Testimony of

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Recent Developments in Assessing Future Asbestos Claims Under the FAIR Act
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Mr. Chairman and Members of the Committee, my name is Mark Lederer. Thank you for inviting me to share my views with you here today. I joined the Manville Personal Injury Settlement Trust (the "Manville Trust") in 1988 and served as its Treasurer until 1991, when I assumed my present office of Chief Financial Officer. Throughout my employment with the Manville Trust I have been responsible for asset/liability management, including the oversight and analysis of future claim projections prepared by outside experts. Since 1988, the Manville Trust has commissioned seven such projections, beginning in 1993 and the last concluded just last summer. As a Limited Fund, the reliability of such projections is essential if the Manville Trust is to succeed in its ongoing mission to treat all claimants equitably and enhance and preserve the trust estate.

On two occasions the Manville Trust has been required to dramatically reduce its payment percentage, first in 1990 upon being declared a Limited Fund less than two years after Consummation and again in 2001. On both occasions the triggering events were huge unexpected numbers of claims. To bring its assets and liabilities back into balance, on the first occasion the Manville Trust slashed its payment percentage from one hundred percent to ten percent and on the second occasion to five percent. As a consequence of these two events, the Manville Trust is extremely concerned about the reliability of projections of future claims. Unfortunately, there is no viable alternative to making such projections if current claimants or their heirs are to receive some compensation for their injuries within their lifetimes. Learning from the past, the Trust continues to employ such forecasts, but with great caution. Our long familiarity with the forecasting process has included frequent disappointments and engendered a certain degree of skepticism regarding all such forecasts.

My statement briefly covers the claim filing history of the Manville Trust, the past projections made of future claims and, where available, the variance between actual and projected claim filing, with some possible explanations for the differences. Given the widespread distribution of Manville's asbestos products, national projections of asbestos-related diseases by recognized experts, whether commissioned by the Manville Trust or another party, are of great interest to the Manville Trust. Therefore, insofar as they have ramifications for the Manville Trust and are within my area of expertise, I will also make some comments in regard to the recent projections

made by Bates White and the CBO. However, I have not analyzed and thus have no opinion regarding the viability or adequacy of the proposed national trust fund.

The experience of the Manville Trust has important ramifications for the entire asbestos claims industry because its claim filings are very representative of the overall claim filings against all defendants. Manville was a dominant producer of asbestos, with a roughly estimated 30% share of the overall asbestos market in the U.S. RAND Corporation has estimated that through 2002 there were approximately 730,000 claimants. Over the same time period, the Manville Trust has received claims from some 558,104 claimants or over 75% of the total claimants identified by Rand, as reported in Table 3. The claims database maintained by CRMC is one of the most complete and accurate asbestos claim databases currently in existence.

Manville Trust History

The Manville Trust was established in 1988 pursuant to the Manville Corporation's (Manville or JM) Second Amended and Restated Plan of Reorganization (the Plan). The Trust was formed to assume Manville's liabilities resulting from pending and potential litigation involving asbestos-related personal injury claims against Manville. Upon consummation of the Plan, the Trust assumed liability for existing and future asbestos disease claims. The Trust's funding is dedicated solely to the administration and settlement of asbestos disease claims.

When the Trust was established in 1988, it was hoped that there would be sufficient resources available to pay each and every Manville Trust claimant the full value of his or her claim. However, it soon became apparent that many more claims would be filed than had originally been anticipated. As a result of the additional filings, the Trust would run out of money long before all claims were paid if it tried to pay claimants the full value of their claims. To preclude that from happening, counsel for the Trust's beneficiaries worked with counsel for the Trust, under the supervision of the federal courts, to ensure that the limited resources available were distributed to all claimants fairly and equitably. Their efforts resulted in the Trust Distribution Process (TDP), the claim evaluation and payment plan approved by federal courts in 1995 as part of the Stipulation of Settlement that resolved the Findley v. Falise Class Action. The history of that legal action, which was filed in New York, is reported in the federal case reporters as In re Joint Eastern and Southern Dists. Asbestos Litigation, 878 F. Supp. 473 (E. & S.D.N.Y. 1995), aff'd in part, vacated and remanded on other grounds, 78 F.3d 764 (2d Cir. 1996). In September 2002, the 1995 TDP was amended ("the 2002 TDP"). In Re Joint E. & S. Dists. Asbestos Litigation, 237 F. Supp.2d 297 (E. & S.D.N.Y. 2002). The 1995 and 2002 TDPs are at available at the CRMC web site, www.claimsres.com, under the documents tab at the letter "T."

Because there are insufficient funds to pay each claimant the full value of their claim, no one whose claim is settled pursuant to the TDP receives the full value of their claim. Instead, the TDP is a pro rata payment plan, with each claimant receiving a pro rata payment as equivalent as possible to the pro rata share received by all other Trust Beneficiaries paid pursuant to the TDP. From implementation of the TDP until 2000, the pro rata share was ten percent (10%). In June 2001, in response to increased claim filings, the payment share was reduced to five percent (5%) on an interim basis, applied to claims filed after approximately October 2000. The pro rata share is currently under review by the Trust and counsel for its beneficiaries.

All of the approximately $2.2 billion funding for the Manville Trust was received at consummation in 1988. As of September 30, 2005, excluding withdrawn claims, the Manville Trust has received over 690,000 claims and resolved over 650,000 claims. From principal and income the Trust has made $3.4 billion in claim payments and has remaining assets of approximately $1.7 billion in diversified investments.

In December 1998, the Manville Trust formed a wholly-owned subsidiary corporation, the Claims Resolution Management Corporation (CRMC), to provide the Manville Trust with claim processing and settlement services. Prior to 1999, the Manville Trust provided its own claim processing and settlement services. CRMC also processes asbestos claims and performs services for other asbestos trusts.

Manville Trust Claims Filing Experience

As of September 30, 2005, excluding duplicate, withdrawn and incomplete claims, there were 691,786 claims filed with the Manville Trust. Of this number, 17,740 were filed by claimants whose exposure to Manville's asbestos products occurred outside the U.S. These foreign claims have been filed sporadically, with the most recent surge in 2003. Those claims came principally from Germany and England, and consisted of a far more serious disease mix compared to U.S. claims. Table 1 breaks down these claims by disease across filing years.

To increase the comparability of Manville Trust claims to claims that may be filed against the proposed national trust, my analysis for this statement includes tables and charts that exclude foreign claims and a very modest number of other claims missing exposure information, to arrive at a U.S. exposed filed claim population of 673,924 claims. In that population, 14,669 claims with U.S. exposure were received in the first 9 months of 2005. For some tables and charts, I have annualized this 2005 number to facilitate comparisons to full year projections, making the total estimated filed claim population through 2005 about 678,814 claims. See Table 2 and Chart 1.

Except for two spikes, the first in 1989 and the last in 2003, filing of cancer claims has been steady, with an upward trend. By contrast, the filing of non-cancer claims has been very erratic, with a pronounced upward trend until recently. For the cancer claims, the spike in 1989 probably is due to the filing of claims that were stayed during the six years (1982 to 1988) that Manville was in bankruptcy. In the following year, cancer claim filings dropped dramatically and then increased only modestly over time. The 2003 spike probably is due to a rush to file claims prior to an October deadline for filing claims pursuant to the 1995 TDP. The 2002 TDP tightened medical and exposure criteria for some diseases and changed the Scheduled Values for all claims. Under the 2002 TDP, the criteria for mesothelioma claims were unchanged and their Scheduled Values significantly increased from $200,000 to $350,000. The criteria for lung and other cancers were tightened and Scheduled Values changed in ways that encouraged the filing of all then identified claims on an accelerated basis to qualify them based on the less restrictive 1995 TDP rules. For example, the 1995 TDP assigned a Scheduled Value of $60,000 to lung cancer claims for which there was no evidence of underlying asbestos-related disease, but for which claimants could demonstrate: 1) fifteen years of heavy occupational exposure; 2) in employment regularly requiring work; 3) in the immediate area of visible asbestos dust. Under the 2002 TDP, those claims must be individually reviewed, a more intensive review process with a less certain outcome, an average award of $40,000 and an award cap of $50,000. Even lung cancer claims with underlying disease, for which the Scheduled Value was increased slightly from $90,000 to $95,000, face more rigorous exposure requirements under the 2002 TDP. Those requirements, referred to as Significant Occupation Exposure (SOE), are part of the legislation now under consideration.

These incentives for claimants to file some of their claims prior to the October 2003 deadline may have focused higher than usual law firm attention on all of their Manville claims in 2003. This may have been a factor contributing to higher than usual mesothelioma claim filings in 2003.

The Manville bankruptcy stay that led to the spike in cancer claims also explains the surge in non-cancer claim filings in 1989. The stay on all Trust payments (except those to exigent health and financial hardship claimants) from 1990 until 1995 (during a Class Action restructuring which brought the Trust's asset/liability ratio back into balance) contributed to the decline that followed. With approval of the 1995 TDP, based upon Scheduled Disease criteria and values, non-cancer claim filings again rose steeply, in part as a result of the stay, but also as a result of the streamlined claims processing system. The decline in 1997 and slower growth thereafter may have been due in part to the implementation of the Manville Trust's medical (x-ray) audit program and the rejection or downgrading of thousands of claims. Claimants' challenge of the x-ray audit program through litigation was resolved by a settlement in 1999, and non-cancer claim filings again rose dramatically. They plunged again coinciding with full implementation of the 2002 TDP's more restrictive criteria and, for most claims, less generous Scheduled Values. Using the date of earliest diagnosis, rather than filing, to track filing patterns over time smoothes out some of the peaks and valleys that appear in the data by filing year. See Chart 3.

All of the explanations just discussed have their origin in events directly related to the Manville Trust, but events external to the Trust, which impact asbestos claims against all defendants, can have an equal or greater impact. For example, while implementation of the 2002 TDP could alone have led to lower claim filings, factors such as uncertainty created by the pending Fair Act, the ongoing governmental investigations into claim screening practices, and the prolonged resolution of the many pending asbestos-related bankruptcies, also impact claim filings. Given the longevity and maturity of asbestos litigation, it is surprising the extent to which current events continue to influence fluctuating filing rates.

Cancer claims exhibit less variability because they are firmly grounded in a dose response biological process, something I will return to later, whereas non-cancer claims are far more variable, influenced more by socioeconomic and legal considerations. Medicine plays a part, but is part art and part science, leading to shifting definitions of what constitutes a non-cancer claim. As a result, the ratio of non-cancer claims for every cancer claim has also varied significantly over time. See Chart 2. Since no accepted dose response model exists to project non-cancer claims, this ratio, unstable as it is, forms the basis of most non-cancer projections, with predictable results.

Over time, in response to changing TDP requirements, the Manville Trust has changed the way it classifies diseases. Currently, the Manville Trust reports five summary disease groups, within which it maintains more detailed disease codes. Since the implementation of the 1995 TDP, each claim is first evaluated against the criteria in the TDP. Depending on whether the claim is processed pursuant to the 1995 or 2002 TDP, a disease Category (1995) or Level (2002) is assigned. Claims evaluated pursuant to the pre-TDP criteria are only assigned a summary disease. A summary description of the Categories and Levels appears in Table 4, with a complete description in the 1995 and 2002 TDPs. The current classification of claims by current detailed disease by summary disease appears in Table 5. The disease breakdown for 2002 TDP claims filed since 2004 appears in Table 6.

History of Manville Trust Claims Projections

The Manville Trust's track record for accurately projecting future claims is decidedly mixed. A summary of all seven Manville Trust claims projections is provided at Table 7. For a variety of reasons, the oldest forecasts, dating back to 1993 and earlier, are poor, even for cancer claims. Except for the historical perspective they provide, they shed little light on today's claim projection concerns. There may be many reasons for this, including the radically different

approach to processing, evaluating and paying claims since the implementation of the TDP in 1995. Over time, the Manville Trust has been able to improve the reliability of its forecasts, particularity for malignancy claims, but whether the newer forecasts will withstand the test of time remains a question. It was not until the latest forecast, prepared by Tillinghast in 2005, that the baseline total forecast over the life of the Manville Trust has declined from the all earlier projections.

A starting point for reviewing past Manville projections is a forecast prepared by Dr. Alexander Walker that was published in 1983, shortly after Manville entered bankruptcy. Dr. Walker's central projection was for 45,000 claims to be filed between 1982 and 2009, with a reasonable lower bound of 30,000 claims and a "very indefinite upper bound" of 120,000 claims. The Manville Bankruptcy Plan's Disclosure Statement, released in 1986, stated that 83,000 to 100,000 claims could be expected over the life of the Trust and it was anticipated that adequate assets would be available to pay all claims in full.

Within 12 months of the consummation of the Trust, over 100,000 claims were received and in 1990 it was judicially determined that the Trust was a Limited Fund, with insufficient assets to pay all present and projected future claims in full, as anticipated by the Plan. However, when you break Dr. Walker's estimate down by disease, his cancer estimates are far better than his overall estimate, and would have been better yet had he not excluded from his estimates claims from foreign claimants, women claimants and "other" (non-mesothelioma or lung cancer) cancer claimants, claims that probably didn't exist in any meaningful numbers at the time he made the projection. These sub-populations continue to pose a forecasting challenge.

In addition, Dr. Walker cautioned that the filing of claims on behalf of large numbers of persons with only minimal x-ray changes would dramatically increase the estimate to over 600,000 claims. This compares to 573,000 actual non-cancer filings during the period. If this observation had been given greater weight in arriving at the preferred range, the estimate would have been far closer to actual. The lesson here is not that hindsight is 20/20, but that seemingly extreme events do occur sometimes with surprising speed and frequency and are worthy of more consideration.

In 1993, in the context of the Findley v. Falise Class Action, the Manville Trust retained Resource Planning Corporation (RPC or ARPC) to prepare the first of what would be a series of future claims projections. While the Manville Trust made available to ARPC its claims database and there may have been some outline of the emerging 1995 TDP that was to come, there were no claims filed pursuant to such a distribution process upon which to build their projections. The 706 Panel convened by the courts to make their own projections of future claims were similarly limited. While the resulting preferred forecasts of each of the parties, approximately 302,000 claims for ARPC and 317,000 claims for the 706 Panel, were reasonably close, it was widely understood that the actual number of future claims could be substantially different. Unlike Dr. Walker's earlier estimates that ended in 2009, the projection by ARPC and the 706 Panel extended as far as 2049.

The Manville Trust again retained ARPC in 1995 to update its prior forecast and in 1997 to prepare a new bottoms-up projection. By 1997 the Manville Trust had some experience with filings under the 1995 TDP and that experience indicated that the prior estimate might be too low. However, filings pursuant to the 1995 TDP were still in their infancy and the filings trends were difficult to interpret because of the confounding influence of the prior stay on payments in the Class Action litigation and the early results of the Manville Trust's medical x-ray audit program (medical audit) that indicated that many claims would be downgraded in severity or

denied outright. The 1995 and 1997 forecasts were for 511,000 and 550,000 claims, respectively. Although the Manville Trust had acquired some experience with the 1995 TDP before preparing the 1997 projection, it occurred in the middle of the Manville Trust's medical (x-ray) audit program and may have been too conservative because of the early results of that program. The selection of the appropriate calibration period to gauge the likely number of non-malignancy claims to be filed for every malignancy claim is difficult.

In 2001 the Manville Trust again retained ARPC to prepare another future claim projection. At this time, the Manville trust had received many more claims than previously estimated, partly in response the cessation of its medical audit program, the new wave of claim screenings and the filings of claims based on non-traditional exposures, that is exposures not previously identified or given any or much weight in the existing asbestos literature, particularly the pioneering work of Dr. William Nicholson. Recognizing the growing importance of understanding the range of possible projections, ARPC was requested to prepare multiple projections and assign a relative, subjective weight as to the likelihood of each outcome. As a consequence, they provided 8 different projections, with a range of 748,000 to 2,685,000 claims and a weighted average of 1,422,000 claims between 2001 and 2049. However, the individual projection closest to the weighted average was assigned only a likelihood of about 17%. In other words, the weighted average projection was the most likely of those provided, but it was not particularly probable.

The last and current projection was prepared by Tillinghast Towers Perrin (Tillinghast) in 2005. A major difference between this projection and all previous projections was that is was based on the 2002, implemented in 2002. Therefore, the Manville Trust had some actual filing experience with the new process upon which Tillinghast could base its projections, including the impact of Significant Occupational Exposure (SOE) and other more stringent medical criteria. In order to better assess the impact of these new criteria and augment the data provided on the newly filed 2002 TDP claims, a sample was drawn from the more recent 1995 TDP claims to ascertain how they might have been evaluated if the new 2002 TDP had been in effect earlier. Based on the 2002 TDP claims filed, the above sample and other information available to Tillinghast, they projected a range of 600,000 to 1,500,000 claims with a weighted average of about 900,000 from 2005 to 2054. If the foreign exposed claimants are excluded, the range becomes 573,000 to 1,400,000 claims with a weighted average of 850,000 claims. In the U.S. exposed population, the cancer rate ranged from 9% to 15% with an average of 13%.

In general, projections of cancer claims have been more dependable, as one would expect given the historical filing patterns exhibited earlier and the nature of these claims. Measured from the 2001 and later projections, the forecasting error is quite low, although the period of comparison is only five years and the year to year variability is great. See Tables 10 and 11. While some progress has been made on non-cancer projections, the forecasting errors are still substantial, but opposite the direction previously seen. In other words, more recent forecasts have projected more non-cancer claims than have been received. Reasonable explanations for this shift include the 2002 TDP and uncertainties concerning the future definition and value of these claims in the broader universe of asbestos claims.

Forecast Variances

I have computed by disease the forecast variances (the number of claims forecast in any given period less the actual over the same period divided by the forecast) for the forecasts prepared in 1993, 1997 and 2001. With respect to cancer claims, actual filings are 77% above the 1993 forecast, 40% above the 1997 forecast and 8% below the 2001 forecast. Although the 2001 forecast is only 5 years old, it is encouraging that is much closer to actual filings.

With respect to non-cancer claims, actual filings are 163% above the 1993 forecast, 12% above the 1997 forecast and 22% below the 2001 forecast. In other words, the huge 1993 underestimation has been eliminated entirely in the 2001 forecast and the 2001 forecast on a cumulative basis now exceeds actual, principally due to a dramatic reduction in claim filings beginning in late 2003 coincident with the change over to the new 2002 TDP that raised the criteria and reduced the scheduled value for almost all non-cancer claims. However, the explanation for the decrease may also be the tremendous uncertainty surrounding the proposed Fair Act, the ongoing asbestos-related bankruptcies and government investigations into claims screening practices, which may have discouraged lawyers from pursuing such claims. As these matters are resolved, the longer-term trend in non-cancer filings hopefully will become clearer.
For a variety of reasons, projections of cancer claims, especially mesothelioma, but lung cancers as well, should be far more reliable. The absence of accepted bio-actuarial (dose response models) and the barely discernable nature of the overwhelming number of non-cancer diseases, many without any impairment, has made forecasting these claims more a function of socioeconomic and legal considerations than epidemiology and medicine.
Under these circumstances, forecasters often have extrapolated from the historic relationship of non-cancer to cancer claims to predict the future. Unfortunately, despite the passage of 23 years since Manville declared bankruptcy, the asbestos claim and litigation landscape continues to change, further complicating projections based on past filing patterns.
Applicability of the Manville Trust Experience
Projections can be no more reliable than the data upon which they are founded. Given the continuing debate regarding the extent of the exposed population and the degree of exposure necessary to trigger the onset of non-cancer diseases, the absence of a comprehensive claims database including the settlement history of multiple defendants is particularly troubling, especially given that the information exists today. If the problem of forecasting non-malignant claims is a socioeconomic and legal problem, then such information is critical to significantly improving upon past forecasts.
More importantly in the context of the proposed Fair Act, a good understanding of prior filing and settlement activity of lung cancer claims may be more illuminating (and achievable) than trying to resolve the questions of the exposed population and the rate of underlying asbestos markers within that population. There is a strong filing pattern discernable in the past Manville claims filing data that has led to reasonably reliable forecasts and therefore, absent radical external changes, reasonable confidence in future predictions.
Whether the treatment of lung cancers within the Fair Act is a significant departure from past practice is unclear. The medical and exposure criteria for such claims are more restrictive than the Manville Trust's criteria. Therefore, one would expect fewer, not more claims, based on that element alone. While the 1995 TDP Scheduled Value payments made by the Manville Trust for such claims, ranging from $6,000 to $9,000 (based on the ten percent (10%) pro rata payment percentage in place until June 2001), were substantially less than the scheduled compensation in the Fair Act, it is the expected total net recovery, which may be far higher, that drives claiming behavior. Unlike the existence of sufficient exposure and underlying non-cancer disease, this question should be definitively answerable from existing data.
Even if such filing and recovery information cannot be made available so as to strongly establish whether the Fair Act represents a radical departure from past patterns, the Manville Trust, and by extension all defendants, have been inundated with hundreds of thousands of lesser valued ($600 - $2,500) claims on behalf of unimpaired individuals. If a large population of more highly valued

eligible lung cancer claimants existed in the past, why didn't they file claims as well?
I do not know the extent to which the CBO or Bates White projections are based upon data which has not been made available to me or to those who have assisted the Manville Trust with future claim projections. Thus questions related to these projections are best addressed to those who prepared them.