

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
H.R. 982, the “Furthering Asbestos Claim Transparency (FACT) Act of 2013.”
March 13, 2013

Mr. Inselbuch’s Responses to Questions for the Record

Questions from Subcommittee Ranking Member Steve Cohen for Mr. Inselbuch

1. *During the hearing, the Majority’s witnesses alleged that the submission of “inconsistent information” to trusts and in tort filings somehow suggested that the inconsistencies were widespread and submitted with fraudulent intent. Does the submission of inconsistent information to trusts and in tort filings constitute fraud? Why else might there be such inconsistencies?*

There has been no showing that there is any significant incidence of inconsistent information being submitted to trusts and in tort filings, and certainly no showing that this is a large-scale problem, let alone that there is any evidence of fraud. The argument that such inconsistencies exist and are equivalent to fraud is created out of whole cloth in Mr. Scarcella’s written testimony, where he equates “inconsistent and fraudulent claiming behavior” (at 5), suggests that there is a problem because trusts cannot identify “inconsistent claiming patterns” (*id.*), expresses concern over “inconsistent and potentially fraudulent exposure allegations” (at 14), and argues that without the FACT Act “inconsistent and specious claiming will go unchecked” (*id.*).

Mr. Scarcella does not identify what he means by inconsistency, nor why he equates it with fraud. Nor does he quantify it with any evidence. To understand why there is not a problem, it is helpful to understand how the tort system and the trusts actually function in the real world.

Two types of “inconsistencies” are usually asserted. One is between the testimony of a plaintiff in the tort system and his trust claim filings. The other is among multiple trust filings by one claimant. The fact that there may be differences does not mean that there are questionable “inconsistencies.”

A worker who is injured by exposure to asbestos and who brings a lawsuit against solvent defendants is required to answer questions in discovery about where he worked and what he did, and, if he has filed any trust claims, to produce copies to the defendants. Many plaintiffs are unlikely to be able to identify the manufacturers of all the asbestos-containing products to which they were exposed over the course of their careers, particularly if they were cutting into or removing products, previously installed, or working in an area where this was done.

As a result, in a tort lawsuit, the plaintiff’s exposure to many defendants’ products is most frequently proven through the testimony of other workers from his worksite, or through manufacturers’ documents such as sales records or purchase orders.

When the plaintiff files a trust claim, in many situations his personal exposure does not have to be proven, as the trust, formed to resolve legitimate claims and not to resist them as do tort defendants, has already conceded that there are locations where people in certain occupations were exposed to products for which the trust bears responsibility. The plaintiff can rely on the trust's published site list and his own job history. So a plaintiff may not know that he was exposed to an X-Corporation product, and can therefore not identify X-Corporation in responses to interrogatories or in a deposition in the tort system, but can still make a claim to the X-Corporation trust.

It is this inability to personally identify the manufacturer of a product in tort system discovery while legitimately claiming against a trust that is being described as an "inconsistency." It is not.

Defendants, of course, have equal access to all this information. They have the plaintiff's work history and the site lists, and can depose him and ask whatever he remembers about exposure, and can obtain copies of any proof of claim forms he has filed.

Prior to a firm's bankruptcy, the plaintiff had the same burden of proving exposure to that firm's products as it does now against currently solvent defendants. Once a defendant is no longer in the tort system, the plaintiff's memory is still the same, but the trust which has replaced the defendant admits the liability. The plaintiff who does not remember the products can recover based on his occupation and his presence at a site where those products were. The individual plaintiff's inability to remember product names while still being able to recover from a trust are not inconsistent statements. And they are certainly not fraud.

As I explained in my written testimony, because of the ubiquitous presence of asbestos in industry, multiple companies are almost always at fault for asbestos-related diseases and deaths. Think of the shipyard worker, for example, assisting in the repair of countless U.S. Navy warships. The asbestos-containing products which were causes of his injury included boilers, pipe and thermal insulation, gaskets, and many others. A person so injured can properly recover from every company responsible, including both those he sues in the tort system and the trusts that stand in the shoes of bankrupt defendants.

Because the injured victim was typically exposed to multiple asbestos products at multiple job sites over a period of many years, he or she must file different claims, with different trusts, with different forms that request different information. The fact that the exposure information submitted to one trust *differs* from the exposure information submitted to another does not mean it is "inconsistent" – and certainly not specious or fraudulent. These exposure scenarios address different questions and therefore are not the same; but they are not, in any way, inconsistent. A trust compensates only exposures to the products for which it has been assigned or accepted responsibility, and each trust's requirements are different. For example, a WWII veteran exposed in a Navy shipyard to asbestos supplied by Manville would cite such early

exposures in seeking compensation from the Manville Trust. If such a veteran later worked in the construction industry as a pipefitter and was exposed to different manufacturers' asbestos products years later, his claims against the trusts responsible for the products he worked with in that job would reflect only his exposure history as a construction worker. These exposure scenarios are not inconsistent. And, the defendant in any case would be entitled to learn of all exposures during discovery.

There have been hundreds of thousands of claims filed with the asbestos trusts, and hundreds of thousands of lawsuits have been brought against solvent defendants. To the extent that there is ever a documented incident of an asbestos claimant or his attorney behaving somehow improperly – such as in the *single case* Judge Ableman encountered in her *twenty-nine years* on the Delaware bench – as she demonstrated, the state courts will be able to implement remedial measures using existing state law. It is simply unnecessary to invoke extraordinary federal intervention into state tort claims and trusts organized under state laws.

It should not be forgotten that these few isolated instances of claimed misconduct pale in comparison to the long history of corporate deceit by the proponents of this legislation with respect to the mining, manufacturing and marketing of asbestos products over many decades. This industry-wide indefensible corporate conduct resulted in tens of thousands of deaths of innocent workers.

2. *A March 11, 2013 Wall Street Journal article cited by some of my colleagues purports to identify several instances of fraudulent claims that were submitted to asbestos trusts. What is your response to this article in general and with respect to its assessment of the problem of false claims?*

In spite of searching for more than four months, with access to a database of more than 850,000 claims, the investigation published in the March 11, 2013 *Wall Street Journal* article was able to turn up but one case of supposed fraud – which the *Journal* itself admits is a “footnote in the history of the multi-billion-dollar asbestos litigation industry.”¹ Indeed, all that the *Journal*'s reporters found was this one case, a miniscule number of what it thought were anomalies among the claims received by the Manville Trust (2,000 of the 850,000 claims it has received, or roughly 0.2%), some other potential wrongdoing (as yet unproven, and some of which was discovered by the trusts themselves which were allegedly targeted), and one case in which the Manville Trust decided to compensate a victim's daughter based on a new diagnosis of an old claim. The *Journal* even acknowledges that the anomalies in the Manville filings could be clerical errors or, for cases in which the person exposed was a child killed by mesothelioma contracted from exposure to a parent's work clothes, simply the recording of the occupation of a parent who worked with asbestos.

¹ Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J. (Mar. 11, 2013), <http://online.wsj.com/article/SB10001424127887323864304578318611662911912.html>.

Anecdotes are not data, and the authors were unable to come up with more than their own “worries” about fraud. The article certainly does not provide support for the FACT Act. Indeed, it found no unbiased observer concerned about “fraud” – instead, searching for legitimacy, it falsely attributed comments criticizing plaintiffs’ conduct to a judge hearing asbestos cases rather than to a nameless “person familiar with the case”², and needed to print a retraction.³

3. *Your fellow witnesses have repeatedly asserted that more transparency is needed in the trust system and that asbestos companies need legislation to get information, currently being hidden from them, in order to litigate the claims. Can you explain what information solvent defendants that are defending their claims in court can request via available state discovery rules?*

Solvent defendants in the tort system can determine all other exposures a plaintiff has alleged in trust claims by various means in the normal course of discovery, including requesting the claim forms from plaintiffs directly or subpoenaing trusts.

Through discovery in an individual case, a defendant can usually obtain the following information from the plaintiff and, in some cases, from the trusts:

- If a plaintiff has made a claim to a trust;
- Any materials a plaintiff has submitted to a trust, including the proof of claim form and any attachments;
- If a plaintiff has exposure to a product that might be covered by a trust;
- Locations where a plaintiff worked and might have been exposed to asbestos;
- And, when appropriate (such as in certain situations after a verdict), if a trust has paid a claim to a plaintiff and the amount of that payment.

Discovery is a fundamental part of the legal system in the United States, implementing policies adopted state by state, and asbestos litigation should not be treated differently – there is no need for the federal government to blunder in and tip the scales across the board in favor of asbestos defendants.

² *Corrections & Amplifications*, Wall St. J. (Mar. 22, 2013), <http://online.wsj.com/article/SB10001424127887324557804578376330040722070.html>.

³ *Id.*

4. *We heard from your fellow witnesses that the FACT Act would not put any additional burdens on the trusts by way of additional costs to meet the reporting requirements and responding to information requests. What is your response to these assertions?*

The FACT Act will significantly increase the burdens and costs to the trusts. It will impose substantial administrative burdens, which, contrary to Mr. Scarcella's claims, the trusts are not equipped to handle. These administrative burdens would divert staff from processing claims while they respond to limitless demands for information and prepare required reports. Even with additional staff, the burden of responding to asbestos defendants' deliberate and unnecessary reporting demands will overwhelm the ability of the trusts to timely pay claims. Even with some of the costs reimbursed, the trusts will still incur significant overhead and other administrative costs to meet the requirements of the FACT Act, reducing the already meager sums available to pay claims. It is wasteful to use the already limited monies available in trusts to pay claims, to provide information already available through the state court discovery system.

Asbestos trusts expressed strong opposition to this legislation, in part because of the burdensome administrative costs that will reduce recoveries for future trust claimants.⁴ In their initial letter to the Subcommittee, they stated that the bill "would impose burdens upon the trusts solely to benefit third parties, not the beneficiaries of the trust"⁵ and noted that the bill "is both unnecessary and bad policy. Rather than protecting the trusts and the victims of asbestos exposure, the bill burdens the victims with a loss of confidentiality and burdens the trusts with additional administrative obligations, solely for purposes that are well beyond the proper scope of the Bankruptcy Code."⁶

After the Subcommittee's hearing on this bill, four substantial trusts – the Babcock & Wilcox Company Asbestos Personal Injury Trust, the Federal-Mogul Asbestos Personal Injury Trust, the Owens Corning/Fibreboard Asbestos Personal Injury Trust, and the United States Gypsum Asbestos Personal Injury Settlement Trust – submitted a supplemental letter on or about March 20, 2013 to the Subcommittee addressing the burden the Act would place on the trusts.⁷

⁴ See Letter from Douglas A. Campbell, Campbell & Levine, LLC, to Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary, Rep. Spencer Bachus, Chairman, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, and Rep. Steve Cohen, Ranking Member, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (Mar. 11, 2013) ("March 11, 2013 Campbell Letter").

⁵ *Id.* at 2.

⁶ *Id.* at 5.

⁷ See Letter from Douglas A. Campbell, Campbell & Levine, LLC, to Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary, Rep. Spencer Bachus, Chairman, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, and Rep. Steve Cohen, Ranking Member, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (Mar. 20, 2013) ("March 20, 2013 Campbell Letter").

The four trusts estimated that a trust like one of them receiving 10,000 claims per quarter and paying 5,000 of them over time would require experienced managers and claim reviewers to spend an aggregate of 20,000 hours per year on that trust's compliance with the Act – the equivalent of ten new full-time employees.⁸ Contradicting Mr. Scarcella's testimony before the Subcommittee, the four trusts explain that the data for "exposure history" and "basis for payment" required by the Act can not be collected using pre-set data or information from a claim form, but must be extracted from a review of the supporting documentation submitted by the claimant.⁹

The quarterly reporting requirement alone would place this significant burden on the trusts. Moreover, the language requiring trusts to provide information on historical claims is so broad as to make the impact potentially vast and yet unquantifiable.¹⁰

5. *The FACT Act forces the trusts to disclose certain information about claims. Would this bill help asbestos victims? Who would benefit most from this bill?*

As the Subcommittee members must have noted, no victims or victims' group came to support this bill.

The bill's provisions grant solvent asbestos defendants new rights and advantages to be used against asbestos victims in state court and to add new burdens to the trusts, such that their ability to operate and pay claims would be damaged. Further, the bill is intended to help defendants skirt state laws regarding rules of discovery.

The bill would slow down or stop the process by which the trusts review and pay claims, such that many victims would die before receiving compensation, since victims of mesothelioma typically only live for 4 to 18 months after their diagnosis.¹¹ The bill's new burdens will require the trusts to spend time and resources complying with these requirements, causing trust recoveries to decrease and be delayed.

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

⁸ *Id.* at 2.

⁹ *Id.* at 1-2.

¹⁰ *Id.* at 2-3.

¹¹ *Stages of Mesothelioma and Outcomes*, Mesothelioma Applied Research Foundation, http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.8055915/k.8443/Stages_of_Mesothelioma__Mesothelioma.htm (last visited Apr. 12, 2013).

Delay of the trusts will benefit tort system defendants. Terminally ill victims have no tolerance for delay and, when trust settlement monies prove unavailable, will be induced to settle their pending tort cases cheaper and sooner to reach some resolution before they die.

6. *The FACT Act would require the trusts to respond to any request from a party to any action if the subject of such action concerns liability for asbestos exposure. What would prevent a trust from receiving hundreds or even thousands of these requests during any given year? What would the effect of that be on the trusts and on the efficiency of paying out claims to asbestos victims?*

There is nothing in the bill to prevent defendants from blanketing the trusts with requests – indeed, the FACT Act is an invitation for asbestos defendants to flood the trusts with requests for information for no other reason than to delay the ability of the trusts to pay out claims and to help defendants avoid accountability for their wrongdoing. They have articulated no legitimate need for this data in case-by-case litigation. This is a heavy-handed piece of federal interference with the states’ legal systems. State court discovery rules attempt to create balance between litigants; they already allow asbestos defendants to get information whenever it is relevant. The FACT Act, on the other hand, allows *any defendant* to request information from the trusts for *any reason at any time*. The reason for this is clear: asbestos defendants want to be able to bury the trusts in paperwork so that they slow down the process of paying out claims to victims of asbestos exposure.

As I explained during my testimony, the delay in that recovery will force plaintiffs to settle cases with solvent defendants faster, and, ultimately, for less money.

7. *Professor Brown claims that asbestos trusts have become less transparent and more aggressive in challenging efforts to investigate the operations.*

What is your response?

Professor Brown has not provided sufficient evidence to support these claims. Instead, relying on an article by Mr. Scarcella, he equates modifications in a few trust documents that standardize their provisions and make explicit the requirement that entities seeking trust information do so with a subpoena with the trusts acting aggressively – a conclusion without merit. However, given the extent to which asbestos defendants and their allies have been vigorously targeting the trusts with aggressive litigation and legislative initiatives, one would expect the trusts to respond.

8. *Professor Brown complains that the annual reports that trusts file with the courts are no longer accessible through PACER “because the judge overseeing the cases ordered them closed.”*

Why are the courts limiting access to these reports? Does it reflect the fact that the courts are concerned about the privacy of asbestos victims who make claims against these trusts?

I am not aware of any such orders. As Professor Brown knows, all bankruptcy cases are closed when they are finished, primarily because the debtors want them closed so they can stop paying administrative fees. Professor Brown’s complaint appears to be grounded on a misapprehension founded on a desire to find a conspiracy of silence where none exists.

Certain annual reports are inaccessible, but this is not related to any action taken by the trusts or courts. In 2010, the Judicial Conference amended the policy on privacy and public access to electronic case files by restricting access through PACER to all documents in all bankruptcy cases that were filed before December 1, 2003, and that have been closed for more than one year, due to a concern that documents filed prior to that date did not meet privacy standards implemented at that time.¹² Nonetheless, the filings remain available electronically to parties who appeared in the cases (including defendants and insurers who were interested enough to participate), and all court filings remain available to the public at the clerks’ offices.¹³

The annual reports provide information on the number and type of claims paid. Courts do not require the trusts to publish individual data, likely due both to privacy concerns and to the sheer volume of claims paid. The Owens Corning / Fibreboard Trust, for example, paid more than 80,000 claims in 2011.¹⁴

9. *The trusts typically treat claimants’ submissions as confidential.*

Please explain why such matters are treated as confidential.

The asbestos personal injury trusts replace insolvent defendants, and are settlement vehicles created to settle claims created by the liability of their insolvent predecessors. Claims

¹² See Report of the Proceedings of the Judicial Conference of the United States at 12-13 (Sept. 14, 2010), available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2010-09.pdf>. For implementation, see, e.g., *Review Case Files*, United States Bankruptcy Court for the District of Columbia, <http://www.dcb.uscourts.gov/dcb/review-case-files> (last visited Apr. 12, 2013).

¹³ *Id.*

¹⁴ Annual Report and Account of the Owens Corning/Fibreboard Asbestos Personal Injury Trust for the Fiscal Year Ending December 31, 2011 at 10, 12, *In re Owens Corning*, No. 00-3837 (Bankr. D. Del. Apr. 30, 2012) [ECF No. 21049].

Inselbuch Responses

April 15, 2013

Page 9

paid out by asbestos trusts are settlements and therefore should be treated in the same manner as any others' settlements negotiated in the court system. Lawsuit settlements are classically deemed confidential by the parties. Just as a solvent corporation has no obligation to make settlement information available to the public, an asbestos trust should have no obligation to do so either.

Asbestos defendants insist on complete confidentiality when they address and settle claims in the tort system to ensure that other victims do not know how much they are willing to pay for their asbestos wrongdoing. Courts routinely refuse to compel discovery of settlement information. Settlements by asbestos trusts should be no exception.

The important issue is whether asbestos defendants have access to information about a claimant's exposure information when that information is relevant to a pending claim. State discovery rules already provide a method for defendants to obtain this information, so there is simply no reason to burden the trusts with the significant effort and expense of producing it again.

This bill requires the trusts to disclose the amount requested and paid out to the victim. This is identical in nature to requiring disclosure of a settlement. However, the bill does not affect the rights of asbestos defendants to demand confidentiality for their settlements. These same defendants are thus trying to force disclosure of a victim's settlement information with the trusts, while maintaining their own right to confidentiality.

Ironically, given that the trusts publish a list of the standard, average, and maximum settlement values which they pay for each asbestos-related disease, as well as their payment percentages, the defendant already has much more information about what a particular plaintiff is likely to recover from trusts than a plaintiff has about what the defendant has paid to other workers with similar injuries from the same places and products with which the plaintiff worked.

10. Professor Brown states that in "the absence of transparency, nobody with an interest in this debate - litigants, legal representatives, trust officials or judges - has access to sufficient information across trusts to reach the extreme conclusions that are commonly advanced - that fraud is nonexistent, on the one hand, or rampant, on the other - as an empirical matter."

What is your response?

This statement is a post hoc justification for the legislation. The production of the data required by the FACT Act "across trusts" would not allow anyone to find fraud. Each trust requires only evidence of disease and exposure to the products for which it has admitted responsibility and pays settlements. Releasing this data would not help. In addition, as I have explained previously, the GAO has investigated claims of fraud, and found no evidence of it.

Trusts regularly conduct audits. And even the *Wall Street Journal*, which spent months combing through data and conducting interviews, was able to find just one example of an allegedly fraudulent claim out of 850,000 claims examined. The data would not change this.

11. *What is your response to the allegation that asbestos victims “double dip”?*

Asbestos defendants commonly argue that asbestos lawsuits and claims against the trusts constitute “double dipping,” since claimants may potentially recover both from defendants in the state court system and from bankruptcy trusts. The claim is false and reflects a basic, fundamental mischaracterization of the way both the bankruptcy system and state court lawsuits operate. If any court anywhere—any state or federal, trial or appellate court hearing asbestos cases, or any bankruptcy court—had found any merit in this contention, it might have credibility, but no court ever has.

For there to be “double-dipping” there would have to be a recovery beyond that to which a claimant is entitled. The only time that a fixed amount is set to which an asbestos victim is entitled is when his case goes to trial and the jury returns a verdict in his favor. In a settlement context (which accounts for – literally – more than 99% of asbestos cases) there is no fixed amount above which recovery is illegal or even inappropriate.

In a context where all the defendants are solvent and in the tort system, the plaintiff settles with whomever he settles with, and does not disclose the amounts of the settlements. He goes to trial with the rest, and the jury says how much he is entitled to. If he already received that much from settlers, the trial defendant(s) pay nothing. If not, the trial defendants pay the balance. But without a jury verdict, there is no set amount to compensate a plaintiff for his injuries, and no possibility of double-dipping.

Additionally, as I state in my written testimony, asbestos disease is typically the result of being exposed to multiple asbestos-containing products over the course of a person’s working lifetime. The law in every state is settled that any victim can recover from every asbestos defendant who substantially contributed to his or her illness or injury; this includes asbestos trusts because the trusts essentially step into the place of the former defendant. Thus, when an asbestos victim recovers from each defendant whose product contributed to their disease, that victim is in no way “double-dipping;” rather they are recovering a portion of their damages from each of the corporations who harmed them. In fact, each trust is responsible for and pays for only its own share of the damages.

12. *What are some of the reasons why defendant corporations demand that their settlement agreements be kept confidential? Do you think it would be hypocritical not to ask that they forgo confidentiality under the FACT Act?*

I do not represent any defendant corporations, so I am unable to speak to their state of mind. It seems to me, however, that a defendant would not want a suing plaintiff to know how much that defendant had paid to other plaintiffs in similar circumstances because it would allow that plaintiff to better understand the “marketplace” threshold for settlement, and demand a larger settlement than he might have otherwise. Similarly, a plaintiff would not want a defendant to know what he settled for with other defendants, as that would provide a “ceiling” for the defendant.

This bill requires only the trusts to disclose the amount requested and paid out to the victim. This is requiring disclosure of a settlement. It is hypocritical for asbestos defendants to argue that they should maintain their right to demand confidentiality for their settlements while trying to force disclosure of a victim’s settlement information from the trusts. If there is to be forced disclosure of settlements, why not force defendants to turn over their settlement information as well, including the amount of the settlement, the plaintiff’s injuries, and the exposure evidence put forth by the plaintiff, including the location where the plaintiff was exposed and the defendant’s products at that site.

13. *To your knowledge, do any asbestos victims support the FACT Act?*

No. The FACT Act is not in their interest. The record shows that a number of asbestos victims submitted statements opposing the FACT Act. No victim or victims’ group appeared to support the bill.

Similarly, the Future Claimants’ Representatives, who represent the interests of asbestos victims who have yet to manifest symptoms and make a claim, have submitted a statement opposing the FACT Act.¹⁵ The only parties involved in asbestos litigation who support the FACT Act are the defendants themselves – those who injured hundreds of thousands of people through their conduct and are now attempting to evade responsibility for their actions – as they have done historically.¹⁶

¹⁵ See Letter from Future Claimants’ Representatives to Committee Members (Mar. 11, 2013).

¹⁶ This is not a new issue. For a history of the deliberate efforts of the asbestos industry to avoid responsibility for the deaths and injuries it has caused, see Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985).

Questions from Subcommittee Member Hank Johnson for Mr. Inselbuch

In your submitted testimony, you note that ALEC has drafted model legislation that delays recovery for plaintiffs.

1. *Please discuss ALEC's role in drafting model legislation in this area.*

The American Legislative Exchange Council, or ALEC, is a group which works to make state laws more corporation-friendly. While it is chartered as a nonprofit organization under Section 501(c)(3) of the Internal Revenue Code, ALEC provides a vehicle for its corporate members to lobby state legislators, while they deduct their payments to ALEC as charitable contributions.¹⁷ One of the ways ALEC does this is to draft “‘model’ legislation” provided by its corporate and legislative members, and then lobby for the adoption of that legislation.¹⁸

While nominally controlled by members who are state legislators (“Legislative Members”), ALEC’s Board of Directors is advised by a Private Enterprise Board, representing major corporate sponsors (“Private Sector Members”).¹⁹ According to ALEC’s Bylaws, the “Private Enterprise Board of Directors” meets jointly with ALEC’s Board of Directors at least once per year.²⁰ Members of the Private Enterprise Board represent tobacco, pharmaceutical, alcoholic beverage, oil and gas, and insurance companies, as well as lobbying firms that serve these industries.²¹

ALEC’s Private Sector Members pay significant sums to sit down at the table with its Legislative Members. Whereas legislators pay membership fees of \$50 per year,²² private companies pay between \$7,000 and \$25,000, depending on the membership tier.²³ Buying into a

¹⁷ Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. Times (Apr. 21, 2012), available at <http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?ref=mikemcintire&r=0>; see also *Letter Submission to the Internal Revenue Service under the Tax Whistleblower Act*, 26 U.S.C. § 7623(b), Common Cause, at 1 (Apr. 20, 2012), available at http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/ALEC_FINAL_SUBMISSION_IRS_WHISTLEBLOWER.PDF.

¹⁸ *Id.*

¹⁹ See Robert G. Natelson, *Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers*, ALEC, at i (2011), available at <http://www.alec.org/docs/ArticleVHandbook.pdf>.

²⁰ See ALEC Bylaws art. V, § 5.10 (July 10, 2007); see also *id.* art. XV, §§ 15.01-15.08 (describing the role, composition, and responsibilities of the Private Enterprise Board).

²¹ See ALEC Private Enterprise Advisory Council, <http://www.alec.org/about-alec/private-enterprise-advisory-council/> (last visited Apr. 12, 2013).

²² Legislative Membership: Join ALEC Online, <http://www.alec.org/membership/legislative-membership/join-alec-online/> (last visited Apr. 12, 2013); see also Laura Sullivan, *Shaping State Laws with Little Scrutiny*, National Public Radio (Oct. 29, 2010), <http://www.npr.org/templates/story/story.php?storyId=130891396>.

²³ See ALEC Private Sector Membership, <http://www.alec.org/membership/private-sector-membership/> (last visited Apr. 12, 2013).

more costly membership tier gives the corporation access to a greater number of ALEC meetings, policy summits, “VIP Events,” and Board of Directors receptions.²⁴

In addition to paying substantial membership fees, some Private Sector Members pay separate fees to participate in ALEC’s issue-focused “Task Forces” where ALEC’s Legislative Members “welcome their private sector counterparts to the table as equals” to jointly draft “model legislation” in areas like healthcare, energy and the environment, communications and civil justice.²⁵ These industry-written bills are introduced with few alterations – and, in many cases, passed – at statehouses around the country.²⁶

ALEC has prepared model legislation to advance corporate interests in numerous subject areas, including so-called tort reform, which does such things as limiting the ability of injured Americans to file class actions, making it harder for them to bring lawsuits, and limiting their ability to recover for pain and suffering.²⁷ Some of this model legislation has included: laws designed to cap the liability of companies that acquired the assets of a business that previously engaged in asbestos-related activity, thus protecting their financial assets at the expense of victims of asbestos-related diseases and their families;²⁸ the “Stand your Ground” law which

²⁴ See *Private Sector Membership Brochure*, ALEC, at 2, available at http://www.alec.org/wp-content/uploads/2011_privateSector_brochure.pdf.

²⁵ See ALEC Private Sector Membership, *supra* note 23.

²⁶ See, e.g., Sullivan, *supra* note 22 (“Since Arizona Gov. Jan Brewer signed [ALEC-drafted] SB 1070 into law in April, five state legislators have introduced eight bills similar to it. Like SB 1070, four of them were also named ‘Support Our Law Enforcement and Safe Neighborhoods Act.’ Lawmakers in many more states NPR interviewed have said they would introduce or support a similar bill.”); Beth Hawkins, *Treyvon Martin Case Leads to Corporate Exodus from ALEC*, MinnPost (Apr. 16, 2012), <http://www.minnpost.com/politics-policy/2012/04/trayvon-martin-case-leads-corporate-exodus-alec> (“In total over the last two years Minnesota lawmakers have introduced some 60 bills identical or very similar to model legislation drafted by ALEC.”); Salvador Rizzo, *Some of Christie’s Biggest Bills Match Model Legislation from D.C. Group Called ALEC*, N.J. Online (Apr. 1, 2012), http://www.nj.com/news/index.ssf/2012/04/alec_model_bills_used_in_nj_la.html (“The Star-Ledger found a pattern of similarities between ALEC’s proposals and several measures championed by the Christie administration. At least three bills, one executive order and one agency rule accomplish the same goals set out by ALEC using the same specific policies. In eight passages contained in those documents, New Jersey initiatives and ALEC proposals line up almost word for word. Two other Republican bills not pushed by the governor’s office are nearly identical to ALEC models.”); Paul Krugman, *Lobbyists, Guns, and Money*, N.Y. Times (Mar. 25, 2012) <http://www.nytimes.com/2012/03/26/opinion/krugman-lobbyists-guns-and-money.html> (“[ALEC] doesn’t just influence laws, it literally writes them, supplying fully drafted bills to state legislators. In Virginia, for example, more than 50 ALEC-written bills have been introduced, many almost word for word. And these bills often become law.”).

²⁷ *Tort Reform, Corporate Liability and the Rights of Injured Americans*, Center for Media and Democracy: ALEC Exposed, http://www.alecexposed.org/wiki/Tort_Reform,_Corporate_Liability_and_the_Rights_of_Injured_Americans (last visited Apr. 12, 2013).

²⁸ See Brad Shrade, *Asbestos Victims Oppose Company’s Push for Liability Shield in State Law*, Minneapolis Star-Tribune (Feb. 14, 2012), <http://www.startribune.com/politics/statelocal/139335403.html>. The law, 2012 Mich. Pub. Acts 84 (codified at Mich. Comp. Laws §600.3001) was signed into law in 2012; it primarily benefited a single corporation, Crown Holdings, Inc. (formerly known as Crown Cork & Seal). See also, e.g., Anita Kumar, *Virginia Passes Bill to Limit Legal Claims on One Firm*, Wash. Post, Feb. 10, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020903797_pf.html (discussing the

provoked public outcry following the shooting death of Florida teen Trayvon Martin, crafted by the NRA through ALEC's "Criminal Justice Task Force", and considered a priority by ALEC;²⁹ and a model bill which reportedly served as the basis for Arizona's controversial immigration law, and which was drafted by an ALEC group including officials from private prison companies focusing on immigrant detention as a growing market.³⁰

One part of ALEC's agenda is limiting the ability of people injured by exposure to asbestos and asbestos-containing products to receive compensation in the legal system. In addition to the Crown Cork Bill described above, to facilitate this anti-victim agenda, ALEC drafted a model bill called the "Asbestos Claims Transparency Act", which was adopted by that organization's "Civil Justice Task Force" in July 2007 and by the ALEC Board of Directors in August 2007.³¹ I explored the effects of such legislation in my written testimony; in sum, it is an effort to facilitate the defense against asbestos claims by forcing asbestos victims to assist the defendants' efforts to shift their responsibility (and financial obligations) to other entities, thereby reducing the victims' recoveries.

ALEC's own materials acknowledge that this is "an effort to keep claimants from collecting damages from both sources [tort system defendants and trusts]."³² In other words, it is a law designed to enable corporations to avoid the consequences of their decision to knowingly (for much of the twentieth century) expose workers and their families to asbestos, a substance those corporations *knew* was deadly and would cause disease leading to death.

efforts of ALEC Legislative Members and ALEC corporate member, Crown Holdings, to secure passage of a bill to limit Crown's successor liability for asbestos-related lawsuits in Virginia, where Crown employed 300 workers, and noting that "[s]ince 2007, Crown has donated more than \$100,000 to 46 Virginia legislators or their political action committees.").

²⁹ Mike McIntire, *Conservative Nonprofit Acts as Stealth Business Lobbyist*, N.Y. Times (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html> ("ALEC has drawn scrutiny recently for promoting gun rights policies like the Stand Your Ground law at the center of the Trayvon Martin shooting case in Florida, as well as bills to weaken labor unions and tighten voter identification rules."); *see also* Krugman, *supra* note 26 ("[L]anguage virtually identical to Florida's ["Stand Your Ground"] law is featured in a template supplied to legislators in other states by the American Legislative Exchange Council, a corporate-backed organization."); Press Release, NRA Institute for Legislative Action, NRA Presents ALEC Model Legislation in Grapevine, Texas (Aug. 12, 2005), *available at* <http://www.nraila.org/legislation/state-legislation/2005/8/nra-presents-alec-model-legislation-in.aspx?s=&st=10507&ps=>; ALEC 2007 Legislative Scorecard, *available at* <http://web.archive.org/web/20081106040540/http://www.alec.org/am/pdf/2007alecscorecard.pdf> (listing the "Castle Doctrine Act" among the "Model Bill Highlights for 2007" and touting the passage of the legislation in Maine, North Dakota, and Tennessee).

³⁰ *See* Sullivan, *supra* note 22; Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, National Public Radio (Oct. 28, 2010), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>.

³¹ <http://www.alec.org/model-legislation/asbestos-claims-transparency-act/>; *see also* *Asbestos Claims Transparency Act Exposed*, Center for Media and Democracy: ALEC Exposed, http://www.alecexposed.org/w/images/c/c7/0E1-Asbestos_Claims_Transparency_Act_Exposed.pdf.

³² ALEC Model Bill Review at 3 (Nov. 2012), *available at* [http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/CJ%20MODEL%20BILL%20REVIEW%20\(NEED%20UPDATES\).PDF](http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/CJ%20MODEL%20BILL%20REVIEW%20(NEED%20UPDATES).PDF).

2. *Have many states passed such legislation?*

Ohio passed this legislation in December 2012.³³ Legislation based on ALEC's model bill has been introduced in a number of other state legislatures, including: Oklahoma;³⁴ Wisconsin;³⁵ Louisiana;³⁶ Texas;³⁷ Illinois;³⁸ Mississippi;³⁹ Pennsylvania;⁴⁰ and West Virginia (2011 session).⁴¹

3. *You mentioned in your written testimony that asbestos defendants and insurance companies, are simultaneously pushing for both federal and state asbestos trust reform legislation. Can you explain how the FACT Act would work with the proposed state bills that are currently being shopped in the states by asbestos companies and ALEC?*

This bill is part of a coordinated effort by asbestos defendants and their insurance companies to avoid or at least reduce their responsibility for the deaths and injuries of millions of Americans. In states where set-off regimes do not punish victims for first settling with trusts, the delays in trust payment will force dying plaintiffs, who are in desperate need of funds, to settle for lower amounts with solvent defendants. During my live testimony before the Subcommittee, I explained how delay matters to someone who is sick and dying from mesothelioma. They do not view the time value of money in the same way as a bank, insurer, or corporation. In an earlier case a test was run in which asbestos victims were asked whether they would prefer \$50 now and \$50 in three years, or \$70 immediately, and notwithstanding the substantial discount

³³ H. 380, 129th Gen. Ass'y (Ohio 2012), available at http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_380.

³⁴ Personal Injury Trust Fund Transparency Act, S. 404, 54th Leg. (Okla. 2013), available at http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20INT/SB/SB404%20INT.PDF.

³⁵ S. 13, 2013-2014 Leg. (Wisc. 2013), available at <http://docs.legis.wisconsin.gov/2013/related/proposals/sb13.pdf>; A.B. 19, 2013-2014 Leg. (Wisc. 2013), available at <http://docs.legis.wisconsin.gov/2013/related/proposals/ab19.pdf>.

³⁶ H. 481, 2013 Leg., Reg. Sess. (La. 2013), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=835094&n=HB481%20Original>.

³⁷ Act Relating to Settlement Credits in Asbestos and Silica Cases, H. 2545, 83d Leg. (Tex. 2013), available at <http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/HB02545I.pdf>.

³⁸ H. 153, 98th Gen. Ass'y (Ill. 2013), available at <http://www.ilga.gov/legislation/98/HB/PDF/09800HB0153lv.pdf>.

³⁹ H. 529, 2013 Leg., Reg. Sess. (Miss. 2013), available at <http://billstatus.ls.state.ms.us/documents/2013/pdf/HB/0500-0599/HB0529IN.pdf>; S. 2373, 2013 Leg., Reg. Sess. (Miss. 2013) available at <http://billstatus.ls.state.ms.us/documents/2013/pdf/SB/2300-2399/SB2373IN.pdf>.

⁴⁰ Fairness in Claims and Transparency Act, H. 1150, 2013 Leg. (Pa. 2013), available at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2013&sessInd=0&billBody=H&billTyp=B&illNbr=1150&pn=1388>.

⁴¹ Asbestos Claims Transparency Act, S. 43, 79th Leg., Reg. Sess. (W.V. 2011), available at http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=sb43%20intr.htm&yr=2011&sesstype=RS&i=43; Asbestos Claims Transparency Act, S. 56, 79th Leg., Reg. Sess. (W.V. 2011), available at http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=sb56%20intr.htm&yr=2011&sesstype=RS&i=56; Asbestos and Silica Compensation Fairness Act of 2011, H. 2686, 79th Leg., Reg. Sess. (W.V. 2011), available at http://www.legis.state.wv.us/Bill_Text_HTML/2011_SESSIONS/RS/Bills/hb2686%20intr.htm.

they overwhelmingly chose the immediate \$70 payment, to pay for their medical expenses and settle their affairs. Delay is a weapon for asbestos defendants.

In states where set-off regimes prevent victims from settling with trusts before resolving their tort system cases, the state laws drafted by ALEC, which would require trust resolutions before the trial can be calendared, will enable defendants to shift the shortfall created by the insolvency of the trusts' predecessors from the remaining culpable defendants to the innocent victims, and, as an added bonus resulting from delay at the trusts, further delay trials in the tort system. If a plaintiff is forced to settle first with a trust, then, in a jurisdiction that calculates set-offs against verdict not by the amount of any settlement but by the relative fault of the settling party (here a trust) the victim's recovery against the tort defendants will be reduced by the shortfall. Delaying trial until all trust claims are resolved will further put victims at the mercy of the culpable tort defendants, and delaying trust resolutions is a double whammy.

4. How is ALEC funded? Do asbestos defendants contribute to ALEC? Does Koch Industries, as owner of Georgia Pacific, an asbestos litigant, contribute to ALEC?

A 2011 report which reviewed ALEC's IRS filings indicates that almost 98% of ALEC's income comes from corporations, trade associations, and corporate foundations.⁴²

As I note above, ALEC's Private Sector Members pay significant sums to sit down at the table with its Legislative Members. Whereas legislators pay membership fees of \$50 per year,⁴³ private companies pay between \$7,000 and \$25,000, depending on the membership tier.⁴⁴ Buying into a more costly membership tier gives the corporation access to a greater number of ALEC meetings, policy summits, "VIP Events," and Board of Directors receptions.⁴⁵ And, in addition to paying substantial membership fees, some Private Sector Members pay separate fees to participate in issue-focused "Task Forces" where they draft model legislation.⁴⁶

Many of the Private Sector Members and other supporters are asbestos defendants. A strong funder of ALEC is the privately-held Koch Industries, the parent company of Georgia-

⁴² See Lisa Graves, *A CMD Special Report on ALEC's Funding and Spending*, Center for Media and Democracy, nn.9-13 & accompanying text (July 13, 2011), <http://www.prwatch.org/print/10887> (citing ALEC IRS Form 990s for 2007-2009).

⁴³ Legislative Membership: Join ALEC Online, <http://www.alec.org/membership/legislative-membership/join-alec-online/> (last visited Apr. 12, 2013); see also Laura Sullivan, *Shaping State Laws with Little Scrutiny*, National Public Radio (Oct. 29, 2010), <http://www.npr.org/templates/story/story.php?storyId=130891396>.

⁴⁴ See ALEC Private Sector Membership, <http://www.alec.org/membership/private-sector-membership> (last visited Apr. 12, 2013).

⁴⁵ See *Private Sector Membership Brochure*, ALEC, at 2, available at http://www.alec.org/wpcontent/uploads/2011_privateSector_brochure.pdf.

⁴⁶ See ALEC Private Sector Membership, *supra* note 44.

Pacific LLC,⁴⁷ as are the related Claude R. Lambe Foundation (controlled by Charles Koch and his family), and the Charles G. Koch Foundation, which together donated more than \$200,000 in 2009.⁴⁸ Georgia-Pacific has been a defendant in numerous asbestos lawsuits (in 2004, prior to being taken private by Koch Industries, it reported to the SEC that there were 59,700 pending claims against it, and it had paid more than \$200 million in asbestos claims).⁴⁹

Other large corporate asbestos defendants and their insurers supporting ALEC include: Exxon Mobile Corp., Dow Chemical Company (owner of Union Carbide), Caterpillar Inc., BNSF Railway, Travelers' Insurance, and Pfizer Inc.⁵⁰

Lobbying groups which support limiting the rights of asbestos victims also support ALEC financially. These include the Tort Reform Association, the American Insurance Association, and the U.S. Chamber of Commerce's Institute for Legal Reform.⁵¹

Finally, some of ALEC's other big supporters are tobacco, oil, and health insurance companies, which have pushed for legislation that would restrict the liability of tobacco companies,⁵² used ALEC to prevent action on climate change and distort science,⁵³ and tried to kill health care reform passed by Congress.⁵⁴

5. *Does this mean that defendants, who are large corporations with an army of experienced attorneys ready to litigate disputes, are writing the rules for the road?*

While I was not called as an expert on, and cannot speak with personal knowledge about the operation of state legislatures generally and corporate influence thereon, the text which became the Ohio Asbestos Claims Transparency Act was drafted by ALEC.⁵⁵ Given the

⁴⁷ <http://www.gp.com/newsroom/quickfacts.asp> (last visited Apr. 12, 2013).

⁴⁸ Graves, *supra* note 42, nn.14-15 & accompanying text.

⁴⁹ *Georgia-Pacific Hit With \$9 Million Asbestos Verdict*, Atlanta Bus. Chron. (Mar. 15, 2005), <http://www.bizjournals.com/atlanta/stories/2005/03/14/daily20.html>.

⁵⁰ See http://www.sourcewatch.org/index.php?title=ALEC_Corporations for a list of corporate funders of ALEC.

⁵¹ See *Civil Justice Task Force Meeting Agenda*, ALEC, 33-36, 38, 40 (June 30, 2011), available at http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/1-35-day_mailing_civil-final%20new%20orleans2.pdf.

⁵² *Memorandum re RJR Tobacco 1987-89 Strategic Plan*, Legacy Tobacco Documents Library, Bates Number 504987561-65, available at <http://legacy.library.ucsf.edu/tid/pgp35d00/pdf>; Bill Hogan, *A Big Business Agenda*, Defenders Magazine, Winter 2002.

⁵³ *Smoke, Mirrors & Hot Air*, Union of Concerned Scientists (Jan. 2007); *ExxonMobil's Continued Funding of Global Warming Denial Industry*, Greenpeace (May 2007).

⁵⁴ Lee Fang, *Blue Cross Blue Shield Lobbyists Quietly Helping Extreme Effort to Declare Health Reform Unconstitutional*, Think Progress (Dec. 5, 2009).

⁵⁵ http://www.alecexposed.org/w/images/c/c7/0E1-Asbestos_Claims_Transparency_Act_Exposed.pdf; compare http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_380.

evidence that ALEC is funded by large corporations, this certainly implies that asbestos defendants are successfully creating an environment which aids them in litigation.

In Ms. Abelman's testimony, she argues that defendants cannot be informed of the full extent of a claimant's exposure.

1. *Do federal or state rules of civil procedure prevent a defendant from gaining all relevant information about a claimant's exposure during discovery?*

No. As I explain above, defendants can inquire exhaustively into plaintiffs' work history, their knowledge of exposures to products, trust claims they have made, and, when and if it becomes appropriate, such as for molding a verdict, recoveries they have received from trusts.

2. *Are defendants and claimants on equal footing during discovery, or any other stage of litigation?*

In an ideal world, plaintiffs and defendants would be on equal footing. Defendants, however, have advantages throughout the litigation process: not only are they better-funded than plaintiffs, they have specific knowledge of the sites where their asbestos-containing products were used, any delay in litigation is to their advantage, and they have the knowledge and experience gained from twenty-five or more years of litigation against similarly-situated plaintiffs.

3. *Is there a policy basis for granting additional discovery to defendants, which are often multi-billion dollar corporations represented by experienced and successful law firms?*

No. Discovery should be fair to both parties. The adversarial system theoretically places both parties on equal footing (ignoring the greater resources and knowledge already available to defendants), and there is no national policy basis for favoring defendants by shifting their responsibilities to trusts, causing further damage to innocent victims and interfering with the operation of organizations set up to compensate those victims.

4. *Should the FACT Act contain additional measures to automatically provide the full extent of a defendant's liability to prospective and current claimants?*

The bill is irredeemably flawed and the most sensible course of action is for the Subcommittee to report the bill out unfavorably. However, should that not be an option, in order to make the best of a bad situation and achieve even-handed transparency, the Act should require any entity that has been sued for an asbestos-related personal injury to report the following

information, and it should include a private right of enforcement so that bureaucratic neglect will not prevent disclosure:

- all asbestos-related lawsuits brought against that entity;
- all jury verdicts if found liable for an asbestos-related injury;
- the amount of each settlement it makes for an asbestos-related injury, and the nature of the injury, and the place of exposure;
- every location it is aware of where its asbestos-containing products are located; and
- every entity to which it sold its asbestos-containing products.

5. *Are other witnesses here today affiliated with any institutions that would benefit from passage of the FACT Act?*

While it is inappropriate for me to comment on the affiliation of the witnesses, as a general matter, the institutions most likely to benefit from the FACT Act are asbestos defendants and their insurance companies, and, at least secondarily, the entities they employ in asbestos litigation (such as lawyers, consultants, and expert witnesses). Conversely, the victims and their families for whom I speak will be harmed by, and not benefit from, the Act.

Question from Subcommittee Member Suzan DelBene for Mr. Inselbuch

Mr. Inselbuch, you mentioned in your written testimony that asbestos defendants and insurance companies, are simultaneously pushing for both federal and state asbestos trust reform legislation. Can you explain how the FACT Act would work in conjunction with the proposed state bills that are currently being considered, or the Ohio legislation that you cited in your testimony?

This bill is part of a coordinated effort by asbestos defendants and their insurance companies to avoid or at least reduce their responsibility for the deaths and injuries of millions of Americans. In states where set-off regimes do not punish victims for first settling with trusts, the delays in trust payment will force dying plaintiffs, who are in desperate need of funds, to settle for lower amounts with solvent defendants. During my live testimony before the Subcommittee, I explained how delay matters to someone who is sick and dying from mesothelioma. They do not view the time value of money in the same way as a bank, insurer, or corporation. In an earlier case a test was run in which asbestos victims were asked whether they would prefer \$50 now and \$50 in three years, or \$70 immediately, and notwithstanding the substantial discount they overwhelmingly chose the immediate \$70 payment, to pay for their medical expenses and settle their affairs. Delay is a weapon for asbestos defendants.

In states where set-off regimes prevent victims from settling with trusts before resolving their tort system cases, the state laws drafted by ALEC, which would require trust resolutions

before the trial can be calendared, will enable defendants to shift the shortfall created by the insolvency of the trusts' predecessors from the remaining culpable defendants to the innocent victims, and, as an added bonus resulting from delay at the trusts, further delay trials in the tort system. If a plaintiff is forced to settle first with a trust, then, in a jurisdiction that calculates set-offs against verdict not by the amount of any settlement but by the relative fault of the settling party (here a trust) the victim's recovery against the tort defendants will be reduced by the shortfall. Delaying trial until all trust claims are resolved will further put victims at the mercy of the culpable tort defendants, and delaying trust resolutions is a double whammy.

Questions from Subcommittee Member Hakeem S. Jeffries for Mr. Inselbuch

Before voting on this Act in the Subcommittee, it would be helpful to receive answers from all the witnesses on the following items:

1. *Whether systemic fraud does actually exist in asbestos trust claims.*

Quite simply, charges of fraud on the asbestos trusts are not supported by facts. A study by the GAO, which was conducted at the behest of the former Chairman of this Committee,⁵⁶ found no fraud on the trusts, stating: "each trust's focus is to ensure that each claim meets the criteria defined in its Trust Distribution Procedures ("TDP"), meaning the claimant has met the requisite medical and exposure histories to the satisfaction of the trustees. Of the trusts officials that we interviewed that conducted audits, none indicated that these audits had identified cases of fraud."⁵⁷ The Judicial Conference's Subcommittee on Business Rules, reporting back to the Advisory Committee on Bankruptcy Rules on a proposal by the Chamber of Commerce to amend the Bankruptcy Rules to require so-called trust transparency, stated that "the comments [i.e., all the evidence and rhetoric presented by the Chamber in support of its proposal] have pointed only to anecdotal evidence of abuse."⁵⁸

2. *Whether the information that trusts require for settlements has been reevaluated within the last three years to determine whether it is adequate for sufficient transparency.*

The information that a trust requires for settlement is set forth in its TDP. Initially, the TDP is typically approved by a bankruptcy court when it confirms a plan of reorganization. The TDP is then available to the public. In addition to courts that have approved similar TDPs during

⁵⁶ U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (2011), available at <http://www.gao.gov/assets/590/585380.pdf> (hereinafter "GAO Report").

⁵⁷ *Id.* at 23.

⁵⁸ Memorandum from Subcomm. on Business Issues to Advisory Comm. on Bankruptcy Rules (Sept. 19, 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Bankruptcy/BK2011-09%20Addendum.pdf>.

the last three years,⁵⁹ as I note in my answer to the previous question, both the GAO and the Judicial Conference’s Subcommittee on Business Issues found no fraud.

As an aside, please note that the GAO reported that the Judicial Conference’s Rules Committee suggested that “quarterly reporting requirements would not necessarily achieve the purpose of ensuring the integrity of the trust payment system by rooting out improper claim payments, and acknowledged that one person seeking and receiving payments from several trusts does not itself reveal impropriety.”⁶⁰

3. *An estimate of the funds and resources that would be required by trusts to create quarterly reports.*

After the Subcommittee’s hearing on this bill, four substantial trusts – the Babcock & Wilcox Company Asbestos Personal Injury Trust, the Federal-Mogul Asbestos Personal Injury Trust, the Owens Corning/Fibreboard Asbestos Personal Injury Trust, and the United States Gypsum Asbestos Personal Injury Settlement Trust – submitted a supplemental letter on or about March 20, 2013 to the Subcommittee addressing the burden the Act would place on the trusts.⁶¹

The four trusts estimated that a trust like one of them receiving 10,000 claims per quarter and paying 5,000 of them over time would require experienced managers and claim reviewers to spend an aggregate of 20,000 hours per year on that trust’s compliance with the Act – the equivalent of ten new full-time employees.⁶² Contradicting Mr. Scarcella’s testimony before the Subcommittee, the four trusts explain that the data for “exposure history” and “basis for payment” required by the Act can not be collected using pre-set data or information from a claim form, but must be extracted from a review of the supporting documentation submitted by the claimant.⁶³

The quarterly reporting requirement alone would place this significant burden on the trusts. Moreover, the language requiring trusts to provide information on historical claims is so broad as to make the impact potentially vast and yet unquantifiable.⁶⁴

⁵⁹ See, e.g., Findings of Fact and Conclusions of Law and Order Pursuant to Sections 1129(a) and (b) of the Bankruptcy Code and Rule 3020 of the Federal Rules of Bankruptcy Procedure Confirming Debtors’ Second Amended Joint Chapter 11 Plan, *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. Mar. 29, 2011), ECF No. 9941; Order Confirming Debtor’s Joint Plan of Reorganization, *In re W.R. Grace Co.*, No. 11-199 (D. Del. June 11, 2012), ECF No. 218; Order Regarding Confirmation Amended Joint Plan of Reorganization in Respect of the Flintkote Company and Flintkote Mines Limited, *In re Flintkote Co.*, No. 04-11300 (Bankr. D. Del. Dec. 21, 2012), ECF No. 7254.

⁶⁰ GAO Report at 32-33.

⁶¹ See March 20, 2013 Campbell Letter.

⁶² *Id.* at 2.

⁶³ *Id.* at 1-2.

⁶⁴ *Id.* at 2-3.

4. *Information on the types of safeguards and best practices are already built into asbestos trusts to address concerns of fraud. Information on safeguards and best practices that are built into other types of trusts to address concerns of fraud.*

The asbestos personal injury trusts have a number of safeguards built in to ensure that only people entitled to compensation – who were actually injured by products for which a trust bears responsibility – are paid. Indeed, one of the examples of alleged misconduct in the March 11, 2013 *Wall Street Journal* article was discovered and is being prosecuted by the asbestos trusts to which the supposedly questionable claims were submitted.

First, the trusts are managed by independent trustees, a number of whom are former judges,⁶⁵ who are appointed by the bankruptcy court at the time that the plan of reorganization is confirmed. These trustees, like the trustees of any other trust, have a fiduciary duty dating back to the Middle Ages extending to all beneficiaries of the trust, and must treat all equally, both present and future. They are charged with the responsibility to ensure that funds are paid only to the legitimate beneficiaries of the trusts.

Second, the bankruptcy courts also appoint a future claimants representative (“FCR”) whose only role is to ensure the trust is managed so as to preserve funds to treat future claimants equivalently to present claimants. When the trust reconsiders its payment percentage (as it is required to do on a regular basis by its governing documents) the FCR will often retain a separate expert to ensure that the trust’s estimation of the funds needed for future claimants is sufficient.

Third, the trusts regularly perform audits of claims to ensure that the claims which are being paid are legitimate. As the GAO noted, 98 percent of the trusts it studied had a claims audit program; none of the trust officials interviewed had identified fraud.⁶⁶

I am not involved with non-asbestos trusts, and am unable to comment on their practices.

⁶⁵ These retired judges include; Hon. Jack Marionneaux (Louisiana) (Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust), Hon. Ken Kawaichi (California) (multiple trusts); Hon. Robert Parker (5th Cir.) (DII Industries, LLC Asbestos PI Trust); Hon. Edward “Chip” Robertson, Jr. (Missouri) (multiple trusts); Hon. Dean Traftalet (Illinois) (multiple trusts); Hon. Alfred Wolin (D.N.J.) (multiple trusts).

⁶⁶ See GAO Report at 22-23.