my own conclusions about the policy judgment. Don't tell me about the cost of something. Tell me about the policy considerations, Mr. Scarcella. I mean, you know, this is a policy discussion. I suppose you could pay for anything costwise.

Go ahead. I don't mean to go off on this panel. I just don't find it all that informative to have a bunch of advocates testifying rather than a bunch of people who are here to try to inform us about what the policy considerations are.

Ms. SCHELL. Yes, sir. The situation with 524(g) trust is unique to other types of litigation.

Mr. WATT. Why?

Ms. SCHELL. In most other types of litigation in which I am involved, it is part of my practice every day, there aren't any trusts set up that can pay bankrupt shares.

Mr. WATT. Okay. But they are parties to the litigation, and there are public policy considerations why in a number of cases we would disclose to the public dangers, right? And yet privacy agreements

are entered into in settlement agreements every single day in our litigation setting. So how is this different?

Ms. SCHELL. Well, the trust submissions are not——

Mr. WATT. Just because some trust is sitting out there, we should have a different set of rules?

Ms. SCHELL. Yes, sir, and the reason is because the trust submissions are not in the nature of routine settlement agreements, but instead contain oftentimes sworn or certified statements supporting an exposure history that is sometimes inconsistent with that is given——

Mr. WATT. I don't understand that. My time is over. So if all four of you can write me something about how this is distinct in some way.

Mr. COBLE. If the gentleman will suspend, we are going to keep the record open for 5 days.

Mr. WATT. Okay. I have asked the question. Maybe I can get a response from everybody, but I don't want to come back and pursue it.

Mr. COBLE. As I said, the record will remain open for 5 days. And I will get into that ultimately.

I am not offended by having advocates as witnesses. As long as both sides are represented, that doesn't bother me. I think that may even illuminate the procedure.

But I want to thank all of you for your testimony today. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that their answers will be made a part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, again, I thank the witnesses and for those in the audience. And this hearing is adjourned.

[Whereupon, at 10:38 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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

Asbestos is among the most lethal substances that has been widely used in the American workplace.

Most victims of asbestos exposure either receive compensation for their injuries by filing claims with asbestos bankruptcy trusts or by filing lawsuits in state and federal court against solvent defendants.

Today's hearing will consider H.R. 4369, the "Furthering Asbestos Claims Transparency Act," or the "FACT Act."

This bill essentially seeks to shift a portion of the costs of discovery away from solvent defendants in asbestos litigation cases to asbestos bankruptcy trusts that were created to compensate victims harmed by bankrupt entities.

It does this by imposing several potentially burdensome reporting and other information-sharing requirements. Specifically, the bill requires a trust:

- to file a report at the end of every quarter with the bankruptcy court and the United States Trustee describing each demand that the trust received from a claimant and the basis for any payment from the trust to the claimant, including the name and exposure history of such claimant; and
- provide any information related to payment from or demands for payment from such trust to any party in a lawsuit based on asbestos exposure upon written request, in a timely manner.

Moreover, this bill applies retroactively, meaning that it will apply to all existing asbestos trusts.

This legislation is problematic for several reasons.

First, the bill, while perhaps well-intentioned, may have an adverse impact on the most vulnerable individuals in this system, namely, the thousands of Americans who were exposed to asbestos and now suffer from serious diseases and must wait for years to have their legitimate claims paid.

The bankruptcy system is one based on equity and, unfortunately, asbestos manufacturers do not have the cleanest of hands in this matter.

Since the early 20th Century, asbestos manufacturers have known that asbestos could cause serious injury and possible death to their employees and their families, as well as unsuspecting consumers.

Yet, these manufacturers continued to allow these unsuspecting men and women to be exposed to asbestos.

As a direct result of such exposure, victims experience mesothelioma, a fatal cancer caused by asbestos.

They also contract non-malignant asbestosis, a disease that impairs the victim's lung function.

In addition, victims exposed to asbestos experience lung cancer as well as stomach cancer.

Notwithstanding these serious illnesses, asbestos manufacturers used every trick in the book to avoid responsibility, including ——

- suppressing the evidence of its mortal dangers, and then,
- fighting the government's efforts to ban its use when the deadly effects of asbestos were indisputable.

In some cases, innocent victims risk not receiving any compensation at all because the responsible manufacturers have gone out of business or incessantly deny their liability to these victims.

H.R. 4369 must also be viewed in the context of asbestos-related bills from past Congresses in which the asbestos industry tried a strategy of avoiding responsibility for the harm it caused by seeking legislation that would have denied or limited recoveries to the asbestos victims and their families.

Another concern that I have with H.R. 4369 is that it would effectively shift the cost of discovery away from solvent asbestos defendants to the bankruptcy trusts, ultimately diminishing the available pool of money to compensate the victims of bankrupt asbestos defendants.

As it is, claimants often receive only a small portion of the full amount of their claims, even as little as 1 percent.

A critical goal of our discussion today should be to ensure that H.R. 4369 does not lessen the amount of compensation for asbestos claimants, who have already been victimized.

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

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

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

But, H.R. 4369 does nothing to advance the interests of the trust beneficiaries.

If anything this measure could lessen the amount of compensation available to pay the claims of these trust beneficiaries because it shifts the cost of discovery from solvent defendant companies to the very trusts that are charged with maximizing payments to their beneficiaries.

Again, as a matter of equity, the victims of asbestos exposure should not now bear the discovery costs of those who caused their injuries and death.

Nevertheless, some of the witnesses today will likely say the asbestos claim process is rife with fraud and that asbestos bankruptcy trusts need to be more transparent to deter dishonest claims practices.

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

And, as the Government Accountability Office reported last fall, there is no empirical evidence of endemic fraud in the claims processing system.

Finally, I am concerned about H.R. 4369's potential to expose private and confidential information about asbestos victims.

While the bill requires the exclusion of confidential medical records or full Social Security numbers of claimants, it also requires trusts to report and make public the names and exposure histories of trust claimants.

Such information, once irretrievably released into the public domain, could be used by data collectors and other entities for purposes that have nothing to do with compensation for asbestos exposure.

Just think what insurance companies and prospective lenders could do with that information.

These are just a few of the concerns that I have with this legislation.

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

Response to Questions for the Record from Leigh Ann Schell, Esq., Kuchler Polk Schell Weiner & Richeson, LLC, New Orleans, LA

Questions for the Record
From the May 10, 2012 Hearing on
H.R. 4369, the "Furthering Asbestos Claim Transparency Act of 2012"

Questions from Ranking Member Steve Cohen for Ms. Schell

1. **You are obviously a big proponent of transparency and disclosure. 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?**

I would not support the current version of H.R. 592 because in my opinion Rule 26 (b) of the Federal Rules of Civil Procedure which sets forth the scope and limits of discovery along with Rule 26 (c) on protective orders provide courts with ample instruction for when protective orders are appropriate. A court may enter a protective order only for "good cause." The party seeking the protective order bears the burden of proving its need. In contrast to H.R. 592, the FACT Act reserves to courts the right to issue protective orders where good cause is shown reserving to the court the discretion given by Congress in Rule 26.

Additionally, the FACT Act is only seeking claims information which would be traditionally available if the claim was made through a proof of claim form in an open bankruptcy procedure. The unique nature of 524(g) and the confidentiality provisions put in place by the trusts post-confirmation are contrary to the open claims process employed in a bankruptcy proceeding. The FACT Act seeks to restore 524(g) trusts to the usual of level of transparency in bankruptcy proceedings subject to the privacy protections already contained in the Bankruptcy Code and to protection via protective order from the courts.

The Sunshine in Litigation Act, on the other hand, seeks to deprive the courts of their decision making power regarding protective orders.

2. **Do your clients typically put all of the details concerning their settlements acknowledging liability for causing injury based on asbestos exposure in the public record?**

Typically, my clients' settlement document is a Receipt, Release and Indemnity Agreement which is not filed into the record because filing is not required. If court approval is needed such as where the settlement involves a minor, the Receipt, Release and Indemnity Agreement would be filed into the record.

The confidentiality provision contained in my clients' asbestos settlements is generally insisted on by plaintiffs rather than by my clients because the plaintiffs do not want other defendants to be able to assess how much the plaintiff is collecting in settlement as that could impair negotiations with remaining defendants. The confidentiality provision contained in my asbestos settlements would allow for production of the settlement agreement if authorized by a statute such as the FACT Act. The language reads:

> Releasee and its attorneys agree that, except as otherwise required by court order, statute, governmental agency, governmental authority or other binding requirement of law, they will keep confidential any fact of or any of the terms or conditions of this Release or any of the amounts, numbers or sums payable to Releasors hereunder.

In my cases, typically when defendants request the production of settlement documents, it is the plaintiff who objects not the defendant who is a party to the agreement.

3. **Why do your clients insist that their settlements be kept confidential?**

My clients generally do not insist that their individual asbestos settlements be kept confidential. In my experience, the confidentiality provisions are requested by plaintiffs.

4. **Would you be in favor of having solvent defendant manufacturers pay for the cost of the FACT Act's reporting and response requirements, given the apparent importance of this information to them?**

I am in favor of having those requesting documents from the trusts pay for the response which is in keeping with the current prevailing process under which defendants pay a fee

charged by the trust. Some of the trusts even charge for advising whether or not a claim has been filed.

I am not in favor of having solvent defendant manufactures pay for the FACT Act's reporting requirement because I believe that reporting is necessary to work toward accountability and is not unique to any particular party.

Questions from Mr. Watt for Ms. Schell

1. **If most asbestos settlements resolved in state court are kept confidential, should a different standard be applied to settlements with asbestos trusts?**

Most asbestos settlements in state court cases do not contain any factual information or information in line with a verified proof of claim form. The settlements are based on factual information generated in the law suit such as that contained in documents and obtained through deposition testimony. The underlying factual material developed in the asbestos lawsuit is generally not confidential and can be used to the extent allowed by rules of civil procedure in subsequent law suits.

On the other hand, claims made to 524(g) trusts are based on verified submissions which contain factual information such as statements as to which products or at which locations plaintiffs allege exposure. As recently recognized by Louisiana's Fourth Circuit Court of Appeal,

> The Relator believes these materials would include affidavits of exposure and medical evidence relating to Mr. Oddo's disease. In his deposition, Mr. Oddo testified that he may have been exposed to JM asbestos material that was deposited as fill for his driveway. **Any documents that suggest multiple exposures would be relevant to the Respondents claim and the Relator's defenses.** Accordingly, because the subpoenaed documents are relevant to the subject matter of the pending action, they are discoverable. (Emphasis added.)
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> The objectives of discovery are: to afford all parties a fair opportunity to obtain facts pertinent to the litigation; to discover the true facts and compel their disclosure; to assist litigants in preparing for trial; to narrow and clarify the issues; and to facilitate and expedite the legal process by encouraging settlement or abandonment of less than meritorious claims. *Hodges,* 433 So.2d at 129; *In re Marriage of Kuntz*, 2007-0601, p. (La. App. 4 Cir. 2008), 998 So.2d 120, 124 (*citing Moak*, 631 So.2d at 403)). The production of documents in this case would certainly aid both the Respondents and the Relator in obtaining true facts pertinent to the litigation.

See *Oddo* writ decision, Attachment A.

Because verified trust submissions contain facts pertinent to the litigation where settlement documents generally do not, I do believe that they should be treated differently because they are different.

2. **If greater disclosure is required of victims' settlements with asbestos trusts, should greater disclosure also be required of asbestos settlements resolved in state court?**

See Answer to question Number 1.

3. **How do you reconcile charges of rampant fraud on asbestos trusts and solvent defendants with studies by the U.S. Government Accountability Office and the Rand Corporation and audits by the asbestos trusts themselves that have failed to find such rampant fraud?**

The GAO report recognized the need for transparency and accountability for over sixty trusts established to collectively form a *$38.6 billion* privately funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system.[1] The report also recognized that it is problematic that federal law created the 524(g) trusts but provides no mechanism to ensure that the trusts operate in a manner consistent with Congressional intent.[2] Further, the GAO report underscored that 65% of the 524(g) trusts have

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1 *See* U.S. Government Accountability Office, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, GAO-11-819, at 3 (Sept. 2011), *available at* http://www.gao.gov/products/GAO-11-819.

2 *Id.*

formalized policies and procedures through their post-confirmation Trust Distribution Plans that are specifically intended to prevent the production of information related to exposure allegations and other claims information.[3] The GAO report acknowledges that "a claimant could file the same medical evidence and altered work histories with different trusts."[4] The report cites *Kananian*, discussed in my written and oral testimony, in support of defendants' assertion that the trusts' lack of transparency enables contradictory claims in both the trust and tort systems.[5]

Only three of the 11 trusts interviewed by GAO have conducted audits to confirm that submitted claims meet their individual trust requirements, and only one of these trusts engaged an outside medical expert to review the materials submitted in support of claims (the GAO report does not indicate how many claims were subjected to outside scrutiny).[6] Even though the three trusts have not discovered fraud, given the long history of fraud in asbestos-related litigation (e.g. Judge Jack decision), the discovery of fraudulent and inconsistent claims in tort cases, and the indisputable fact that fraudulent claims have been filed with other compensation funds such as the 9/11 Victim Compensation Fund, the Hurricane Katrina Compensation Fund and the BP Oil Spill Compensation Fund, this result is not in line with the evidence of misinformation, misstatements and fraud routinely found in practice.

Like the GAO report, the 2011 Rand report further recognized the need to reconcile to two parallel systems to preserve resources for future asbestos claimants. According to the report,

> Given these sizable assets, and the great reservoir of future asbestos personal injury claims, both plaintiffs and solvent defendants have a great deal at stake with regard to how trusts enter into the determination of tort awards. At issue is whether a lack of coordination between the trusts and the tort system allows plaintiffs to, in effect, recover once in the tort system and then again from the

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3 *Id.* at 26 and 28.
4 *Id.* at 23.
5 *Id.* at 30, n. 32.
6 *Id.* at 23.

> trusts. Similarly at issue is whether the payments by solvent defendants are being properly adjusted to account for the compensation available from the trusts. Higher trust payments to current plaintiffs mean fewer trust resources for future plaintiffs, so also of concern is whether a lack of coordination between trusts and the tort system advantages today's plaintiffs relative to future plaintiffs.[7]

The Rand report concluded that in some instances plaintiffs stand to recover more from the two parallel systems than they would have if all defendants remained in the tort system:

> We have found that the potential effects vary considerably by state, reflecting the differences in liability regimes and in court rules and procedures. Some states have rules that take into account past or possible future trust payments. Others seem to treat trust payment as *sui generis*, outside the purview of the courts. This can allow plaintiffs to recover more from tort and trust combined than they would have recovered had none of the defendants filed for reorganization, ceteris paribus.[8]

But, the most recent Rand report made no attempt to identify or quantify fraud:

> Finally, our analysis has not evaluated whether the current system for compensating asbestos victims is functioning well or poorly. Rather, it has attempted to describe the linkages between the trusts and tort cases and the potential implications of these linkages. Such an assessment would require a set of goals for the performance of the asbestos compensation system. Goals pertaining to transaction costs, the intent of the liability standard, time to disposition, and single satisfaction for a wrong might be considered. We leave it to future work to assess the performance of the multisource system in place today for compensating asbestos victims and to suggest reforms that will improve outcomes.[9]

What I have seen in my practice is evidence of misinformation and fraud which I believe is just the tip of the iceberg. In addition to the examples given in my written and oral testimony before the Subcommittee on May 10, 2012, in one of my cases, the plaintiff answered discovery on May 25, 2012 affirmatively stating that he had not made any prior claims or received any settlements.

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7 Rand, *Asbestos Bankruptcy Torts and Trust Compensation*, Lloyd Dixon and Geoffrey McGovern at Summary p. x.

8 *Id.* at 46.

9 *Id.* at 58.

REQUEST FOR PRODUCTION NO. 16:

Please produce a copy of each and every document, which evidences any and all lawsuits and/or written claims and/or demands for compensation (including, but not limited to, workers' compensation and social security benefits) relating to any physical injury or disease Plaintiff may have sustained or contracted.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to the extent this interrogatory requests confidential information and/or information protected by the attorney-client privilege, work product doctrine and/or any other applicable laws or Rules. **Subject to and without waiving said objections, none.** Plaintiff reserves the right to supplement.

REQUEST FOR PRODUCTION NO. 17:
Please produce a copy of each and every document that evidences any and all settlements of any claims for Plaintiff's injuries arising out of exposure to asbestos or asbestos-containing materials into which Plaintiff has entered.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to the extent this interrogatory requests confidential information and/or information protected by the attorney-client privilege, work product doctrine and/or any other applicable laws or Rules. **Subject to and without waiving said objections, none.** Plaintiff reserves the right to supplement.

See Plaintiff's Reponses to *Burton* discovery, Attachment B (Emphasis added).

Yet last month we receive an e-mail from Claims Resolution Management confirming that Mr. Burton had in fact made a claim with the Johns-Manville Trust and that he was in fact paid.

Likewise, recently in *Brian Montgomery v. American Steel and Wire Corp.*, in a pre-trial hearing on November 7, 2011, Judge Peggy Ableman of the Superior Court of Delaware, Castle County recounted in detail the history of a matter in which the plaintiff failed to reveal his trust

claims in spite of a case management order requiring him to so do. Judge Ableman described the acts as "dishonestly at its highest level."[10]

4. Typically a victim can recover from anyone who harms them, even if there were multiple actors. Should the asbestos industry be subject to a different standard?

Under joint liability, a plaintiff can recover from one actor but that actor, in turn, has the right to lessen his liability by proving that someone else was responsible for the injury. Documents suggesting multiple exposures are relevant both to a plaintiff's claim and to the defendant's defenses. The asbestos industry is not subject to a different standard nor does the FACT Act create one.

Joint liability, known as solidary liability in Louisiana, has been abandoned by most states in favor of comparative fault tort systems. Under comparative fault, an actor only pays the plaintiff for his percent contribution to the loss. If there are multiple actors, each is responsible to the plaintiff only for a part of the damages. Here again, documents suggesting multiple exposures are relevant both to a plaintiff's claim and to the defendant's defenses.

In Louisiana, for causes of action arising before the Louisiana Legislature rejected solidary liability in favor of comparative fault, Louisiana courts apply the old law of solidary obligations. Because the alleged asbestos exposure occurred before the change in the law, the asbestos industry is subject to a different standard than today's usual tort defendant. The standard applied to asbestos defendants, solidary liability, is much more onerous than that under current law such that the asbestos defendant is treated worse than the usual defendant. However, even under this onerous standard, an asbestos defendant can prove the fault of others to lessen his liability. Documents evidencing multiple exposures are relevant for this purpose.

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[10] See Transcript of November 7, 2011 Pre-Trial hearing, Attachment C at p. 3.

4. Are asbestos trusts already required to disclose claim information? Do current state discovery rules allow defendants to obtain this information if a judge determiues it is relevant?

As the GAO report recognized, 65% of the 524(g) trusts have now taken steps in their Trust Distribution Procedures developed post-confirmation to require the trust to contest subpoenas issued by state courts in contravention of state discovery rules. And, in fact, some of the Trust Distribution Procedures, such as the example cited below, require that the discovery contest take place in federal court by providing that the trust will *only* respond to a subpoena issued by the Bankruptcy Court and not one issued by a state court.

These Trust Distribution Procedures (TDPs) have been modified post-confirmation to include a "confidentially" provision that generally states that all information submitted to the respective trust 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. Second, a large number of these TDPs have been modified post-confirmation to include a "sole benefit" provision that generally states that evidence submitted to the respective trust to establish proof of an asbestos-related claim is for the sole benefit of the trust, not third parties or defendants in the tort system.

For example, the Babcock and Wilcox Personal Injury Asbestos Settlement Trust's plan now provides:

> 6.5 **Confidentiality of Claimants' Submissions.** All submissions to the PI Trust by a holder of a PI Trust Claim of a proof of claim form and materials related thereto shall be treated as made in the course of settlement discussions between the holder and the PI Trust, and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including but not limited to those directly applicable to settlement discussions. **The PI Trust will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only in response to a valid subpoena of such materials issued by the Bankruptcy Court. The PI Trust shall on its own initiative or**

> **upon request of the claimant in question take all necessary and appropriate steps to preserve said privileges before the Bankruptcy Court and before those courts having appellate jurisdiction related thereto.**[11]

Not only does the Babcock and Wilcox Trust require a subpoena for production of claims information, it requires that the subpoena issue from the Bankruptcy Court. And, the Trustee is ordered to take the initiative to challenge the subpoena. Such constraints are not surprising given that plaintiffs' firms often are part of the group responsible for developing the trust's distribution procedures.[12] This procedure makes state court discovery essentially irrelevant.

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[11] *See* The Babcock & Wilcox Co., Asbestos Personal Injury Settlement Trust Distribution Procedures, Exhibit B to Plan of Reorganization, at 47-48, *at* http://www.bwasbestostrust.com/files/Revised%20B%20W%20TDP%201.pdf (emphasis added).

[12] *See* GAO Report, *supra* at 22-23, noting that Trust Advisory Committees (TACs) are dominated by a small group of plaintiffs' firms and that TAC approval is needed to set payment percentages, modify payment percentages and approve audit methods.

NO. 2012-C-0415

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

WILLIAM ODDO, JR., ET AL.

VERSUS

ASBESTOS CORPORATION, LTD., ET AL.

IN RE: FORD MOTOR COMPANY

APPLYING FOR: SUPERVISORY WRIT

DIRECTED TO: HONORABLE PIPER D. GRIFFIN
CIVIL DISTRICT COURT, ORLEANS PARISH
DIVISION "I-14", 2011-5883

WRIT GRANTED

The writ application of the Relator, Ford Motor Company, is granted. The Relator is entitled to relief on the claims in its writ application for supervisory review of the district court's granting of a motion to quash subpoena filed by the Respondent, William Oddo, Jr., et al. Finding that the district court abused its discretion in quashing the Relator's subpoena for the production of documents and concluding that the subpoenaed materials were work product, we reverse the judgment of the district court.

In its writ application, the Relator contends that the district court erred in quashing its subpoena because the documents it requested contain relevant and non-privileged information of Mr. Oddo's asbestos exposure and therefore falls within the scope of discoverable material.

Louisiana's Code of Civil Procedure generally permits discovery regarding any matter, not privileged, which is relevant to the subject matter of the action. La.

C.C.P. arts. 1422-1425; *Hodges v. Southern Farm Bureau Casualty Insurance Co.*, 433 So.2d 125, 129 (La. 1983). The scope of discovery is set forth in the Louisiana Code of Civil Procedure article 1422, which provides in pertinent part:

> **Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,** whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. **It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.** [Emphasis Added].

Discovery statutes should be liberally and broadly construed to allow discovery whenever possible. *Simmons v. Transit Mgmt. of Se. Louisiana, Inc.*, 2000-2530, p. 3 (La. App. 4 Cir. 2/7/01), 780 So.2d 1074, 1077 (*citing Chesson v. Hungerthe Relator*, 228 So.2d 332, 335 (La. App. 3 Cir. 1969)); *Hodges*, 433 So.2d at 129; *Moak v. Illinois Central Railroad Co.*, 93-0783 (La. 1/14/94), 631 So.2d 401, 405; *In re Marriage of Kuntz*, 2007-0601, p. (La. App. 4 Cir. 10/15/08), 998 So.2d 120, 124 (*citing Moak*, 631 So.2d at 406).

The Respondents argue in their motion to quash that the documents the Relator requests JM Trust to produce are privileged settlement agreements and are not subject to discovery. The Respondents primarily rely on three cases in support of their argument, none of which, however, appear to be applicable or binding on this Court.[1]

The *Davis v. Johns-Manville Products*, CIV. A. 77-2282, 1990 WL 162844 (E.D. La. Oct. 16. 1990) case improperly cited by the Respondents as *Davis v. Johns-Manville Products*, 766 F. Supp. 505 (E.D. La. 1991) cannot be considered

[1] The Relator also pointed out to the district court in its opposition to the Respondents' motion to quash.

by this Court because it is unpublished and decided prior to the amendment of La. C.C.P. art. 2168.[2]

The second case the Respondents rely on is the Federal Fifth Circuit case, *Branch v. Fid. & Cas. Co. of New York*, 783 F.2d 1289, 1294 (5th Cir. 1986). In *Branch*, the court prevented the use of evidence from the plaintiff's previous settlement with one defendant in subsequent litigation with a second defendant when both actions arose out of same accident. However, the *Branch* court addressed the admissibility of the settlement agreement, not the discoverability of the settlement agreement, which is the issue in the present case.

The third case that the Respondents rely on is this Court's opinion in *Dutton v. Guste*, 387 So.2d 630 (La. App. 4 Cir. 1980), which held that a compromise agreement was privileged and not subject to discovery. However, the Louisiana Supreme Court reversed this Court's decision on that very point. *Dutton v. Guste*, 395 So.2d 683 (La. 1981). *Dutton* involved whether the discovery code articles were to be read in *pari materia* with the provisions of the public records statute. The Supreme Court ultimately held that the purported settlement documents were public records and subject to inspection.[3] *Id.* at 685. The Respondents have thus failed to cite any authority to this Court that supports their claim that settlement agreements are not discoverable.

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[2] The first case the Respondent discussed is a federal district court case cited as *Davis v. Johns-Manville Products*, 766 F. Supp. 505 (E.D. La. 1991). In *Davis*, 766 F. Supp. 505, the district court addressed whether a plaintiff's asbestos lawsuit was prescribed. The actual case that the Respondents rely on is an unpublished decision, *Davis v. Johns-Manville Products*, CIV. A. 77-2282, 1990 WL 162844 (E.D. La. Oct. 16, 1990). La. C.C.P. art. 2168, as amended, requires that the Louisiana Supreme Court and Louisiana courts of appeal post unpublished opinions on their internet websites, and allows opinions so posted to be cited as authority. However, because the *Davis* case was decided prior to August 15, 2006, the effective date of this legislation, it continues to be governed by Uniform Rules-Courts of Appeal, Rule 2-16.3 (before it was amended in 2007), and cannot be cited as authority to this Court. La. Prac. Civ. Proc. Art. 2168 (2011 ed.). See also, *State v. Bennett*, 10-393 (La. App. 5 Cir. 3/29/11), 63 So. 3d 251, 259 (La. Ct. App. 2011) *writ denied*, 2011-0931 (La. 12/21/11), 73 So. 3d 381.

[3] *Dutton v. Guste*, 395 So.2d 683 (La. 1981) (holding that documents which concerned purported settlement of claims between various architects and engineers and the state of Louisiana with regard to liability for defects in design or construction of the Louisiana Superdome were "public records" and were not exempt from public's right of inspection under any of the exceptions established by law).

There is law, however, establishing that compromise discussions are not admissible in evidence for purposes of establishing liability.[4] La. C.E. art. 408; La. C.E. art. 413; *Fidelity Bank & Trust Co. v. Deutsch, Kerrigan & Stiles*, 89-0759 (La. App. 4 Cir. 1990), 557 So.2d 991, p. 994; see also, *Reeves v. Grove*, 2010-1491, p. 8 (La. App. 4 Cir. 9/21/11), 72 So. 3d 1010, 1015, *reh'g denied* (10/24/11) (citing *Belanger v. Employers Mutual Liability Ins. Co.*, 159 So.2d 500, 508 (La. App. 1 Cir.1963)). "However, although generally inadmissible to prove liability, compromises may be admissible for other purposes." *Reeves*, 2010-1491, p. 8, 72 So.3d at 1015 (quoting *Broussard v. State Farm Mut. Auto. Ins. Co.*, 188 So.2d 111, 121 (La. App. 3 Cir. 1966) and *Launey v. Thomas*, 379 So.2d 27, 30 (La. App. 3 Cir. 1979)); see also, *Page v. Guidry*, 506 So.2d 854, 857 (La. App. 4 Cir. 1987) (holding that settlement agreements from the plaintiff's two prior accidents were admissible to show that the medical expenses claimed by the plaintiff had already been submitted for recovery in the prior settlements and dispute plaintiff's credibility).

Furthermore, whether or not the purported settlement agreements are ultimately admissible at trial is immaterial in determining whether the documents are discoverable. Under La. C.C.P. art 1422, a party may obtain discovery about any matter, not privileged, which is relevant to the subject matter of a pending action. Information which would not be admissible at the trial may be discovered if it appears reasonably calculated to lead to the discovery of admissible evidence.

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[4] With regard to settlement agreements, La. C.E. Art. 408(A) provides:

> **In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, anything of value in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.** Evidence of conduct or statements made in compromise negotiations is likewise not admissible. **This Article does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations.** This Article also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Emphasis Added].

Id. Thus, the "test of discoverability is not the admissibility of the particular information sought, but whether the information appears reasonably calculated to lead to the discovery of admissible evidence." *Guy v. Tonglet*, 379 So.2d 744, 745 (La. 1980) (quoting *Ogea v. Jacobs*, 344 So.2d 953, 960 (La. 1977)); see also, *Perez v. State Indus., Inc.*, 578 So.2d 1018, 1020 (La. App. 4 Cir. 1991).

In *Perez*, 578 So.2d 1018, this Court found that the district court improperly quashed the production of a settlement agreement. The settlement agreement in *Perez* contained a "Mary Carter" provision that entitled the settling defendant to reimbursement in the event the plaintiff recovered from other defendants. The provision made any testimony given by the settling defendants' employees biased, and thus the Court found that the agreement was relevant and discoverable as it went directly towards witness bias. In reversing the district court, the *Perez* Court reasoned:

> **[T]he scope of information subject to discovery is not limited to information which would be admissible at trial**. Generally, even information inadmissible at trial is discoverable, if it "appears reasonably calculated to lead to the discovery of admissible evidence," so long as it is "relevant to the subject matter involved in the pending action" and is not privileged.
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> **Since discoverability is not controlled by admissibility, the trial court erred in denying the discovery request for that reason. Under La.C.C.P. 1422, only two issues may be considered when determining discoverability of information which is not privileged: (1) Is the information sought relevant? and (2) Does the information appear "reasonably calculated to lead to the discovery of admissible evidence?"** Concerning the request for discovery of the settlement agreement in the instant case, the answer to both questions is "yes."
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> [T]he trial judge improperly decided a discoverability issue on the basis of whether the information would have been admissible at trial. Since the information sought by State is both relevant and "reasonably calculated to lead to the discovery of admissible evidence," it is discoverable. [Emphasis added].

Id. at 1019-20.

Similarly, discoverability of the alleged settlement agreements is at issue in the present case, not admissibility. In the Petition of Letters Rogatory, the Relator requested the production of:

> A certified copy of all documents relating to or reflecting any claims for compensation, including all documents reflecting the status of payment if any such claims, bases on asbestos-related injuries submitted to Johns Manville Trust/Claims Management Corporation by or on behalf of William Odd, Jr.

The Relator believes these materials would include affidavits of exposure and medical evidence relating to Mr. Oddo's disease. In his deposition, Mr. Oddo testified that he may have been exposed to JM asbestos material that was deposited as fill for his driveway. Any documents that suggest multiple exposures would be relevant to the Respondents claim and the Relator's defenses. Accordingly, because the subpoenaed documents are relevant to the subject matter of the pending action, they are discoverable.

Moreover, JM Trust routinely produces documents in response to subpoenas in asbestos litigation and specifically does not produce settlement agreements including "correspondence that relates to claim evaluation and negotiation by and between [JM Trust] and claimant/counsel… copies of settlement checks, electronic fund transfer reports (EFT), or releases. Thus, there is no danger that privileged materials will be released pursuant to the Relator's subpoena. However, to the extent that the Relator's subpoena is too broad, the district court should conduct an *in camera* review of the documents produced.

Furthermore, the Respondents argue, for the first time in their opposition to the Relator's writ application, that they never actually filed a claim with JM Trust as a result of Oddo's asbestos exposure. However, in its reply memorandum, the Relator attached a copy of an email and a spreadsheet from JM Trust verifying that not only did the Respondents file a claim, but that the Respondents claim was

actually paid. Additionally, in its second motion to supplement, The Relator submitted a letter written and signed by the same JM Trust representative specifically stating that "Mr. Oddo has filed a claim with the Johns Manville Trust. His claim is settled and paid."[5] The Respondents contend in their reply brief that it had no knowledge that Mr. Oddo previously filed a claim with JM Trust and that they only became aware of it from corresponding with the Relator's counsel. The Respondents argue that if Mr. Oddo did submit a claim to JM Trust, it was not for his contraction of mesothelioma and was not in conjunction with this case. The Respondents also claim that if the email and spreadsheet is what it purports to be, the Relator may revisit this issue before the district court to present the "new evidence."[6]

The Respondents are correct in their assertion that an appellate court may not review evidence that is not in the record on appeal and cannot receive new evidence. La. C.C.P. art. 2164; *Denoux v. Vessel Mgmt. Services, Inc.*, 2007-2143, p. 6 (La. 5/21/08), 983 So.2d 84, 88; *Bd. of Directors of Indus. Dev. Bd. of City of New Orleans v. All Taxpayers, Prop. Owners, Citizens of City of New Orleans*, 2003-0826, p. 4 (La. App. 4 Cir. 5/29/03), 848 So. 2d 740, 744. Even after the record has been transmitted to the appellate court, the record can be supplemented by stipulation of the parties, by the district court, or by order of the appellate court, only if the evidence was properly filed into the record in the trial court. La. C.C.P. art. 2132. However, the Relator did not submit the "new evidence" in the original application for supervisory writs. The "new evidence" was offered to refute the Respondents allegation that Mr. Oddo never submitted a claim with JM Trust.

Nevertheless, the fact that the parties dispute whether a claim was filed on behalf of Mr. Oddo further demonstrates the importance of the subpoenaed

[5] This letter was not presented to the district court as it was obtained by the Relator after the hearing on the Respondents motion to quash.

documents. The objectives of discovery are: to afford all parties a fair opportunity to obtain facts pertinent to the litigation; to discover the true facts and compel their disclosure; to assist litigants in preparing for trial; to narrow and clarify the issues; and to facilitate and expedite the legal process by encouraging settlement or abandonment of less than meritorious claims. *Hodges*, 433 So.2d at 129; *In re Marriage of Kuntz*, 2007-0601, p. (La. App. 4 Cir. 2008), 998 So.2d 120, 124 (*citing Moak*, 631 So.2d at 403)). The production of documents in this case would certainly aid both the Respondents and the Relator in obtaining true facts pertinent to the litigation. At the very least, it would help determine whether Mr. Oddo did in fact file a claim with JM Trust regarding his mesothelioma. As such, the subpoenaed materials are relevant to the underlying claims in this lawsuit.

The Relator also argues in its writ application that the district court erred in finding *sua sponte* that subpoenaed documents are work product and not subject to discovery. This argument also appears to have merit.

Louisiana's work product rule generally prohibits courts from ordering the production of any writing obtained or prepared by the adverse party "in anticipation of litigation or in preparation for trial." La. C.C.P. art. 1424(A). However, that prohibition does not apply if the denial of production "will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice." *Id.*; see also, *Cacamo v. Liberty Mut. Fire Ins. Co.*, 1999-1421, p. 5 (La. App. 4 Cir. 10/10/01), 798 So.2d 1210, 1214.

Louisiana courts have developed a two-part inquiry for determining whether documents should be excepted from discovery under the attorney work-product rule: "(1) [w]ere the documents obtained or prepared in anticipation of litigation or

[6] As noted in the previous footnote, the written correspondence that the Relator attached as Exhibit 23 to its second motion to supplement the record was also not submitted to the district court.

in preparation for trial? and (2) [i]f so, will the party seeking production be unfairly prejudiced or subject to undue hardship or injustice by denial of the discovery request?" *Simmons*, 2000-2530, p. 3, 780 So.2d at 1076-77 (citing *Smith v. Travelers Insurance Co.*, 418 So.2d 689, 691 (La. App. 4 Cir.1982), *rev'd on other grounds*, 430 So.2d 55 (La.1983)); see also, La. C.C.P. art. 1424(A).

Once the party from whom discovery is sought establishes that the documents were obtained or prepared in anticipation of litigation, the party seeking the discovery must prove two facts: (1) that he has a substantial need for the materials in preparation of the case, and (2) that he is unable to obtain a substantial equivalent of the materials by other means without undue hardship. *Cacamo v. Liberty Mut. Fire Ins. Co.*, 1999-1421, p. 6, (La. App. 4 Cir. 2001) 798 So.2d 1210, 1215 (*citing Ogea*, 344 So.2d at 953). The party seeking discovery must show the importance of the requested information to the preparation of his case, and the difficulty he will face in obtaining substantially equivalent information from other sources if production is denied. *Id.* p. 6, 798 So.2d at 1215 (*citing State, Department of Transportation and Development v. Stumpf*, 458 So.2d 448, 452-53 (La. 1984)).

Here, the Respondents did not attempt to prove that the subpoenaed materials were prepared or obtained in anticipation of litigation, as the district court decided on its own that the documents constituted work product. However, assuming that the subpoenaed documents are protected by the work product privilege, it seems that the Relator would be unfairly prejudiced by the denial of its discovery request.

The documents the Relator subpoenaed JM Trust to produce allegedly contain sworn affidavits and medical evidence of Mr. Oddo's asbestos exposure. Because Mr. Oddo died before the Relator was able to cross examine him, the Relator has a substantial need for the subpoenaed materials in the preparation of its

defense against the Respondents claims. As such, the nonproduction of these documents would unfairly prejudice the Relator in defending the lawsuit. See, *Simmons*, 2000-2530, p. 4-5, 786 So.2d at 1077-1079 (finding that production of documents was required when the person involved in the accident was deceased and the denial of discovery request would deprive the remaining plaintiff of eyewitness testimony without the report and thereby suffer undue hardship).

Furthermore, when the Respondents filed a claim with JM Trust regarding Mr. Oddo's asbestos exposure, they arguably waived any protections afforded under the work product doctrine. See, *Cooper v. Pub. Belt R.R.*, 2002-2051, p. 6 (La. App. 4 Cir. 1/22/03), 839 So.2d 181, 185 (holding that although an affidavit obtained in preparation for trial was privileged as work product, the litigant waived the privilege when he voluntarily provided a copy to the opponent). La. C.C.P. art. 1424(D) only protects a party that inadvertently discloses information subject to work-product protection.[7] In the present case, the Respondents waived the work product privilege when they voluntarily provided the documents to JM Trust, a third party, in connection with the alleged settlement negotiations.

Because the Relator would be unfairly prejudiced by the denial of its request, and because the Respondents voluntarily disclosed the information potentially subject to work product protection, it appears that the subpoenaed documents are discoverable. The district court, therefore, erred in finding that the subpoenaed matters are immune from discovery under the work product doctrine.

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[7] La. C.C.P. art. 1424 (D) provides:

> A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver if the disclosure is inadvertent and is made in connection with litigation or administrative proceedings, and if the person entitled to assert the privilege or work product protection took reasonably prompt measures, once the holder knew of the disclosure, to notify the receiving party of the inadvertence of the disclosure and the privilege asserted. Once notice is received, the receiving party shall either return or promptly safeguard the inadvertently disclosed material, but with the option of asserting a waiver. Even without notice of the inadvertent disclosure from the sending party, if it is clear that the material received is privileged and inadvertently produced, the receiving party shall either return or promptly safeguard the material, and shall notify the sending party of the material received, but with the option of asserting a waiver.

In conclusion, the district court abused its discretion in granting the Respondents' motion to quash the Relator's subpoena and concluding that the requested documents were not discoverable. The proper inquiry with regard to a discovery motion is whether the subpoenaed documents are relevant and reasonably calculated to lead to discoverable evidence, not whether they will be ultimately admissible at trial. *Guy*, 379 So.2d at 745; *Ogea*, 344 So.2d at 960; *Perez*, 578 So. 2d at 1019. Moreover, the Relator has demonstrated a substantial need for the subpoenaed materials, without which the Relator would be unfairly prejudiced in preparing its defense against the Respondents claims.

Therefore, for the foregoing reasons, it is ordered by this Court that JM Trust produce the subpoenaed materials so the district court may inspect the documents *in camera* to determine which documents, if any, are privileged.

New Orleans, Louisiana this ____ day of _____, _____.

_____
CHIEF JUDGE CHARLES R. JONES

_____
JUDGE DENNIS R. BAGNERIS, SR.

_____
JUDGE EDWIN A. LOMBARD

_____
JUDGE PAUL A. BONIN

_____
JUDGE DANIEL L. DYSART

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2012-3839 SECTION 14 DIVISION "I"

JOHNNY RAY BURTON

VERSUS

AFTON PUMPS, INC., ET AL

FILED: _____ _____
DEPUTY CLERK

PLAINTIFFS' RESPONSE TO DEFENDANT HENRY VOGT MACHINE COMPANY'S FIRST SET OF INTERROGATORIES, REQUEST FOR ADMISSION AND REQUEST FOR PRODUCTION

TO: Defendant Henry Vogt Machine Company, by and through their attorneys of record, Joseph H. Hart, Kuchler, Polk, Schell, Weiner & Richeson, 1615 Poydras Street, Ste. 1300, New Orleans, LA 70112.

NOW COMES Plaintiff and files his Responses and Objections to Defendant Henry Vogt Machine Company's First Set of Interrogatories, Request for Admission and Request for Production pursuant to the Louisiana Code of Civil Procedure.

REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1
Please admit that you are not asserting fraud claims against Henry Vogt.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 2
Please admit that you are not asserting conspiracy claims against Henry Vogt.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 3
Please admit that you are not asserting intentional tort claims against Henry Vogt.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 4
Please admit that you are not asserting claims for products liability against Henry Vogt.

RESPONSE: Deny

REQUEST FOR ADMISSION NO. 5
Please admit that Plaintiff was never a payroll employee of Henry Vogt.

RESPONSE:

EXHIBIT "B"

After a reasonable inquiry, the information known at this time or readily available is insufficient to admit or deny but, it is believed that Mr. Burton was a member of a pipe fitter union.

REQUEST FOR ADMISSION NO. 6
Please admit that Plaindiffs spouse was never a payroll employee of Henry Vogt.

RESPONSE:
Admit

REQUEST FOR ADMISSION NO. 7
Please admit that Plaintiff never worked at any Henry Vogt facility.

RESPONSE:
After a reasonable inquiry, the information known at this time or readily available is insufficient to admit or deny but, it is believed that Mr. Burton worked at various facilities throughout Louisiana.

REQUEST FOR ADMISSION NO. 8
Please admit that Plaintiffs spouse never worked at any Henry Vogt facility.

RESPONSE:
Admit

REQUEST FOR ADMISSION NO. 9
Please admit that Plaintiff has not been diagnosed with asbestosis or any other asbestos-related condition.

RESPONSE:
Deny. Plaintiff has been diagnosed with asbestos related lung cancer.

REQUEST FOR ADMISSION NO. 10
Please admit that you are not alleging exposure to any alleged asbestos-containing products distributed, sold, produced, or manufactured by Henry Vogt.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 11
Please admit that you have no personal knowledge that you were exposed to asbestos-containing materials.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 12
Please admit that Plaintiff has no personal knowledge of working with asbestos- containing products or materials.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 13
Please admit that Plaintiffs spouse has no personal knowledge of working with asbestos-containing products or materials.

RESPONSE:
After a reasonable inquiry, the information known at this time or readily available is insufficient to admit or deny but it is believed that as a Union pipe fitter, Mr. Burton was have

worked with and around various asbestos containing materials including product and equipment incorporating asbestos components.

REQUEST FOR ADMISSION NO. 14
Please admit that Plaintiff has not handled any alleged asbestos-containing products distributed, sold, produced, or manufactured by Henry Vogt.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 15
Please admit that Plaintiffs spouse has not handled any alleged asbestos- containing products distributed, sold, produced, or manufactured by Henry Vogt.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 16
Please admit that Plaintiff has not come into contact with any alleged asbestos- containing products distributed, sold, produced, or manufactured by Henry Vogt.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 17
Please admit that Plaintiff is not aware of any co-worker with personal knowledge that Plaintiff and/or Plaintiffs spouse handled or came into contact with any alleged asbestos-containing products distributed, sold, produced, or manufactured by Henry Vogt.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 18
Please admit that Plaintiff is unaware of any documents that indicate that Plaintiff handled alleged asbestos-containing products distributed, sold, produced, or manufactured by Henry Vogt.

RESPONSE:
After a reasonable inquiry, the information known at this time or readily available is insufficient to admit or deny.

REQUEST FOR ADMISSION NO. 19
Please admit that Plaintiff is unaware of any documents that indicate that Plaintiffs spouse handled alleged asbestos-containing products distributed, sold, produced, or manufactured by Henry Vogt.

RESPONSE:
After a reasonable inquiry, the information known at this time or readily available is insufficient to admit or deny.

REQUEST FOR ADMISSION NO. 20
Please admit that you have no documentation to substantiate your alleged claim of illnesses and disabilities which were the direct and proximate result of any alleged asbestos-containing products distributed, sold, produced, or manufactured by Henry Vogt.

RESPONSE:
Plaintiff objects to this request as it requires Plaintiff to admit/deny a proposition of law. Subject to and without waiving said objection, deny.

REQUEST FOR ADMISSION NO. 21
Please admit that you have no witnesses to substantiate your claim that your claimed illnesses and disabilities are the direct and proximate result of any alleged asbestos-containing products distributed, sold, produced, or manufactured by Henry Vogt.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 22
Please admit that you have no documentation to substantiate your claim Henry Vogt was negligent, which could have been a direct and proximate cause of your claimed illnesses and disabilities.

RESPONSE:
Plaintiff objects to this request as it recuires Plaintiff to admit/deny a proposition of law. Subject to and without waiving said objection, deny.

REQUEST FOR ADMISSION NO. 23
Please admit that you have no witnesses to substantiate your claim that Henry Vogt was negligent in any manner which was a direct and proximate cause of your claimed illnesses and disabilities.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 24
Please admit that you have no documentation to substantiate your claim that any Henry Vogt products at issue in this matter were unreasonably dangerous.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 25
Please admit that you have no witnesses to substantiate your claim that any Henry Vogt products or materials at issue in this matter were unreasonably dangerous.

RESPONSE:
Deny

REQUEST FOR ADMISSION NO. 26
Please admit that you have no documentation to substantiate your claim that you relied on any representations by Henry Vogt with regard to the purchase or use of any of its products that it distributed, sold, produced, or manufactured.

RESPONSE:
After a reasonable inquiry, the information known at this time or readily available is insufficient to admit or deny.

REQUEST FOR ADMISSION NO. 27
Please admit that you have no witnesses to substantiate your claim that you relied upon any representations by Henry Vogt with regard to the purchase or use of any of its products that it mined, distributed, sold, produced, or manufactured.

RESPONSE:
After a reasonable inquiry, the information known at this time or readily available is insufficient to admit or deny.

REQUEST FOR ADMISSION NO. 28
Please admit that your claimed illnesses and disabilities at issue in this case were diagnosed more than one year prior to the filing of this lawsuit.

RESPONSE:
Deny

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1
Please execute the attached medical records authorization forms.

RESPONSE:
We have sent these to Mr. Burton for signature and will supplement once they are received.

REQUEST FOR PRODUCTION NO. 2
Please execute the attached employment record authorization form.

RESPONSE:
We have sent these to Mr. Burton for signature and will supplement once they are received.

REQUEST FOR PRODUCTION NO. 3
Please execute the attached criminal record authorization form.

RESPONSE:
We have sent these to Mr. Burton for signature and will supplement once they are received.

REQUEST FOR PRODUCTION NO. 4
Please execute the attached military record authorization form.

RESPONSE:
We have sent these to Mr. Burton for signature and will supplement once they are received.

REQUEST FOR PRODUCTION NO. 5
Please execute the attached income tax authorization form.

RESPONSE:
We have sent these to Mr. Burton for signature and will supplement once they are received.

REQUEST FOR PRODUCTION NO. 6
Please execute the attached Social Security authorization form.

RESPONSE:
We have sent these to Mr. Burton for signature and will supplement once they are received.

REQUEST FOR PRODUCTION NO. 7
Please produce a copy of Plaintiff's and Plaintiff's spouse's income tax returns and W-2 forms for the last five (10) years.

RESPONSE:
Plaintiff's is not in possession of these records. We will supplement when they are available.

REQUEST FOR PRODUCTION NO. 8
Please produce each and every document you intend to use as an exhibit at trial of this matter.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 9
Please produce curriculum vitae for each expert witness, medical and/or otherwise, you intend to call to testify at trial of this matter as well as curriculum vitae for each person you have

retained or employed in anticipation of litigation, or for trial purposes, whom you do not expect to call as trial witnesses.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify all witness and provide expert reports at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 10
Please produce all documents that have been provided to, reviewed by, or prepared by or for a consulting expert in anticipation of the testimony of an expert retained on your behalf in this lawsuit.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify all witness and provide expert reports and all reliance materials at the time set forth by the Court's Case Management Order. Subject to and without waiving said objections, none. Plaintiff reserves the right to supplement.

REQUEST FOR PRODUCTION NO. 11
Please produce all statements, invoices, and other billing records that evidence or relate to any fees and expenses charged by any expert retained on your behalf for time spent, or services rendered, in this lawsuit.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order. Subject to and without waiving said objections, none. Plaintiff reserves the right to supplement.

REQUEST FOR PRODUCTION NO. 12
Please produce the complete file of each consulting expert whose mental impressions or opinions have been reviewed by a testifying expert.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify all witness and provide expert reports and all reliance materials and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 13
Please produce a copy of each and every document that was supplied to, collected by or reviewed by each expert witness, medical or otherwise, in connection with his/her work in this matter.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify all witness and provide expert reports and all reliance materials and exhibits at the time set forth by the Court's Case Management Order. Subject to and without waiving said objections, none. Plaintiff reserves the right to supplement.

REQUEST FOR PRODUCTION NO. 14
Please produce a copy of each and every document upon which each expert witness, medical or otherwise, in connection with his/her work in this matter.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify all witness and provide expert reports and all reliance materials and exhibits at the time set forth by the Court's Case Management Order. Subject to and without waiving said objections, none. Plaintiff reserves the right to supplement.

REQUEST FOR PRODUCTION NO. 15
Please produce a copy of all photographs, films, movies, or video recordings that depict or purport to depict anything relevant to any of the matters at issue in this case, including any of the matters alleged in your petition.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 16
Please produce a copy of each and every document, which evidences any and all lawsuits and/or written claims and/or demands for compensation (including, but not limited to, workers compensation and social security benefits) relating to any physical injury or disease Plaintiff may have sustained or contracted.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to the extent this interrogatory requests confidential information and/or information protected by the attorney-client privilege, work product doctrine and/or any other applicable laws or Rules. Subject to and without waiving said objections, none. Plaintiff reserves the right to supplement.

REQUEST FOR PRODUCTION NO. 17
Please produce a copy of each and every document that evidences any and all settlements of any claims for Plaintiff's injuries arising out of exposure to asbestos or asbestos- containing materials into which Plaintiff has entered.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to the extent this interrogatory requests confidential information and/or information protected by the attorney-client privilege, work product doctrine and/or any other applicable laws or Rules. Subject to and without waiving said objections, none. Plaintiff reserves the right to supplement.

REQUEST FOR PRODUCTION NO. 18
Please produce all documents evidencing or supporting your contention that Plaintiff was exposed to each asbestos-containing product or material to which Plaintiff alleges exposure.

RESPONSE:
Please see Plaintiff's Original Complaint filed in this case as well as Plaintiff's Work History Sheet and Plaintiff's Deposition to be taken in this case.

REQUEST FOR PRODUCTION NO. 19
Please produce a copy of each and every document that evidences Plaintiff's use of any respirator, mask or other device to reduce Plaintiff's possible exposure to any dust or fumes at any facility.

RESPONSE:
Please see Plaintiff's Original Complaint filed in this case as well as Plaintiff's Work History Sheet and Plaintiff's Deposition to be taken in this case. Plaintiff reserves the right to supplement. In addition, Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 20
Please produce a copy of each and every document that evidences any safety training or other instructions and/or communications relating to workplace activities, dust control and safety provided to Plaintiff or his co-workers at any facility.

RESPONSE:
Please see Plaintiff's Original Complaint filed in this case as well as Plaintiff's Work History Sheet and Plaintiff's Deposition to be taken in this case. Plaintiff reserves the right to supplement. In addition, Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 21
Please produce a copy of each and every document which evidences Plaintiff s use of any respirator, mask or other device to reduce Plaintiff's possible exposure to any dust or fumes for each job or place of work at which Plaintiff allegedly was exposed to asbestos or asbestos-containing materials.

RESPONSE:
Please see Plaintiff's Original Complaint filed in this case as well as Plaintiff's Work History Sheet and Plaintiff's Deposition to be taken in this case. Plaintiff reserves the right to supplement. In addition, Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 22
Please produce a copy of each and every document which evidences safety rules, regulations, procedures, etc., in effect for each job or place of work at which Plaintiff allegedly was exposed to asbestos or asbestos-containing materials.

RESPONSE:
Please see Plaintiff's Original Complaint filed in this case as well as Plaintiff's Work History Sheet and Plaintiff's Deposition to be taken in this case. Plaintiff reserves the right to supplement. In addition, Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 23
Please produce a copy of each and every document which evidences any safety training or other instructions and/or communications relating to workplace activities, dust control and safety provided to Plaintiff or his co-workers for each job or place of work at which Plaintiff allegedly was exposed to asbestos or asbestos-containing materials.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 24
Please produce a copy of each and every document which evidences how and when Plaintiff first learned that he was allegedly exposed to asbestos or asbestos-containing materials for each job or place of work at which Plaintiff allegedly was exposed to asbestos or asbestos-containing materials.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order. In addition, please see Plaintiff's Dr. Hospital List, all medical and billing records currently in Plaintiff's possession and Plaintiff's deposition to be taken in this case.

REQUEST FOR PRODUCTION NO. 25
Please produce a copy of each and every document which evidences how and when Plaintiff first learned he was allegedly exposed to asbestos or asbestos-containing materials at any place other than a work site.

RESPONSE:

Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order. In addition, please see Plaintiff's Dr. Hospital List, all medical and billing records currently in Plaintiff's possession and Plaintiff's deposition to be taken in this case.

REQUEST FOR PRODUCTION NO. 26
Please produce a copy of each and every document which evidences each job or place of work Plaintiff has had at which Plaintiff was not exposed to asbestos or asbestos- containing materials.

RESPONSE:
Please see Plaintiff's Original Complaint filed in this case as well as Plaintiff's Work History Sheet and Plaintiff's Deposition to be taken in this case. Plaintiff reserves the right to supplement. In addition, Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 27
Please produce a copy of each and every document which evidences Plaintiff's employment for each job or place of work at which Plaintiff was allegedly exposed to asbestos or asbestos-containing materials.

RESPONSE:
Please see Plaintiff's Original Complaint filed in this case as well as Plaintiff's Work History Sheet and Plaintiff's Deposition to be taken in this case. Plaintiff reserves the right to supplement. In addition, Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 28
Please produce a copy of each and every document which evidences any claim for and/or receipt by Plaintiff for any health or accident insurance benefits, workers' compensation payments, disability benefits, pensions, accident compensation payments or Veterans disability compensation awards.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to the extent this interrogatory requests confidential information and/or information protected by the attorney-client privilege, work product doctrine and/or any other applicable laws or Rules. Subject to and without waiving said objections, none. Plaintiff reserves the right to supplement.

REQUEST FOR PRODUCTION NO. 29
Please produce a copy of each and every document referenced in Plaintiff s Answers to Interrogatories by Henry Vogt.

RESPONSE:
Plaintiff believes he has produced all documents responsive to this request.

REQUEST FOR PRODUCTION NO. 30
Please produce a copy of any photograph, videotape, or film depicting any of the sites at which Plaintiff was allegedly exposed to asbestos-containing products, or otherwise supporting your claimed exposure to asbestos-containing products and any other products that allegedly caused Plaintiffs exposure to asbestos.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 31
Please produce a copy of any photograph, videotape, or film depicting any of products or materials that Plaintiff worked with or around that Plaintiff believes may have exposed him to asbestos-containing products, or otherwise supporting your claimed exposure to asbestos-containing products and any other products that allegedly caused Plaintiff's exposure to asbestos.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 32
Please produce a copy of all transcripts or videotapes of any prior deposition, trial, or other sworn testimony in any lawsuit, proceeding, or claim involving or relating to asbestos, given by Plaintiff, or by any person identified by Plaintiff in this lawsuit as being a person with knowledge of relevant facts.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 33
Please produce copies of any and all photographs, advertisements, or other depictions in your or your attorney's custody, possession, or control, depicting either the packaging of any alleged asbestos-containing product to which you claim exposure, or any other product that allegedly caused Plaintiff's exposure to asbestos, or the actual product itself.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 34
Please produce all documents, including receipts and purchase orders, from any of Plaintiff's employers or facilities at which he may have worked, that evidence or relate to the purchase of any asbestos or asbestos-containing products or materials from Henry Vogt.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 35
Please produce all documents constituting, memorializing, evidencing, or relating to settlement agreements, contracts, deals, or any other type of agreement or understanding (whether or not reduced to final form and whether or not fully performed, paid, or satisfied) which Plaintiff has entered into, or agreed to enter into, with any person or company or other entity, to compromise, settle, release, or otherwise resolve any claim or potential claim (including any lawsuit, other legal proceeding, worker's compensation claim, or other claim) relating to any injury or disease that Plaintiff has suffered or claimed to suffer.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 36

With respect to any lawsuit, claim, or settlement made or anticipated (including but not limited to a claim made to a settlement trust in conjunction with a bankruptcy proceeding such as those for Johns Manville, UNARCO, and Celotex) regarding Plaintiff's alleged asbestos disease, please produce:

(a) Copies of your responses to written discovery;
(b) Reports of the diagnosing physician (including test results and other documents on which the diagnosis identified in the report is based), and independent medical examination reports (including test results and other documents identified in the report);
(c) Transcript(s) of Plaintiff and/or Plaintiff's spouse's depositions, and the depositions of any co-workers; and
(d) Copies of any affidavit, statement, claim form, or any document submitted to "prove up" or confirm exposure for purposes of obtaining payment or a promise to pay consideration in resolution of such claim.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to the extent this interrogatory requests confidential information and/or information protected by the attorney-client privilege, work product doctrine and/or any other applicable laws or Rules. Subject to and without waiving said objections, none. Plaintiff reserves the right to supplement.

REQUEST FOR PRODUCTION NO. 37
Please produce all documents, including but not limited to studies and reports, describing, or relating to, levels of exposure to asbestos fibers resulting from the operation of or work on, with or around equipment, including but not limited to, pumps, vessels, turbines, boilers, furnaces, heat exchangers, tractors, heavy equipment, engines, or any other mobile or affixed equipment.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 38
Please produce all documents (including but not limited to: log books, notes, calendars, diaries, or like materials) prepared or kept by Plaintiff, and all documents in the nature of memoranda, notes, or recordings of statements made by Plaintiff in connection with (a) any work history or list of job sites; (b) any exposure to asbestos or to asbestos-containing materials; (c) any conduct of the Defendants with respect to asbestos or asbestos-containing products; (d) any asbestos-related injury, disease, or treatment (including mesothelioma); or (e) any elements of actual damages resulting from Plaintiff's claimed asbestos-related injury.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 39
Please produce all documents containing, depicting, describing, evidencing, or relating to any warnings, cautions, protections, instructions, rules, procedures, or guidelines relating to asbestos or dust, and provided to Plaintiff during Plaintiff's working career by any employer, union, general contractor, premises owner or occupier, or other person or entity.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 40

Please produce all documents depicting, describing, evidencing, or reflecting the identity of each asbestos-containing product or material to which exposure to asbestos is alleged.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 40
Please produce all documents depicting, describing, evidencing, or reflecting each location and use of asbestos or asbestos-containing products or materials that you contend Plaintiff was exposed to asbestos.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 41
Please produce all documents evidencing, reflecting, showing results of, or otherwise relating, to any air monitoring, sampling, or testing, for the presence or level of asbestos fibers or dust in general on any premises on which you allege Plaintiff was exposed to asbestos. This request necessarily includes any documents evidencing any violations of any standards or regulations related to permissible levels of asbestos.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 42
Please produce a certified and admissible copy of the Social Security Records of Plaintiff.

RESPONSE:
Please see a copy of Plaintiff's Uncertified Social Security Records attached. Plaintiff's counsel has also sent authorizations to Mr. Burton and will supplement when they are available.

REQUEST FOR PRODUCTION NO. 43
Please produce all employee handbooks, safety manuals, guidelines, policies, rules, regulations, and procedures and any other written material supplied by Plaintiff's employers that describe the work Plaintiff was to perform.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify trial documents and exhibits at the time set forth by the Court's Case Management Order.

REQUEST FOR PRODUCTION NO. 44
As to each named Plaintiff, please provide a clear photocopy (both sides) of his "Medicare card," and/or any card provided by Medicare which identifies the eligibility of Plaintiff to receive Medicare benefits.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague and unduly burdensome. Plaintiff will supplement, if available.

REQUEST FOR PRODUCTION NO. 45
Please provide a completed and signed copy of the attached Model Language information disclosure form (described in the attached August 24, 2009 AJ/RT: Compliance regarding

Obtaining Individual HICNs and/or SSNs for Non-Group Health Plan (NGHP) Reporting under 42 U.S.C. 1395y (b) (8)).

RESPONSE:
We have sent these to Mr. Burton for signature and will supplement once they are received.

REQUEST FOR PRODUCTION NO. 46
Please provide a completed and signed copy of the attached Consent to Release form (as described in the attached "Consent to Release" Liability Insurance (including Self- insurance), No-Fault Insurance, or Workers' Compensation memorandum).

RESPONSE:
We have sent these to Mr. Burton for signature and will supplement once they are received.

INTERROGATORRIES

INTERROGATORY NO. 1:
Please state your:
Full name;
Date of Birth;
Gender;
Address;
Telephone Number;
Social Security Number;
Medicare Health Insurance Claim Number. (If any);
Date of incident (date of first claimed exposure to asbestos); and
Date of last claimed exposure to asbestos.

RESPONSE:
Johnny Ray Burton, DOB: April 27, 1940; Male 14824 Woodrow Kerr Lane, Zachary, LA 70791; 428-72-5225;

INTERROGATORY NO. 2:
Please state whether you are currently a Medicare beneficiary, or whether you are currently eligible to receive Medicare benefits:
If yes, please state the date you became, or will become, eligible to receive Medicare benefits; and the amount of such payments to date.

RESPONSE:
Yes. Plaintiff will supplement as discovery is ongoing.

INTERROGATORY NO. 3:
Are you presently, or have you ever been, enrolled in Medicare Part A or Part B?
If yes, please complete the following.
Full Name:
(Please print the name exactly as it appears on your SSN or Medicare card if available.)
Medicare Health Insurance Claim Number (HCIN):
Date of Birth:
Sex:
Social Security Number:
(If Medicare Health Insurance Claim Number is unavailable.)

RESPONSE:
Yes. Johnny Ray Burton, 428-72-5225A, April 27, 1940, Male, 428-72-5225. Plaintiff reserves the right to supplement as discovery is ongoing.

INTERROGATORY NO. 4:
Do you have a spouse that is presently, or has ever been, enrolled in Medicare Part A or Part B?
If yes, please complete the following.

Full Name:
(Please print the name exactly as it appears on your SSN or Medicare card if available.)
Medicare Health Insurance Claim Number (HCIN):
Date of Birth:
Sex:
Social Security Number:
(If Medicare Health Insurance Claim Number is unavailable.)

RESPONSE:
Yes. Sherri Burton, 427-76-2457B, March 1941, Female, 427-70-2457. Plaintiff reserves the right to supplement as discovery is ongoing.

INTERROGATORY NO. 5:
Do you have another covered family member that is presently, or has ever been, enrolled in Medicare Part A or Part B?
If yes, please complete the following. If additional space is needed for completion of this section, please attach another sheet.
Full Name:
(Please print the name exactly as it appears on your SSN or Medicare card if available.)
Medicare Health Insurance Claim Number (HCIN):
Date of Birth:
Sex:
Social Security Number:
(If Medicare Claim Number is unavailable.)

RESPONSE:
No

INTERROGATORY NO. 6:
Are you receiving Social Security Disability Insurance benefits?
If yes, please state the date you began receiving Social Security Disability Insurance benefits.

RESPONSE:
Yes. Plaintiff will supplement as discovery is ongoing.

INTERROGATORY NO. 7:
Do you have end-stage renal disease (kidney failure), or Lou Gehrig's disease?

RESPONSE:
No

INTERROGATORY NO. 8:
Are you claiming, that you were exposed prior to December 5, 1980 to asbestos contained in a product for which you believe Henry Vogt is liable? If so, please describe:
(a) The nature of your claimed exposure; and
(b) The date(s) of your claimed exposure.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is vague and unduly burdensome. At this time, upon information and belief, Plaintiff was exposed to asbestos as a union pipefitter. Subject to and without waiving said objections, please see Plaintiff's response to RFA No. 13. Plaintiff reserves the right to supplement as discovery is ongoing.

INTERROGATORY NO. 9:
Are you claiming that you were exposed on or after December 5, 1980 to asbestos contained in a product for which Henry Vogt is liable? If so, please describe:
(a) The nature of your claimed exposure; and
(b) The date(s) of your claimed exposure.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is vague and unduly burdensome. At this time, upon information and belief, Plaintiff was exposed to asbestos as a union pipefitter. Subject to and without waiving said objections, please see Plaintiff's response to RFA No. 13. Plaintiff reserves the right to supplement as discovery is ongoing.

INTERROGATORY NO. 10:
As to each named Plaintiff, have you received from CMS, its agents and/or contractors any of the following documents relating to your Medicare beneficiary status?
(a) Rights and Responsibilities Letter (RAR);
(b) Conditional Payment Letter (CPL); and/or
(c) Final Demand Letter.

RESPONSE:
Plaintiff will supplement as discovery is ongoing.

INTERROGATORY NO. 11:
For each person you expect to call to testify as an expert witness with respect to any and all claims made against Henry Vogt in your Petition, identify:
(a) The expert witness, including his or her telephone number;
(b) The subject matter on which the expert is expected to testify;
(c) The substance of the facts and opinions to which the expert is expected to testify;
(d) A summary of the grounds for each opinion that the expert is expected to testify;
(e) all documents supplied to, collected by or reviewed by the expert in connection with his or her work in these cases; and
(f) All documents upon which the expert relies in forming each opinion.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff will identify all witness and provide expert reports at the time set forth by the Court's Case Management Order.

INTERROGATORY NO. 12:
Please identify the names, addresses, contact information, job title, and employer, of any person who witnessed or observed you working with or in proximity to any asbestos-containing products or materials, manufactured, sold, or distributed by Henry Vogt, or any witness capable of identifying any asbestos-containing products or materials, manufactured, sold, or distributed by Henry Vogt to which Plaintiff may have been allegedly exposed.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague, unduly burdensome and premature. Plaintiff is still in process of determining and locating coworkers and witnesses as discovery is ongoing. Plaintiff reserves the right to supplement.

INTERROGATORY NO. 13:
Please identify all parties to this action who have been dismissed, or that have settled their claims whether by high/low, Mary Carter or some other agreement in part or in their entirety to date, and/or through the time of trial. Henry Vogt specifically requests that the response to this interrogatory be continuously and timely updated through the time of trial, immediately following the settlement or dismissal of each party.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to the extent this interrogatory requests confidential information and/or information protected by the attorney-client privilege, work product doctrine and/or any other applicable laws or Rules. Subject to and without waiving said objections, none.

INTERROGATORY NO. 14:

With regard to any claim or settlement made or anticipated to be made with any entity or trust (including but not limited to claims made in conjunction with a bankruptcy proceeding such as those for Johns-Manville, UNARCO, and Celotex, and including any claims made to or through the Center for Claims Resolution, and including any Defendants named in this pending lawsuit) in which Plaintiff claimed, or someone claimed on her behalf, a personal injury affecting their lungs, stomach or other illness (including but not limited to any asbestos-related, silica- related, mixed-dust related, or welding-fume related condition), identify the following, and update your response if you settle with any parties during your lawsuit:

(a) The full identity of the entity against whom such claim was or will be made;
(b) The amount, if any, paid or agreed to be paid, in compensation for the claim;
(c) The date such claim was made and current status (e.g., claim made and pending);
(d) the date upon which the Plaintiff first became aware that asbestosis was a compensable occupational disease under state or federal law and describe the manner in which the Plaintiff became so aware, including when and under what circumstances the Plaintiff first heard of the filing of any asbestos-related lawsuits. Identify all documents relating to the matters described in this Interrogatory.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to the extent this interrogatory requests confidential information and/or information protected by the attorney-client privilege, work product doctrine and/or any other applicable laws or Rules. Subject to and without waiving said objections, none. Plaintiff reserves the right to supplement.

INTERROGATORY NO. 15:
If you were ever discharged from or voluntarily left a position of employment due to health reasons, please identify the following:

(a) The employer;
(b) The circumstances of the departure;
(c) The health problems; and
(d) All documents relating to the matters requested in this Interrogatory.

RESPONSE:
Plaintiff works on a contract basis. His primary employer is Universal Pipeline Contracting. Plaintiff has had to turn down work due to his recent diagnosis and subsequent treatment schedule Plaintiff reserves the right to supplement as discovery is ongoing.

INTERROGATORY NO. 16:
If you ever worked with or around asbestos or asbestos-containing materials at a facility owned or operated by a company, government agency or other entity not named as a Defendant in this lawsuit, please identify the following:

(a) The employer;
(b) The owner or operator of the facility;
(c) The job title(s), trade, the dates of the employment, and the nature of the work performed; and
(d) The address of the facility.

RESPONSE:
Plaintiff objects to this interrogatory to the extent that it is overbroad, vague and unduly burdensome. Subject to and without waiving said objections, Plaintiff worked at the following sites. Plaintiff reserves the right to supplement.

Georgia Pacific Pulp & Paper Mill, Port Hudson
Foster Grant Plant, Baton Rouge
Ethyl Corp (aka Albemarle), Baton Rouge
Exxon Oil Refinery, Baton Rouge
Exxon Chemical Plant, Baton Rouge
Crown Zellerback Paper mill, Port Hudson
St. Francisville Paper Co., Port Hudson
Hercules Chemical Plant, Baton Rouge

Plantation Pipe Line, Baton Rouge
Maryland Tank Farm, Baton Rouge
Kaiser Aluminum Plant, Baton Rouge
Stauffer Chemical Plant, Baton Rouge
Copolymer Rubber & Chemical Plant, Baton Rouge
Uniroyal Chemical Plant, Baton Rouge
Dow Chemical Plant, Plaquemine
Georgia Pacific Chemical Plant, Plaquemine
Hercules Chemical Plant, Plaquemine
Union Carbide Chemical Plant, Plaquemine
Ethyl Chemical Plant, Plaquemine Point
Gulf States Willow Glen Power Plant
Stauffer Chemical (aka Olin Chlor Alkali Products), St. Gabriel
Allied Chemical & Plastics Plant, Geismar
BASF Wyandotte, Geismar
Shell Chemical Plant, Geismar
Borden Chemical Plant, Geismar
Uniroyal Chemical Plant, Geismar
Rubicon Chemical Plant, Geismar
Shell Chemical Plant, Geismar
Texaco Refinery (aka Motiva), Convent
Agrico Chemical Plant, Donaldsonville
Ethyl Chemical Plant, Convent
Marathon Oil Pipeline, St. James
Imperial, aka Cargill Sugar Refinery, Gramercy
DuPont Chemical Plant, Gramercy
Shell Chemical, Gramercy
Air Products (late 1960s or early 1970s, one time only), New Orleans

In addition to these locations in Louisiana, Plaintiff recalls working at the Pine Bend Koch Refinery in Minnesota, a fabrication shop and chip plant in Arizona in the 1990s, and an unspecified testing site near Las Vegas, Nevada in approximately 1989.

INTERROGATORY NO. 17:
If you ever worked in or around a shipyard, please identify the following:
(a) The employer;
(b) The owner or operator of the facility;
(c) The job title(s), trade, the dates of the employment, and the nature of the work performed
(d) The address of the facility.

RESPONSE:
Plaintiff worked at the Ingalls Shipyard, Pascagoula, Mississippi (Approx. 1958 for 3 to 4 months, while enrolled in the pipefitter/welder apprentice program and the Levingston Shipyard, Beaumont, TX (Approx. early 1960s).

INTERROGATORY NO. 18:
Please provide detailed information about your non-occupational history during which you may have been exposed to asbestos or asbestos-containing materials, including:
(a) A description of the activity engaged in;
(b) The location, including address, of such possible exposure;
(c) The dates of all possible exposure; and
(d) The identity of any persons who were present during such exposure.

RESPONSE:
Plaintiff objects to this interrogatory as overly broad and vague. Subject to and without waiving said objections, at this time, upon information and belief, Plaintiff was exposed to asbestos during a home remodel project and through his work in vehicles. In addition, please see Plaintiff's Work History Sheet, Original Complaint and Plaintiff's deposition to be taken in this case, if he is able.

INTERROGATORY NO. 19:
If you ever served in the military in any capacity, please state the dates, rank, service number, and branch of service; MOS (Military Occupational Specialty) or equivalent; each location where she was stationed; her duties at each location; injuries, if any, received during service; the exposure, if any, to any chemicals, solvents, silica, asbestos, radioactive materials, or biological or chemical weapons; date and type of discharge from each tour or enlistment; and type of disability and pension received, if any. If military service included service upon vessels, provide ship names and dates of service on each vessel.

RESPONSE:
Plaintiff served in the US Navy from 1960-1962 as a Seaman. He attended boot camp in San Diego and left for a nine month West-Pac Cruise aboard the USS Bon Home Richard (CVA-31). Plaintiff was assigned to a fighter squadron, the Fighting 193, which was affectionately known as the "Ghost Riders. His job duties involved checking oil, hydraulics, moving, and cleaning the aircraft. Plaintiff went on a second West-Pac Cruise before receiving an honorable discharge in 1962. After his discharge, Plaintiff was in the Naval Reserve until 1968.

INTERROGATORY NO. 20:
Please state your occupation and union membership, if any, and the dates of membership_ if you were an officer or steward in any union, please provide the dates that such position was held.

RESPONSE:
Plaintiff was a member of the Pipefitters Union, Local 198, Baton Rouge, LA (Approx. 1965 to 1998).

INTERROGATORY NO. 21:
Please state when you first became aware of the health hazards of exposure to asbestos or asbestos-containing materials, and identify the means or communication by which they received such information.

RESPONSE:
Plaintiff will supplement as discovery is ongoing.

INTERROGATORY NO. 22:
Please state the following injury information pertaining to Plaintiff:
(a) The asbestos-related injury or injuries claimed;
(b) The first date of diagnosis of each of her conditions; and
(c) The name and address of the physician/health care provider(s) who rendered the diagnosis.

INTERROGATORY NO. 23:
Please identify all doctors, hospitals, and other health care providers or facilities that have ever treated you for any heart, lung, chest-related injury, or cancer, and all doctors, hospitals, and other health care providers or facilities where she has been treated at any time during the preceding ten (10) years, to include:
(a) The approximate dates of treatment;
(b) The names and current addresses of the doctors, hospitals, or other healthcare providers; (c) the reasons for the treatment and diagnosis.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and premature. Subject to and without waiving said objections, please see Plaintiff's Doctor Hospital List attached as well as all medical and billing records currently in Plaintiff's possession.

INTERROGATORY NO. 24:
If you have ever made a claim for and/or received any health or accident insurance benefits, workers' compensation payments, disability benefits, pensions, accident compensation payments or veterans disability compensation awards, or if anyone has made such a claim on your behalf, identify:

(a) The circumstances under which you received the awards, benefits or payments;
(b) The illness or injury and date thereof, which prompted each claim or payment;
(c) The employer at the time of each injury or illness;
(d) The examining doctors for each injury or illness;
(e) The officers or boards or tribunals before which or to whom the claim was made or filed, and the date made or filed;
(f) The amount paid to you;
(g) The dates during which you received the awards, benefits or payments;
(h) The agencies or insurance companies from whom you received the awards, benefits or payments; and
(i) All documents and communications relating to the matters requested in this Interrogatory.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving said objections, no.

INTERROGATORY NO. 25:
Please state your tobacco use history, including quantity, product smoked, when started and stopped, and whether you and/or your spouse smoked in the home.

RESPONSE:
Plaintiff smoked approximately 1 pack of Marlboro cigarettes from age 21 to 28.

INTERROGATORY NO. 26:
Please identify and describe any safety training or other instructions/communications relating to workplace activities, dust control and safety provided to you by: (1) each of your employers; and (2) the owner of each premises.

RESPONSE:
Plaintiff will supplement as discovery is ongoing.

INTERROGATORY NO. 27:
If you have ever used or been offered the use of any respirator, mask or other device, or been advised to adopt any work practice(s) to reduce your possible exposure to, or inhalation of, any dust or fumes (including, but not limited to, asbestos dust), identify: the device or work practice including, where applicable, the manufacturer and type; the person and/or company from whom the device was obtained or received, or upon whose request or instruction the work practice(s) were adopted; whether you actually used the device or adopted the work practice(s); The employer at the time, and the date(s) of use of the device or work practice.

RESPONSE:
Plaintiff was not offered and/or did not use a mask, respirator or other device or was advised to adopt any other work practices in his jobs prior to the 1990's. During and after the 1990's he has worn dust masks. Plaintiff reserves the right to supplement as discovery is ongoing.

INTERROGATORY NO. 28:
Please state whether you were ever a participant in or were monitored for an air sampling test for asbestos exposure while handling, cutting, modifying, installing, using or removing insulation of any type? If so, state the following:
(a) When and where the tests were conducted;
(b) The person or entity who conducted the tests;
(c) The type of material you worked with or were exposed to while the tests were conducted;
(d) The procedure being performed with the material while the tests were being conducted;
(e) What were the results of such tests;
(f) Whether you have copies of the reports or results from such tests;
(g) State the name and current address of the person or entity that has copies of such test results or reports.

RESPONSE:
Plaintiff objects to this interrogatory as vague, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving said objections, not to Plaintiff's knowledge. Plaintiff reserves the right to supplement.

INTERROGATORY NO. 29:
With respect to each job and place of work you have had at which you were not exposed to asbestos or asbestos-containing materials. Identify:
(a) The employer and the nature of the employer's business;
(b) The dates the employment commenced and terminated;
(c) The address of the facility or place of work;
(d) The job title(s), trade, job classification, and the nature of the work performed by you;
(e) The industrial or manufacturing processes conducted;
(f) The number of hours per week which you worked and the average number of hours of overtime you worked per week; and
(g) Your immediate supervisor.

RESPONSE:
Plaintiff objects to this interrogatory as vague and overly broad. Subject to and without waiving said objections, please see Plaintiff's Work History Sheet and Plaintiff's deposition to be taken in this case. Plaintiff reserves the right to supplement.

Respectfully submitted,

LANDRY, SWARR & CANNELLA, L.L.C.

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served via electronic mail and US Mail to counsel for Henry Vogt Machine Company on this the 25th day of May 2012.

DAVID R. CANNELLA

EFiled: Nov 8 2011 4:15PM
Transaction ID 40786518
Case No. N09C-11-217 ASB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION:
Limited to: P&S 11-2011 Trial Setting

BRIAN C. MONTGOMERY, Personal Representative of the Estate of June Montgomery,

Plaintiff,

v. C.A. 09C-11-217 ASB

AMERICAN STEEL & WIRE CORPORATION, a Delaware corporation, et al.,

Defendants.

BEFORE: HONORABLE PEGGY L. ABLEMAN, J.

PRETRIAL HEARING TRANSCRIPT
November 7, 2011

DOMENIC M. VERECHIA, RPR
SUPERIOR COURT OFFICIAL REPORTERS
500 N. King Street, Suite 2609, 2nd Floor
Wilmington, Delaware 19801-3725
(302) 255-0710

EXHIBIT "C"

APPEARANCES:

JAMES T. PERRY, ESQ.
Perry & Sensor
and
SCOTT C. BARNES, ESQ.
WESLEY A. BOWDEN, ESQ.
Levin, Papantonio, Thomas, Mitchell,
Rafferty & Proctor, P.A.
for the Plaintiff

BRIAN L. KASPRZAK, ESQ.
Marks, O'Neill, O'Brien & Courtney, P.C.
and
CHRISTOPHER S. MARKS, ESQ.
Sedgwick, LLP
for the Defendants

November 7, 2011
Chambers
10:09 a.m.

PRESENT:

As noted.

- - - - -

THE COURT: When I went downstairs for my motions today, I had not read this letter that I just received. And it is extremely troubling to the Court.

Mr. Barnes, I need to know from you whether you made it clear to your client that he was to disclose the bankruptcy claims.

MR. BARNES: I can't say that my client and I ever talked about it, because it was my understanding that there weren't going to be those claims.

THE COURT: Well, then as far as I'm concerned, I think the prejudice to the defendant is so great here that I'm inclined to grant the relief that they're asking for.

MR. BARNES: Your Honor, I would implore you not to.

THE COURT: You can't. This is dishonesty at its highest level. This is a guy who got checks and never reported those to you. It affected their

discovery. It affected their ability to prepare their case. There is no way this trial could go forward today. And I'm not inclined to make them go through the process of a new discovery period and prepare for another trial. I'm sorry. I think this is unfair when, you know, if you didn't tell him he had to do it, then you were remiss.

MR. BARNES: Your Honor, to the extent that this is my fault and to the extent that this is the fault of counsel, please, please don't do this to my client. I implore you not to. The case law --

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

any other way.

MR. BARNES: Your Honor, there's only one exposure witness in this case, and it's Mr. Montgomery, who last week, or two weeks ago, they actually wanted to redepose; they wanted to reopen this case for discovery two weeks ago, and --

THE COURT: That's because of other factors. It had nothing to do with this.

MR. BARNES: I understand that completely. But I guess my point is that they were willing to reopen it at that time. And I realize that this is five days later from the pretrial when you denied their exception to that. But with that being said, I think that you can remedy -- I think it could be remedied by --

THE COURT: How?

MR. BARNES: By, first of all, starting with him and seeing what he knows, because I have a sneaking suspicion he doesn't know anything. Your Honor, there were no affidavits filed in this case because there was nothing signed. These were --

THE COURT: The plaintiff himself, not Mr. Montgomery the husband, but the plaintiff himself accepted these checks. He's the plaintiff in this case.

He's your client. That's the problem here. That's the problem here.

MR. BARNES: Your Honor, my client is an honest man who made an honest mistake and who, to some extent, assumed that there was better communications between --

THE COURT: Well, then you made an honest mistake, or you made a big mistake if you didn't make it very, very clear to him the importance of these disclosures.

MR. BARNES: Your Honor, I did make a mistake. And last Thursday I represented that there was nothing. And I made that in absolute good faith. And as soon as I found out there was something, I took it upon myself -- I know that that's not anything that's admirable, but I opened up this can of worms --

THE COURT: This is ten o'clock Saturday night. Put yourself in their position. How would you feel? Let's just turn the tables around and I assume that you found something out about them at ten o'clock Saturday night while you're preparing vigorously to litigate this case in a court in Delaware.

MR. BARNES: I would be upset. And I understand that they are. I believe Delaware case law

on this issue talks about this being the most extreme sanction especially when it's based on the improper conduct of the attorneys.

THE COURT: What other sanction at this point can I impose that can be fair? You tell me. Because I can't think of one.

MR. BARNES: Your Honor, you can open up discovery so they can redepose my client.

THE COURT: Why is that fair? Why would that be fair to them? They've already spent a lot of money preparing for this case for today. How can that undo that?

MR. BARNES: It cannot, Your Honor. But I think that there are other sanctions in the Delaware law. You know, if we have to compensate them for some of their time -- but if that's something that has to be done in lieu of actually dismissing my client's case, which is an ultimate remedy --

THE COURT: This is really seriously egregiously bad behavior. This is misrepresenting. This is trying to defraud. I don't like that in this litigation. And it happens a lot. And I'm trying to put an end to it. This is an example of the games that

are being played. And I don't think that this case warrants anything but dismissal based on what your client has done or not done.

MR. BARNES: Your Honor, I can -- there was no game being played here in any way, shape, or form. It was misunderstanding to the extent that it was our fault, to the extent it was miscommunication; that's what it was. It was not game playing.

THE COURT: That would be fine. I'll give you all the credit for making the mistake and it not being your fault and not doing anything purposely. That doesn't change the issue of the prejudice to the other side. It doesn't change the mess that you've created by this. It's not fair.

MR. BARNES: I understand that --

THE COURT: The playing field is no longer level. It's way skewed.

MR. BARNES: But it can be leveled by giving them the opportunity to rediscover these issues. There are things that can be done.

THE COURT: Do you know how expensive that's going to be for them?

MR. BARNES: I can imagine it would be, Your

Honor.

THE COURT: Is your client willing to pay for all that extra discovery and that extra expense? Because it's likely his verdict may not be as high as what those expenses might be. You need to discuss this with him. Because it might be worth it for you not to be fighting for this. Because if this has to be reopened, every dime is going to be his responsibility. That's my other option. And looking at this case, there's a lot more exposures than I was aware of as of last week. Okay? That being the case, there's a lot less money that you can expect to get out of Foster Wheeler, if any at all, because there's going to be a lot more names on that verdict sheet than there would have been as of last Thursday.

MR. BARNES: Your Honor, I know you've read the letter, but the situation -- it wasn't the affidavit.

THE COURT: I don't think you're trying to lie, you personally, Mr. Barnes. I don't have any problems with that. I think you are very honest.

MR. BARNES: Thank you.

THE COURT: Because if you were really trying to lie, you wouldn't have sent this e-mail to the other

side. Let me put that very much so on the record. I am not blaming you. I do think you had an obligation to make your client fully and totally aware of the ramifications of not disclosing other claims made with these bankruptcy trusts and also that he received money from them and didn't report it to you.

MR. BARNES: Your Honor, I think, I'm guessing it was his assumption --

THE COURT: That's pretty serious.

MR. BARNES: If I had to guess, I would think it was his assumption that the attorneys would have communicated better amongst each other. And that makes it our fault, the attorneys's fault, not my client's fault. And to the extent that -- you know, I just implore you because this is my client's one day in court. And to punish him --

THE COURT: Well, he's not going to have today because there is no way that we can go forward with the type of thing -- and I'm just not really inclined -- I'm very inclined to dismiss because I'm not sure that the prejudice that is being created by this can ever really be undone. I can't go to verdict now and fix it because it's not the way our verdict sheets -- Florida law

requires that there be an attribution of percent of fault. There's nothing I can do after the number comes in.

MR. BARNES: Yes, Your Honor. And by his day in court, I wasn't suggesting today. I understand your position on that. I think it's completely reasonable.

THE COURT: Look at all the expense.

How long have you been here in Delaware, since Thursday or Wednesday?

MR. MARKS: I had a room over the weekend. I went home for my daughter's birthday.

But that's not the prejudice, Your Honor. The prejudice is that -- and believe me, we don't make this request lightly. The problem is that there are 23 defendants in the caption, and there are now 20 additional entities that plaintiffs admit exposure to, including products that haven't even come up in the course of discovery, things like gaskets, automotives --

THE COURT: I saw that.

MR. MARKS: I mean, it's a whole different case.

THE COURT: You've got to start over with brand new case, brand new discovery that's going to be -- the

expenses that you have already incurred, it's just going to be duplicated again.

MR. MARKS: The other problem, Your Honor, is one of credibility. And it is an issue of credibility. Because if you take the testimony of Mr. Montgomery, as I read his testimony with respect -- this is Art Montgomery, the father. Johns Manville came up in the deposition. It was his view that this was all fiberglass, you know, manmade mineral fiber, nonasbestos. Well, one of the checks that they received payment for is from Johns Manville. It's entirely inconsistent. Not only do I want that evidence in of exposure, but I want the context in. And it's impossible at this point without the claim forms, without the witnesses to bring them in, without the authentication issues, I can't do that. It's with respect to all of these. And we got Barry Castleman apparently tomorrow. I have to prepare 20 new cross-examinations --

THE COURT: Do you know what this is going to cost your client? Probably any recovery that he might get if I were to reopen it. And I'm not even sure that I'm going to do it, if I were to allow it to go forward.

I am very, very concerned about the magnitude of this -- I feel very sorry for you, but it's your client that -- you know, there's a lot of stuff -- we could probably go through more deeply into this and find that this wasn't totally innocent on his part.

MR. MARKS: May I speak to that, Your Honor?

THE COURT: Yes.

MR. MARKS: We got to depose Mr. Brian Montgomery yesterday. Brian Montgomery has been involved with this case from the onset. He was the one who helped his parents fund a lawsuit -- he testified to this yesterday -- find a lawyer and filed a lawsuit.

They found Brent Coon & Associates in Texas. Brent Coon & Associates are the ones that sent him the check and the ones that referred the case to the Levin firm. So he has been involved in this since the start. He disclaimed any knowledge of any type of retention agreement. I find it hard to believe that there's a law firm in Texas submitting trust claims and settling cases without his consent. I suspect it's consent up front because I've seen that before. There's got to be consent somewhere. And yesterday --

THE COURT: Usually that's what they do.

MR. MARKS: Right. They said, look, you just settle everything, you can on behalf of me. But he got the check in March, April, February --

THE COURT: Months ago.

MR. MARKS: Months ago. And this issue didn't come up. And this is not unique. I don't know the circumstances between the law firms. But this is not unique, from what I have seen, and it causes tremendous prejudice.

The one thing that can't be rectified, Your Honor, is the fact that they have taken inconsistent positions. And I want to cross-examine -- the cross-examination of Dr. Legier, for instance, would have been entirely different. Because what he based his opinion on was a representation from counsel by way of hypothetical and a summary statement. He wasn't told about Johns Manville and Celotex and Owens-Corning and 17 others.

THE COURT: That's a lot.

MR. MARKS: And I would have gone in there with a vengeance on that. And that would have been not only with respect to the *Fabre* issue, it would have also been with respect to impeachment because we have inconsistent

sources.

THE COURT: There's no way you could possibly try this case with what the situation you're in right now today. I'm inclined to dismiss it. I really am inclined to dismiss it.

MR. BARNES: Your Honor, I agree completely that we cannot try the case today. I understand your position on that.

THE COURT: They've spent money to prepare this case to start today, to do the discovery. I don't know how many thousands of dollars have already been expended. It's going to have to be done all over again. Do you really think this is worth it for you to ask for another trial date? I don't. I don't. Not with the extra defendants that are involved in this case.

MR. BARNES: I have to talk to my client about that.

THE COURT: I think he's done this to himself.

MR. BARNES: Your Honor, again, this is my client's only one chance to bring a lawsuit.

THE COURT: He had a chance to be honest. And I think he needed to disclose to you the stuff that he didn't tell you about. There's something not right

about saying Foster Wheeler is mean, this is the exposed -- there were some letters in here. And we believe that Foster Wheeler was the predominant -- has the predominant responsibility for the most exposure. And then all of a sudden there's names that were never even named as defendants, never even disclosed. This is just not -- this is so dishonest. It's wrong.

MR. BARNES: Your Honor, when these things -- it's my understanding that when these bankruptcy trusts were applied to, that there was no affidavit signed. There was nothing signed by Mr. Montgomery, Mrs. Montgomery.

THE COURT: He got checks. He cashed the checks, didn't he? He signed off on them.

MR. BARNES: He deposited them into an estate account.

THE COURT: Did he tell you about that?

MR. BARNES: No, he did not.

THE COURT: That's the problem. That's a serious problem. How much were they? You don't want to tell me, I'm sure.

MR. BARNES: If I have to, I absolutely will. If you're instructing me, I will. I can tell you that

they were very small. They were very minor checks.

THE COURT: It doesn't matter. It doesn't matter.

MR. BARNES: Your Honor, I don't even know that he ever signed a piece of paper for these. These were literally filed with no proof of anything other than maybe his Social Security records and no representation by him.

THE COURT: Here's what I'm going to do. I'm going to dismiss this case. In my opinion, I think that's the only way to do it. And I'm going to write an opinion that's going to outline and set forth why so this doesn't happen again with any other of these cases. This is just not the way we litigate in this state.

MR. BARNES: Your Honor, I implore you; I implore you. This is my client's one opportunity to bring a case.

THE COURT: He blew it.

MR. BARNES: He didn't blow it, Your Honor. It was a miscommunication.

THE COURT: That's a serious miscommunication if he went to deposition and he repeatedly did not discuss the exposures from these other defendants

purposely even though knowingly he was getting money from the trust or he had asked for money from these trusts.

MR. BARNES: He was deposed for the first time yesterday. He had never been deposed at any point in time. There hadn't been any necessary contact between him and I. I don't know exactly when --

THE COURT: He's your client.

MR. BARNES: I understand that, Your Honor. There were certain parts of the case that were going on where his involvement --

THE COURT: Everything that you are doing, every representation that you make in every pleading that you make is on his behalf, including your representation last Thursday that there were no filings, no bankruptcy filings, trust filings.

MR. BARNES: Yes, Your Honor, which was completely, again --

THE COURT: Do you know what? That's pretty serious.

MR. BARNES: That's why --

THE COURT: When you got the motion, did you think it might have been important to call him and say,

listen, I've got to make sure I represent accurately to the Court what's going on here; and I want to make sure that you're not going to blind side me and embarrass me?

That's just really unfortunate. Maybe this is a lesson that you have to learn. But I don't know how else I can undo -- because I think the prejudice here is serious. It's not minimal. It's not something that, okay, we'll just give you another trial date; go back and redo your discovery. That's an expensive thing to put them to.

MR. BARNES: Yes, Your Honor, and I understand that. But it is ultimately curable. And under the Delaware cases --

THE COURT: I'm not sure it is.

MR. BARNES: If there is prejudice, that is curable. It's possible that it is curable. I think my client -- I would love if my client would be given the opportunity to cure it. Because they can redepose Mr. Montgomery about this, figure out what he knows. If they want to redepose our expert witness, fine.

They don't have an expert witness. If they want to bring in an expert witness to talk about this type of thing -- their previous expert witness was

struck. You know, to the extent that they get the opportunity to cure it by bringing in an expert witness to even the playing field much more so than it has been to date, I think that that would be an appropriate remedy. And it would give them the opportunity to then play on an equal playing field. Right now they can't bring any expert in under your previous ruling. This would give them the opportunity to come in, they could hire whatever expert they want, and he can talk about the extent of this exposure in detail.

THE COURT: That's up to Mr. Marks.

MR. MARKS: The cost of redoing this -- and I didn't mean to trivialize the Court's comment about the hotel room. Hotel rooms are value for money in Wilmington.

THE COURT: I know. That's just minimal. I know that. You're flying in from --

MR. MARKS: Seattle. But that's at my client's cost. But the cost of time and preparation and preparing for this trial -- and, again, I go back to -- 'cause I thought about this issue -- what could be done that's less than what we've requested?

They have represented in their answers to

interrogatories with the allegations in the complaint, with the oppositions they filed to summary judgment, to affidavits filed by Art Montgomery --

THE COURT: See, I can't go through all that now and know what -- in fact, maybe I'll make you brief it.

MR. MARKS: I would be pleased to brief it. Because it's entirely inconsistent.

THE COURT: If there are that many misrepresentations, then the damage is probably too severe to undo.

MR. MARKS: The standard interrogatories, as I read them, Your Honor, ask the plaintiffs to identify their exposure, and that includes all exposures. And I understand --

THE COURT: I know they do.

MR. MARKS: And I understand the complaint, the game that can be played by delaying trust submissions until after the litigation --

THE COURT: And that's a big issue. And I didn't address that, as you all know, because it's very controversial. But this is different. These were already made.

MR. MARKS: This is different. And they were made a long time ago, and they were made by counsel who knew each other, who referred the case to one another. And whether it was done intentionally or by negligence, the result is the same. It's severe prejudice. And the fact is is that in order to have done this case properly to defend it, we would have pointed out that collusion that occurred with respect to how this case is portrayed. Because Foster Wheeler has never been the target exposure in this case.

He is an electrician claiming exposure to boiler work to take home to his wife when for 40 years he's working as an electrician around joint compound that wasn't identified in this case, USG. All he said was Georgia Pacific, Georgia Pacific, Georgia Pacific. His lawyers submitted a claim to the USG trust claiming exposure to USG joint compound. That should have been in his affidavit, in his opposition to --

THE COURT: And it wasn't in his responses to interrogatories?

MR. MARKS: I cannot find USG anywhere. I spent a good portion of this weekend, Your Honor, when I should have been preparing other things, trying to

figure out how I was going to overcome the situation where we now have 20 new claims that I am burdened with to prove up. And I don't have the TIP submission. And I disagree with the fact that the lack of an affidavit or declaration by Brian or Art Montgomery --

THE COURT: No. This is litigation. And what we're trying to get here is the truth.

MR. MARKS: Exactly.

THE COURT: That's always been my abiding goal when I sit in a trial. I want there to be fairness by getting to the truth. And once I see this much dishonesty and disreputableness, it's really difficult for me to imagine how you could ever undo it. That's the problem. I agree with you on this. Because there's so much more that you would had been able to cross-examine him on.

And I don't think it's fair to ask them to start over. How would you feel?

MR. BARNES: Your Honor, I would be upset. I admit that I would be.

THE COURT: How fair is it for me to give you another chance? Your guy screwed up. He didn't tell you the truth. You misrepresented all through these

pleadings all along stuff that was critically important to their defense of the case.

MR. BARNES: First, Your Honor, in all honesty, I don't know when the general interrogatories were filed at that time, our standing order interrogatories. What had been filed now --

THE COURT: But you're responsible for whatever you took from that other firm. Once you took over, you're the responsible attorney.

MR. BARNES: I understand that, Your Honor. And I understand your position that it was -- it's not fair and how would they feel. I guess my position on this is that, even though it is unfair, even though there is some prejudice, Delaware case law says that if there is a way to cure it --

THE COURT: I don't think there is, though.

MR. BARNES: Your Honor, this is a big mistake by my firm. This is a big mistake by the other firm. I recognize that. But we have --

THE COURT: I'm not sure your client isn't in some respects also part of this little game that's going on here, and that makes it even worse.

MR. BARNES: Your Honor, there is -- there

haven't been, you know, repeated attempts. We haven't been ignoring your orders. It's not like you've been saying do this, do this, and we're bucking you or the court at any opportunity --

THE COURT: Begging me isn't going to make any difference. It's very unseemly. Please don't beg me.

This is really a problem because it gets to the very crux of this case. The core of this case has been fraudulent. There's a problem there, a serious problem there. It's just like they thought they were dealing with oranges, and they're dealing with not even apples; they're dealing with grapes and bananas. This is a serious, serious problem. It goes to the core of what this litigation is all about.

I mean, this whole litigation is based on who was responsible. Nobody can say which fibers did what. But the most important thing is that a plaintiff disclose what they think caused their disease. And if they don't disclose honestly when they're asking money for another company and they don't even let the defendant know about that, that's so dishonest. It is just so dishonest. Because they assumed that there was no other, for example, joint compound other than Georgia

Pacific. Now they know he's claiming that there was another joint compound manufacturer to which he was exposed, for which she was exposed.

MR. BARNES: Your Honor, Mr. Montgomery himself, if he were to be asked, and I think he was asked at his deposition, what brands of joint compound do you remember, Georgia Pacific was the only one he remembered.

THE COURT: Well, obviously, he remembered something enough to be able to go and file a bankruptcy claim.

MR. BARNES: That's not my understanding of how the bankruptcy claims that were filed work. It's my understanding --

THE COURT: Then that's too bad. Because do you know what? Then he's got a problem with his attorneys if that's what they did. But that's too bad.

MR. BARNES: Your Honor, it's my understanding that some of these bankruptcy trusts, and I'm speaking with just a general understanding, that what they do is they essentially concede that certain trades were exposed. So if you prove that -- all you have to do is show that the person --

THE COURT: There's an overriding responsibility in this litigation in Delaware to disclose early on and to continually update any claims with any bankruptcy trusts. It wasn't done here. And if it was one claim and it didn't make a big difference to their defense, I'd be sitting here saying, fine, we'll fix it. This is a huge thing. This goes to the heart and soul of their defense.

MR. BARNES: Your Honor, we have not been able to put any kind of response in writing to their motion. I would enjoy the opportunity --

THE COURT: I'm going to get them to file a brief on this so they can point out -- because they didn't really have time to point out the stuff that he's now trying to let me know. You can file a response. I'll write an opinion. I'll decide what I'm going to do. But at this point, I'm not inclined, I am not inclined to let this case go forward.

MR. BARNES: I understand. Thank you.

THE COURT: I bet you that Mr. Marks is going to point out in a brief to me a lot more than what I know from just this four-page letter. Because I wasn't privy to all the discovery that went on in this case.

And I have a feeling that you're going to probably maybe not want to read what he's going to be writing. And I'll let you respond to it. But if there's testimony from your clients or from Mr. Brian Montgomery or from Mr. Arthur Montgomery that is inconsistent with what they were actually doing, cashing checks from these people, from these other entities, I think it's not going to look good for them.

MR. MARKS: Your Honor, may I ask the Court to inquire of opposing counsel what their prior relationship is with the Brent Coon firm?

THE COURT: Yes, I would like to know that actually.

MR. BARNES: They refer us -- they in the past, no longer, but in the past they have referred us some cases in the Florida area.

MR. MARKS: May the Court ask, please, of opposing counsel whether they have been employed by, anyone at their firm has been employed by Brent Coon & Associates?

MR. BARNES: To my knowledge, no one at my firm has ever been employed by anyone at Brent Coon & Associates.

MR. MARKS: Thank you, Your Honor.

THE COURT: Well, I don't know the scenario and how this all -- I don't know the timeline of everything. That will be your --

MR. MARKS: It will be in our brief and will be based upon the testimony of Brian Montgomery from yesterday, who made it quite clear, who is a sheriff's deputy for 25 years and testifies routinely with prosecutors. And I think he understands the importance of chain of custody and candor to the tribunal and just being honest. It's amazing.

THE COURT: It probably wouldn't have had -- it may not even had that much more of an effect, but when you lie, when you don't disclose, and when you're not upfront about all this stuff, it creates -- it's so unfair. It makes it equally difficult for the other side and for the Court to be fair. And it occurs a lot in this litigation. And I'm kind of getting sick of it, frankly. I'm just not used to that. The lawyers do not do this in Delaware. They are very straightforward.

MR. BARNES: Your Honor, and I am, too.

THE COURT: I believe that, Mr. Barnes. I do. I'm not suggesting that you're not.

MR. BARNES: Thank you.

THE COURT: But you need to appreciate that this kind of stuff is not acceptable in this state and that you have an obligation, you have an obligation to make sure your clients know that.

MR. BARNES: Absolutely, Your Honor. I understand that completely.

THE COURT: At this point, if it's not your fault, whose is it?

MR. BARNES: It absolutely then has to be my fault. And I am --

THE COURT: If you want to fall on the sword for your client, fine. That's your responsibility. But I have a feeling that there's probably a lot of blame to go around here. And it's not the way we're going to be litigating in this case. And at this point, I'll get Mr. Marks's brief.

And you could point out to me in the brief all the things that I am not aware of. See, the thing is, I don't even know; I'm just reading the four pages that I got. That was enough to make me very upset.

MR. MARKS: Thank you, Your Honor.

What kind of briefing schedule would Your Honor

like?

THE COURT: Whatever is agreeable to you. We're getting in close to the holidays.

MR. MARKS: We'll have it done soon.

THE COURT: You tell me.

MR. MARKS: What would be customary for a local -- two weeks to get this submitted?

THE COURT: I'd say 30 days.

MR. MARKS: Thirty days. Okay.

THE COURT: And you'll have 30 days to respond. And I will write an opinion. And you'll get your answer one way or another. And you may want to decide that it may not be worth it for you, if he starts to point out to me some of the stuff that he's starting to point out to me today. I don't think I know the whole --

MR. MARKS: I would like an opportunity to bring it all to light.

THE COURT: I don't think this is it. I'm just seeing the tip of the iceberg. I think there's probably some more things, little dishonest things that are going to come up out of his research that are going to make it more difficult for me to keep this case open.

MR. BARNES: Your Honor, and I will put all

this in the briefing. Again, my request of the Court is and will be that there are alternative remedies and that if --

THE COURT: We'll see.

MR. BARNES: -- and if things have to be opened, that my client at least be given the chance to determine whether or not, as you said, it's even worth it to do it.

THE COURT: You'll find that out after you read his brief.

Right?

MR. MARKS: Yes, Your Honor.

THE COURT: To the extent that the damage is much as he is representing to me -- and I'm only seeing this (indicating). All I know now is that there's been this much prejudice. If there's a whole lot more, A, it's going to be more difficult for me to fashion a remedy that's going to work; and, B, it's going to be a whole lot more expensive for your client. If you're expecting this case to start over, it's going to be at absolutely zero expense to the defense.

MR. BARNES: I understand that.

THE COURT: Zero expense.

MR. BARNES: I do understand that fact.

THE COURT: I mean, soup to nuts, every aspect, every billable hour, every deposition, every expert, everything. And that's a shame, but this is not the way we're supposed to be litigating. A court of law is where people swear on a Bible and tell the truth, and a jury bases their decision on facts and truths. It's just so unfair to start a case with this type of lack of candor and to expect me to condone it.

I was shocked when I read this letter, to tell you the truth. I was really shocked. I've never had this happen. I've had people misrepresent cases to me a lot, but I've never had anybody blatantly do this. And it's pretty unfortunate.

You need to talk to your counsel in Texas, too. Because, depending upon what I do -- I don't know. I just don't know. But Mr. Marks is going to let me know the whole breadth of this.

MR. MARKS: I will, Your Honor.

THE COURT: And I won't even give you a limit on pages.

MR. MARKS: Thank you, Your Honor.

THE COURT: To the extent that I can't remedy

it -- and to the extent that I can, you may have to decide whether it's going to be worth it.

MR. BARNES: Yes, Your Honor.

THE COURT: And this will be a lesson. I'll write an opinion that will get out in the asbestos world and hopefully this won't happen again. Because this is just not acceptable behavior. I mean, I've never seen this happen before in this type of litigation, or any litigation for that matter. Because it's tainted the entire discovery process and their entire defense, their preparation, everything about it.

I mean, I can't even believe you were taking a deposition yesterday. That was after you found out about this?

MR. MARKS: Yes, Your Honor.

THE COURT: Even that, the fact that they had to interrupt their trial preparation --

MR. MARKS: In fairness to opposing counsel, Your Honor, we did accept the deposition as offered for Sunday out of convenience for the witness. But we did spend a considerable amount of time trying to figure out how we were going to address this under the rules of evidence and then writing a letter last night when we

should had been working on our opening and finalizing jury instructions.

THE COURT: It's been expensive to the court. We've got jurors sitting down there. And my time may not be valuable to you folks, but it is to me. So I can tell you that this is a very unfortunate experience for me.

And I mean, I'm not making any judgment calls here about who is responsible for what, but it is a mess that has been created; and I suspect there's a lot of blame to go around. For me to allow this case to go forward given what's occurred is going to have to be -- you're going to have to come up with some really creative way that you can possibly undo the prejudice and the expense to the defense. I'm just not quite sure that it will be possible.

All right. Thirty days. Today is the 7th?

MR. MARKS: The 7th, Your Honor. So December 7th?

THE COURT: That's fine.

And you'll have until January to respond.

And then I will write an opinion, and we'll see where it goes.

MR. MARKS: Thank you, Your Honor.

THE COURT: I'll go and dismiss the jury.

I hope you enjoyed your brief stay in Delaware.

MR. MARKS: I did. And I appreciate the Court's courtesies and comments.

THE COURT: All right.

(Whereupon the proceedings concluded at 10:43 a.m.)

STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, Domenic M. Verechia, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this 8th day of November, 2011.

/s/ Domenic M. Verechia
Domenic M. Verechia, RPR
Certification No. 162-PS

Response to Questions for the Record from S. Todd Brown, Professor, SUNY Buffalo Law School, Buffalo, NY

Questions for the Record
From the May 10, 2012 Hearing on
H.R. 4369, the "Furthering Asbestos Claim Transparency Act of 2012"

Questions from Ranking Member Steve Cohen for Professor Brown

1. Upon confirmation in a chapter 11 case where a trust has been established under Bankruptcy Code section 524(g), does the bankruptcy court resolve disputes with respect to claims or demands made against the trust?

No. Section 524(g) does not require such disputes to be resolved in the federal district court that enters the channeling injunction or the bankruptcy court to which the chapter 11 case was referred. Thus, current parties in interest exercise considerable discretion in designing the procedures that will govern the processing and payment of both current claims and future demands. These claims and demands are evaluated according to the applicable trust distribution procedures (TDP's), so the specific procedures for submitting claims and appealing adverse claim decisions may vary from one trust to another. The trust involved in the *Garner* matter discussed in my testimony, for example, allows claimants to seek review of any unfavorable initial determinations through alternative dispute resolution procedures. If the claimant selects non-binding arbitration, she may subsequently pursue litigation in any appropriate forum. Exact numbers are not available, but I am aware of only a miniscule number of trust claims that have been litigated in court.

What role does the United States Trustee play with regard to this matter?

Title 11 and Title 28 do not currently require the United States Trustee (UST) to perform any oversight or other functions with respect to trusts established under the Bankruptcy Code, and I am unaware of any direct involvement by the office with respect to trust claim disputes.[1]

2. You allege that "dubious claims continue to slip" through the asbestos claims process.

Are you familiar with the GAO Report from last year that examined the role and administration of asbestos trusts?

How do you respond to the fact that the GAO did not find any overt evidence of fraud?

The GAO Report neither found overt fraud nor concluded that the audit procedures that are in place are sufficient to uncover fraud, corruption or other manipulation. In reporting what officials from 11 of the 60 trusts shared with the GAO concerning audit procedures,

[1] This is consistent with the conclusions of the United States Government Accountability Office in its September 2011 report. *See* Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts, United States Government Accountability Office, Sept. 2011, at 13 [hereinafter, GAO Report].

however, the GAO Report reinforces that trusts largely operate in isolation and must seek approval from some of the lawyers who will submit claims (i.e., members of the applicable "trust advisory committee") before adopting or modifying audit procedures. Perhaps most significant from an audit integrity standpoint, only 2 of these trusts (18%) reported using random and targeted sampling. The GAO did not, of course, independently review or audit any claims, opine on the degree to which dubious claims are or are not filed, or contrast trust audit procedures with comparable audits designed to discover dubious claims in other settings.

The sole reference to the prevalence of fraudulent claim filings against asbestos bankruptcy trusts in the GAO Report states, "Of the trust officials that we interviewed that conducted audits, none indicated that these audits had identified cases of fraud." As I noted in my oral testimony, this representation is more suggestive of weaknesses in audit procedures or compensation standards rather than proof that dubious claims are not filed. When large compensation funds are established, history shows that they will attract at least some specious claims. The history asbestos personal injury litigation likewise demonstrates that some doctors and lawyers[2] are willing and able to "manufacture" claims that superficially satisfy fixed settlement criteria but would not survive scrutiny if investigated. Thus, even if fraudulent filings are relatively rare, we should expect to see at least a small number of fraudulent claims uncovered in the audit process.

3. Do trusts rubber-stamp demands for payment from asbestos claimants?

The *Garner* matter demonstrates that trust administrators can and do reject claims that fail to satisfy the applicable TDP standards. It also demonstrates, however, that (i) some trusts are more lenient than others in applying comparable criteria and (ii) facially minor distinctions in TDP criteria can yield substantially different results concerning the same claim. To that end, I do not believe any blanket characterization of trusts as "rubber-stamping" claims or demands would be fair to those who process claims across trusts. *Garner* and the other cases discussed at the hearing and below, however, demonstrate that there are significant gaps in the claim review and approval process that contribute to the trust oversubscription.[3]

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[2] I share Congressman Cohen's reluctance to characterize asbestos plaintiffs' lawyers as "parasites" and reject the notion that most plaintiffs' lawyers are corrupt or intentionally advance specious claims. Even a small number of lawyers, however, can amass large claim "inventories" through mass recruiting practices and flood global settlements with specious claims. Indeed, the use of fixed and predictable global settlement criteria, such as found in TDP's, makes it possible for this group to "manufacture" claims that superficially satisfy these criteria even if the claims would not withstand modest scrutiny in adversarial litigation. *See* S. Todd Brown, *Specious Claims and Global Settlement*, 42 MEMPHIS L. REV. 559 (*forthcoming* 2012).

[3] *Id.* (outlining the manner in which global settlements attract large volumes of dubious claims and discussing a recent asbestos bankruptcy in which the aggregate liability of the defendant-debtor increased 1250-fold over its liability during its first three decades as an asbestos tort defendant in connection with the establishment of its bankruptcy trust).

4. You state in your prepared testimony that "some lawyers may be gaming the system to obtain unwarranted recoveries either in state court or from the trusts."

What evidence do you have to support this statement?

In addition to the cases discussed in my testimony, the recently concluded *Montgomery*[4] case in Delaware Superior Court further demonstrates yet another manner in which the disconnect between state court proceedings and bankruptcy trusts – and the expectation of secrecy with respect to the latter – can corrupt the process. In the *Montgomery* matter, one attorney for the plaintiff submitted claims to trusts that advanced one set of factual representations under penalty of perjury and another firm advanced conflicting factual representations in state court.[5] The plaintiff's state court lawyer was not aware[6] of the bankruptcy trust submissions or payments received[7] from the trusts and, accordingly, did not produce them in discovery and expressly represented that no trust claims had been submitted as late as the week before trial was scheduled to begin.[8] When the plaintiff's state court lawyer learned of the trust filings on the eve of trial, he informed defense counsel, who subsequently advised the court. The trial judge was understandably outraged by the deception:

> **This is really seriously egregiously bad behavior. This is misrepresenting. This is trying to defraud. I don't like that in this litigation. And it happens a lot. And I'm trying to put an end to it. This is an example of the games that are being played.[9]**

The trial court subsequently authorized additional discovery into the events that led to the failure to disclose the trust submissions and gave the plaintiff the choice of waiving privilege with respect to these questions, on the one hand, or dismissal of the case on the other.[10] The case was subsequently dismissed by agreement of the parties.[11]

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[4] Montgomery v. Am. Steel & Wire Corp., 09C-11-217 (Del. Sup. Ct.).

[5] In addition to naming twenty bankruptcy trusts as potentially culpable for the plaintiff's injuries, the trust submissions alleged direct exposure to some of their products during her employment, while the state proceedings alleged that her injuries were solely the result of "take-home" exposure (that is, asbestos from her husband's work sites that he "took home" on his clothes, etc.).

[6] According to the hearing transcript, the state court attorney did not recall asking about any bankruptcy submissions prior to responding to discovery. Pretrial Hearing Transcript, *In re Asbestos Litig. (Montgomery v. Am. Steel & Wire Corp.)*, 09C-11-217, at 3 (Del. Sup. Ct. Nov. 7, 2011).

[7] These payments were received and deposited by the plaintiff several months before trial was scheduled to begin. *Id.*, at 14 & 16.

[8] *Id.*, at 6.

[9] *Id.*, at 7-8.

[10] Motions Hearing Transcript, *In re Asbestos Litig.*, 09C-11-217, at 48-50 (Del. Sup. Ct. Jan. 30, 2012).

[11] Because of the dismissal, the public record does not provide additional insight into the reason for the absence of communication between the plaintiffs' lawyers or the plaintiff (who deposited

Delayed filings, intentional non-disclosure of known filings, and the compartmentalization of roles found in the *Montgomery* matter are all ways in which plaintiffs may circumvent state law and procedures that attempt to incorporate trust submissions and settlements into state tort compensation systems. The failure to disclose at issue in the *Montgomery* matter would not have been a violation of the plaintiff's pretrial discovery obligations had the firm submitting the trust claims deferred these submissions until after the state court trial. Likewise, this failure would not have come to light but for the actions of the plaintiff's lawyer in the state court proceeding once he became aware of the trust filings.[12] These practices present varying levels of risk of sanction (from none, where trust filings are delayed, to high, where the lawyer is shown to have intentionally misled the court concerning existing trust submissions), but concrete examples of each approach and "the lack of communication between the trusts and state tort systems fuels concerns that some lawyers may be gaming the system to obtain unwarranted recoveries either in state court or from the trusts."[13] Indeed, the 2011 RAND Report outlined both the manner in which such strategic trust claim submission can result in "double-dipping" that exceeds the compensation obtainable in the absence of bankruptcy[14] and disagreement among some plaintiffs' lawyers concerning the strategic and ethical dimensions of doing so.[15]

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the checks received from the trusts) and the state court lawyer. Thus, it is not possible to establish whether this case reflects an orchestrated scheme by the plaintiff or one or more of the attorneys involved or merely a reckless absence of communication.

[12] According to a recently filed complaint in connection with the Garlock bankruptcy, this stands in stark contrast to a similar dispute concerning conflicting representations. *See* Complaint, In re Garlock Sealing Techs., LLC (Garlock Sealing Technologies v. Chandler), 10-BK-31607 (Bankr. W.D.N.C. June 4, 2012)(alleging fraud in a pre-bankruptcy asbestos case, in which plaintiffs attorneys were allegedly aware of conflicting representations in the state court proceeding and ballots submitted in connection with asbestos bankruptcy cases and failed to disclose the latter as required in the state proceeding).

[13] Written Statement of Professor S. Todd Brown, May 10, 2012, at 4 [hereinafter, Written Statement]. A representative sample of articles and other sources expressing these concerns include: Mark A. Behrens & Cary Silverman, *Report Sheds Light On Parallel World Of Asbestos Bankruptcy Trusts*, Legal Op. Ltr., Aug. 20, 2010; David C. Landin, Victor E. Schwartz & Phil Goldberg, *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 J.L. & POL'Y 589, 629-30 (2008) (noting "inconsistencies between allegations made in open court and those submitted to settlement trusts or other funds set up by bankrupt companies to pay asbestos-related claims" and the need for transparency to create "proper pressure on plaintiffs' lawyers to file more consistent and accurate bankruptcy trust claims"); Patrick M. Hanlon & Anne M. Smetak, *Asbestos Reform in the States*, Nov./Dec. 2006 (discussing absence of transparency in asbestos trust filings and suggesting that improving transparency "would address the fraud that too often occurs in attributing exposure to different defendants"); Daniel Fisher, *Double-Dippers*, FORBES, Sept. 4, 2006, available at: http://www.forbes.com/forbes/2006/0904/136.html.

[14] Lloyd Dixon & Geoffrey McGovern, RAND Inst. for Civil Justice, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION, at 17 n. 8 & 59 (2011) [hereinafter, 2011 RAND Report]. *See also* Reed v. Allied Signal, 2010 Phila. Ct. Com. Pl. LEXIS 410 (Pa. C.P. 2010)("It is not uncommon for a person who can show exposure to asbestos to make application to several, or

As I noted in my written statement, however, "The extent to which these complaints may reflect pervasive problems . . . remains uncertain in large part because trust operations are largely shielded from public scrutiny."[16] In the absence of transparency, nobody with an interest in this debate – litigants, legal representatives, trust officials or judges – has access to sufficient information across trusts to reach the extreme conclusions that are commonly advanced – that fraud is nonexistent, on the one hand, or rampant, on the other – as an empirical matter.

What we do know for certain is that trust assets continue to be depleted at a rate that exceeds projections, even as these projections are revised year after year, at the expense of future victims. Understanding the sources of this problem – the extent to which it is attributable to overt fraud, weaknesses in exposure or medical criteria, generous interpretations of TDP standards, or a combination of these and other factors – necessarily comes prior to solving it, but this understanding is limited by the current cloud of secrecy concerning trust submissions. With respect to the relative ease with which state efforts to incorporate trust submissions and payments into their tort systems may be circumvented by delay or otherwise, transparency should likewise increase the prospects of discovery and, accordingly, reduce any such manipulation.

5. The FACT Act requires the United States Trustee to receive the quarterly report.

What do you expect the United States Trustee to do with such information?

My understanding is that such reports will enable the UST to ensure that bankruptcy trusts are complying with the reporting requirement generally and maintain a centralized record of trust submissions consistent with the other data that is collected by the UST.

6. You are obviously a big proponent of transparency and disclosure.

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?

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even more bankruptcy trusts, and to simultaneously sue other, non-bankrupt, manufacturers, often more than one, in civil court proceedings. Thus, one individual or estate has two avenues of recovery; the 524(g) bankruptcy trusts administrative procedure, as well as civil lawsuits. This has led to the potential of double recovery, as there has only been haphazard reporting, if at all by plaintiffs of funds received from bankruptcy trusts, despite recoveries also received at trial.").

[15] *Id.*, at 19-20.

[16] This is consistent with the 2011 RAND Report's discussion of this issue. 2011 RAND Report, at 17 n. 8 ("Although there are examples of inconsistency between plaintiff affidavits and testimony and trust claim submissions, systemic analyses have not been conducted on its prevalence.").

I am a proponent of measures that strike an appropriate balance between the public and private interest in improving transparency, on the one hand, and limiting the costs and unnecessary disclosure of properly confidential information on the other. This balance tends to shift in favor of transparency in bankruptcy and limited fund settings, including other forms of aggregate litigation and settlement with similar opportunities for those in control of the litigation to advance their own interests at the expense of other current and future claimants. I have not, however, considered the broad range of matters in which the Sunshine in Litigation Act might apply or the sort of information that might be disclosed outside of my core areas of research, and I do not believe that I have anything to add to that discussion that others have not already mentioned over the last two decades.

Questions from Mr. Watt for Professor Brown

1. If most asbestos settlements resolved in state court are kept confidential, should a different standard be applied to settlements with asbestos trusts?

Yes. In creating a dual compensation system that is not exclusive (that is, it allows claimants to obtain compensation from both trusts and defendants in tort litigation), Section 524(g) necessarily introduces issues that would not otherwise exist in the tort system alone. Inconsistent and conflicting factual representations in pleadings or sworn testimony in tort litigation are likely to be discovered and relevant to the litigation and settlement of a plaintiff's claims against the universe of defendants in tort alone. Similar inconsistencies in trust filings filed under penalty of perjury and tort litigation can remain concealed under the dual compensation approach, where representations to a trust are unknown due to delayed submissions or the failure to disclose filings that have been made.

Likewise, in light of the fact that the trusts are established to advance the policy objectives of Section 524(g), the mandatory disclosure of limited information concerning the resolution of individual claims is necessary to determine whether and to what extent these objectives are, in fact, satisfied. As a matter of quantitative individual claim settlement analysis, this disclosure is relevant only with respect to the small number of claims that receive individual review[17] because other claims will be paid according to the default scheduled values established in the trusts, as modified by the applicable payment percentages. In the aggregate, however, this information should improve our understanding of how trusts operate, the impact of variations in TDP provisions on the distribution of limited funds across claims of varying quality and type, and, more generally, why bankruptcy trust claim projections consistently underestimate future demands to the detriment of future victims.

I do not, however, believe that discussions and negotiations that occur between the submission of the claim form (which is ordinarily compared to the filing of a complaint in litigation or proof of claim in bankruptcy, both of which are public filings) and settlement (the terms of which are also public information in bankruptcy for the reasons outlined in

[17] The GAO Report notes that only 2-3% of claims are submitted for individual review. GAO Report, at 20.

my testimony) should be disclosed. Such negotiations are not disclosed by default in bankruptcy – though they may be subject to discovery and public disclosure where there is evidence of abuse or fraud in the settlement – and I do not find the arguments in favor of a more expansive mandatory disclosure provision with respect to this information compelling.

In sum, to the limited extent disclosure obligations may be different for bankruptcy trusts under the FACT Act than for defendants in the tort system, these differences are due to differences between the tort and bankruptcy/limited fund contexts and consistent with comparable obligations imposed in bankruptcy generally. Disclosure with respect to claim form submissions is consistent with both bankruptcy and tort law. To the extent that disclosure of quantitative settlement information varies from the tort system, it is nonetheless consistent with bankruptcy law and practice and would provide additional individual settlement amount information with respect to only the 2-3% of claims that are submitted for individual review under the applicable TDP's.

2. If greater disclosure is required of victims' settlements with asbestos trusts, should greater disclosure also be required of asbestos settlements resolved in state court?

In the limited circumstances in which such settlements would have comparable effects on absent parties, I would not oppose similar transparency requirements outside of the bankruptcy context.

3. How do you reconcile charges of rampant fraud on asbestos trusts and solvent defendants with studies by the U.S. Government Accountability Office and the Rand Corporation and audits by the asbestos trusts themselves that have failed to find such rampant fraud?

Aside from the reasons identified in response to Congressman Cohen's question 2, the policy discussion tends to be confused by the distinction between the common use of the term "fraud" and its specific legal meaning. When trust standards are exceedingly low, ambiguous, do not exclude claims premised upon factual representations that conflict with representations made under penalty of perjury elsewhere, or otherwise allow claims that we might characterize as fraudulent under the common use of the term, such claims may not be deemed legally "fraudulent" as against the trust because the trust accepts and pays them.

A brief review of the case examples mentioned previously may help illustrate the point. Although four trusts paid the *Garner* claim, the claimant in that case submitted evidence that was grossly inadequate to qualify for compensation in tort (and arguably under the applicable TDP's), but it does not appear that she lied or advanced fabricated evidence. Likewise, although the factual representations in the *Montgomery* case conflicted with representations advanced in state court, it is not clear that the representations to the trusts were, in fact, untrue (as opposed to intentionally concealed from the state court proceedings, in which they were relevant). Even the representation that the claimant in the *Kananian* matter was a shipyard worker hung from a thread of truth (he was there for one day to pick up his ship), which would strike many as too cute by half but may be sufficient

for others to dismiss this misstatement as a zealous embellishment of the record rather than overtly fraudulent, particularly given the fact that the trust accepted and paid the claim.

4. Typically a victim can recover from anyone who harms them, even if there were multiple actors. Should the asbestos industry be subject to a different standard?

Asbestos personal injury plaintiffs should remain entitled to pursue defendants in tort, and obtain aggregate recoveries up to the amount of the damages they are entitled to receive, in accordance with applicable state law and procedure. Any modifications to specific state rules or procedures to account for trust submissions and payments, if any, would presumably be – and, to date, have been – premised upon the need to preserve the underlying objectives of state law given the presence of bankruptcy trusts rather than the defendants' involvement in the asbestos industry.

5. Are asbestos trusts already required to disclose claim information? Do current state discovery rules allow defendants to obtain this information if a judge determines it is relevant?

My own sense of this emerging area of law is that courts tend to allow discovery of trust submissions and payments that have been made, notwithstanding various arguments that such discovery violates the Supremacy Clause.[18] Even among courts that allow this discovery as a matter of course, however, very few require plaintiffs to make submissions before trial or disclose the trusts they intend to pursue in the future, and these provisions are likewise under attack[19] and difficult to enforce.

[18] For example, in a recent proceeding, one of the leading asbestos personal injury firms in New York argued not only that bankruptcy trusts are immune from discovery because they are "federally-supervised" but also that individual claimants are similarly immune to disclosure of the forms they submitted to the trusts under the Supremacy Clause. *See* Affirmation Objecting to (1) The Special Master's Recommendation Requiring Production of Bankruptcy Trust-Related Filings, and (2) ACMO Paragraph XV(E)(2)(1), *In re New York City Asbestos Litig.*, No. 40000/88, at 6-7 (Dec. 21, 2011)(arguing that the confidentiality "assurances and representations afforded by the federally-supervised bankruptcy trust scheme" are entitled to protection under the Supremacy Clause), available online at: http://www.nycal.net/PDFs/POC-Appeal(Heitler)Dec21-2011.pdf.

[19] *See*, *id.*, at 11 (arguing that a state requirement that claim submissions to bankruptcy trusts occur within a specific timeframe vis-à-vis the tort litigation "is unconstitutional and impinges upon the Federal administration of, and sole authority over, the bankruptcy-related trusts.").

Response to Questions for the Record from Charles S. Siegel, Partner, Waters & Kraus LLP, Dallas, TX

Questions from Ranking Member Steve Cohen for Mr. Siegel

1. Mr. Scarcella says that FACT's requirement for quarterly reporting and responding to third party disclosure requests "will not result in overly burdensome efforts or costs to the trusts."

What is your response?

The FACT Act will significantly increase the burdens and costs to the trust. I understand that the Manager's Amendment added a provision to the FACT Act that would require the requesting party to pay for the costs of the requests. This will do little, however, to alleviate the financial and administrative burdens on the trusts.

The legislation will impose substantial administrative burdens, which, contrary to Mr. Scarcella's claims, the trusts are not equipped to handle. These administrative burdens divert staff from processing claims while they respond to limitless demands for information and prepare required reports. Even with additional staff, the burden of responding to asbestos defendants' deliberate and unnecessary reporting demands will overwhelm the ability of the trusts to timely pay claims. Even with some of the costs reimbursed, the trusts will still bear significant overhead and other administrative costs to meet the requirements of the FACT Act, reducing the already meager sums available to pay claims. In view of the limited monies available in trusts to pay claims, it is highly wasteful to spend them on providing information already available through the state court discovery system.

I think it is also important to highlight that many of the trusts have expressed strong opposition to this legislation, in part because of the burdensome administrative costs that will reduce recoveries for future trust claimants.[1] The letter to the Committee states that the reporting requirements of the bill are "extensive and will require the trusts to establish reporting systems and then administer quarterly reports to bankruptcy courts. Likewise, the bill will require the bankruptcy courts to develop means to receive, store, and maintain data on thousands of asbestos claimant, presumably in electronic form." The trust representative also stated that "[s]ection (8)(A) would burden both the trusts and the bankruptcy courts with creating central repositories for data on all asbestos victims who file claims with the asbestos trusts."[2]

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[1] Letter from Keating Muething & Klekamp PLL (on behalf of AC&S Asbestos Settlement Trust, Keene Creditors Trust, Plibriceo 524(g) Asbestos Trust, Raytech Corporation Asbestos Personal Injury Settlement Trust, and the United States Mineral Products Company Personal Injury Settlement Trust) to the Honorable Lamar Smith, May 9, 2012.

[2] *Id.*

2. The FACT Act would require the trusts to respond to any request from a party to any action if the subject of such action concerns liability for asbestos exposure.

What would prevent a trust from receiving hundreds or even thousands of these requests during any given year?

Nothing. The FACT Act is an invitation for asbestos defendants to flood the trusts with requests for information, for no other reasons than to delay the ability of the trusts to pay out claims and to avoid accountability for their wrongdoing. State court discovery rules already allow asbestos defendants to get this information whenever it is relevant. H.R. 4369, on the other hand, allows *anyone* to request information from the trusts for *any reason* at *any time*. The requesting party does not even have to be a party in the case. The reason for this is clear: asbestos defendants want to be able to bury the trusts in paperwork so that they cannot pay out any claims to victims of asbestos exposure. Asbestos defendants also want to obtain this information so they can use it to deny asbestos victims recovery from solvent defendants.

It is important to mention that asbestos defendants, in coordination with ALEC and the Chamber of Commerce, are engaged in efforts at the state level to pass state laws requiring asbestos claimants to resolve trust claims *prior* to moving forward with state law tort claims. Thus, H.R. 4369, when combined with these state proposals, would deprive asbestos victims of their rights to seek compensation for their injuries from both asbestos defendants in the state tort system and from the trusts.

3. Ms. Schell complains that the trusts typically treat claimants' submissions as confidential.

Please explain why such matters are treated as confidential.

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.

Further, the fact that these trusts are created under section 524(g) of the bankruptcy code is irrelevant. Make no mistake about it: claims paid out by asbestos trusts are settlements and therefore should be treated in the same manner as any others settlements negotiated in the court system. Just as a solvent corporation has no obligation to make settlement information available to the public, an asbestos trust has no obligation to do so either.

As I discussed during the hearing, 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 asbestos wrongdoing. In fact, the solvent asbestos defendants themselves require that the settlements they reach with asbestos victims remain confidential. Attached as exhibit A is an example of a release required by Ms. Schell's firm. It has been redacted to prevent disclosure of personal information that would identify the claimant or the lawsuit. The standard confidentiality provision demanded by Ms. Schell's clients appears in the fourth full paragraph, on the second page. This is a typical provision.

Courts routinely refuse to compel discovery of settlement information. Settlements by asbestos trusts are no exception.

This bill requires the trusts to disclose the amount requested and paid out to the victim. This is identical in nature to requiring disclosure of a settlement. However, the bill keeps intact the rights of asbestos defendants to demand confidentiality for their settlements. Now these same defendants are trying to force disclosure of a victim's settlement information with the trusts, while maintaining their own right to confidentiality.

4. Your fellow witnesses asserted that asbestos victims "double dip."

What is your response?

Asbestos defendants commonly argue that asbestos lawsuits and claims against the trusts constitute "double dipping," since claimants may potentially recover both from defendants in the state court system and from bankruptcy trusts. The claim is false and reflects a basic, fundamental misunderstanding 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.

The assertion is that large amounts of money are recoverable from bankruptcy trusts, and that plaintiffs routinely game the system so that they receive a full recovery in the bankruptcy system, and then a second, "double" recovery in the tort system. Neither premise is correct: there is no windfall of money available to claimants, and plaintiffs cannot and do not "game the system" such that solvent tort defendants pay the liability shares of bankrupt companies.

First, asbestos disease typically results from exposure to multiple asbestos-containing products over the course of a person's working lifetime. Second, the law in every state is settled that any victim can recover from every asbestos defendant who substantially contributed to their illness or injury; this includes asbestos trusts because the trusts essentially step into the place of the former defendant. Thus, when an asbestos victim recovers from each defendant whose product contributed to their disease, that victim is in no way "double-dipping." Rather, they are simply recovering a portion of

their damages from each of the corporations who harmed them. In fact, each trust is responsible for and pays for only its own share of the damages.

Further, asbestos victims receive only a fraction of the scheduled value provided for each disease category, so to suggest that victims are somehow being overpaid is entirely false. A RAND study found that "[m]ost trusts do not have sufficient funds to pay every claim in full and, thus, set a payment percentage that is used to determine the actual payment a claimant will be offered." The median payment percentage is 25%, but some trusts pay as low as 1.1 percent of the value of a claim.[3]

The asbestos trusts generally are underfunded because the debtors that established them were insolvent. The trusts are required to ensure that they have adequate funds to pay present and future claimants and to treat all such claims in "substantially the same manner."[4] To meet this statutory requirement, trusts often pay claimants only a fraction of the scheduled value of their claim. For example, the Manville Trust currently pays 7.5% of its settlement amounts; the Owens-Corning Trust pays 10%; the Armstrong Trust pays 20%; the USG Trust pays 35%; and the Dresser Trusts have one of the highest payment percentages: 52.5%.[5]

Because the trusts are underfunded, mesothelioma victims whose claims are paid by bankruptcy trusts are woefully *undercompensated* for their fatal illnesses. The *scheduled* value for mesothelioma claims across trusts range from $7,000 - $1.2 million.[6] But, the average payment for mesothelioma claims from all trusts was $126,000 in 2008; for all malignant claims in 2007 the average payout was $21,700; and in 2008 the average payment for malignant claims was $34,100.[7] Even as medical costs and other expenses of illness rise, and while the profits of asbestos defendants also rise, these compensation values are frozen. These figures are substantially below what a mesothelioma victim can expect to recover if his case is tried.

5. In the absence of any empirical evidence of prevalent fraud, why would Congress change the law in an apparent effort to respond to allegations of rampant fraud?

Quite simply, charges of fraud on the asbestos trusts are not supported by either facts or a detailed study, which was conducted at the behest of the Chairman of this Committee.[8] The GAO report found no fraud on the trusts, stating: " . . . each trust's focus is to ensure that each claim meets the criteria defined in its Trust Distribution

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[3] Lloyd Dixon, et al, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND Institute for Civil Justice, page xv (2010); available at http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf (hereinafter "Dixon RAND Report").
[4] Bankruptcy Code §524(g)(2)(B)(ii)(V).
[5] Dixon RAND Report, p. 38 (2010).
[6] Dixon RAND Report, p. 36 (2010).
[7] Dixon RAND Report, p. 33 (2010).
[8] GAO, "*Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts,*" September 2011,available at http://www.gao.gov/assets/590/585380.pdf (hereinafter "GAO Report").

Procedures ("TDP"), meaning the claimant has met the requisite medical and exposure histories to the satisfaction of the trustees. Of the trust officials that we interviewed that conducted audits, none indicated that these audits had identified cases of fraud."[9]

It should be noted that the trusts already have various ways of identifying questionable or potentially fraudulent claims. First, they hire experienced claims processing facilities to review filed claims, and the reviewers and supervisors at the facilities are well-trained in identifying anomalies in claim submissions. In addition, the trusts have claim validation procedures that the claims processing facilities follow to identify potentially invalid claims. When a problem is identified, the trust will ask the claimant to provide additional evidence to support and verify the claim. If the claimant does not provide the information that is necessary to alleviate the concerns of the trust, the trust will not approve and pay the claim.

The trusts also track public information and court filings to determine if questions have been raised regarding medical reports provided by a particular doctor or claims made by a particular lawyer or claimant. When a trust becomes aware of an individual about whom questions have been raised, it will review the facts and determine its policy with respect to such individual. We are not aware of any trusts that do not have a list of doctors from whom they will not accept medical reports.

The trusts also conduct targeted audits of law firms when a trust detects any type of suspicious claim filing practices on the part of a firm. The targeted law firm bears the cost of the audit, and the auditing trust reviews in detail all aspects of the firm's filings. In addition to targeted audits, some of the trusts also conduct random compliance audits in which they select a random sample of claims for audit. The law firms who filed the selected claims are required to submit the documentation that the firms relied upon in submitting the medical and exposure information for the subject claims. If, during the random audit, the trust finds irregularities, it will expand the scope of the audit and undertake a targeted audit of the subject law firm. At the conclusion of an audit, the trust will take the steps it believes appropriate based on the outcome of the audit.

The FACT Act merely helps solvent defendants in state court by adding significant time and delay to the trust process. By putting burdensome and costly reporting requirements on the trusts, in addition to those that already exist, trusts will have to spend time and resources complying with these requirements and responding to asbestos defendants' demands for information. This will cause trust recoveries to be reduced and will add a significant amount of time to the trust process, something that asbestos victims who are dying of cancer can hardly afford. It will also allow the asbestos defendants to make unnecessary, burdensome requests to the trusts for the sole purpose of obstructing and delaying justice for asbestos victims. This promotes a system where many victims will die before receiving compensation.

The bill would also help asbestos defendants override their state's law regarding joint and several liability. Asbestos defendants want a victim's trust claim information

[9] *Id.* at 23.

readily available to deny accountability and to argue that it should pay the victim less. But state law already determines how a victim should be compensated and indeed, state judges routinely require that plaintiffs disclose information about a trust payment or other settlement and provide a defendant with a set off for amounts received. How this occurs is, and has always been, a matter of *state* law.

6. Ms. Schell cites several instances of fraudulent claims by purported asbestos victims.

What is your response?

Asbestos defendants, including Ms. Schell's clients, have no evidence to support their assertions of fraud by plaintiffs. The cases Ms. Schell cites can be categorized in one of two ways: (1) instances in which the plaintiff availed himself of procedural mechanisms available to all parties to litigation and routinely used by defendants; or (2) instances in which Ms. Schell fails to report certain facts in an apparent attempt to mislead the committee. In none of the cases that Ms. Schell cites does a plaintiff's conduct amount to fraud. In addition, it is worth noting that there are hundreds of thousand claims filed with the trusts each year yet Ms. Schell only cites a handful of alleged examples of fraud. This is by no means a valid sample size from which to draw any conclusions, let alone conclusions of fraud..

Where Ms. Schell alleges that asbestos victims utilize legal procedures, that are equally available to defendants, to object to having their personal information disclosed, I would only note that these procedures are commonplace and are used frequently by both sides. A judge will overrule any objection if he finds that, under state law, such information is relevant and should be disclosed. In no way does the use of these procedures by either party constitute fraud.[10]

To the extent I was able to get information about the cases cited by Ms. Schell, not a single one involved fraud.[11] A detailed analysis of the cases cited follows.

1. *Robeson, et al v. Amatek, Inc. et al,* Civil District Court for the Parish of Orleans, No. 2004-15722, Div. E.
    - Allegation: Plaintiffs committed fraud in that: (1) Mr. Robeson's attorneys never contacted Mr. Robeson to obtain information from him before filling out the trust claim forms information on his behalf; (2) Mr. Robeson's son "had no knowledge of the exposure" history claimed by the attorneys on his father's behalf; and (3) Mr. Robeson's attorney's

[10] Cases cited by Ms. Schell concerning the normal use of litigation procedures include: *State of Rhode Island Superior Court, In Re Asbestos Litigation*, Filed December 28, 2011; *Julian Rivera v. Avondale Industries, Inc. Northrop Gruman Shipbuilding, Inc., Huntington Ingalls, Inc.,* et al, Civil District Court for the Parish of Orleans, State of Louisiana, No 2011-12719; and *William Oddo, Jr. v. Asbestos Corporation LTD. et al.*, No. 2011-058853, Civil District Court for the Parish of Orleans, Div. 14-1, filed January 13, 2012.

[11] The one exception was the *Kananian* case which I address in question #1 from Rep. Quayle below.

intentionally lied about whether the plaintiff had been a smoker on 16 different trust claim forms.

- Facts: Ms. Schell is correct that the attorneys for Mr. Robeson never contacted their client to obtain information about his exposure history and medical history. This is because William Robeson had already died from mesothelioma before his survivors became their clients. As Mr. Robeson had already passed away, the plaintiff's attorneys had to gather information about his exposure history and medical history from various sources including Mr. Robeson's son, other family members, social security records, military records, and the trust funds themselves. So it is no surprise that Mr. Robeson's son did not know of every product that his father had been exposed to and that had been filled out on the claims forms. Ms. Schell cannot accuse these attorneys of making false statements just because their deceased client's son did not know every detail of his father's asbestos exposure and work history. Finally, Ms. Schell claimed that Mr. Robeson's attorneys lied on 16 different trust claim forms about whether Mr. Robeson was a smoker, in an attempt to intentionally misrepresent his smoking history. Again, this is absolutely not true. First, Mr. Robeson died of mesothelioma, which has no causal relationship to smoking. In fact, for mesothelioma victims, many of the trusts say you do not have to answer the smoking question at all, since smoking is not a contributing factor. For most of Mr. Robeson's claims to the trusts, the smoking history was simply left blank, but one was filled in incorrectly in an unintentional error. This claim that was incorrectly filled in was a claim on a website for a group of trusts that allowed you to copy the claim to submit to the various different trusts. Since the website allowed you to copy claim information from one trust to another, the claim that was originally filled in incorrectly was carried over to other trusts. This was an unintentional error – not fraud – and made absolutely no difference to the resolution of Mr. Robeson's case.

2. *William Oddo, Jr. v. Asbestos Corporation LTD. et al.*, No. 2011-058853, Civil District Court for the Parish of Orleans, Div. 14-1 filed January 13, 2012.
    - Allegation: Ms. Schell believes that plaintiffs lied in their answers to interrogatories when they stated that Mr. Oddo had not applied to the Johns-Manville Trust. The defendants issued a subpoena to the trust and plaintiffs successfully moved to quash the subpoena, a matter which is currently on appeal to the Fourth Circuit. Ms. Schell then claims that defendants obtained written correspondence that Johns-Manville not only received a claim, but that the claim had actually been paid.
    - Fact: The plaintiffs did in fact object to a subpoena that the defendant sent to the Johns-Manville trust. But the judge had already reviewed this issue and found that nothing in the trust claim forms was admissible, and further that simply answering whether or not a claim was filed is sufficient. Defendants continued to pursue information from Johns-Manville despite their subpoena being quashed, and they discovered that a person with the same name filed a claim for asbestosis in 1994 with Johns-Manville.

Plaintiff's attorney had no information about a prior claim. Regardless, the 1994 claim for asbestosis has nothing to do with the pending claim for mesothelioma since Louisiana is a "two disease" state, i.e. a plaintiff may file a second lawsuit if he contracts a second asbestos-related disease after resolving his first claim.

3. *Lorraine Bacon v. Ametek, Inc. et al.*, No. CJ-08-238, In the District Court for McIntosh County, State of Oklahoma.
    - Allegation: Plaintiffs should have disclosed 11 affidavits from product identification witnesses which were "relevant to accurately assess Mr. Bacon's exposure history." Because this information was not disclosed, Mrs. Bacon, the plaintiff's wife, would receive an overpayment for the death of her husband because she made 14 trust claims and then deferred resolution of those claims.
    - Fact: 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 a victim can recover from every asbestos defendant who substantially contributed to their illness or injury. Thus, since the defendant's product had contributed to Mr. Bacon's disease, Ms. Bacon was entitled to recover from them, regardless of any claims she made to the trusts for additional exposure to other products. Further, even if those trusts paid the estimated value of $313,000, as alleged by the defendants, in addition to the amount recovered from CertainTeed, Ms. Bacon would still only recover a fraction of the amount owed to her for her husband's death from asbestos exposure.
4. *D'Ulisse v. Amchem Products, Inc. et al*, Index No. 113838104, Supreme Court, State of New York
    a. Allegation: Plaintiff had denied exposure to products made by Johns-Manville at trial while later making sworn admissions to 5 asbestos trusts in opposition.
    b. Facts: This allegation is particularly egregious in that Ms. Schell merely repeats the defendant's assertions of fraud, while ignoring the judge's actual decision in the case. This appears to be an attempt to deliberately mislead Members of this Committee. The court found *no validity* to defendants' claims, because plaintiff had admitted such exposure in plaintiff's answers to interrogatories, at deposition and at the original trial. In concluding his order, the judge chastised the defendants, stating "[t]he jury's verdict was rendered at the end of a rancorous trial lasting more than two months. Entry of the judgment has been delayed at the behest of the defendants after at least two on the record discussions which was held at their request. During that post-trial period, plaintiff Alfred D'Ulisse has passed away and his wife has been appointed his executor. It is time for the delay to end." The judge further emphasized his point by adding a handwritten and signed note to the order stating, "note: I have considered defendant's remaining arguments and find them to be without merit." I have attached the court's order as exhibit B.

7. What are some of the reasons why defendant corporations demand their settlements be kept confidential?

It is important to distinguish between the openness of the jury system and the confidentiality of settlements. When an asbestos defendant settles in the tort system, individual settlement information is generally treated as confidential by both asbestos victims and asbestos defendants. As I discussed during the hearing, 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 asbestos wrongdoing. In fact, the solvent asbestos defendants themselves require that the settlements they reach with asbestos victims remain confidential. Naturally, defendants would like to know how much the plaintiff has accepted from settling tortfeasors, as it would give them greater insight into what amount the plaintiff might be willing to accept in their own settlement negotiations. For the same reason, plaintiffs also would like to know what the solvent defendants have paid other plaintiffs. Courts routinely refuse to compel discovery of settlement information. Settlements by asbestos trusts are no exception.

When asbestos victims sue solvent defendants in the tort system, the defendants routinely seek, and obtain, discovery from the plaintiff regarding any claims that the plaintiff submitted to any of the asbestos trusts. But just as they refuse discovery of settlements with any other co-defendants or potentially responsible parties, courts presiding over asbestos cases — including the Eastern District of Pennsylvania, which oversees the federal multi-district asbestos litigation, comprising about 60,000 cases and 3.5 million individual claims — routinely refuse to compel disclosure of information regarding the fact of settlement with, and settlement amounts plaintiffs have received from, settling asbestos trusts until after a verdict has been entered against the defendant (at which point the settlement amounts may be relevant in determining any set-offs to which the defendant may be entitled). And just as a solvent corporation has no obligation to make settlement information available to the public, an asbestos trust has no obligation to do so either.

This bill requires the trusts to disclose the amount requested and paid out to the victim. This is identical in nature to requiring disclosure of a settlement. However, the bill keeps intact the rights of asbestos defendants to demand confidentiality for their settlements. Now these same defendants are trying to force disclosure of a victim's settlement information with the trusts, while maintaining their own right to confidentiality.

8. This bill forces the trusts to disclose certain information about claims. Who would this bill help and why would those entities seek this information?

The bill's provisions have no other intended consequences than to grant solvent asbestos defendants new rights and advantages to be used against asbestos victims in

state court and to add new burdens to the trusts, such that their ability to operate and pay claims would be crippled. Further, the bill is intended to help defendants skirt state laws regarding rules of discovery and joint and several liability.

The bill would slow down or stop the trust process such that many victims would die before receiving compensation, since victims of mesothelioma typically only live for 4 to 18 months after their diagnosis.[12] The bill's new burdens will require the trusts to spend time and resources complying with these requirements, causing trust recoveries to decrease and be delayed.

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

9. In asserting that rampant fraud exists, Ms. Schell suggests that the submission of "inconsistent" information to trusts and in tort filings is somehow suggestive that the inconsistencies are widespread and submitted with fraudulent intent. What explanations for inconsistent filings are there other than fraud?

First, I think it is important to note the definition of "fraud." Fraud is an *intentional* deception made for personal gain or to damage another. Ms. Schell's allegation that every submission of "inconsistent" information to trusts and in tort filings is made with fraudulent intent is patently incorrect.

The trust claims system is a vast and often complicated system where each claimant almost always has been exposed to multiple asbestos products at multiple job sites over a period of many years. Because of the very nature of this claims process, an individual claimant must file different claims, to different trusts, with different forms that request different information. Thus, the most common reason for inconsistent filings is just plain human error. With that said, when these inconsistencies do occur, current law provides a remedy to rectify these inconsistencies. Defendants, through discovery, already have the means to identify any inconsistencies between statements filed in court and with trusts and courts will and do take action any time they find inconsistencies.

In addition, while it is of course inappropriate for a plaintiff to intentionally submit inconsistent exposure information, the fact that the exposure information submitted to one trust *differs* from the exposure information submitted to another does not mean it is inconsistent. These exposure scenarios address different questions and

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[12] Mesothelioma Applied Research Foundation, *Mesothelioma Information: Disease Development and Progression*, available at: http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.4023387/k.643A/Mesothelioma_Information.htm#whatismesothelioma.

therefore are not the same, but they are not, in any way, inconsistent. A trust's TDP establishes those exposures compensated by the trust and each trust's requirements are different. For example, a WWII veteran exposed in a Navy shipyard to asbestos supplied by Manville would cite such early exposures in seeking compensation from the Manville trust. If such a veteran later worked in the construction industry as a pipefitter and was exposed to a different manufacturer's asbestos years later, his lawsuit would recite this later exposure history as a construction worker. These exposure scenarios are not inconsistent. And, the defendant in the latter case would of course be entitled to learn of any earlier exposures during discovery.

There are hundreds of thousands of claims filed with the asbestos trusts. [13] To the extent there are rare and isolated incidents of asbestos claimants making inconsistent claims, state courts can and do implement remedial measures using existing state law. It is simply unnecessary to invoke extraordinary federal intervention into state tort claims and trusts organized under state laws. Moreover, these rare instances of alleged malfeasance have been and continue to be addressed with the current remedies available to the defendants under the rules of state courts. In addition, it should not be forgotten that these few isolated instances of misconduct pale in comparison to the long history of corporate deceit and silence with respect to the mining, manufacturing and marketing of asbestos products over many decades. This indefensible corporate conduct resulted in hundreds of thousands of deaths of innocent workers.

10. Professor Brown says that claims filings at some trusts are "exceeding projections," that trust assets are "being depleted rapidly" and that it will be "unlikely" that any of the trusts operating today ". . . will be in a financial position to pay present claims and future demands that involve similar claims in the same manner." He then discusses two trusts that have recently increased payment percentages. All of this appears intended to suggest that (1) there is no legitimate reason to increase trust percentages, (2) claims filings "exceed projections" because of fraud, and (3) even if there are legitimate reasons for modification of trust operations, defendants are aggrieved by such modifications. Are there alternative explanations for the trust circumstances he describes?

The payment percentages of trusts are based on actuarial projections of the number of people who will submit claims to the trusts and the amount of those claims. These projections are periodically revised and the payment percentages adjusted based on the trusts' actual claims and investment experience. The payment percentages are set by the

[13] *See, supra* fn 2 RAND INSTITUTE FOR CIVIL JUSTICE, at page xvii (2005) ("Approximately 730,000 people had filed an asbestos claim through 2002."); Congressional Budget Office, Cost Estimate: S.1125 Fairness in Asbestos Injury Resolution Act (October 2003) (estimating 1.7 million claims would be made over the next three decades nationwide); Dr. Laura S. Welch, MD, Medical Director, Center to Protect Workers Rights, in testimony before the Senate Judiciary Committee (June 2003) (estimating that 2.6 million claims have yet to be filed in the United States); available at: http://judiciary.senate.gov/hearings/testimony.cfm?id=4f1e0899533f7680e78d03281fecaab3&wit_id=4f1e0899533f7680e78d03281fecaab3-3-2

court appointed trustees and they are the individuals responsible for determining whether those payment percentages are appropriate.

Professor Brown contends that unexpected numbers of lung cancer victims are evidence of fraud within the trust system, yet he fails to explain how a diagnosis of lung cancer could be fraudulently obtained. In reality, the number of claims and the number of state court filings simply reflect the fact that thousands of Americans are sick and dying of cancer caused by asbestos exposure.

Solvent asbestos defendants have no basis for complaining about the operations of the trusts. The 524(g) trusts are designed to protect the interest of present and future claimants against the bankrupt estate. Other defendants are not aggrieved by any modification or change that occurs, because the corpus of trust assets and whatever earnings are obtained over the life of the trust are all dedicated to paying the claims of asbestos victims who had legitimate claims against that corporation. If any tension exists, it is between the present and future claimants all of whom are affected by the change in payout percentages. Trust fiduciaries are required to make sure that future claimants will receive the payment percentages and that any increase of payment percentages out of the trust take in account the impact of the increase or decrease on future claimants.

11. Do defendants have any right or standing to complain about or benefit from the operation of the trusts?

524(g), in its purpose and structure, has nothing to do with the liability of solvent defendants that may or may not be determined by state law. Rather, the legislative judgment in creating 524(g) bankruptcy trusts was to protect the assets of the trusts *irrespective of the solvent defendants*. While solvent defendants may have an interest in obtaining an offset in appropriate purposes under state law, that is irrelevant to the operation of the trusts.

12. If there are any other points that you would like to raise, including any responses to your fellow witnesses' testimony, that you did not have a chance to raise during the hearing, please do so here.

I have had adequate opportunity through my written and oral testimony at the hearing and these follow-up questions to address all pertinent points.

Questions from Mr. Watt for Mr. Siegel

1. **If most asbestos settlements resolved in state court are kept confidential, should a different standard be applied to settlements with asbestos trusts?**

No. 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. 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.

As I discussed during the hearing, 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 asbestos wrongdoing. In fact, the solvent asbestos defendants themselves require that the settlements they reach with asbestos victims remain confidential. Courts routinely refuse to compel discovery of settlement information. Settlements by asbestos trusts are no exception.

2. **If greater disclosure is required of victims' settlements with asbestos trusts, should greater disclosure also be required of asbestos settlements resolved in state court?**

Yes. Asbestos victims already face enormous obstacles to obtaining fair and adequate compensation for the illnesses they suffer from. The playing field should not be tilted in favor of corporate wrongdoers who knowingly exposed workers and the public to deadly asbestos fibers. At a minimum, asbestos defendants should have no greater right to individual settlement information than do asbestos victims. Further, it is unconscionable that the companies that hid the dangers of asbestos for decades, causing the deaths of thousands of American workers, are now complaining about "fraud" being committed by those families impacted by asbestos disease. As I noted in my testimony during the hearing, if defendants had not kept their knowledge of the dangers of asbestos confidential, thousands of people would not be dying every year from asbestos exposure.

3. **How do you reconcile charges of rampant fraud on asbestos trusts and solvent defendants with studies by the U.S. Government Accountability Office and the Rand Corporation and audits by the asbestos trusts themselves that have failed to find such rampant fraud?**

Charges of fraud on the asbestos trusts are simply not supportable. The GAO report, which was conducted at the behest of the Chairman of this Committee,[14] found no fraud on the trusts, stating: " . . . each trust's focus is to ensure that each claim meets the criteria defined in its TDP, meaning the claimant has met the requisite medical and exposure histories to the satisfaction of the trustees. Of the trusts officials that we

[14] See Supra fn 8

interviewed that conducted audits, none indicated that these audits had identified cases of fraud."[15]

4. **Typically a victim can recover from anyone who harms them, even if there were multiple actors. Should the asbestos industry be subject to a different standard?**

No. First, asbestos disease is typically the result of being exposed to multiple asbestos-containing products over the course of a person's working lifetime. Second, the law in every state is settled that any victim can recover from every asbestos defendant that substantially contributed to their illness or injury; this includes asbestos trusts because the trusts essentially step into the place of the former defendant. Thus, when an asbestos victim recovers from each defendant whose product contributed to his disease, that victim is in no way "double-dipping;" rather he is recovering a portion of his damages from each of the corporations who harmed him. In fact, each trust is responsible for and pays for only its own share of the damages.

5. **Are asbestos trusts already required to disclose claim information? Do current state discovery rules allow defendants to obtain this information if a judge determines it is relevant?**

Reporting requirements included in trust approval documents provide that each trust must submit annual reporting data to the bankruptcy court. Therefore, asbestos trusts are already required to disclose general claim information and publish lists of the products for which they have assumed responsibility. Although individual settlement information is generally confidential, the average amounts that are to be paid by each trust are publicly available, in addition to the number of claims that were filed.

Furthermore, each trust's TDP is available on its website. The TDP includes information on the scheduled value for each disease. Payment percentages are also publicly available and asbestos defendants also have full access to this information. These annual reports provide more transparency about payments from asbestos trusts than is available about payments by solvent defendants. Further, because the trusts are created under state statutes, the reporting requirements themselves are matters of state law.

The information that is not publicly available may also be available to the defendants under state law. Asbestos defendants have access to this information through pre-trial discovery, such as depositions of the victim and interrogatories asking him or her with which bankruptcy trusts they filed and the specific information surrounding those claims. In addition, upon request from an asbestos defendant, the court may also subpoena this information from the trusts as long as it is found to be relevant to the ongoing legal matter.

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[15] *Id.* at 23.

Questions from Mr. Quayle for Mr. Siegel

1. **It is my understanding that Judge Harry Hanna of the Cuyahoga County Court of Common Pleas, who presided over the Kananian case, revoked the pro hac vice admissions of an attorney and his firm, but declined to dismiss the plaintiffs' tort claim. You testified that "[the] lawyer was disbarred, and [the plaintiff's] claim was dismissed." Please provide the Committee with information and documents supporting this testimony, including information on any bar action taken in response to Judge Hanna's order, any motion dismissing the *Kananian* case, and any action taken by a trust to recover a payment made pursuant to the plaintiff's inconsistent claims.**

My written testimony correctly describes what occurred in the *Kananian* case. For purposes of clarification, I was incorrect when I stated the attorney was disbarred and I apologize for that misstatement, but I was correct in that sanctions were applied by the state court who properly issued those sanctions.

With respect to *Kananian*, the system worked; the claims were rejected and the lawyers were disciplined. The case should not be cited as a reason to enact federal legislation. Instead, *Kananian* illustrates that defendants, through discovery, already have the means to identify any inconsistencies between statements filed in court and with trusts and that when they find such inconsistencies, the Courts will take action. The remedies available to the defendants under the rules of court were adequate to address any alleged malfeasance. It is simply unnecessary to invoke extraordinary Federal intervention into state law tort claims and trusts governed by state law.

2. **You testified that many trusts pay pennies on the dollar, which is true, but isn't it also true that some trusts have paid claims at their full scheduled value for some period of time, only to later decrease their payment percentages? The T H Agriculture and Nutrition Trust (THAN), for example, paid over $325 million to resolve the claims of individuals who supported the formation of the trust in its first 16 months of operation. Before opening the trust to new claimants, THAN decreased its payment percentage to 30%. Was this fair to future claimants?**

One of the primary purposes of the 524(g) bankruptcy trusts is to protect the financial interests of future claimants. Accordingly, the amount put in the trusts and the payment percentages of trusts are based on actuarial projections of claims, both present and future. These are periodically revised and the payment percentages adjusted based on the trusts' actual claims experience and the investment earnings of the trust. The payment percentages are set by trustees after seeking input from a committee representing the interests of future claimants. This group has a fiduciary duty to protect the interests of future claimants. The THAN trust, like many trusts, initially paid out what were thought to be prudent amounts at the time given the interests of future claimants. Also like many

trusts, however, it then had to adjust those payments due to unforeseen circumstances including the overall health of economy and the number of claims being filed.

3. Fraud has been perpetrated against both government-backed and privately-funded compensation funds in the past, including the September 11th Victim Compensation Fund and BP's Gulf Coast Claims Facility. Yet as to fraud in the asbestos compensation system, you claim "there is none." Why do you believe that the asbestos trust funds are "magically different" from other compensation funds in this regard? Do you stand by your unequivocal claim that the asbestos trust system, which resolves hundreds of thousands of claims and pays out billions of dollars every year, is absolutely free of fraud?

I cannot comment on whether or not there was fraud in the September 11th Victim Compensation Fund and BP's Gulf Coast Claims Facility. My testimony about the absence of fraud in the asbestos trust system is based on decades of representing asbestos victims and their families in both state and federal court and in the bankruptcy proceedings. That conclusion is supported by the GAO's report which found no fraud on the trusts, stating: " . . . each trust's focus is to ensure that each claim meets the criteria defined in its TDP, meaning the claimant has met the requisite medical and exposure histories to the satisfaction of the trustees. Of the trusts officials that we interviewed that conducted audits, none indicated that these audits had identified cases of fraud."[16] This GAO study, which clearly found no fraud on the trusts, was requested by the Chairman of the Judiciary Committee, Rep. Lamar Smith.[17]

4. Ranking Member Cohen noted that Warren Zevon declined to pursue litigation after being diagnosed with an asbestos-related cancer and suggested that his decision was based, at least in part, on his inability to ascertain the genesis of his disease. Do you believe that au individual who is diagnosed with asbestos disease but cannot clearly identify the party at fault should nonetheless pursue tort and trust claims? Is it ever appropriate to make a claim without a clear basis in fact?

I cannot comment on the facts of Warren Zevon's case. My firm only files claims we believe have a clear basis in fact. As in all cases, the factual merits of an asbestos case are for the jury to decide. Even where a defendant claims a case lacks merit, a jury or a judge often decides otherwise. For example, in the *D'Ulisse* case cited by Ms. Schell as an example of "fraud," the court found the allegation of fraud to have no merit and upheld the jury's award to the plaintiff.

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[16] GAO, "*Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts,*" September 2011, pg 23.
[17] Id. 1-3.

5. Have you ever worked for or represented a trust or claims processing facility? What personal experience do you have with the internal mechanics and ongoing operation of an asbestos trust—as opposed to experience filing trust claims—that serves as a basis for your claim that the FACT Act would place onerous burdens on the trusts?

No, I have never worked for an asbestos trust. I have however, represented asbestos victims for more than 25 years. My law firm has represented thousands of asbestos victims in state and federal courts and before asbestos trusts. We have also participated in bankruptcy proceedings where 524 (g) trusts were established on several occasions. During that time, I have had hundreds of conversations with other attorneys who handle asbestos claims, including victims of asbestos, solvent asbestos defendants, members of the asbestos trust committees, and other asbestos trust officials. I have attended dozens of conferences discussing asbestos litigation and asbestos bankruptcy trusts. Based on these extensive experiences, it is my opinion that the FACT Act will place onerous and costly burdens on the trusts. My view is also supported by the trusts themselves who have submitted letters to this Committee in opposition to the bill.

6. Have you attempted to estimate the actual costs that would result from enactment of the FACT Act? If so, how? If not, how can you claim that the Act's reporting requirement would be onerous?

I have not done a cost study. However, as I noted in the prior question, numerous trusts oppose this legislation on the grounds that it would be unduly burdensome. In addition, given that the GAO study found no evidence of systemic fraud, this legislation is entirely unnecessary.

EXHIBIT "A"

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RELEASE

For and in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, I , on my own behalf and also on behalf of the current and future administrators, successors and assigns, executors, children, heirs and personal or legal representatives of the Estate of , (referred to hereafter as "Releasors") release and forever discharge the following Releasees: Union Carbide Corporation (f/k/a Union Carbide Chemicals & Plastics Company, Inc.); The Dow Chemical Company; Amchem Products, Inc.; Benjamin Foster Company; H.B. Fuller Company; Rhone-Poulenc Ag Company; Rhone-Poulenc Inc.; Aventis CropScience USA Inc.; Bayer CropScience Inc.; Henkel Corporation, and all of their past, current and future agents, officers, directors, attorneys, employees, distributors and sellers, indemnitors, indemnitees, predecessors in interest, successors in interest or assigns and all of their parents, subsidiaries, and affiliated entities (solely in their capacity to the above-named entities), and their liability insurance carriers (solely in their capacity as insurers for Releasors) from any and all rights, claims, demands and causes of action of whatever kind or nature which Releasors now have or may have in the future, whether now known, now existing but unknown, or manifesting themselves or arising in the future, for personal injuries, disability, pain and suffering or death, mental anguish, cancer, fear of cancer, or any other asbestos-related disease or condition suffered by , and from any and all loss or damages, including but not limited to, medical and hospital expenses, loss of income, support or inheritance or loss of consortium, society, services and any other damages sustained by or Releasors including any damages allowed under applicable state or federal causes of action for the wrongful death of , which may be related to, result from, or arise out of any and all exposure to asbestos and/or asbestos-containing products experienced by except for a full reservation of all rights, claims, demands, and causes of action of whatever kind or nature which Releasors now have or may have in the future against any and all remaining defendants and all other persons, firms and corporations not specifically released herein.

The payments receive hereunder for the settlement of claims are solely and specifically for the settlement of personal physical injuries claims, which are excluded from income under Section 104 of the Internal Revenue Code of 1986, as amended. No consideration has been paid for confidentiality.

Nothing in this release shall be construed as releasing any claims 's spouse or heirs may have for any asbestos-related disease which is the result of his/her own personal exposure to ashestos or asbestos-containing products.

Releasors further acknowledge the above-described payment in full settlement, satisfaction and compromise of all rights, claims, demands and causes of action which Releasors now have or may have in the future, specifically including the cause of action asserted against the Releasees in the suit entitled , pending in the STATE DISTRICT COURT, which suit will be dismissed, with prejudice, as to the Releasees, except for a full reservation of all rights, claims, demands and causes of action of whatever kind or nature which Releasors now have or may have in the future, against all other persons, firms or corporations not specifically released herein, including, but not limited to, all remaining defendants, upon receipt of the settlement funds referenced herein.

In further consideration of the above-described payment, Releasors agree to indemnify, hold harmless and defend the Releasees from and against any and all claims, demands, causes of action, lawsuits (including the lawsuit identified above) and/or judgments for contribution or indemnity which are, or may be, related to, or may result from or arise out of, any injuries, illnesses, diseases and/or death sustained by because of exposure to any and all asbestos and/or asbestos-containing products regardless of whether or not any of the aforesaid claims, demands or causes of action against the Releasees are based on negligence, fault, strict liability, intentional tort, or any other legal basis for which recovery of damages may be sought. Releasors also agree that the foregoing hold harmless and indemnity obligation will include payment of reasonable attorney's fees, court costs and other costs of defense, and that the Releasees will have the right to select their own defense counsel.

Releasors also agree to indemnify and hold harmless the Releasees from and against the collection of any liens, privileges and/or subrogation claims, including any Worker's Compensation or medical payments due or claimed to be due, under state or federal regulation or contract, any services rendered by a charitable medical facility, any judgment and/or settlement in favor of any intervenor, or any other person, firm or corporation responsible for payment of Worker's Compensation benefits, maintenance and cure, found or any other benefits,

damages or compensation which may in any way be related to, result from or arise out of, any injuries, damages or losses sustained by or Releasors because of exposure to any and all asbestos and/or asbestos-containing products regardless of whether or not any such liens, privileges and/or subrogation claims, judgments or settlements are based on intentional tort, strict liability or any other theory of liability of the Releasees whether now known, now existing but unknown, or manifesting themselves or arising in the future.

Releasors do not agree to indemnify any of the parties released hereunder against a claim or suit brought by any other party released hereunder, or by any other defendant in this case, nor do they agree to indemnify Releasee for any contractual indemnity Releasee may have with a third party.

The parties to this Release further understand and agree that nothing in this Release is intended to settle, waive or relinquish any claim that may have individually against the Releasees, or any other entity for an asbestos-related injury or disease which is the result of his/her personal exposure to asbestos-fibers and/or asbestos-containing products.

In further consideration of the payment of the aforesaid sum, Releasors warrant that they are the only parties entitled to claim and recover damages or otherwise make any recovery whatsoever resulting from or arising out of the injury, illness, disease and/or death of and they agree to defend, indemnify and hold harmless the Releasees from any and all claims and demands, including third-party claims or subsequent claims of any individual Releasor, for damages resulting from or in any way arising out of the injury, illness, or death of which may be made by any other person, party or concern whether now known, now existing but unknown, or manifesting themselves or arising in the future.

The parties further agree that this agreement, its terms, provisions and conditions, including the Settlement Amount, shall remain confidential between the parties and shall not be disclosed by any party without the prior written consent of all other parties to this agreement. Notwithstanding the foregoing, plaintiffs may disclose the terms of this agreement as necessary for the preparation of tax-related documents, or to enforce the terms of this agreement, or as ordered by a court.

The parties understand and agree that nothing contained in this Release shall be construed or deemed an admission of wrongdoing or of liability by any party as to any of the claims or counter-claims which have been made in the litigation. The parties further agree that this Release shall not be admissible as evidence in any way including without limitation in any suit or proceeding whatsoever as evidence or admission of any liability or fault, or to argue a waiver of any defense.

This Release memorializes a settlement made based upon was exposed to asbestos and/or the asbestos-containing products of Releasees and that was diagnosed with an asbestos-related disease.

Plaintiffs' obligations under this Agreement are conditioned upon the issuance of the above-described consideration and shall be void if the consideration is not paid in full.

Nothing herein shall be construed to be a stipulation for the benefit of any third person nor as a benefit to anyone other than Releasors and the Releasees.

Releasors further acknowledge that the payment provided for herein is made solely for the purpose of compromise and amicable settlement of disputed claims, liability therefor on the part of the Releasees being expressly denied, and has executed this Release only on the considered advice of his/her attorneys.

This document is executed at the place and date indicated below.

WITNESSES:

_____

_____

_____

STATE OF LOUISIANA

PARISH OF _____

BEFORE ME, the undersigned Notary Public, qualified in the Parish and State aforesaid, personally came and appeared on his/her own behalf and on behalf of the Estate of who, after being sworn, stated he/she has read and had explained to him/her the foregoing Release in its entirety; that he/she understands the contents thereof and has signed his/her name thereunto for the purposes stated and on the considered advice of counsel.

SWORN TO AND SUBSCRIBED, before the undersigned Notary Public on the ____ day of _____, _____ at _____, Louisiana.

_____
NOTARY PUBLIC

My Commission Expires: _____

EXHIBIT "B"

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK PART 2
Justice

ALFRED D'ULISSE and MARGARET D'ULISSE,
Plaintiffs,
-against-
AMCHEM PRODUCTS, INC., ET AL,
Defendants.

Index No. 113838/04
Motion Date
Motion Seq. No. 034
Motion Cal. No.

The following papers, numbered 1 to were read on this motion for Leave to Renew.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [ ] No

FILED
MAY 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is

ORDERED that this motion for leave to renew the post-trial motion of the jury's finding of recklessness and for judgment in favor of the plaintiff or for a new trial on the ground that plaintiffs' attorney fraudulently withheld material information is denied as nothing submitted by defendant would change the verdict.

The defendant has offered no information which would alter the Court's decision of July 10, 2007 on the recklessness issue.

Defendant also alleges that plaintiff withheld information regarding exposure to John's Mansville products that would have altered the verdict if defendant had known about it. In fact, defendant Chrysler was informed in the plaintiff's answers to interrogatories that

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counsel, on information and belief, alleged that plaintiff might have been exposed to asbestos products. At his deposition, plaintiff D'Ulisse stated that he was exposed to Mansville's asbestos block. During the trial, plaintiff conceded that he had been exposed to John's Mansville asbestos product. Although knowing that plaintiff had testified at his deposition of his exposure to John's Mansville asbestos products, defendant's counsel unequivocally stated that he was not asking about asbestos. Defendant, therefore, had this information and had he inquired about its asbestos composition, he would have been able to put this matter on the verdict sheet. Therefore, this was not new information that justified renewal of this issue. The filing of a claim with the Mansville Trust does not alter the situation. Although filed after the verdict, it does not add any information not already known to the defendants. It in no way alters the verdict since no payments have been made to plaintiff from the trust.

There was no withholding of information regarding Garlock and Ingersold Rand exposures. Defendant knew that they were let out of the case years before the trial. Nothing new concerning exposure to their products was added by the releases to these two entities. They appeared on the verdict sheet, but because defendant's counsel failed to offer any evidence of plaintiff's exposure to those two companies by questioning Mr. D'Ulisse as to the asbestos in their products. The result was that the jury did not find them to be liable. The releases, which contained no admission to exposure to asbestos products of those companies, would not have changed the result.

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D'Ulisse v Amchem Products, Inc. -3- Index No. 113838/04

The jury's verdict was rendered at the end of a rancorous trial lasting more than two months. Entry of the judgment has been delayed at the behest of the defendants after at least two on the record discussions which was held at their request. During that post-trial period, plaintiff Alfred D'Ulisse has passed away and his wife has been appointed his executor. It is time for the delay to end. Accordingly, it is

ORDERED that this motion is denied.

Dated: May 2, 2008

Enter:

Louis B. York, J.S.C.

note: I have considered defendants remaining arguments and find them to be without merit. LBY

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

**Response to Questions for the Record from Marc Scarcella,
Bates White, LLC, Washington, DC**

Questions for the Record
From the May 10, 2012 Hearing on
H.R. 4369, the "Furthering Asbestos Claim Transparency Act of 2012"

Questions from Ranking Member Steve Cohen for Mr. Scarcella

1. **Are you aware of GAO's Report that examined the role and administration of asbestos trusts?**

Yes.

2. **Do you recall that GAO identified a trust that reported it incurred $1 million in attorneys' fees to respond to a request to disclose every document on every claimant?**

Yes. This example referenced on page 30 of the GAO report, is the type of costly and burdensome situation the FACT Act will prevent 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. 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 such as social security number, home address, or certain medical information 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 of $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, it is my understanding that the amended bill is now requiring that the third party pay reasonable costs for producing the information.

3. **Given the importance of trust claimant information to solvent defendants, would you support letting the trusts charge defendants to produce this information?**

Yes, I believe it is acceptable for the defendants to bear the cost of having the trusts produce this information. It is my understanding that an amendment to the FACT Act was added prior to the bill's June 8, 2012 passage from the House Judiciary Committee to allow the trusts to charge defendants for this service.

4. Please elaborate on exactly what you mean when you state that the data extract of individual claim filing, processing and settlement data that is available for a minimal cost of $1,000.

The Manville Personal Injury trust offers a data extract of claim level information for $1,000.[1] The Manville trust has made this data, which contains over 800,000 claim records and dozens of fields of information, available to *select** 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 process 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.*[2]

Questions from Mr. Watt for Mr. Scarcella

1. If most asbestos settlements resolved in state court are kept confidential, should a different standard be applied to settlements with asbestos trusts?

The quarterly reporting requirements of the FACT Act are only asking trusts to make available to the public information about trust claims that is akin to what is already available on public lawsuit disclosures in the asbestos tort. Currently, the asbestos civil tort system provides a level of claiming and resolution transparency that the asbestos bankruptcy trust system lacks. Each lawsuit that is filed in the tort system includes a publically available complaint that identifies the plaintiff and each defendant from which compensation is sought. In most cases, the complaint also provides general exposure allegations that resulted in the alleged asbestos-related injury and, in some cases, a detail work history and alleged exposure sites. Furthermore, as the case progresses, publically available dockets track the status of each named defendant, including dispositions such as dismissals with and without prejudice, and orders granting summary judgments.

In sharp contrast, the asbestos bankruptcy trust system provides no public disclosure on individual claimants seeking compensation, or the corresponding alleged exposures. This creates a clear asymmetry of information between the tort and trust compensation systems. During her testimony on May 12, 2012, Ms. Schell provided a number of examples of how this lack of trust claim transparency has denied defendants, judges, and juries from learning the plaintiff's full exposure history thus making proper allocation of liability impossible.

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[1] Manville Trust Single Use Data License Agreement
http://www.claimsres.com/documents/MT/DataAgreement.pdf

[2] Manville Trust, Distribution of Manville Trust Data for Use Solely by Other Trusts
http://www.claimsres.com/documents/MT/DataPolicy.pdf

2. If greater disclosure is required of victims' settlements with asbestos trusts, should greater disclosure also be required of asbestos settlements resolved in state court?

See previous answer to question 1 from Mr. Watt.

3. How do you reconcile charges of rampant fraud on asbestos trusts and solvent defendants with studies by the U.S. Government Accountability Office and the Rand Corporation and audits by the asbestos trusts themselves that have failed to find such rampant fraud?

I believe the trust system operates without the appropriate level of public accountability that is necessary for properly identifying fraudulent or specious claiming practices. In my experience, the audit procedures leveraged by many trusts focus on reviewing the medical data that has been submitted, 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 and RAND were 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. Typically a victim can recover from anyone who harms them, even if there were multiple actors. Should the asbestos industry be subject to a different standard?

I believe asbestos victims should be compensated through a fair process that appropriately allocates responsibility based on the facts and the law.

5. Are asbestos trusts already required to disclose claim information? Do current state discovery rules allow defendants to obtain this information if a judge determines it is relevant?

It is my understanding that state discovery laws vary in regards to the production of bankruptcy trust claim forms and/or trust payments. As Ms. Schell pointed out in her testimony on May 12, 2012, it is a process that is often met with plaintiffs' attorney opposition;

"The discovery system in the State courts is a problem. For one, the State in which the tort case is pending is usually not the state in which the trust is formed, and so issuing a subpoena cannot be done by the State court sitting over the tort suit. Instead it has to be done through a court in the jurisdiction where the trust is, and also, as I mentioned, that is often met with opposition."

As I suggested in my answer to question 2 above from Ranking Member Cohen, the FACT Act should eliminate the extensive legal costs incurred by both defendants and plaintiffs under the current state discovery rules by putting in place a single standard for how third parties can request information and how the trusts are expected to respond. I have worked on a number of engagements where extensive trust discovery is sought, and the amount of time, resources, and costs spent on attorney fees from both sides arguing over the merit of the discovery far outweighs the expense of producing the actual information. By standardizing the process, the FACT Act could save trusts a substantial amount of legal fees, and as amended, will require the requesting third party to cover the reasonable costs associated with the actual production of the information.

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May 9, 2012

Via Electronic Mail

The Honorable Lamar Smith
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Howard Coble
Chairman
Subcommittee on Courts, Commercial and Administrative Law
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member
Subcommittee on Courts, Commercial and Administrative Law
2138 Rayburn House Office Building
Washington, DC 20515

RE: H.R. 4369

Dear Committee Members:

I write this letter as counsel to the trustees of the Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust. The trustees voice their opposition to H.R. 4369, a bill that will not serve in any way the interests of victims of asbestos-related diseases. The bill would amend Section 524(g) of the Bankruptcy Code to impose extensive and unnecessary reporting requirements on asbestos trusts, the administrative costs of which necessarily will reduce recoveries for future trust claimants. The bill also would create a superfluous, statutory discovery right whenever an asbestos lawsuit is pending. The only beneficiaries of these proposed reporting and discovery requirements would be asbestos defendants in the tort system and their insurers. H.R. 4369, an amendment to the Bankruptcy Code with no connection to bankruptcy law, would be bad law and bad policy. Our clients respectfully recommend the Committee reject it.

There Is No Lack of Transparency

There is ample transparency in the operations of asbestos trusts. Most asbestos trusts publish on their websites all the documentation that governs their payment of claims. These include claim forms, releases, lists of asbestos products for which the predecessor companies

were responsible, lists of exposure sites where the company's products were known to have been placed, and the Trust Distribution Procedures themselves, which set forth the "Scheduled" and "Average" values for asbestos disease claim settlements paid by the trust, as well as the criteria a claimant must establish to settle a claim with the trust. The trusts also file annually with the bankruptcy court a report on the past year's operations that include an audited financial statement and schedules detailing the total claims filed, the total claims paid, and a breakdown of malignant versus non-malignant claims.

In addition, defendants in the tort system may, and overwhelmingly do, use the extensive discovery procedures available to litigants in civil litigation in state and federal courts. The asbestos trusts we represent respond frequently, sometimes weekly, to subpoenas validly issued on an asbestos defendant's behalf from a state or federal trial court in which an asbestos personal injury case is pending. This discovery is overseen by the state or federal trial courts in which the cases are pending. The courts ensure the discovery is conducted in compliance with the rules of civil procedure and evidence governing the cases. The discovery process today results in our trust clients regularly producing to asbestos defendants, in response to valid subpoenas, everything that an asbestos plaintiff may have filed with the trust in support of a claim. Even more common are informal, consensual discovery requests, whereby the plaintiff and defendant in an asbestos case agree and request our clients to produce what the claimant filed with the trust. Through such formal and informal discovery, over the years our trust clients have produced to asbestos defendants claim information submitted by thousands of trust claimants.

Between the public disclosures on the trusts' web pages and their annual filings with the bankruptcy courts, and the fulsome discovery available to asbestos defendants either informally or under the modern rules of civil procedure and evidence, no one can fairly say that asbestos trusts operate without sufficient transparency to asbestos defendants in the tort system.

Nonetheless, H.B. 4369 would give asbestos defendants more, and at no cost to themselves. Section (8)(A) would burden both the trusts and the bankruptcy courts with creating central repositories for data on all asbestos victims who file claims with the asbestos trusts. (No doubt the asbestos defendants wish this data to be provided in electronic form to aid them and their insurers in maintaining a national database containing everything known about an asbestos victim's claim.) Section (8)(B) of H.R. 4369 would create a statutory means of discovery separate and apart from today's court-supervised discovery. Section (8)(B) is more than just superfluous to the discovery available to asbestos defendants today — it would move this discovery outside the oversight of the trial courts and beyond the long-established, reasonable bounds of the rules of civil procedure and evidence.

H.B. 4369 would not be a solution to the non-existent problem of "lack of transparency" of asbestos trusts; it instead would create a set of new and wholly unnecessary problems for the trusts and the bankruptcy courts.

There Is No "Double Dipping"

Proponents of H.R. 4369 claim that the trust system allows for "double dipping," when a claimant receives more than his or her fair recovery by applying for compensation from more than one trust and suing more than one defendant. Somehow, quarterly reporting on claims and statute-based discovery will prevent this purported "double dipping." Setting aside the questionable efficacy of these proposed measures to meet this purpose, it must be stated emphatically that there is no "double dipping" by asbestos trust claimants. The asbestos defendants and their insurers desire the ease, to them, of centralized data repositories on asbestos victims' claims and freedom from the normal discovery rules applied by courts that H.B. 4369 would provide. They have manufactured the "double dipping problem" in order to justify their desires.

Unquestionably, asbestos victims can recover from more than one asbestos trust and more than one asbestos defendant in the tort system. There is nothing wrong or inappropriate in this; it is coherent with and results from long-established tort law. In the tort system, asbestos victims exposed to asbestos from many different sources bring suit against all the parties responsible for these many sources of their exposure. The victims — the plaintiffs — typically settle with the various defendants that they have sued, thereby receiving multiple payments in their attempts to make themselves whole. The defendants pay in settlement only what each reckons would be its proportionate share of the total liability to the plaintiff.

The asbestos trust system is a substitute for the tort system. It is designed as a private, low-cost, alternative dispute resolution system in which claims are settled, not litigated. Claimants submit claims to all trusts whose predecessor companies exposed the claimant to asbestos. A claimant typically receives recoveries from multiple trusts and multiple asbestos defendants, but the amount recovered from each is limited to the defendant's share of fault. "Double dipping" therefore is an intentionally misleading description.

Asbestos trusts settle claims at or near "Scheduled Values" and "Average Values" for asbestos diseases in amounts set by the bankruptcy courts to approximate the pre-bankruptcy settlement values paid by the predecessor companies. Inherently, these pre-bankruptcy settlement values represent only the predecessor company's proportionate share of the total liability. Therefore, if an asbestos victim were to recover 100% of the "Scheduled Value" or "Average Value" paid on a claim by an asbestos trust, the victim would not be made whole in any way. Instead, the victim would have recovered only what amounts to one defendant's share of the total liability.

Importantly, recoveries from asbestos trusts are never at 100% of the trusts' "Scheduled" or "Average" claim values. Asbestos trusts are limited funds, able to pay only a fraction of the recoveries paid out by the trusts' predecessor companies prior to bankruptcy. Indeed, some of the other asbestos trusts we represent pay claims at less than 1% of their "Scheduled" or "Average" values. To suggest that claimants are somehow receiving a windfall from the trust system is disingenuous. There are no windfalls to victims in the trust system, and there is no "double dipping."

There Is No Widespread Fraud

Proponents of H.R. 4369 consistently point to a case in an Ohio state court, *Kananian v. Lorillard Tobacco Co.* (Ohio Cuyahoga County Comm. Pl. Jan. 18, 2007), as somehow emblematic of widespread fraud by asbestos victims who file claims with asbestos trusts. But despite the energetic efforts by defendants to find other cases of fraud, they are left with this single instance of misconduct.

It is irresponsible to suggest that the trust system is rife with fraud based on this one instance. As stated above, trusts have been responding to formal and informal discovery in asbestos litigation on a regular basis for years. When considering the fact that defendants in the tort system have cumulatively obtained tens of thousands of claimants' trust filings — apparently for the specific purpose of rooting out fraudulent and inconsistent statements — and have discovered only this one case, the *Kananian* case is seen as a lonely outlier. This is truly the rare exception that proves the rule that there is no widespread fraud by trust claimants.

H.R. 4369's Requirements Are a Waste of Trust and Bankruptcy Court Resources

The reporting requirements set forth in H.R. 4369 are extensive, and will require the trusts to establish reporting systems and then administer quarterly reporting to bankruptcy courts. Likewise, the bill will require the bankruptcy courts to develop means to receive, store, and maintain data on thousands of asbestos claimants, presumably in electronic form.

The only beneficiaries of the reporting requirements are the proponents of this bill — asbestos defendants in the tort system and their insurers. These groups seek to create a central repository of information about every claimant in the trust system so that they can research plaintiffs who file suit against them. They are free to do so at their own expense. They currently can get this information through discovery on a case-by-case basis. This current system works efficiently and effectively. Asbestos defendants in the tort system get targeted information specific to the plaintiff who is suing them, managed by a federal or state court with the power and ready means to ensure that the defendants will get all information to which they are entitled.

A lack of access to information is not the complaint of the defendants — instead, it is that they must bear the costs of obtaining this information. But the cost for obtaining the information naturally lies with the defendants as the parties that injured the plaintiff and must answer to the suit. This cost should not be shifted to trust funds dedicated to paying victims.

No Bankruptcy Law Purpose Can Justify H.R. 4369's Amendments to the Bankruptcy Code

The purported concerns and justification underlying H.R. 4369 have nothing to do with bankruptcy law. The trusts subject to this bill are now years removed from confirmation of their predecessor companies' bankruptcy plans. (For example, the Armstrong World Industries bankruptcy proceedings ended in 2006.) The Bankruptcy Code governs the relationship between debtors and their creditors, and so should any amendment. H.R. 4369 does not pertain to the debtor/creditor relationship, and instead pertains only to the desires of asbestos defendants in the tort system.

Assigning bankruptcy courts to be a central repository of claimant data for asbestos defendants, as section (8)(A) of H.B. 4369 would do, cannot serve any bankruptcy law purpose. Moreover, any claim that such a repository is needed for tort defendants to properly defend themselves is belied by the fact that these defendants can obtain claimant-specific information through normal discovery procedures, as discussed above.

Nor is an additional, statute-based discovery right, which section (8)(B) of H.B. 4369 would create for asbestos defendants, necessary or appropriate. Discovery in the tort system today is appropriately overseen and enforced by federal and state courts who have the litigants before them and best can manage any case specific disputes relating to the information sought. While section (8)(B) is silent on what court, if any, would oversee enforcement of this new statutory discovery. A fair assumption is that it would fall to the bankruptcy courts, and this would burden them with a task that has no relation whatsoever to the bankruptcy process.

In conclusion, the transparency and "double dipping" concerns of the proponents of H.R. 4369 are manufactured issues designed to justify wholesale, centralized data production to serve the narrow interests of asbestos defendants and their insurers. Asbestos settlement trusts do a remarkable job of limiting fraud and abuse. Imposing new reporting and discovery requirements on the trusts is unnecessary and superfluous, and serves only to shift some of the costs of litigation off asbestos defendants and onto trusts holding funds dedicated to the payment of claimants injured by many of these same defendants. The trustees we represent respectfully urge the Committee to reject H.R. 4369.

Very truly yours,

KEATING MUETHING & KLEKAMP PLL

By: K E Irwin
Kevin E. Irwin

KEI:amv

4365952.1

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May 9, 2012

Via Electronic Mail

The Honorable Lamar Smith
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RE: H.R. 4369

Dear Committee Members:

I write this letter as counsel to the trustees of the ACandS Asbestos Settlement Trust, Keene Creditors Trust, Plibrico 524(g) Asbestos Trust, Raytech Corporation Asbestos Personal Injury Settlement Trust, and United States Mineral Products Company Personal Injury Settlement Trust. The trustees voice their opposition to H.R. 4369, a bill that will not serve in any way the interests of victims of asbestos-related diseases. The bill would amend Section 524(g) of the Bankruptcy Code to impose extensive and unnecessary reporting requirements on asbestos trusts, the administrative costs of which necessarily will reduce recoveries for future trust claimants. The bill also would create a superfluous, statutory discovery right whenever an asbestos lawsuit is pending. The only beneficiaries of these proposed reporting and discovery requirements would be asbestos defendants in the tort system and their insurers. H.R. 4369, an amendment to the Bankruptcy Code with no connection to bankruptcy law, would be bad law and bad policy. Our clients respectfully recommend the Committee reject it.

There Is No Lack of Transparency

There is ample transparency in the operations of asbestos trusts. Most asbestos trusts publish on their websites all the documentation that governs their payment of claims. These include claim forms, releases, lists of asbestos products for which the predecessor companies were responsible, lists of exposure sites where the company's products were known to have been placed, and the Trust Distribution Procedures themselves, which set forth the "Scheduled" and "Average" values for asbestos disease claim settlements paid by the trust, as well as the criteria a claimant must establish to settle a claim with the trust. The trusts also file annually with the bankruptcy court a report on the past year's operations that include an audited financial statement and schedules detailing the total claims filed, the total claims paid, and a breakdown of malignant versus non-malignant claims.

In addition, defendants in the tort system may, and overwhelmingly do, use the extensive discovery procedures available to litigants in civil litigation in state and federal courts. The asbestos trusts we represent respond frequently, sometimes weekly, to subpoenas validly issued on an asbestos defendant's behalf from a state or federal trial court in which an asbestos personal injury case is pending. This discovery is overseen by the state or federal trial courts in which the cases are pending. The courts ensure the discovery is conducted in compliance with the rules of civil procedure and evidence governing the cases. The discovery process today results in our trust clients regularly producing to asbestos defendants, in response to valid subpoenas, everything that an asbestos plaintiff may have filed with the trust in support of a claim. Even more common are informal, consensual discovery requests, whereby the plaintiff and defendant in an asbestos case agree and request our clients to produce what the claimant filed with the trust. Through such formal and informal discovery, over the years our trust clients have produced to asbestos defendants claim information submitted by thousands of trust claimants.

Between the public disclosures on the trusts' web pages and their annual filings with the bankruptcy courts, and the fulsome discovery available to asbestos defendants either informally or under the modern rules of civil procedure and evidence, no one can fairly say that asbestos trusts operate without sufficient transparency to asbestos defendants in the tort system.

Nonetheless, H.B. 4369 would give asbestos defendants more, and at no cost to themselves. Section (8)(A) would burden both the trusts and the bankruptcy courts with creating central repositories for data on all asbestos victims who file claims with the asbestos trusts. (No doubt the asbestos defendants wish this data to be provided in electronic form to aid them and their insurers in maintaining a national database containing everything known about an asbestos victim's claim.) Section (8)(B) of H.R. 4369 would create a statutory means of discovery separate and apart from today's court-supervised discovery. Section (8)(B) is more than just superfluous to the discovery available to asbestos defendants today — it would move this discovery outside the oversight of the trial courts and beyond the long-established, reasonable bounds of the rules of civil procedure and evidence.

H.B. 4369 would not be a solution to the non-existent problem of "lack of transparency" of asbestos trusts; it instead would create a set of new and wholly unnecessary problems for the trusts and the bankruptcy courts.

There Is No "Double Dipping"

Proponents of H.R. 4369 claim that the trust system allows for "double dipping," when a claimant receives more than his or her fair recovery by applying for compensation from more than one trust and suing more than one defendant. Somehow, quarterly reporting on claims and statute-based discovery will prevent this purported "double dipping." Setting aside the questionable efficacy of these proposed measures to meet this purpose, it must be stated emphatically that there is no "double dipping" by asbestos trust claimants. The asbestos defendants and their insurers desire the ease, to them, of centralized data repositories on asbestos victims' claims and freedom from the normal discovery rules applied by courts that H.B. 4369 would provide. They have manufactured the "double dipping problem" in order to justify their desires.

Unquestionably, asbestos victims can recover from more than one asbestos trust and more than one asbestos defendant in the tort system. There is nothing wrong or inappropriate in this; it is coherent with and results from long-established tort law. In the tort system, asbestos victims exposed to asbestos from many different sources bring suit against all the parties responsible for these many sources of their exposure. The victims — the plaintiffs — typically settle with the various defendants that they have sued, thereby receiving multiple payments in their attempts to make themselves whole. The defendants pay in settlement only what each reckons would be its proportionate share of the total liability to the plaintiff.

The asbestos trust system is a substitute for the tort system. It is designed as a private, low-cost, alternative dispute resolution system in which claims are settled, not litigated. Claimants submit claims to all trusts whose predecessor companies exposed the claimant to asbestos. A claimant typically receives recoveries from multiple trusts and multiple asbestos defendants, but the amount recovered from each is limited to the defendant's share of fault. "Double dipping" therefore is an intentionally misleading description.

Asbestos trusts settle claims at or near "Scheduled Values" and "Average Values" for asbestos diseases in amounts set by the bankruptcy courts to approximate the pre-bankruptcy settlement values paid by the predecessor companies. Inherently, these pre-bankruptcy settlement values represent only the predecessor company's proportionate share of the total liability. Therefore, if an asbestos victim were to recover 100% of the "Scheduled Value" or "Average Value" paid on a claim by an asbestos trust, the victim would not be made whole in any way. Instead, the victim would have recovered only what amounts to one defendant's share of the total liability.

Importantly, recoveries from asbestos trusts are never at 100% of the trusts' "Scheduled" or "Average" claim values. Asbestos trusts are limited funds, able to pay only a fraction of the recoveries paid out by the trusts' predecessor companies prior to bankruptcy. Indeed, some of

the asbestos trusts we represent pay claims at less than 1% of their "Scheduled" or "Average" values. To suggest that claimants are somehow receiving a windfall from the trust system is disingenuous. There are no windfalls to victims in the trust system, and there is no "double dipping."

There Is No Widespread Fraud

Proponents of H.R. 4369 consistently point to a case in an Ohio state court, *Kananian v. Lorillard Tobacco Co.* (Ohio Cuyahoga County Comm. Pl. Jan. 18, 2007), as somehow emblematic of widespread fraud by asbestos victims who file claims with asbestos trusts. But despite the energetic efforts by defendants to find other cases of fraud, they are left with this single instance of misconduct.

It is irresponsible to suggest that the trust system is rife with fraud based on this one instance. As stated above, trusts have been responding to formal and informal discovery in asbestos litigation on a regular basis for years. When considering the fact that defendants in the tort system have cumulatively obtained tens of thousands of claimants' trust filings — apparently for the specific purpose of rooting out fraudulent and inconsistent statements — and have discovered only this one case, the *Kananian* case is seen as a lonely outlier. This is truly the rare exception that proves the rule that there is no widespread fraud by trust claimants.

H.R. 4369's Requirements Are a Waste of Trust and Bankruptcy Court Resources

The reporting requirements set forth in H.R. 4369 are extensive, and will require the trusts to establish reporting systems and then administer quarterly reporting to bankruptcy courts. Likewise, the bill will require the bankruptcy courts to develop means to receive, store, and maintain data on thousands of asbestos claimants, presumably in electronic form.

The only beneficiaries of the reporting requirements are the proponents of this bill — asbestos defendants in the tort system and their insurers. These groups seek to create a central repository of information about every claimant in the trust system so that they can research plaintiffs who file suit against them. They are free to do so at their own expense. They currently can get this information through discovery on a case-by-case basis. This current system works efficiently and effectively. Asbestos defendants in the tort system get targeted information specific to the plaintiff who is suing them, managed by a federal or state court with the power and ready means to ensure that the defendants will get all information to which they are entitled.

A lack of access to information is not the complaint of the defendants — instead, it is that they must bear the costs of obtaining this information. But the cost for obtaining the information naturally lies with the defendants as the parties that injured the plaintiff and must answer to the suit. This cost should not be shifted to trust funds dedicated to paying victims.

No Bankruptcy Law Purpose Can Justify H.R. 4369's Amendments to the Bankruptcy Code

The purported concerns and justification underlying H.R. 4369 have nothing to do with bankruptcy law. Our trust clients subject to this bill are now many years removed from confirmation of their predecessor companies' bankruptcy plans. The Bankruptcy Code governs the relationship between debtors and their creditors, and so should any amendment. H.R. 4369 does not pertain to the debtor/creditor relationship, and instead pertains only to the desires of asbestos defendants in the tort system.

Assigning bankruptcy courts to be a central repository of claimant data for asbestos defendants, as section (8)(A) of H.B. 4369 would do, cannot serve any bankruptcy law purpose. Moreover, any claim that such a repository is needed for tort defendants to properly defend themselves is belied by the fact that these defendants can obtain claimant-specific information through normal discovery procedures, as discussed above.

Nor is an additional, statute-based discovery right, which section (8)(B) of H.B. 4369 would create for asbestos defendants, necessary or appropriate. Discovery in the tort system today is appropriately overseen and enforced by federal and state courts who have the litigants before them and best can manage any case specific disputes relating to the information sought. While section (8)(B) is silent on what court, if any, would oversee enforcement of this new statutory discovery. A fair assumption is that it would fall to the bankruptcy courts, and this would burden them with a task that has no relation whatsoever to the bankruptcy process.

In conclusion, the transparency and "double dipping" concerns of the proponents of H.R. 4369 are manufactured issues designed to justify wholesale, centralized data production to serve the narrow interests of asbestos defendants and their insurers. Asbestos settlement trusts do a remarkable job of limiting fraud and abuse. Imposing new reporting and discovery requirements on the trusts is unnecessary and superfluous, and serves only to shift some of the costs of litigation off asbestos defendants and onto trusts holding funds dedicated to the payment of claimants injured by many of these same defendants. The trustees we represent respectfully urge the Committee to reject H.R. 4369.

Very truly yours,

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May 9, 2012

The Honorable Lamar Smith
Chair, House Judiciary Committee
2409 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee
2426 Rayburn House Office Building
Washington, D.C. 20515

Re: The Furthering Asbestos Claims Transparency Act of 2012

Dear Chairman Smith and Ranking Member Conyers:

A bill has been introduced in the House of Representatives titled The Furthering Asbestos Claims Transparency Act of 2012, or H.R. 4369, as an amendment to Section 524(g) of the Bankruptcy Code. Proponents of the amendment claim that it would ensure "greater transparency" in the operation of the asbestos settlement trusts that have been or will be established to facilitate the implementation of confirmed bankruptcy reorganization plans that comply with Section 524(g) of the Bankruptcy Code. The asbestos settlement trusts named hereafter, represented by our firm, submit the following comments and background to aid the House Judiciary Committee staff in considering the merits of the amendment: Owens Corning/Fibreboard Asbestos Personal Injury Trust; 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. Background

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, and, often, proceeds from its insurer, as well. No government funding is provided.

It is important to understand Section 524(g) in its historical context. The first asbestos trust was established through the Johns Manville Corporation reorganization in the 1980s. Manville filed for chapter 11 bankruptcy protection because of its overwhelming obligations for asbestos claims in the tort system. It needed to find a format to liquidate present and future claims, and to determine how much of the company's assets needed to be reserved to pay the asbestos-claimant constituency. A channeling injunction ultimately directed all asbestos-related claims to the Manville trust, which assumed the liabilities of the debtor and was funded, in part, by stock of the reorganized company. Manville's stock was rendered unmarketable, however, because of concerns in the market that, should the trust run out of funds, the channeling injunction could be successfully challenged by future claimants for a lack of "due process," and Manville therefore would again be subject to asbestos claims, and would again be insolvent.

Congress responded to that concern by enacting section 524(g) of the Bankruptcy Code, which allows for a channeling injunction to issue and be enforceable against the holders of future claims, so long as certain requirements are met, including (i) the appointment of a representative to protect the interests holders of future claims, and (ii) the channeling of all asbestos claims to a trust, which must operate in a manner that provides reasonable assurance that similarly situated present and future claims will be treated in substantially the same manner. There is no requirement that the trust operate either for the benefit of solvent third-party defendants in the tort system or for the benefit of other trusts. They operate solely for the benefit of their express beneficiaries, the holders of asbestos claims against the trust.

II. The Amendment Does Not Benefit the Trust's Beneficiaries

The proposed amendment does not, as its proponents claim, protect either the trusts or their beneficiaries. Rather, the amendment merely changes the rules in the tort system so as to impose increased costs on the trusts' claimants. The litigation advantage that this proposed amendment provides to solvent asbestos defendants is its only practical purpose. The trusts believe that any legislation that unduly and unnecessarily increases the costs of trust administration and thus reduces the funds available to pay claimants is a fundamentally flawed idea. The proposed amendment in no way would protect either the trusts or their beneficiaries. In fact, it does the opposite – it burdens them.

There is no bankruptcy-related justification for requiring the trusts to provide such post-confirmation reporting to either the Court or to third parties who have no beneficial interest in the trusts. The Bankruptcy Code and the Bankruptcy Court may not be used as a collateral source of judicial authority to increase the costs to trusts and thereby diminish the payments to trust claimants. Discovery in non-bankruptcy actions, which the proposed rule would purport to

[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).

govern, is not a bankruptcy issue and is entirely beyond the scope of the federal bankruptcy power.

III. The Proposed Amendment Falls Outside the Scope of Bankruptcy Jurisdiction

The proposed amendment does not concern practice or procedure in bankruptcy cases. It would apply only after a plan is confirmed, and would impose burdens upon the trusts solely to benefit third parties, not the beneficiaries of the trust. It purports to govern discovery in personal injury litigation brought in another court, a matter clearly unrelated to bankruptcy jurisdiction, and to the extent it purports to govern discovery in any state court, violates fundamental principles of federalism.

IV. The Proposed Amendment 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 themselves to ensure that the trusts remain subject to the continuing jurisdiction and supervision of the bankruptcy court, and thus are qualified settlement funds for tax purposes.[2] While the plans themselves could require that the trusts submit more detailed reports, post-confirmation reporting requirements is a matter that solely affects the substantive rights of the trusts, their settlors and their beneficiaries, who negotiated the plan.

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 Agreements and 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 recent report that litigants in the tort system can

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[2] *See* Treas. Reg. §1.468B-1 (1993).

readily obtain information from the trusts regarding claimants, such as their exposure to a particular company's asbestos-containing products, pursuant to a court-issued subpoena. Moreover, defendants can routinely obtain such information directly from the claimants themselves in discovery.

The trustees of the asbestos settlement trusts, each of whose appointments have been approved by a bankruptcy court, are fiduciaries who must at all times manage the trusts and their assets consistent with the purposes of the trust they serve, solely in the best interest of its beneficiaries. It is their responsibility to ensure that funds are paid only to legitimate beneficiaries. Each trust pays only for its several share of liability to its claimants. The amount that each trust pays reflects the fact that most claimants will have claims against a number of other tortfeasors — both other trusts and solvent defendants. And because the vast bulk of asbestos claims are settled, rather than tried to verdict, the total amount to which a claimant is entitled is never fixed.[3] Thus, even if each trust or solvent defendant in the tort system knew the settlements paid by other trusts or solvent defendants, without a trial and verdict it simply is not possible to establish that a claimant has obtained a full recovery of his damages.

V. Conclusion

The proposed amendment serves no bankruptcy purpose, and violates principles of federalism. The proposed amendment is unnecessary and bad policy. Rather than protecting the trusts and the victims of asbestos exposure, the proposed amendment burdens them with a loss of confidentiality and additional administrative expenses for purposes beyond the proper scope of the Bankruptcy Code.

Yours Very Truly,

Douglas A. Campbell

DAC/hlp

cc: Howard Coble, Chairman of the Subcommittee on Courts, Commercial and Administrative Law
Steve Cohen, Ranking Member of the Subcommittee on Courts, Commercial and Administrative Law

[3] As Judge Fitzgerald recently noted in the *Bondex* case, the value of a claim is not "fixed," other than by a verdict at trial that has become final and non-appealable. *See* Hearing Transcript at 26, *In re Specialty Prods. Holding Corp.*, No. 10-11780 (Bankr. D. Del. Dec. 13, 2010) (excerpts attached as **Ex.** []) ("[H]ow has the amount of the claim ever been fixed so that you could possibly know that the plaintiff has recovered a full share if it's pursuant to a settlement?").

May 9, 2012

The Honorable Lamar Smith, Chairman
House Judiciary Committee
2409 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.,
House Judiciary Committee
2426 Rayburn House Office Building
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The Honorable Howard Coble, Chairman
Subcommittee on Courts, Commercial and Administrative Law
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The Honorable Steve Cohen
Subcommittee on Courts, Commercial and Administrative Law
1005 Longworth House Office Building
Washington, DC 20515

Re: Opposition to H.R. 4369, the Furthering Asbestos Claim Transparency Act

Dear Congressmen:

We are the below-listed legal representatives for future asbestos personal injury claimants ("Future Claimants' Representatives" or "FCRs") with respect to certain asbestos personal injury settlement trusts that have been established under reorganization plans pursuant to 11 U.S.C. § 524(g). We write in opposition to H.R. 4369, the Furthering Asbestos Claim Transparency ("FACT") Act, which we understand will be the subject of a hearing before the Subcommittee on Courts, Commercial and Administrative Law on May 10. For the reasons set forth below, we respectfully submit that the subcommittee should table, report unfavorably, or otherwise take no further action with respect to the FACT Act.

I. Overview of the FACT Act

The FACT Act would amend 11 U.S.C. § 524(g) by adding a new subsection (8), which would impose certain disclosure requirements on each asbestos settlement trust created under a reorganization plan pursuant to Section 524(a). Specifically, the FACT Act would require a trust (1) to file with the bankruptcy court and the United States Trustee quarterly reports that "describ[e] each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant"; and (2) "upon

written request" to timely provide "any information related to payment from, and demands for payment from, such trust . . . to any party to any action in law or equity if the subject of such action concerns liability for asbestos exposure."

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

The FACT Act would harm asbestos personal injury claimants, especially the future claimants. Compliance with the Act's unnecessary and unreasonable reporting and discovery obligations would divert resources from the trusts' limited funds, which were specifically created to pay the claims of individuals stricken with asbestos-related diseases, for the benefit of third party defendants in non-bankruptcy, asbestos-tort litigation. Moreover, the Act serves no bankruptcy or trust purpose and unnecessarily usurps the existing federal and state laws that govern the discovery of information in litigation. Additionally, the Act would require disclosure of the identity of every person who files a claim with a trust and the amount paid by a trust with respect to every valid claim, resulting in the wholesale abridgment of the privacy rights of

[1] *See, e.g., In re Federal-Mogul Global Inc.*, 2012 U.S. App. LEXIS 8814, *20 (3d Cir. May 1, 2012) ("[T]he trusts appear to have fulfilled Congress's expectation that they would serve the interests of both current and future asbestos claimants and corporations saddled with asbestos liability. In particular, observers have noted the trusts' effectiveness in remedying some of the intractable pathologies of asbestos litigation, especially given the continued lack of a viable alternative providing a just and comprehensive resolution."); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200-201 (3d Cir. 2004) ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits. For reasons well known to observers, a just and efficient resolution of these claims has often eluded our standard legal process - where an injured person with a legitimate claim (where liability and injury can be proven) obtains appropriate compensation without undue cost and undue delay.").

hundreds of thousands of individuals who did nothing except seek compensation from a trust. Accordingly, the FACT Act should be rejected.

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

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

Bankruptcy reorganizations under Section 524(g) have resulted in the creation of more than 60 asbestos settlement trusts, including those formed by household-name companies like Armstrong World Industries, Babcock & Wilcox, Celotex, Johns Manville, and Owens Corning. The trusts provide an efficient way to resolve and pay the claims of asbestos victims outside of the over-burdened judicial system. Under Section 524(g) and the trust system, many reorganized companies have been able to continue their business operations, providing a source of funding for the trusts and preserving jobs that otherwise would be lost in a liquidation.[2]

As evident in Section 524(g), Congress recognized the need for an independent person to represent the interests of future claimants. Section 524(g) requires that a trust be structured in a

[2] *See Federal-Mogul*, 2012 U.S. App. LEXIS 8814, *11 fn.8 ("As one senator described it, § 524(g) 'affirm[s] what Chapter 11 reorganization is supposed to be about: allowing an otherwise viable business to quantify, consolidate, and manage its debt so that it can satisfy its creditors to the maximum extent feasible, but without threatening its continued existence and the thousands of jobs that it provides.'") (quoting 140 Cong. Rec. 28,358 (1994) (statement of Sen. Brown)).

manner that provides reasonable assurance that future claimants will be treated similarly to present claimants, that sufficient resources will be available to fund their claims, and that they will be treated fairly and equitably.

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

As Future Claimants' Representatives, we represent those individuals who have been exposed to asbestos and have not yet brought claims for asbestos personal injury, but will assert such claims when their injuries manifest ("Future Claimants"). We offer a unique perspective on the FACT Act because we are non-partisan participants with respect to asbestos bankruptcy proceedings and trusts. Many of us have dedicated decades of our careers to the fair resolution of asbestos claims. We are former judges, practicing lawyers, law professors, mediators, and administrators of claims-resolution organizations. None of us, however, has ever directly brought a claim based on an asbestos personal injury, and we have no personal stake in the outcome of any asbestos litigation or legislation. Through experience, we have become intimately familiar with the economic, administrative, and logistical issues that arise in creating a limited fund to satisfy the claims of an unknown number of Future Claimants.

A primary objective of any Future Claimants' Representative is to ensure that the trust is funded with and maintains sufficient assets to provide for fair and equitable recoveries by Future Claimants. This is no small challenge because it is difficult to predict how many Future Claimants will file valid claims, how serious their diseases will be, and how the trust's assets will

fare over time. Meeting this challenge requires the creation and oversight of adequate administrative and procedural safeguards to minimize the risk that a trust will prematurely exhaust its funds. It also requires that a trust be structured and operated in a manner that ensures the trust properly compensates asbestos personal injury victims and does not pay frivolous or fraudulent claims. These are matters to which we devote careful attention, diligent research, and zealous advocacy.

The FACT Act is the latest in a string of attempts by defendants of asbestos claims to alter the system of asbestos settlement trusts to their advantage. Recently, the United States Chamber of Commerce's Institute for Legal Reform proposed a new Federal Rule of Bankruptcy Procedure that would have imposed similar disclosure requirements on asbestos settlement trusts.[3] That measure was rejected by a subcommittee of the Judiciary Conference.[4] Likewise, the FACT Act should be rejected because its proposal to amend Section 524(g) to require trust disclosures is flawed, is not warranted by any legitimate justification, and will not achieve the goals that the Act purports to further. Initiatives to address the disclosure and discovery of information in the tort system are more appropriately addressed at the state level.

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

[4] After receiving objections from several trusts and FCRs and holding a hearing on the matter, the Judiciary Conference's Advisory Committee on Bankruptcy Rules declined the proposal. *See* Dec. 12, 2011 Memo. Report from Advisory Committee on Bankruptcy Rules to Committee on Rules of Practice and Procedure at 10-11, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/BK12-2011.pdf; Sept.26-27, 2011 Minutes of Advisory Committee on Bankruptcy Rules, Report of Subcommittee on Business Issues, at 10-11, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/BK09-2011-min.pdf; Sept. 19, 2011 Subcommittee on Business Issues Memo. to Advisory Committee on Bankruptcy Rules, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Bankruptcy/BK2011-09%20Addendum.pdf.

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

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

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

Among the myriad of claims filed since the first asbestos settlement trust began processing claims, proponents of schemes like the FACT Act point only to a few isolated incidences of inconsistent claims as support for the assertion that greater transparency is needed. Defendants of asbestos claims in the tort system and their insurers routinely and unabashedly impugn the trusts as being plagued with multiple, duplicative, and fraudulent claims. To be clear, these are serious issues that the Future Claimants' Representatives do not view lightly. And while there is no surefire method to completely prevent attempts to abuse the trust system, there is simply no evidence that such practices are rampant or widespread. Indeed, the Government

Accountability Office recently studied the trusts and criticisms levied at them, but found no pervasive problem of fraud or impropriety.[5]

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

Multiple trusts or defendants can in fact be responsible for a claimant's asbestos-related injury. Asbestos was prevalent in several industries, which means a tradesman could be exposed to the asbestos-containing products of multiple defendants throughout his career. Unless (and until) there is an adjudication of liability and apportionment of damages, each defendant is liable for its joint and several share. On the other hand, each trust pays only its respective several share of liability.

A claimant is not necessarily able to recover fully for his damages. Trust payments are based on "scheduled values" for specified disease claims. Most trusts lack sufficient funds to pay

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

the full value of claims and thus pay only a percentage of their respective several share of liability.

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

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

The trusts' governing documents also authorize the trusts to establish audit and other mechanisms to verify the credibility of claims. The trusts can require additional information from claimants, decline to accept claims from any individual or entity that engages in improper practices, and penalize a claimant or claimant attorney in a variety of ways, including denying a claim, initiating fraud litigation, or seeking sanctions from the bankruptcy court.[6] Also, the trusts

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

typically require that claims filed with the trusts must be signed by the claimant or the claimant's representative subject to the penalties of perjury.

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

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

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

The FACT Act serves no bankruptcy purpose. On the contrary, the only purpose that would be served by the Act is that of aiding defendants of asbestos claims in non-bankruptcy litigation in both federal and state courts. There is no legitimate bankruptcy-related justification to require the post-confirmation disclosures the FACT Act would impose or to render the bankruptcy courts or United States Trustees depositories for such non-bankruptcy-related information. The trusts are not created or established under 11 U.S.C. § 524(g). Rather,

following confirmation of the bankruptcy plans of the entities whose asbestos liability they assume, the trusts are created, organized, and regulated under state law. They are funded entirely by private sources, usually with equity and other assets of the debtor and proceeds from the debtor's insurance policies.

While many of the trusts submit annual reports and accountings to the bankruptcy courts that approved the plans under which the trusts were established, that reporting is not required by Section 524(g) or any other bankruptcy law. Rather, the trusts submit annual reports and accountings pursuant to the terms of the plans that authorized the creation of the trusts and approved the trusts' governing documents, which require the reporting and accounting for tax purposes to maintain the trusts' status as qualified settlement funds. The bankruptcy courts' jurisdiction to receive and approve the reports arises from requirements invented and imposed by parties in the bankruptcy case and reflected in the plans and trust-governing documents. In contrast, the detailed, quarterly disclosures the FACT Act would require have no relation to the implementation and administration of the plans or the trusts created under them. Likewise, the trusts are not under the jurisdiction of and generally have no interaction with the United States Trustees.[7]

Moreover, the Act exceeds the scope of the Bankruptcy Code by purporting to regulate discovery in non-bankruptcy cases, particularly state-court cases that are not subject to federal jurisdiction. The disclosure and discovery of asbestos claims and exposure histories of tort-system plaintiffs are issues properly reserved for resolution at the state level. Indeed, the states

[7] *See* 28 U.S.C. §§ 582-589b; GAO Report at 13 ("Postconfirmation, neither the courts nor the U.S. Trustees have any specific statutory or other requirements to oversee a trust's administration. The bankruptcy court, however, ordinarily maintains limited postconfirmation jurisdiction over the trust, including receipt of annual financial reports filed by a trust, which are usually filed with the court in accordance with a trust's reorganization plan or trust agreement.").

are addressing such issues through legislation[8] and court-mandated disclosures[9] that impose obligations on the parties to the tort litigation, negating the need for Congress to act on these issues or impose additional burdens on the trusts.

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

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[8] In several states, pending legislation entitled the Asbestos Claims Transparency Act would (a) require tort-system plaintiffs to disclose their trust claims and payments and provide those materials directly to the defendants they sue for asbestos-related injuries, and (b) create a presumption that the plaintiff's trust claims are relevant to and discoverable in a tort action. *See* H.B. 477, Reg. Sess. (La. 2012); S.B. 1792, 53rd Leg., 2d Sess. (Okla. 2012); H.B. 380, 129th Gen. Assembly, 2011-12 Reg. Sess. (Ohio 2011).

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

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

It is also significant that the FACT Act purports to require disclosures from every trust created from a reorganization pursuant to Section 524(g), since it would apply "to cases commenced under title 11 of the United States Code before, on, or after the date of the enactment of this Act." The disclosures contemplated by the FACT Act would impose new burden and expense on the trusts that were not considered in the negotiations that ultimately led to the creation of the more than 60 existing trusts. The costs of staffing and other expenses needed to comply with the disclosures contemplated by the FACT Act will only detract from the trust's resources and ability to serve the trust beneficiaries – all for no legitimate purpose.

There is simply no justification for requiring trusts to provide more information than would otherwise be available in the tort system or to shift the burden of discovery from party

litigants to the non-party trusts. The substantial costs of requiring trusts to comply with the FACT Act vastly outweighs any potential benefit to tort-system defendants.

* * *

For the foregoing reasons, the Future Claimants' Representatives listed below respectfully request that the Subcommittee table, not report favorably, or otherwise take no action on the FACT Act.

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June 4, 2012

The Honorable Lamar Smith
Chairman
House Judiciary Committee
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Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
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Washington, DC 20515

Re: EWG Opposition to the Furthering Asbestos Claim Transparency Act of 2012 (H.R. 4369)

Dear Chairman Smith and Ranking Member Conyers:

The Environmental Working Group (EWG) respectfully writes to express strong opposition to the Furthering Asbestos Claim Transparency Act of 2012 (the FACT Act), H.R. 4369, which would require onerous reporting requirements for asbestos trusts. Touted as a sunshine proposal, the bill fundamentally fails to understand health problems related to asbestos exposure and how the legal system compensates victims of asbestos disease. If signed into law, the FACT Act would significantly delay or deny justice for thousands of victims of the great asbestos tragedy. The public deserves better.

EWG is a non-profit public interest organization dedicated to using the power of information to protect public health and the environment. As part of that mission, EWG has published extensive research on America's epidemic of disease and mortality caused by workers' exposure to asbestos, even though companies knew for years that it presents a serious health hazard. The U.S. Occupational Health and Safety Administration is "aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than asbestos exposure." That is why EWG simultaneously has urged that asbestos be banned and everyone injured by asbestos receive fair compensation.

Congress amended federal bankruptcy law in 1994 to allow asbestos companies undergoing reorganization to establish trusts to compensate current and future asbestos victims. The trusts provide a critical mechanism for helping individuals harmed by asbestos while allowing companies to continue their business operations. The FACT Act requires these trusts to collect and publicly disclose detailed information about individuals seeking compensation, including their exposure and work history. It also would allow asbestos companies to require from the trusts any additional information they are interested in, at any time and for practically any reason. The effect of those changes would be devastating for asbestos victims.

Many asbestos victims are grappling with the expensive costs of treating mesothelioma, a fatal form of lung cancer caused by asbestos exposure. Individuals with mesothelioma often live just a matter of months after diagnosis. Therefore, placing additional burdens on those seeking compensation through the trust system would result in many dying before they receive any financial assistance. For example, some states require individuals to file claims through the trust process before they can go to court, even though time is of the essence.

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EWG is a firm believer in public disclosure laws. However, in this particular instance, the benefits of disclosure generated by the FACT Act would be modest at best, particularly when weighed against the costs of dragging out the claims process for asbestos victims. Asbestos trusts already make public far more information about individual claimants than is disclosed through the typical settlement process with solvent companies. And despite claims to the contrary, asbestos companies have shown little evidence of victims abusing the trust system.

For all of these reasons, EWG calls on lawmakers to vote against the FACT Act. Justice demands it.

Sincerely,

Heather Brady White

Heather B. White, Esq.
Chief of Staff & General Counsel
Environmental Working Group

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

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June 5, 2012

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Smith and Ranking Member Conyers:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, urges you to support H.R. 4369, the "Furthering Asbestos Claims Transparency (FACT) Act of 2012," which would shine much needed light on asbestos personal injury settlement trust funds.

Section 524(g) of the federal bankruptcy code authorizes trusts to receive and pay asbestos-related claims on behalf of bankrupt companies. When Congress enacted 524(g) in 1994, it intended to guarantee all present and future asbestos claimants equal access to recompense for their injuries. However, it appears that Congressional intent is being frustrated by the filing of inconsistent and fraudulent claims that draw down the trusts' funds and endanger future victims' recoveries. Questionable claims have been uncovered throughout the country in the course of tort litigation, and independent experts at both the Government Accountability Office and RAND Corporation have concluded that the trusts are susceptible to abuse and may pay improper claims.

The FACT Act's simple transparency requirements would ensure that asbestos trusts, which currently hold over $36 billion in assets for the benefit of current and future asbestos claimants, are protected from fraud and abuse and remain viable sources of compensation for legitimate asbestos victims. The FACT Act would also ensure that still-solvent tort defendants, many of whom were only peripherally involved in the asbestos business, are not prematurely driven into bankruptcy by asbestos claims that are being resolved, in whole or in part, by the existing asbestos trusts.

The Chamber supports the FACT Act, which would be an important step towards fixing the troubled asbestos trust system. The Chamber urges the Committee to favorably report the FACT Act as expeditiously as practical so that it may be considered by the full House.

Sincerely,

R. Bruce Josten

cc: The Members of the House Committee on the Judiciary

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