

3 WEDNESDAY, FEBRUARY 3, 2016

4 United States Senate,
5 Committee on the Judiciary,
6 Washington, D.C.

7 The Committee met, pursuant to notice, at 10:01 a.m.,
8 in room SD-226, Dirksen Senate Office Building, Hon. Jeff
9 Flake, presiding.

10 Present: Senators Flake, Grassley, Hatch, Vitter,
11 Tillis, Durbin, Klobuchar, Franken, Coons, and Blumenthal.

12 OPENING STATEMENT OF HON. JEFF FLAKE, A U.S.

13 SENATOR FROM THE STATE OF ARIZONA

14 Senator Flake. This hearing will come to order. We
15 are here today to discuss the asbestos bankruptcy trusts and
16 what can be done to give them greater transparency. I would
17 like to thank Chairman Grassley for allowing us to hold this
18 hearing and to look into these issues.

19 By now everyone is aware of the health dangers posed by
20 asbestos. Decades of careless exposure have resulted in
21 untold hardship for so many Americans. Asbestos producers,
22 mining companies, shipyards, and others have rightly been
23 held accountable for the suffering and death caused by
24 asbestos. This accountability has, however, led to over 100
25 companies filing for bankruptcy.

1

2 Congress amended the Bankruptcy Code in response,
3 allowing these companies to establish trusts toward ensuring
4 that there is enough money to pay out for current and future
5 claims. Unfortunately, soon after its creation, fraud and
6 misrepresentation began to surround the asbestos trust
7 system. One commentator likened the scale of fraud in
8 asbestos litigation to that of the scandals of WorldCom,
9 Enron, and the vast Ponzi schemes that have recently
10 unfolded.

11 As a bankruptcy judge in North Carolina, Judge Hodges,
12 recently observed in the now well-known Garlock case, there
13 is a "startling pattern of misrepresentation" by plaintiffs
14 in tort cases against solvent defendants. In 15 randomly
15 selected cases where the Garlock court permitted full
16 discovery, the court found that exposure evidence had been
17 withheld in each of them. Judge Hodges' shocking findings
18 have rippled through the legal community and have given a
19 new urgency to the problem with the trusts. How widespread
20 is the problem Judge Hodges identified? The only way to be
21 sure is to bring transparency to the asbestos trust system.
22 As Justice Brandeis famously observed, sunlight is the best
23 of disinfectants.

24 To help bring more transparency to the asbestos trusts
25 and to ensure that the money will be there for people who

1 truly need it, I have introduced the FACT Act. The FACT Act
2 is a common-sense transparency law that will discourage
3 fraud and abuse in the asbestos compensation system while
4 protecting the sensitive information of claimants. It
5 specifically protects the privacy of claimants by shielding
6 their medical records and their full Social Security numbers
7 from disclosure. The FACT Act also operates under the
8 experienced supervision of the bankruptcy courts.
9 Bankruptcy judges will ensure that FACT Act disclosures
10 comply with the privacy provisions and protections that
11 already exist in the Bankruptcy Code.

12 I realize that some people think that these privacy
13 protections do not go far enough. I think we can all agree
14 that the protection of sensitive personal information is
15 critically important. I would like to say at the outset
16 that I welcome any and all recommendations. That is part of
17 the purpose of this hearing, to further improve the privacy
18 protections in the FACT Act while still providing long
19 overdue transparency to the trusts.

20 Today we have assembled what I believe is an excellent
21 panel to discuss the benefits and challenges of greater
22 transparency, and I look forward to hearing the testimony.

23 Senator Durbin will give an opening statement, and then
24 Senator Grassley will give an opening statement as well.

25 OPENING STATEMENT OF HON. RICHARD J. DURBIN A U.S.

1 SENATOR FROM THE STATE OF ILLINOIS

2 Senator Durbin. Thank you very much, Senator Flake.
3 And let me say at the outset that the Republican Senator
4 from Arizona and I have worked together on many, many
5 issues. I respect him very much. I count him as a friend,
6 and I look forward to continuing to work with him on a
7 bipartisan basis to deal with the myriad of issues which we
8 share an interest in. But this is one issue where we
9 disagree.

10 The FACT Act would penalize Americans who are sick and
11 dying from asbestos exposure, and many of them are veterans.
12 In fact, 30 percent of the claimants of asbestos exposure
13 are veterans. And it would be an unwarranted giveaway to
14 the companies that made the products that contained
15 asbestos, made a profit from those products, and did so
16 knowingly, knowing it was a dangerous and deadly fiber.

17 Let us start with some historical perspective.
18 Throughout much of the 20th century, asbestos was used in
19 thousands of industrial, household, and military products:
20 insulation, piping, roof shingles, brake pads, floor tiles--
21 on and on. The use of asbestos in America actually peaked
22 in 1973. All the time--all the time--it was known that
23 asbestos was dangerous.

24 According to the GAO, as early as 1900, asbestos was
25 recognized as a cause of occupational disease, namely,

1 asbestosis. One hundred years ago, it was the Prudential
2 Insurance Company which announced it was not going to
3 provide life insurance or sell life insurance to people who
4 worked around asbestos because their lives were compromised
5 by their exposure. That was 100 years ago.

6 By 1960, the connection between asbestos and
7 mesothelioma, a cancer of the lining of the lungs, chest, or
8 abdomen that typically causes death within 1 or 2 years, was
9 firmly established.

10 So did the companies that made the asbestos products
11 know about the dangers? Of course. What did they do? Did
12 they warn their customers? Did they warn their employees?
13 In most cases, not at all. And what happened? We are now
14 losing on average 10,000 Americans a year to asbestos-
15 related disease--10,000 who were exposed to asbestos at some
16 point in their lives, exposed to the products that these
17 companies made and turned a profit on and now are trying to
18 reduce and escape liability.

19 According to the GAO, at least 27 million Americans
20 were exposed to asbestos. They include: construction
21 workers, auto mechanics, pipefitters, shipyard workers,
22 members of the military, as well as family members. One of
23 my closest friends on Earth was diagnosed with mesothelioma
24 last year. She is the wife of a man who worked around
25 asbestos. She did the laundry, and she is the victim.

1 Asbestos is still present in the U.S. today. Dozens of
2 companies have banned asbestos, but it is not banned in the
3 United States. Companies continue to import hundreds of
4 tons of asbestos into our country every year. And workers,
5 first responders, and others continue to be exposed,
6 especially when buildings are renovated or dismantled.

7 As I mentioned earlier, 10,000 to 15,000 Americans die
8 each year from asbestos-related disease. People are still
9 getting sick. The number of asbestos victims and families
10 are represented here today. Sue Vento is here. Sue's
11 husband, Bruce, was a Member of the United States House of
12 Representatives representing the 4th District of Minnesota.
13 Bruce was my friend. Bruce's locker was next to mine in the
14 House gym. He was a man who was very concerned about health
15 and fitness. Unknowingly, he had been exposed, as Sue will
16 explain, to asbestos at an earlier part of his life, and it
17 took his life.

18 Linda Reinstein of Los Angeles, whose husband, Alan,
19 died of mesothelioma, Linda founded the nonprofit Asbestos
20 Disease Awareness Organization to stand up for asbestos
21 victims.

22 Senior Airman (Retired)--she is here--Shandi Speedy of
23 San Antonio, Texas. Airman Speedy, who served honorably in
24 the U.S. Air Force, has mesothelioma. She is 26 years old.

25 Would all those in the audience who suffer from

1 asbestos-related disease or who have lost a loved one,
2 please raise your hand? Thank you. Thank you for putting a
3 face on this issue.

4 Unfortunately, it is victims like these who are the
5 targets of this legislation that is before us. Under this
6 legislation, if an asbestos victim, like Airman Speedy,
7 wants to seek compensation from one of the 60 bankruptcy
8 trusts that were set up by asbestos companies to compensate
9 victims, she would be forced to compromise her own privacy.
10 Her name, her identifying information, the last four digits
11 of her Social Security, her asbestos exposure history, her
12 claim information, and any compensation she received would
13 be part of a public database.

14 This registry of sick Americans would be ripe for abuse
15 by cyber criminals and phishers, and the information in the
16 registry could be used to discriminate against the victims
17 when it comes to employment and loans. There is no need to
18 violate victims' privacy this way. If asbestos defendants--
19 that is, asbestos companies--want information from the
20 trusts about claimants, they can get it today through court-
21 ordered subpoenas and through discovery.

22 But the FACT Act, which is before us now, does not just
23 invade victims' privacy. It also allows asbestos companies
24 to demand any information they want from an asbestos trust
25 at any time about any trust claimant. This would allow

1 these defendant asbestos companies to drag out litigation
2 through endless information requests. Sadly, we know what
3 happens when these cases are dragged out. The victims do
4 not live to see the result.

5 And it would also slow down the ability of trusts to
6 process claims because the trusts would have to spend
7 thousands of hours complying with information requests.
8 Victims would die while waiting for relief.

9 Last month, the FACT Act was considered in the House.
10 The only thing bipartisan about the bill was the opposition.
11 Every Democrat and 16 Republicans voted against it. There
12 are a broad range of groups opposed to this bill, and many
13 are represented today. I want to especially thank the
14 veterans organizations that are here representing 30 percent
15 of the claimants who are veterans and who would be adversely
16 affected by this bill. They include the AmVets, Military
17 Officers Association of America, Military Order of the
18 Purple Heart, the Vietnam Veterans Association, the
19 Association of the United States Navy, the U.S. Army Warrant
20 Officers Association, and other groups, such as the
21 International Association of Fire Fighters, the AFL-CIO, the
22 National Education Association, the Asbestos Disease
23 Awareness Organization, and a myriad of other veterans,
24 consumer, labor, environmental, and privacy groups. I ask
25 consent to place in the record letters from these groups, as

1 well as letters from 44 individual asbestos victims and
2 family members.

3 Senator Flake. Without objection.

4 [The letters follow:]

5 / COMMITTEE INSERT

1 Senator Durbin. Let me make two more brief points.

2 First, the FACT Act would amend the Federal Bankruptcy
3 Code, but only to help asbestos companies. Why does the
4 other party oppose reforming the Bankruptcy Code when we
5 want to bring up issues such as:

6 Student college debt, which is also one aspect of the
7 Bankruptcy Code? We have had no luck moving that.

8 Underwater homeowners who were abused and ended up
9 being fleeced by many of the lenders.

10 People with crushing medical debt.

11 And, of course, Puerto Rico, which is in partial
12 default.

13 We cannot touch the Bankruptcy Code for any of these
14 groups. It is a sad reflection of our priorities that we
15 are going after asbestos victims to change the Bankruptcy
16 Code.

17 Also, this bill puts an onerous victim on victims in
18 trust--onerous burden on victims in trust in the name of
19 transparency. Where is the transparency when it comes to
20 the companies that manufactured the products with asbestos
21 that ended up in our homes, schools, and workplaces? This
22 bill lets those companies keep their settlements secret.
23 Many people who are asbestos victims were exposed decades
24 ago, racking their brains to figure out when was this
25 exposure. Now, these trusts know where the exposures took

1 place and, in fact, are paying some victims, but they are
2 keeping that information confidential--information which
3 would help a victim establish whether or not the trust or
4 the defendant company is responsible. So it is secrecy on
5 the side of the criminal defendant--or the civil defendants
6 in these cases, and it is transparency when it comes to the
7 victims.

8 I want to close by quoting a powerful letter the
9 Committee received this week from 17 veterans organizations,
10 including those I mentioned earlier, and here is what it
11 says: "Our veterans are disproportionately impacted by
12 asbestos disease, including the painful and almost always
13 fatal mesothelioma. In fact, while veterans make up about 8
14 percent of the U.S. population, they account for 30 percent
15 of those who are diagnosed with and die from this disease.
16 Forcing our veterans to publicize their work history,
17 medical conditions, part of their Social Security numbers,
18 and information about their children and families is an
19 offensive invasion of privacy to the men and women who have
20 honorably served, and it does nothing to assure their
21 adequate compensation or to prevent further exposure and
22 death. All of this to give big asbestos corporations an
23 advantage in litigation and shift the cost of discovery to
24 the asbestos compensation trust. S. 357 is a bill that its
25 supporters claim will help asbestos victims, but the reality

1 is that this bill only helps companies and manufacturers who
2 knowingly exposed this deadly fiber to our honorable men and
3 women who have made sacrifices for our country. The
4 veterans do not forget."

5 I want to thank all the victims and family members and
6 members of the veteran organizations who have come here
7 today. I look forward to the witness testimony.

8 Senator Flake. Thank you, Senator Durbin.

9 Senator Grassley?

10 OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR
11 FROM THE STATE OF IOWA

12 Chairman Grassley. Two reasons for thanking you for
13 holding this hearing. Number one, you are lead sponsor of
14 the bill. That is very appropriate. The second thing, you
15 give me flexibility to go back and forth between the Budget
16 Committee and this Committee. So I may miss your oral
17 testimony as I am up there questioning witnesses, but if I
18 can, I will come back and ask some questions. And if I do
19 not get back, then I will put the questions in the record.

20 Over 20 years ago, I was the lead Republican sponsor of
21 the Bankruptcy Reform Act of 1994. That legislation gave
22 courts the power to create asbestos bankruptcy trusts.

23 The purpose of these trusts was twofold: first, and
24 most importantly, to establish a system for victims of
25 asbestos exposure to obtain compensation from the companies

1 they worked for years earlier; second, the companies would
2 obtain some degree of certainty as they emerge from
3 bankruptcy and reenter the stream of commerce, creating tens
4 of thousands of jobs along the way.

5 Importantly, these trusts are designed to ensure that
6 all victims--both current and future--are ensured
7 compensation for injuries. If the available funds are being
8 depleted unfairly through fraud or abuse, it is going to be
9 future victims who will feel the impact. For that reason,
10 we have taken a close look at how these trusts are being
11 administered.

12 Since 1994, asbestos trusts have grown significantly.
13 By most estimates, there is now over \$18 billion in assets
14 in the trust system, with billions more on the way.

15 With this much money at stake, you would think there
16 would be independent oversight of some sort, but there is
17 not. The Department of Justice plays an extremely limited
18 role because after the bankruptcy plan is finalized, there
19 is no longer a live case for the U.S. Trustees to oversee.

20 Secondly, the courts as well have limited jurisdiction
21 after confirmation.

22 And, thirdly, of course, there is no Inspector General
23 or other watchdog to protect against fraud and abuse.

24 As a result, we have a situation where these trusts
25 have assets in excess of \$18 billion, but are without any

1 meaningful independent oversight. So it is not hard to
2 understand why we are witnessing reports of fraud and abuse
3 in the system.

4 While a lack of transparency makes it difficult to know
5 the extent of the problem, it is clear a problem exists.
6 Already referred to was the bankruptcy judge in North
7 Carolina who detailed, in a 65-page opinion, the lengths
8 that some lawyers have gone to hide the truth about asbestos
9 exposure and game the system. The judge in that case
10 believed it was only the tip of the iceberg, and Judge
11 Hodges wrote, in part:

12 "It appears certain that more extensive discovery would
13 show more extensive abuse. But that is not necessary,
14 because the startling pattern of misrepresentation that has
15 been shown is sufficiently persuasive."

16 Now, that seems to be pretty strong language,
17 particularly coming from a judge.

18 Likewise, the Wall Street Journal has written a series
19 of articles detailing instances of fraud, including in one
20 case where money was actually paid to a person who did not
21 exist. That money should have gone to a deserving and
22 eligible victim.

23 Again, while it is impossible to know how pervasive
24 these problems are, based on the reporting, they are not
25 limited to just occasional "errors," as some have claimed.

1 Fraud and abuse in the trusts does not impact the
2 company that established the trust, because after it is
3 finalized, that company is no longer involved, and any
4 outstanding litigation is "channeled" to the trust.

5 Fraud and abuse does not impact the lawyers who handle
6 these claims. They are going to collect their fees--some
7 reportedly as high as 40 percent--regardless of whether
8 funds are unfairly or improperly drained from the trusts.

9 But if funds in the trusts are, in fact, depleted, and
10 particularly with fraudulent claims, future victims are
11 going to pay the price, as compensation for illness is
12 reduced.

13 So it seems to me that we owe it to victims to gather
14 the facts and examine the integrity of the asbestos trust
15 system.

16 So I thank you, Senator Flake, and, more importantly,
17 thank you to the witnesses that have come far, and those of
18 you who did not come far, because I know you have to work
19 hard to put your testimony together.

20 Thank you.

21 Senator Flake. Thank you, Mr. Chairman.

22 It is the custom of this Committee to swear in those
23 who give testimony, so if you will stand. Do you affirm
24 that the testimony you are about to give before this
25 Committee will be the truth, the whole truth, and nothing

1 but the truth, so help you God?

2 Judge Ableman. I do.

3 Mr. Inselbuch. I do.

4 Mr. Behrens. I do.

5 Ms. Vento. I do.

6 Mr. McKenna. I do.

7 Senator Flake. Let the record indicate that all
8 answered in the affirmative.

9 Senator Klobuchar, you wanted to introduce one of the
10 witnesses.

11 Senator Klobuchar. Yes, Senator Franken and I are both
12 going to say a few words about Susan Vento.

13 We are so honored to have her here today. Former
14 Congressman Bruce Vento was her husband, and we all loved
15 Bruce. He represented the St. Paul area. They met when
16 they were both public school teachers, and after 24 years in
17 Congress, Bruce was diagnosed with mesothelioma, and despite
18 treatment at Mayo Clinic, we lost him in the year 2000.

19 What has been amazing about Susan is she has continued
20 his fight. He fought, as Senator Durbin knows, having
21 served with him in the House, for so many things--our parks,
22 the environment, and workers--and she is continuing that
23 fight. She has even authored a book, "100 Questions &
24 Answers about Mesothelioma." And she is on the board of the
25 foundation, and she continues to work on this issue. So it

1 means a lot for us and our State to have her here today.

2 Thank you.

3 Senator Franken. I just would like to thank Sue for
4 coming from St. Paul, and Bruce was an amazing Member, and
5 he fought for the homeless in a huge way, and thanks for
6 carrying on his legacy. I want to thank you for coming, and
7 I want to thank all the family members who have traveled
8 here today for this hearing.

9 Thank you, Mr. Chairman.

10 Senator Flake. Thank you both.

11 We will go ahead and introduce all of the witnesses
12 together and then listen to your testimony--oh, Senator
13 Coons.

14 Senator Coons. If you do not mind, I--

15 Senator Flake. Please do.

16 Senator Coons. --am happy to take the courtesy of
17 introducing not just a fellow member of the Delaware bar but
18 a neighbor of mine. Some witnesses have come from far,
19 others from near, and Judge Ableman, who I believe will be
20 our first testifying member of the panel today, is currently
21 special counsel in the product liability practice of
22 McCarter & English, located in my hometown of Wilmington.
23 Before joining that firm in 2013, she spent 29 years as a
24 State trial judge, first on the Delaware family court and
25 later as a judge in the Superior Court of Delaware, and in

1 the Superior Court presided over an asbestos litigation
2 docket with over 500 cases involving litigants from around
3 the world. She before that spent 4 years as an AUSA for the
4 District of Delaware, the first woman to hold that position,
5 received the Chief Justice's Award for Outstanding Judicial
6 Service, and spent decades also working on child protection
7 and contributing to the Child Protection Accountability
8 Commission. She was an adjunct professor at Villanova
9 School of Law and, as I mentioned, a member of the Delaware
10 Bar Association and the National Association of Women
11 Judges. She received her B.A. with distinction from Simmons
12 College, my grandmother's alma mater, and her J.D. from the
13 Emory University School of Law, where she was notes and
14 comments editor of the Law Journal. Welcome, Judge Ableman.

15 Thank you, Senator.

16 Senator Flake. Well, thank you, Senator Coons.

17 I will go ahead and introduce the others, and then we
18 will begin. You said everything I was going to say about
19 Judge Ableman, so I will go on.

20 Mr. Elihu Inselbuch--and I probably butchered that
21 name, I am sorry about that--is a member of the law firm of
22 Caplin & Drysdale, a graduate of Princeton University,
23 Columbia Law School, and NYU Law School. His practice
24 focuses on complex litigation, including asbestos creditors'
25 rights litigation. He has been recognized for his extensive

1 experience in commercial and securities fraud litigation.
2 In 2013, Chambers USA recognized him as a senior statesman
3 for his outstanding work in the field of bankruptcy and
4 restructuring.

5 Mr. Mark Behrens, a partner in the firm of Shook, Hardy
6 & Bacon, in Washington, D.C., is a graduate of Vanderbilt
7 Law School, currently co-chair of the firm's Public Policy
8 Practice Group, nationally recognized expert in litigation
9 reform. Mr. Behrens is a member of the American Law
10 Institute and has published 50 scholarly articles in venues
11 from the Harvard Journal on Legislation to the Texas Review
12 of Law & Politics.

13 As mentioned, Ms. Vento comes to us from St. Paul,
14 Minnesota, a graduate of the College of St. Benedict. She
15 taught first and third grade from 1976 through 1983 and
16 subsequently worked as an advocate for K-12 teachers,
17 employees, and faculty for the Minnesota Education
18 Association. Thank you for being here.

19 And the Honorable Rob McKenna is a partner in the law
20 firm of Orrick, Herrington & Sutcliffe in Seattle, where he
21 is a member of the firm's Cybersecurity and Data Privacy
22 Group. Before returning to private practice, Mr. McKenna
23 was a two-term Attorney General for the State of Washington,
24 where he became a national leader in preventing online
25 fraud. A graduate of the University of Chicago Law School,

1 in 2011 he was awarded the National Association of Attorneys
2 General Kelley-Wyman Award.

3 All of the witnesses' statements will be entered into
4 the record in their entirety. I would ask each of the
5 witnesses to summarize your testimony in about 5 minutes or
6 less.

7 Thank you for being here, Judge Ableman. Will you
8 begin?

1 STATEMENT OF THE HONORABLE PEGGY L. ABLEMAN,
2 SENIOR COUNSEL, MCCARTER & ENGLISH LLP,
3 WILMINGTON, DELAWARE

4 Judge Ableman. Thank you. Senator Flake, I appreciate
5 the opportunity to address this Committee today.

6 As Senator Coons just mentioned, before I retired from
7 the bench 3 years ago, I was a State court trial judge in
8 Delaware for almost 30 years. In that capacity, I was
9 solely responsible for the statewide asbestos docket, which
10 consisted of approximately 500 to 700 cases.

11 I had an experience that deeply troubled me and opened
12 my eyes to the need for greater transparency between the two
13 compensation systems. You see, I have seen the lack of
14 transparency played out in my own courtroom where I
15 personally believed that I possessed all the power necessary
16 to ensure a fair and just result in every case over which I
17 presided. I was wrong. Even with standing judicial orders
18 and rules requiring disclosure, the problem persists.

19 The case that I will briefly describe precipitated my
20 post-retirement interest in advocating for reform of the
21 current system. And as I have come to learn over the past
22 few years, it was not an isolated or unique situation. It
23 is a national problem that threatens the very integrity and
24 fairness of our court proceedings.

25 The case to which I refer was called Montgomery v.

1 Chesterton, but by the time of trial, all but one defendant,
2 Foster Wheeler, had settled. The original plaintiff in the
3 case, Mrs. Montgomery, was diagnosed in April of 2009 with
4 pleural mesothelioma. The suit named 22 defendants and
5 alleged that June's mesothelioma was caused by exposure to
6 their products.

7 At no time did plaintiffs identify the products of any
8 of the 20 entities to whom bankruptcy trust claims had been
9 submitted as sources of their exposure. It was not until
10 the day before trial that those were disclosed. It caused
11 me to have to cancel the trial, and ultimately the case was
12 dismissed.

13 In essence, the representations in that case to the
14 bankruptcy trust had painted a much broader picture of
15 exposure to asbestos than plaintiff or her attorneys had
16 acknowledged during the entire course of the litigation in
17 Delaware.

18 Plaintiff had been poised to try the case before a jury
19 as though Foster Wheeler had sole, or at least predominant,
20 responsibility for Mrs. Montgomery's exposure and disease.
21 This is important because the crux of the Montgomery case,
22 as it is in all asbestos litigation today, is a
23 determination of who had responsibility for the plaintiff's
24 exposure and to what extent. When 20 manufacturers of
25 asbestos are removed from the equation, an honest and fair

1 allocation of fault simply cannot occur.

2 Three years ago, I appeared before the Committee on the
3 Judiciary of the House of Representatives in support of this
4 same FACT Act. When I related the circumstances of the
5 Montgomery case, I was faced with vehement opposition from
6 representatives of the plaintiffs' bar, insisting that there
7 was not a shred of evidence of fraud.

8 In the intervening period since I last testified,
9 extensive evidence has surfaced that demonstrates just how
10 widespread and systemic these claiming abuses have become.
11 We now have additional proof and many examples demonstrating
12 that the Montgomery case was not an isolated or rare
13 circumstance.

14 To be sure, as you indicated, a Federal bankruptcy
15 judge in North Carolina made national headlines 2 years ago
16 after he wrote an exhaustive opinion in the bankruptcy case
17 involving Garlock Technologies. The court in that case
18 concluded that the practice of withholding exposure evidence
19 was sufficiently widespread that Garlock's prior settlements
20 of mesothelioma claims in the tort system were infected by
21 the manipulation of exposure evidence by plaintiffs and
22 their lawyers.

23 Unfortunately, the revelations of abuse in the Garlock
24 case were just the tip of the iceberg. In July 2014, the
25 court granted access to the data in the Garlock bankruptcy

1 case. The information that was made public comprises the
2 most robust and extensive set of asbestos claims data ever
3 assembled, and it was this database that played a crucial
4 role in Garlock's ability to prove and quantify the systemic
5 suppression of vital exposure evidence.

6 We now have additional proof that evidence of
7 manipulation exists well beyond Garlock's experience. The
8 recent article that I co-authored with Bates White Economic
9 Consulting group establishes the same systemic suppression
10 of evidence against Crane Co., who was a solvent company
11 still subject to suit in the tort system.

12 The asbestos litigation landscape has changed
13 dramatically since I testified 3 years ago, and we should
14 now be asking ourselves whether our legal system should
15 continue this tolerance for fraud. In my opinion, we can no
16 longer turn a blind eye to this ongoing assault to the
17 integrity and fairness of our legal processes.

18 When the claims filings are delayed with the express
19 purpose of deliberately concealing evidence of exposure to
20 other products, the outcome is unfair to the remaining
21 solvent defendants in the case as well as to those
22 defendants who have settled.

23 When I first became a member of the judiciary in
24 Delaware, I truly believed that our system was so superior
25 that our procedures were able to ferret out fraud and

1 deceit. I retired from the bench almost 30 years later with
2 the sinking feeling that, at least in asbestos litigation,
3 the civil justice system in our country is facing a real
4 crisis. For too long our courts have been manipulated by
5 the withholding of vital evidence from judges and from
6 juries.

7 I am a passionate supporter of this legislation because
8 I am convinced that it will help to restore integrity to
9 asbestos tort litigation. And from my perspective as a
10 former State court trial judge, the very foundation of our
11 judicial process is at great risk when we continue to
12 tolerate the withholding of information that is critical to
13 the ultimately goal of all litigation, that is, a search
14 for, and discovery of, the truth.

15 Thank you.

16 [The prepared statement of Judge Ableman follows:]

1 Senator Flake. Thank you.

2 Mr. Inselbuch.

1 STATEMENT OF ELIHU INSELBUCH, MEMBER, CAPLIN &
2 DRYSDALE, CHARTERED, NEW YORK, NEW YORK

3 Mr. Inselbuch. Thank you, Mr. Chairman. I am a member
4 of the firm of Caplin & Drysdale, and much of my work over
5 the last 30 years has involved representing victims in
6 asbestos bankruptcy proceedings.

7 Asbestos disease is the longest-running public health
8 epidemic in our country's history. For nearly a century,
9 corporations hid the dangers of asbestos, lied about their
10 knowledge of those dangers, and lobbied to make it harder
11 for victims and their families to recover for their
12 injuries. The FACT Act is their latest attempt.

13 The only beneficiaries of this bill are the same
14 companies who for decades have been held liable for exposing
15 unknowing workers to their deadly products. Had these
16 companies really believed in transparency and
17 contemporaneously shared the information they knew about the
18 dangers of asbestos exposure, thousands of lives would have
19 been saved.

20 Now these same companies, who, in effect, murdered
21 their employees for decades, would have this Committee
22 believe that there is fraud being committed by their own
23 victims. Nothing could be further from the truth.

24 First, let us clear the air about the Garlock
25 estimation opinion, something I know about since I and my

1 firm represent the victims committee in that case.

2 Garlock is a former asbestos gasket manufacturer that
3 is reorganizing under the Bankruptcy Code. The primary
4 issue in the case, as in all asbestos bankruptcies, is how
5 much money Garlock should pay into a trust to compensate its
6 victims of asbestos disease. Unsurprisingly, Garlock would
7 like to pay less than the amount the victims'
8 representatives believe is fair.

9 This is not the forum to debate whether the estimation
10 opinion was wrongly decided. But the Committee should note
11 carefully that on its face, the underlying premise of the
12 Garlock opinion contradicts what the proponents of this
13 legislation assert is its very purpose: to root out and
14 prevent fraudulent trust claim filing. The Garlock judge
15 was contrasting tort system filings with trust filings, and
16 his decision was based on the assumption that all trust
17 claims are valid and provable. Clearly, the trust filings
18 cannot be simultaneously valid and provable but still
19 fraudulent. The Garlock opinion does not support this
20 legislative effort.

21 Not only is there no evidence of any patent or
22 fraudulent filing at the trusts, there are also no
23 incentives for the trusts to pay claims that are not valid.
24 The trustees, many of whom are retired Federal and State
25 court judges and court-appointed future claimants'

1 representatives, have a fiduciary duty to ensure that only
2 valid claims are paid. As Senator Grassley noted, payment
3 of fraudulent claims would dilute the funds available to
4 legitimate present and future claimants. Nonetheless, no
5 bankruptcy trust trustee or future claimants' representative
6 supports this bill.

7 When earlier versions of this legislation were
8 proposed, the need given was to prevent so-called double
9 dipping, meant to convey that plaintiffs were covered more
10 than once for their injuries. A victim who files claims in
11 the State tort system while also filing claims against
12 trusts is not acting inappropriately. Rather, he or she is
13 pursuing the only route through which he or she has the
14 opportunity to be fairly compensated.

15 Most victims were exposed to asbestos-containing
16 products from multiple defendants. In settlement, each tort
17 system defendant seeks to pay only its own share of the harm
18 caused to a victim. Similarly, each trust only pays its
19 respective defendant's share.

20 The amount that the victim receives in total is the sum
21 of the separate settlement shares. There is no table or
22 book to look at that defines what the plaintiff is entitled
23 to and against which to compare the sum of his settlements.
24 Only in the very rare cases that go to trial, verdict, and
25 payment has the jury fixed the settlement entitlement, and

1 the asbestos defendants offer no evidence that anything more
2 was ever paid in those cases.

3 Finally, the proponents forcefully assert that they
4 need this legislation to obtain information that they cannot
5 currently obtain in the State tort system. Defendants have
6 access to the information they may need through State
7 discovery rules which routinely require victims to produce
8 copies of any trust claims they have filed. And through
9 decades of litigation discovery, the defendants have
10 libraries of the proof of product exposure at sites
11 throughout the country.

12 But any so-called transparency is a one-way street for
13 asbestos corporations. Nothing in the Act would require
14 asbestos defendants to provide transparency for all the
15 settlements that they demand be held confidential. They do
16 not want asbestos victims to know where their toxic products
17 were and what they are paying to other victims to resolve
18 their liability. This bill is a solution without a problem,
19 other than the ones it creates: substantial costs to the
20 trusts and violation of the privacy of thousands of your
21 constituents.

22 The bill's sponsors believe by trumping long-developed
23 State law and obtaining information on hundreds of thousands
24 of their victims, asbestos corporations will be able to pay
25 less for the injuries and deaths they have caused. You

1 should not help them.

2 Thank you.

3 [The prepared statement of Mr. Inselbuch follows:]

1 Senator Flake. Thank you.

2 Mr. Behrens.

1 STATEMENT OF MARK BEHRENS, PARTNER, SHOOK, HARDY &
2 BACON LLP, WASHINGTON, D.C.

3 Mr. Behrens. Thank you, Senator, members of the
4 Committee, for allowing me to testify today on the need for
5 transparency in the asbestos trusts.

6 I spend a substantial amount of my time studying and
7 writing about asbestos litigation. My clients include
8 business associations, civil justice associations,
9 defendants in asbestos cases, and insurers. And it is an
10 honor to appear before you today.

11 When I talk about asbestos litigation, one of the first
12 reactions I get is, "Wasn't that a problem of the 1970s or
13 1980s?" People seem to think that the litigation went away.
14 And it is remarkable when I say, "No. You see the ads on TV
15 that run every 5 minutes? This is still a very active
16 litigation."

17 There was a recent study that reported that
18 mesothelioma claim filings have remained near peak levels
19 since the year 2000. Typical projections based on
20 epidemiology assume that mesothelioma claims arising from
21 occupational exposure to asbestos will continue for the next
22 35 to 50 years. This is an ongoing problem that Congress
23 needs to address.

24 For years, the asbestos litigation focused on companies
25 that made thermal insulation. Senator Durbin talked about

1 some of those companies. When Mr. Inselbuch mentioned
2 companies that for decades hid information, did some bad
3 things, those companies went bankrupt. There was a wave of
4 bankruptcy between 1999 and 2002, and the companies that did
5 the things he discussed, they went bankrupt. And Congress
6 stepped in and passed 524(g) to provide a mechanism so
7 trusts could set up to compensate people injured by
8 exposures to their products. So far, over 100 companies
9 have been bankrupted in the asbestos litigation.

10 Now, because we have two completely different sources
11 of recovery, there is the trust system, which GAO says has
12 60 different trusts and over \$30 billion in it, and then
13 there is the tort system, and claimants today are able to go
14 to both paths to seek recovery.

15 In the Garlock case, which the Senator is familiar
16 with, being from North Carolina--and I know this was
17 discussed a lot in the legislature there--a typical
18 mesothelioma plaintiff's total recovery was estimated to be
19 between \$1 million and \$1.5 million, including an average of
20 over \$500,000 in the tort system and about \$600,000 from 22
21 different trusts. So plaintiffs are, according to that
22 case, receiving about equal from each side.

23 Now, so what happens today is the plaintiffs, by
24 delaying the filing of their trust claims, before a personal
25 injury case is resolved, plaintiffs are able to suppress

1 information of trust-related exposures that could be used to
2 apportion fault to the bankrupt company in the tort case.
3 The pervasiveness of this tactic was recently exposed in the
4 Garlock bankruptcy, and I will give you one example. There
5 are many by the judge there.

6 The judge writes about in one case in California that
7 Garlock settled for \$450,000. A former sailor denied that
8 he ever saw anyone installing or removing asbestos pipe on
9 his ship. After he settled with garlock, however, the
10 plaintiff's lawyers filed 11 trust claims on his behalf, 7
11 of which were based on declarations that the plaintiff
12 personally removed and replaced insulation and identified by
13 name the insulation products to which he was exposed.

14 The judge in Garlock bluntly characterized Garlock's
15 tort litigation as infected by a "startling pattern of
16 misrepresentation" that unfairly inflated plaintiffs'
17 recoveries against Garlock following this bankruptcy surge
18 that occurred in the early 2000s.

19 Since that opinion in January of 2014, a mountain of
20 evidence has come out that this is a routine tactic in the
21 asbestos litigation. Judge Ableman co-authored a study that
22 she mentioned that came out in November of 2015 where
23 defendant Crane Co. looked at the Garlock database to
24 determine its history. The study looked at over 1,800
25 mesothelioma lawsuits, and the data revealed that, on

1 average, plaintiffs filed 18 trust forms in cases where
2 Crane was co-defendant with Garlock, and on 80 percent of
3 those occasions, the trust claims and the related exposures
4 were not disclosed in the tort cases.

5 In December 2015, the U.S. Chamber ILR reported on
6 additional examples that showed several more instances of
7 inconsistent claiming behavior by plaintiffs between what
8 they said in the tort system and what they said in the trust
9 claims.

10 Trust claim manipulation and abuse is not victimless.
11 When plaintiffs' lawyers game the legal system to produce
12 inflated tort recoveries, that not only harms the defendant
13 companies but depletes assets needed to compensate future
14 victims. With over 100 companies bankrupt, we know that
15 bankruptcy is a constant threat in this litigation, and
16 driving companies into bankruptcy is only going to hurt the
17 future victims.

18 Similarly, when trusts receive false claims, that
19 depletes assets for future claimants. Many trusts have
20 already had to reduce payment percentages to claimants. The
21 FACT Act, which recently passed out of the House, provides a
22 common-sense Federal solution to this problem.

23 I appreciate the opportunity to appear before the
24 Committee today, and I am happy to answer any questions.
25 Thank you very much.

1 [The prepared statement of Mr. Behrens follows:]

1 Senator Flake. Thank you.

2 Ms. Vento.

1 STATEMENT OF SUSAN VENTO, ST. PAUL, MINNESOTA

2 Ms. Vento. Thank you, Chairman Flake and Senator
3 Durbin, for the opportunity--sorry. You can tell I am a
4 beginner. Thank you, Chairman Flake and Senator Durbin, for
5 the opportunity to be here today. It is an especially
6 important thrill for me to be here with both my Senators
7 present.

8 My name is Susan Vento. My husband, the late
9 Congressman Bruce Vento, represented Minnesota's Fourth
10 Congressional District for almost 24 years.

11 Mesothelioma is an aggressive cancer caused by asbestos
12 exposure. Bruce was exposed while working his way through
13 college to become a science teacher. He died 3 days after
14 his 60th birthday in October 2000, just 8-1/2 months after
15 his diagnosis. Since his death, I have met and worked with
16 patients and family members from across the country to fight
17 for a ban on asbestos and to protect the rights of people
18 whose lives have been forever affected by asbestos,
19 including the effort to stop the legislation you are
20 considering here today. This bill would obstruct justice
21 for victims dying from asbestos diseases while giving a leg
22 up to the very corporations that knowingly exposed people to
23 asbestos and caused their cruel illness and deaths.

24 As you consider this legislation, it is important to
25 understand that it is being pursued by asbestos companies,

1 not by patients and families. We are against it.

2 The human damage done by asbestos continues to repeat
3 itself every hour of every day. Diseases caused by asbestos
4 exposure kill thousands of people every year. Statistics
5 tell just part of the story.

6 When she was a little girl, Shandi Speedy of San
7 Antonio, Texas, would spend time on the Air Force base where
8 her father, Kevin, a member of the Air Force, would work on
9 jet engines. Like her Dad, Shandi joined the Air Force.
10 Shandi was recently medically retired from the Air Force
11 because she has mesothelioma. Shandi is 26 years old. Her
12 Dad had no idea he was exposing his family to lethal
13 asbestos. Shandi is here today.

14 Heather Von St. James's daughter was 3-1/2 months old
15 when her mother was diagnosed with mesothelioma. Like
16 Shandi, Heather's exposure occurred as a child and from
17 asbestos her father unknowingly brought home. This
18 Saturday, Heather and her family and friends will celebrate
19 the 10th anniversary of the removal of her lung at their
20 home in Roseville, Minnesota.

21 Bill Weber from Philadelphia was diagnosed with
22 mesothelioma at the age of 56. He was exposed to asbestos
23 as a teenager. Bill has been battling this horrid disease
24 for nearly 5 years. Bill's mother, Jeanne, from Medina,
25 Ohio, was also exposed and contracted mesothelioma. She

1 passed away just a few weeks ago.

2 Each patient and family member has a powerful story
3 about their battle. Here today are Shandi Speedy, Bob
4 Brittingham, Raya Bednarchek, Andy Goldsmith, Michele
5 Micklik, Kim Hoover, Carrie McNamara, Mary Elizabeth
6 Esposito, Missie Bowles, and Linda Reinstein, who, along
7 with her late husband, Alan, founded the Asbestos Disease
8 Awareness Organization.

9 Veterans are especially affected, as Senator Durbin
10 noted. Thirty percent of mesothelioma patients are
11 veterans, men and women who have served our country bravely,
12 even though veterans make up only 8 percent of our Nation's
13 population.

14 This bill is premised on a myth that fraud is a problem
15 in asbestos litigation and that transparency must be
16 required of those suffering from asbestos diseases and their
17 families. It is offensive and insulting to have it
18 suggested that decent, hardworking Americans are committing
19 fraud.

20 This so-called transparency would require us to divulge
21 highly personal information on public websites, including
22 portions of our Social Security numbers and medical
23 information. This is a gross violation of privacy that will
24 dissuade many patients and families from filing claims with
25 the trusts, even as they desperately need money to pay for

1 medical care and lost wages.

2 The second part of the FACT Act would allow any
3 corporate defendant in any asbestos lawsuit to demand
4 personal information about any asbestos claimant from any
5 asbestos trust fund at any time. Can you assure us that our
6 personal information will be protected under this provision
7 of the law?

8 If the companies that are pushing this bill really
9 cared about transparency, they would not have concealed what
10 they knew regarding the lethal nature of asbestos exposure
11 and hundreds of thousands of Americans would not have died
12 from these cruel diseases.

13 If your goal is transparency, please pass legislation
14 to reduce exposure in work, home, and school settings;
15 increase awareness of the risks; and significantly increase
16 Federal funding for medical research.

17 In his final days of his brave battle with
18 mesothelioma, the musician Warren Zevon wrote a beautiful
19 song, "Keep Me in Your Heart." The first verse is:
20 "Shadows are fallin' and I'm runnin' out of breath/Keep me
21 in your heart for a while/If I leave you it doesn't mean I
22 love you any less/Keep me in your heart for a while."

23 In memory of so many--too many--who have run out of
24 breath in their battles to beat these diseases and in
25 tribute to those who continue the battle and deal with these

1 cruel realities every day, I respectfully ask each of you to
2 stand with the patients and their families and in opposition
3 to this bill.

4 I thank you from the bottom of my heart.

5 [The prepared statement of Ms. Vento follows:]

1 Senator Flake. Thank you.

2 Mr. McKenna.

1 STATEMENT OF THE HONORABLE ROBERT M. MCKENNA,
2 PARTNER, ORRICK, HERRINGTON & SUTCLIFFE LLP,
3 SEATTLE, WASHINGTON

4 Mr. McKenna. Senator Flake and members of the
5 Committee, thank you for the opportunity to testify today.
6 My name is Rob McKenna. I am a partner with Orrick,
7 Herrington & Sutcliffe, and I served as Attorney General of
8 Washington State from 2005 to 2013. During my tenure as
9 Attorney General, my peers elected me president of our
10 National Association; selected me for the Kelley-Wyman Award
11 for Outstanding Attorney General in America; and looked to
12 me as an expert among State AGs on consumer protection
13 issues that involve technology, electronic privacy, data
14 security, and intellectual property protection.

15 As Attorney General, I worked hard to protect our
16 citizens' data privacy and security and to teach them how to
17 protect themselves. My office and I also investigated
18 numerous data breaches involving private companies,
19 nonprofits, and Government agencies. We never saw a data
20 breach or reports of systemic identity theft involving the
21 Federal court--or any court, for that matter.

22 Since returning to private life, I have learned of
23 another threat to some of the most vulnerable among us:
24 those who are ill from asbestos-related diseases and their
25 families. This threat arises from the inadequate disclosure

1 and transparency in the asbestos trust system which the FACT
2 Act is intended to address--inadequate disclosure and
3 transparency which results in misrepresentations and false
4 claiming that diverts resources from current and future
5 claimants.

6 I think that all State Attorneys General recognize the
7 controversy surrounding asbestos litigation and the asbestos
8 trusts that have been established to speed relief to victims
9 of asbestos exposure. Asbestos is a dangerous product that
10 has harmed many people. Companies with actual liability
11 should be held accountable.

12 Courts in both the tort system and bankruptcy system
13 have worked hard to strike the appropriate balance between
14 expeditiously compensating injured individuals who have
15 filed claims and protecting future claimants' interests by
16 safeguarding asbestos trusts from inappropriate claims.

17 Given the disturbing findings to date by several courts
18 concerning misrepresentations in claims made on asbestos
19 trusts, the public has a right to know how far and how deep
20 these problems may or may not extend, and the courts need to
21 know more about claims filed in other forums by the
22 claimants who come before them. The FACT Act will make more
23 such information available to the courts.

24 To the extent the records from an asbestos trust
25 contain claimants' health and other sensitive personal

1 information, such information in documents that are
2 collected and made available to other trusts and courts can
3 be redacted and anonymized to appropriately protect those
4 claimants' privacy interests.

5 The FACT Act explicitly protects asbestos trust
6 claimants' medical records and full Social Security numbers,
7 ensuring that such information will never be included in
8 public reports. Trust disclosures will also be subject to
9 all of the privacy protections afforded by the bankruptcy
10 law and rules.

11 As a result, this bill and existing bankruptcy rules
12 and statutes ensure that sensitive personally identifiable
13 information will not become publicly available, even while
14 ensuring that asbestos trusts will report enough information
15 to deter fraud as they protect individuals' privacy.

16 Courts throughout the country already use these rules
17 to protect the personal information of individuals who file
18 claims during asbestos bankruptcies. For example, the court
19 overseeing the Garlock bankruptcy redacted trust claims
20 information that was introduced into a hearing record and
21 later released to the public. Other courts have required
22 anyone reviewing bankruptcy claims to agree to strict
23 protective orders.

24 In addition, witnesses at the House Judiciary
25 Committee's hearings on the FACT Act explained that the bill

1 does not threaten asbestos victims' private sector and
2 asbestos claimants already routinely disclose more
3 information than trusts would be required to report in the
4 course of tort litigation and bankruptcy proceedings.

5 Virtually all of the primary manufacturers of asbestos
6 and asbestos insulation have entered bankruptcy and
7 established trust funds to address their asbestos
8 liabilities. When asbestos trusts' limited resources are
9 diverted by misrepresentations of exposure history and even
10 the basic facts of employment history, the trusts' ability
11 to compensate legitimate claims is impaired. Preventing
12 that from happening is what the FACT Act is intended to
13 accomplish.

14 Thank you.

15 [The prepared statement of Mr. McKenna follows:]

1 Senator Flake. Thank you, Mr. McKenna.

2 We will turn to Senator Hatch, who has to be somewhere
3 a little later.

4 Senator Hatch. Well, thank you, Mr. Chairman. I
5 appreciate it. This has been extremely interesting. All of
6 you have been excellent witnesses. I just want to thank the
7 Chairman for convening this hearing and for his leadership
8 on this crucially important issue.

9 Asbestos litigation and asbestos fraud has long been an
10 issue of concern to me. In the early 2000s, I led an effort
11 to reform asbestos litigation to cut down on the fraud and
12 abuse that plagues the system and plagued it at that time.
13 Unfortunately, that effort did not pass, but it did help
14 spur the creation of a number of asbestos trusts, which
15 brings us to today's hearing.

16 These trusts manage their affairs and award claims with
17 little or no transparency. Millions of dollars are
18 disbursed without regard to whether claims filed with one
19 trust are consistent with the claims filed with another
20 trust. In short, fraud and abuse continue to plague
21 asbestos litigation, and I believe and many believe it is
22 time for Congress to step in and address the problem.

23 Now, this hearing is a very important move in the right
24 direction, and the next step, of course, would be to pass
25 the FACT Act.

1 Let me start with you, Mr. McKenna. I am very pleased
2 to be a cosponsor of the FACT Act, and I believe it will
3 bring much needed transparency to our asbestos trust system.
4 Opponents of the bill assert that it would threaten the
5 privacy of asbestos claimants by making claimants' names and
6 certain information about their exposure history publicly
7 available.

8 I take privacy issues very seriously, so I want the
9 record to be clear. Would the reports that disclosures
10 required by the FACT Act would create any actual risk of
11 identity theft?

12 Mr. McKenna. Senator Hatch, I believe that the amount
13 of information that would be required to be disclosed would
14 not create a risk of identity theft because the information,
15 A, is already publicly available and, B, would be heavily
16 redacted to remove the most sensitive information which
17 identity thieves are looking for--for example, full Social
18 Security numbers.

19 Senator Hatch. I see. Well, Attorneys General in many
20 States, including mine, are charged with protecting the
21 interests of consumers in their States and, of course,
22 preventing fraud. Were you aware of alleged abuses in the
23 asbestos trust system while you were serving as Washington
24 State's Attorney General? And, secondly, do you think
25 Attorneys General and Federal law enforcement should be more

1 involved in preventing and prosecuting asbestos fraud?

2 Mr. McKenna. Senator, I was not aware of the problems
3 while I served as Attorney General. But after leaving that
4 office and beginning to work in the private sector, I became
5 aware of and I have worked for the last 3 years on this
6 issue. And I have briefed a number of sitting State
7 Attorneys General on the issue. They are quite alarmed at
8 the rate at which the trusts are being depleted and by the
9 reports from several courts, not just the Garlock
10 proceeding, about systemic misrepresentation that is
11 resulting in money being paid where it should not be paid.

12 What they are concerned about is not the effects on the
13 companies involved. They are concerned about the effects on
14 future claimants who are seeing the amount that they can
15 receive from these trusts rapidly decline, pennies on the
16 dollar in many cases, because the trusts are being depleted
17 at a much faster rate than was forecast.

18 Senator Hatch. Thank you.

19 Judge Ableman, could you elaborate on the steps
20 Delaware has taken to promote transparency in asbestos
21 litigation and whether those steps have helped to prevent
22 deception?

23 Judge Ableman. Well, in Delaware, we have a standing
24 order requiring disclosure of all trust claims during the
25 course of the litigation. So it is a requirement.

1 However, it is not that easily enforced, as my
2 Montgomery case--the order was in place when I had that
3 case, and yet the attorneys failed to disclose 20 different
4 trust claims that had been filed. I did not know it until
5 the day before the trial was to begin.

6 So you really have to depend on the honesty of the
7 attorneys to follow the rules, but not only that, they have
8 an easier way to get away with it, and that is, they do not
9 have to file at all until the litigation is concluded. And
10 then they have nothing to report to the judge because they
11 have not filed anything, so there is no fraud. And that is
12 exactly what I being done right now. They purposely,
13 strategically time the filing of the trust claims until
14 after the conclusion of the litigation.

15 Senator Hatch. Do you think State-level asbestos rules
16 are by themselves likely to be sufficient to discourage the
17 kind of abuse you saw in your court? Or do we need an
18 effort at the Federal level to address the problem as well?

19 Judge Ableman. Oh, I definitely believe we need an
20 effort at the Federal level because the fraud is so rampant
21 right now that it is--we cannot seem to--judges do not have
22 the time or the resources to be able to police this sort of
23 thing. We have to rely on the integrity of the attorneys
24 who practice before us. Sadly, in this field of law, that
25 is a problem. And I do not really know--other than to have

1 more transparency, I do not know of any way that you can
2 keep this process fair and make these processes just,
3 because you cannot control what unscrupulous lawyers want to
4 do. I mean, you just only have so much control.

5 For example, in my case, the person who was filing the
6 trust claims was a Texas lawyer who never entered his
7 appearance in my courtroom. So even after I found out that
8 all these trusts had been filed and not revealed, I had no
9 disciplinary authority over him.

10 Senator Hatch. Mr. Chairman, let me just welcome Ms.
11 Vento here. Your husband, a fine man. And we appreciate
12 all of you appearing before the Senate. We just want to do
13 what is right, and, frankly, I have seen some real evidence
14 of fraud in these cases. We just have to see. And I used
15 to be both a plaintiffs' and a defense lawyer. I started
16 out as a defense lawyer and wound up as a plaintiffs'
17 lawyer. But, in any event, I appreciate your coming to this
18 hearing, and I am sorry to take this extra time.

19 Senator Flake. Thank you, Senator Hatch.

20 Senator Durbin?

21 Senator Durbin. Judge Ableman, it has been many years
22 since I have conducted a deposition or prepared questions or
23 interrogatories, so I am hoping I am remembering some of it
24 as I ask you these questions. But all of the information
25 you are talking about here is discoverable. Under the State

1 tort systems, there are discovery procedures to ask basic
2 questions, like: Where else have you filed a claim? Do you
3 have any settlements? Have you received any awards? So it
4 is not a matter of confidential information. It is
5 discoverable.

6 The point that you have just made here about the
7 problem you had in your court--you wrote an article--let me
8 be sure I get the right--it was April, in Mealey's
9 Litigation Report, and you said in this article, "It is
10 incumbent upon the courts to promulgate procedural
11 mechanisms to eliminate the abuses described in Garlock."
12 You argued, "In the face of increasing instances of specious
13 claiming, and growing evidence of the illegitimacy of these
14 practices, the failure of lawyers, disciplinary boards, and
15 the courts to enforce fundamental ethical rules, and to
16 ensure that procedures are administered fairly and even-
17 handedly, stands as a glaring indictment not only of the
18 legal profession, but also of the judges who are ultimately
19 responsible for the administration of justice..."

20 If you said that 10 months ago and still believe this
21 today, that these abuses can be addressed within the
22 existing court system, why do you come up with a solution
23 that does not go after lying lawyers but goes against people
24 who are suffering from these asbestos diseases? Why do you
25 want to make their lives open to the public because you have

1 a grievance, perhaps a legitimate grievance, against their
2 lawyer? Why aren't you focusing on the lawyers who are
3 abusing the system instead of going after the victims?

4 Judge Ableman. Well, I think one other way to focus on
5 the lawyers who are abusing the system is to put in place
6 mechanisms that will make it less likely for them to want to
7 continue to abuse the system.

8 Senator Durbin. So you have changed your mind. Ten
9 months ago--

10 Judge Ableman. I have not changed my mind. I think it
11 needs--I think it needs a full-court press. I think we need
12 to have--I think judges in different jurisdictions need to
13 have standing orders. I think--none of the jurisdictions
14 that I am aware of have standing orders that are really
15 comprehensive enough to address this problem.

16 Senator Durbin. So in order to go after lawyers that
17 you think are being unethical, you want to make the victims
18 disclose all their information and waive their privacy. You
19 think that is the answer? You know, it is discoverable
20 information, and if I lie as a lawyer representing a victim,
21 I know--at least I remember vaguely I can be held personally
22 and professionally responsible for that breach of ethics.
23 That is the right thing to do. None of us are condoning
24 fraud. Why in the world would you go after my client? Why
25 would you go after these victims--

1 Judge Ableman. I am not--

2 Senator Durbin. --asking them to submit this
3 information while many of them are struggling in the last
4 months of their lives?

5 Judge Ableman. The information is already public in
6 the court system. There is nobody that files a lawsuit that
7 does not expose everything about their case--

8 Senator Durbin. You cannot have it both ways.

9 Judge Ableman. --to the public.

10 Senator Durbin. You cannot argue that it is already
11 there and then say we need to create a law so that it is
12 disclosed. It is one or the other.

13 Judge Ableman. Well--

14 Senator Durbin. If it is already in the court system
15 because of discovery, then why are we here? And if it is
16 not in the court system by discovery, you wrote a scholarly
17 article suggesting it is up to the courts to do something
18 about it. Now you come to the United States Senate--

19 Judge Ableman. I am trying everything angle because I
20 think it is so important that our justice system be elevated
21 and that these--I think it is a threat to the integrity of
22 our justice system right now, and I will do--

23 Senator Durbin. We are not--

24 Judge Ableman. --anything that we--

25 Senator Durbin. We are not condoning fraud, and we are

1 not going to do anything.

2 Judge Ableman. Well, it is rampant.

3 Senator Durbin. We are going to do something that is
4 fair and just when it comes to transparency. That I think
5 is the key to this as well.

6 And, Mister--or pardon me, Judge McKenna--Attorney
7 General McKenna, Honorable McKenna--

8 [Laughter.]

9 Senator Durbin. I want to make sure I--under Section
10 107 of the Bankruptcy Code, it is my understanding that to
11 preserve my privacy, I would have to make sure that each
12 individual victim under Section 107 has a lawyer, petitions
13 the bankruptcy court four times a year, and shows undue risk
14 in order to keep my information off the registry. This is a
15 victim who is sick from asbestos disease, and you are saying
16 this is a fairly easy thing to do four times a year to
17 petition the court to protect my privacy?

18 Mr. McKenna. First of all, we have already seen Judge
19 Hodges in the Garlock case redact sensitive information.
20 Judges are already doing the right things in these cases.

21 Secondly, your statement earlier that the victims of
22 asbestos diseases are required to file these claims, make
23 these reports, does not align with what I am reading in the
24 proposed bill, which says that the trusts and the trust
25 administrators are assigned the responsibility of filing

1 reports with the bankruptcy court on a quarterly basis,
2 describing the demand the trust has received from a
3 claimant. It is not the claimants who are--

4 Senator Durbin. I am sorry--

5 Mr. McKenna. --being contacted or required to file
6 anything--

7 Senator Durbin. I am sorry. I was not clear. I am
8 talking about claimants who want to protect their privacy
9 and information, and if they want to, under this bill, and
10 your testimony, they have to lawyer up and petition the
11 court four times a year to prove undue risk if this
12 information is disclosed. For someone who is suffering from
13 asbestos disease, is that a fair thing to do?

14 Mr. McKenna. Senator, we are talking about information
15 that they have already filed in tort litigation that is part
16 of the public record, just as many records that the public
17 files when they are in litigation becomes a matter of public
18 record.

19 Senator Durbin. Well, I would say--

20 Mr. McKenna. This is not a unique situation in our
21 court--

22 Senator Durbin. General McKenna, if that is the case,
23 I will go back to what I said to Judge Ableman. If the
24 information is already out there, why do we have this
25 hearing today?

1 Mr. McKenna. Because the trusts are not receiving
2 claim--the bankruptcy courts are not receiving reports of
3 what is happening in other cases that involve the trusts.
4 All this law does is allow and require that the bankruptcy
5 courts have access to information which is already a matter
6 of public record but which today they are not receiving.
7 That is what it does, no more, and it is designed to protect
8 the very people who I understand you feel very passionately
9 about, people--but not just the people who are here today.
10 I am talking about people who do not even know that there
11 will not be money available to them or nearly as much money
12 available to compensate them because they are not aware--
13 they are not sick yet, for example--that this system is rife
14 with misrepresentation and that these trusts are being
15 depleted at an alarming rate, which judges, one after
16 another, have found is resulting from inadequate
17 transparency.

18 Senator Durbin. Listen, I am not condoning fraud and
19 no one is, but these trusts are being depleted at an
20 alarming rate because so many people are sick and dying and
21 because these products are being sold by these companies
22 when they knew that they were deadly and dangerous.

23 Mr. McKenna. And because, as the judges have found,
24 Senator, there are--in every case I have looked at involving
25 State and Federal courts, that there are misrepresentations

1 and inconsistencies between the tort system and the
2 bankruptcy system which result in money being paid that is
3 not actually owed to some of the claimants.

4 Senator Flake. Just to clarify, Mr. McKenna, does the
5 FACT Act require disclosure of any information that is not
6 already available because of a civil tort claim?

7 Mr. McKenna. It does not. And, in fact, it requires
8 less of that information to be provide in these reports that
9 the trust administrators would be providing to the
10 bankruptcy courts.

11 Senator Flake. So you are saying that the bankruptcy
12 courts dealing with the trusts just do not have access to
13 that information?

14 Mr. McKenna. That is correct. They are not receiving
15 it now, and the information that they do receive under this
16 Act would be protected under existing statutes and
17 bankruptcy rules, for example, would not be put up on a
18 website that anyone could access. It would require--it
19 would allow the parties to have access to it, as they would
20 in discovery, and it would require anyone else who wants
21 access to it to apply to the court for permission to see it.
22 Meanwhile, the court can further redact the information as
23 necessary, as Judge Hodges has done in Garlock and other
24 judges have done in other cases.

25 Senator Flake. Thank you.

1 Mr. Behrens, why are the standard rules of civil
2 discovery not sufficient to allow defendants to obtain
3 necessary information, their exposure evidence, from the
4 plaintiffs?

5 Mr. Behrens. Well, I think this also goes to the
6 question that Senator Durbin asked, Senator, and that is,
7 obviously, if a plaintiff is alive, in his deposition you
8 can ask him, "Tell me about the products that you worked
9 around." The limitation is that what we are seeing time and
10 time again is that the plaintiffs in their depositions are
11 either denying any other exposures except to the solvent
12 tort defendant's products, or saying they do not recall any
13 other exposures.

14 In the Garlock case, the judge looked at a sampling of
15 cases and found that in every single case, the plaintiffs
16 were asked those questions, and they said one thing in the
17 tort system, and then they went out and told a completely
18 different story about their exposure history to the trusts.

19 So the tort system today, although there are standard
20 discovery tools, they have proven inadequate to deal with
21 the problem that this legislation would address.

22 Senator Flake. Thank you.

23 Judge Ableman, how would additional information being
24 available that is required by the FACT Act have aided you as
25 a judge in some of these cases?

1 Judge Ableman. I believe if all of this were
2 transparent and exposed that there would be less likelihood
3 for some of these fraudulent practices to occur. What
4 occurs is that the information really cannot be obtained in
5 normal discovery because plaintiffs are coached to avoid
6 telling the truth about whether they were exposed to the
7 products of bankrupt entities. That is what has occurred.
8 That is what Judge Hodges found in Garlock. That is what we
9 found when we did the study about Crane Co.

10 As long as the plaintiffs are not going to remember or
11 are going to say they did not--they were not exposed and
12 their lawyers coach them to do that, then it is very
13 difficult to use--you have no information unless it is
14 exposed in some other fashion. So we look to the trusts, we
15 need to look to the trusts, to expose the fact that these
16 claims are being made without being revealed in the process
17 of the litigation.

18 Senator Flake. Thank you.

19 Mr. Inselbuch, in Garlock, Judge Hodges found in each
20 and every one of these cases, the 15 cases, exposure
21 evidence was withheld. For 15 plaintiffs represented by
22 five major firms, the pattern of nondisclosure is the same.
23 The fact that each and every one of them contained such
24 demonstrable misrepresentation is surprising and persuasive.
25 Most important is the fact that the pattern exposed in these

1 cases appears to have been sufficiently widespread to have a
2 significant impact on Garlock settlement practices and
3 results.

4 What would your answer be to this pattern of
5 misrepresentation? How do we deal with it?

6 Mr. Inselbuch. Well, first, I do not believe there was
7 any pattern of misrepresentation. Unlike the
8 characterizations that have been made of this evidence, what
9 we have is witnesses being taken to depositions 30 years
10 after they had the work done. At the time they did the
11 work, the insulation companies that Mr. Behrens wants to
12 talk about, they tore out their insulation products, but
13 those products did not have any names on them, so that they
14 did not know at the time who made it and they did not know
15 30 years later when asked to testify about it who made it.

16 They all testified quite truthfully that to get to the
17 Garlock gasket, for example, you had to tear out this
18 terrible insulation that put dust in the air. The only
19 thing they did not know was who manufactured it.

20 There is nothing about these work sites whose products
21 were there, who manufactured the materials, that is unknown
22 to the defendants. The same plaintiffs' lawyers had to take
23 the same lack of knowledge that their own witnesses had,
24 their own clients had, and develop the evidence to prove who
25 manufactured these products, and they were so successful at

1 it that they are all in bankruptcy now.

2 These very same defense lawyers who sat at all of those
3 depositions, who saw all of that evidence go in, are
4 claiming, my goodness, we cannot figure this out unless the
5 witness, the plaintiff, can remember from 30 years ago who
6 made this stuff. This is utter nonsense.

7 And beyond that, I have heard Senators say and I have
8 heard witnesses say here today that there is a report of
9 massive fraudulent filings with the trusts. I defy anybody
10 to show me one fraudulent filing at these trusts. There is
11 no evidence of that at all. None of these opinions, whether
12 it is the Garlock opinion or these other opinions, deal with
13 what was filed at the trusts.

14 Senator Flake. My time has expired, but just very
15 quickly, Mr. Behrens, is it just a matter of not
16 remembering? Or in Garlock was what Judge Hodges found a
17 little more than that?

18 Mr. Behrens. He found it is more than that, and it is
19 just not the Garlock opinion. The study that Judge Ableman
20 did looking at--the Crane Co. study looked at over 1,800
21 mesothelioma cases, and they found in over 80 percent of
22 those cases the trust-related exposures were never
23 identified by the plaintiffs in this court case. So it is
24 not just one story. This is prevalent in the litigation
25 today, and there is in my written testimony one example--

1 Elihu asked to show one example of fraud on a trust. Well,
2 there is one in my written testimony. It was a case that
3 actually some other folks in my firm handled a few years
4 ago, and the Cleveland Plain Dealer wrote in this case that
5 when the plaintiffs were required to produce their trust
6 claims, where there they had actually filed them, the paper
7 said that "effectively opened a Pandora's box of deceit...
8 Documents from the six other compensation claims revealed
9 that [plaintiff's lawyers] presented conflicting versions of
10 how [Mr.] Kananian acquired his cancer." Emails and other
11 documents from the plaintiff's lawyers also showed that
12 their client had accepted monies from entities to which he
13 was not exposed, and one settlement trust form was
14 "completely fabricated."

15 So there is one example in my testimony. The Garlock
16 story, the Crane Co. study. RAND looked at this a year ago.
17 I mean, there is a mountain of evidence now that this is
18 happening in the litigation.

19 Senator Flake. Thank you.

20 Senator Klobuchar?

21 Senator Klobuchar. Thank you very much, Mr. Chairman,
22 for holding this hearing today.

23 I think the first academic paper on this was dating
24 back to the 1930s. The EPA then began limiting the use of
25 asbestos in the early 1970s, and as we can see, that was

1 back then a costly delay for families, for victims, and this
2 continues. And I know that emotions run high on this issue
3 on both sides, and I respect the views on both sides. But
4 in the end, for me this is really a public health tragedy--a
5 tragedy for our country.

6 And I guess I am trying to understand the requirements
7 here, because one thing I have learned over time, meeting
8 with victims--and this is for you, Mr. Inselbuch--is that
9 the claimants really have had trouble getting the
10 information on the history of asbestos from the companies.
11 And yet the proponents of this Act are seeking additional
12 information on claimants, including exposure history, but we
13 do not have anything like this from the companies.

14 Could you explain why this could be a concern of
15 fairness?

16 Mr. Inselbuch. Well, the tort system, as we know it in
17 the United States, has developed over the past 300 or 400
18 years. It is an adversarial system, and it defines State by
19 State what information will be made available on demand to
20 either side in the litigation. The plaintiffs have
21 difficulty getting from the defendants information about
22 where their products were. The defendants will fight tooth
23 and nail. And the defendants want information from the
24 plaintiffs. What they are complaining about here is
25 information the plaintiffs simply do not have.

1 What they do do in this tort system, where nobody has
2 the responsibility to help the other side--we call it an
3 adversary system. It is the defendant's responsibility to
4 marshal their evidence and the plaintiff's responsibility to
5 marshal their evidence.

6 Mr. Behrens keeps talking about situations that do not
7 exist. The plaintiff, the worker, simply did not know who
8 made the asbestos insulation. He just did not know it. No
9 matter how many depositions you take, no matter how many
10 interrogatories you file, he cannot know the answer to that.

11 The irony is that, of course, the defendant does. But
12 what the defendant is not entitled to, he is not entitled at
13 trial, where it is his burden to prove liability or
14 responsibility on the part of the other non-present party,
15 to get the plaintiff to say, not knowing it, that, yes, he
16 is right that those people are responsible. That is the
17 defendant's burden.

18 Senator Klobuchar. All right. Thank you.

19 Ms. Vento, just from a victim's perspective, I only
20 have a few minutes remaining here, and I think you
21 understand how important it is with these trusts to get
22 these cases settled. But could you talk about the last 8
23 months of Bruce's life and what that was like so people have
24 an understanding of what we are dealing with here?

25 Ms. Vento. Yes. Mr. Chairman, Senator Klobuchar,

1 Bruce was on a congressional trip at the time that he
2 started to feel ill. It was in January of 2000. He got
3 back to D.C. on a Wednesday evening, went into the House
4 physician the following morning, was taken to Bethesda Naval
5 Hospital where they drew a pint of fluid from his lung and
6 diagnosed him with lung cancer. He came back to Minnesota,
7 and the following week, we went to the Mayo Clinic where he
8 was further tested and diagnosed with mesothelioma.

9 The first week of February--actually, I think it was 16
10 years ago today perhaps--it was announced that he would not
11 be running for reelection and that he was ill. On February
12 14th, he had his right lung, half of his diaphragm, lymph
13 nodes, and the lining of his lung removed. And following
14 his recovery from the surgery, he went through several
15 rounds of chemotherapy, and following that he went through
16 five rounds of radiation--excuse me, 5 weeks of radiation
17 treatment each day.

18 In early August, we were told that things looked good,
19 that he was in pretty good shape. Within a few weeks, we
20 learned that the cancer had spread to his own remaining
21 lung. He celebrated his birthday on October 7th. If
22 someone had told me on October 9th that he would die the
23 next day, I would not have believed them. We had a great
24 day. We actually saw the Vikings win a football game that
25 evening. A fun day. And the following morning he died.

1 A year and a half after Bruce's death, I learned that
2 the nurse who helped us during the radiation treatments, a
3 lovely woman named Bev, who was with us each time we went
4 for those appointments, she, too, had been diagnosed with
5 mesothelioma. Her exposure was when she was in nursing
6 school. And since then, I have heard so many similar
7 stories. But for Bruce, the last year was not unlike what
8 many, many patients and family members experience. It was
9 brutal. He made every effort to get back here as often as
10 he could. He made every effort to get into his district
11 office. Staff were bringing work home to him. He tried to
12 keep going. The mantra was, "If anybody can beat this
13 disease, it is Bruce Vento." He was not able to.

14 Senator Klobuchar. Thank you very much.

15 Senator Flake. Thank you.

16 Chairman Grassley?

17 Chairman Grassley. You have already answered three of
18 the five questions I was going to ask, so I will have a
19 short time with you here.

20 Judge Ableman, have you given any thought to whether or
21 not the Department of Justice should be specifically
22 empowered to investigate allegations of fraud or whether an
23 Inspector General might be in order?

24 Judge Ableman. I have not considered that. I think in
25 the event that this particular legislation is not

1 successfully passed, I think we need to do something. And
2 if that would be another angle to try to eliminate the
3 fraudulent practices, I think that would be something I
4 would definitely support.

5 Chairman Grassley. Okay. Mr. Behrens, in some other
6 no-fault compensation programs, attorneys' fees and costs
7 are limited so as to maximize compensation to victims. The
8 9/11 Victims Compensation Fund, as an example, limits
9 attorneys' fees to 10 percent.

10 Can you discuss briefly what lawyers for claimants need
11 to do to establish eligibility as opposed to traditional
12 tort? Do you believe there is any merit to the idea that
13 attorneys' fees in these trusts should be limited to some
14 extent like they are in other no-fault compensation issues?

15 Mr. Behrens. Thank you, Senator. I believe that pay
16 should be commensurate with the value of work performed, and
17 the tort system is very different than the trust system. In
18 the tort system, as Mr. Inselbuch said, it is an adversarial
19 system. You have to lawyer up, you have to get witnesses
20 that cost plaintiffs' lawyers a lot of money. The trust
21 system is totally different. So I have a copy of a Manville
22 Trust form. You can go online and look, and it is very bare
23 bones. Most of the information that is available a lawyer
24 would have to ask anyway before even deciding to take on a
25 case that basically asks: What is your name? Where did you

1 work? What did you do? And what disease do you have? And
2 that is it.

3 The lawyers, if you look at the plaintiffs' lawyer
4 websites, and they all boast about how "filing an asbestos
5 claim is similar to filing an insurance claim and less like
6 a lawsuit. No reason for you to travel to court or even to
7 our offices. All the paperwork can be completed in your own
8 home." They say it is "faster and easier than it may seem,"
9 "an experienced paralegal who will start processing your
10 claim within 24 hours." You do not even need lawyers to
11 fill these out. Paralegals can do it.

12 So I think that it is a problem. If full contingency
13 fees are being charged, if lawyers are charging the same
14 amount to do a case that literally has no contingency as
15 they are charging in the tort case where there may still be
16 somewhat of a contingency, I think, yes, that is a problem.

17 Chairman Grassley. I will yield back my time. Thank
18 you all for the questions you have answered.

19 Senator Flake. Thank you.

20 Senator Blumenthal?

21 Senator Blumenthal. Thanks, Mr. Chairman, and thank
22 you for having this hearing.

23 So I think we all agree here. We all favor more
24 transparency in litigation. We are all against double
25 dipping and abuse of the process. We want to prevent

1 claimants from submitting the same claim twice and being
2 compensated for it. And where I think we may part ways here
3 is singling out asbestos victims for this very different
4 treatment. And I know you have been asked, Mr. Behrens,
5 about this issue, but I am in favor of transparency and
6 disclosure, which is why I introduced a bipartisan bill with
7 Senator Graham called the "Sunshine in Litigation Act."
8 This bill would require information in lawsuit settlements
9 to be kept available for the public to be disclosed by
10 judges if necessary to protect the public's health and
11 welfare. It is in the public interest that those
12 settlements be disclosed. I assume you are in favor of
13 that.

14 Mr. Behrens. No, Senator, I am not, but let me explain
15 why. I think that is a very different situation--

16 Senator Blumenthal. And while you are explaining why,
17 maybe you could also state whether you are in favor of
18 another piece of very important transparency litigation
19 submitted by Senator Durbin--I am a co-supporter; it is
20 called the "READ Act"--which would tell the public where
21 asbestos-containing products are located so they can avoid
22 exposure and becoming victims. And I might add many of
23 those victims are veterans. Some are in this room. They
24 represent disproportionately a part of the population
25 affected by this problem, and I want to thank all the

1 veterans who are here today for their service--and ask you
2 to respond as to this transparency issue, and then perhaps I
3 could ask Mr. McKenna to respond as well.

4 Mr. Behrens. Sure. Senator, with regard--

5 Senator Flake. Could you turn your mic on?

6 Mr. Inselbuch. Yes. Senator, with regard to the
7 protective order issue, the courts today already have power,
8 if they believe public health or safety is at risk, to lift
9 a protective order. So there is already a mechanism in our
10 rules today for corrective action to be taken by that.

11 Furthermore--

12 Senator Blumenthal. Well, there is a mechanism in the
13 law, but it really comes into play only when the parties
14 want it to do so or, alternatively, when the parties ask
15 that it not be, there is no disclosure. Correct?

16 Mr. Behrens. I do not believe that that is true,
17 Senator, because separate from the tort case obligations, we
18 have a robust regulatory system, and many of those products
19 you are talking about, there are independent reporting
20 obligations, for example, to CPSC, to NHTSA, and so on. So
21 that the information is not being suppressed in a way that
22 is going to impact public health. There are other
23 mechanisms. It can come out in the civil cases, obviously.
24 There is no protective order if a judge believed it is not
25 warranted, and, furthermore, the information is given to the

1 agencies that are charged with handling those situations.

2 Senator Blumenthal. So your response is that we ought
3 to rely on the regulatory agencies to protect the public
4 interest, but secrecy is fine in the court system?

5 Mr. Behrens. That was not my testimony. My testimony
6 was that if there is something in the tort system, in a case
7 that comes out that affects public health or safety and the
8 judge believes that that should be made public, the judge
9 first can decide not to grant the protective order. It
10 comes from the court. And, second of all, the judge can
11 lift the protective order if he believes that it is in the
12 public interest of doing so.

13 Senator Blumenthal. Well, the same logic that you are
14 applying here would also argue that there are other means to
15 seek information from claimants about their prior claims or
16 their prior awards without going through a process such as
17 the FACT Act contemplates.

18 Mr. Behrens. I would have to disagree, respectfully,
19 Senator, because as Mr. Inselbuch said, at the plaintiffs'
20 depositions, they do not know, and they will say, "I do not
21 know." But the information is available. Their lawyers
22 have it. That is how the claim forms eventually get filed.
23 The information is available--

24 Senator Blumenthal. And companies routinely tell the
25 regulatory agencies, "We do not know," or, "We did not

1 know." Witness GM, the defective ignition switch. Witness
2 Takata, exploding airbags. Those are two only very recent
3 examples. The regulatory agencies are overburdened,
4 understaffed. Relying on them instead of the court process
5 is really, I think, an inadequate approach, and so I hope
6 that you will think about supporting the Sunshine in
7 Litigation Act and the READ Act. I certainly want to
8 address this issue of possible abuse in asbestos claims,
9 although I have yet to be convinced that there is
10 significant abuse or that the abuse warrants the approach
11 that is taken under the FACT Act.

12 My time has expired. I thank the Chairman.

13 Senator Flake. Thank you.

14 Senator Vitter?

15 Senator Vitter. Thank you. My concern in all of this
16 is not for any companies involved. They are pretty much
17 gone. They are bankrupt; they are gone. It is for victims
18 who are not far enough in line, and so I want to explore
19 that. Maybe I am missing something.

20 Do any of our witnesses think that there is more than
21 enough assets in the trusts or the trust entities to cover
22 all the valid claims we think there are and will be?

23 So nobody thinks that? Do you, Mr. Inselbuch?

24 Mr. Inselbuch. No way. Nowhere near.

25 Senator Vitter. Right. So if there is an issue of

1 double dipping or anything similar, it is not going to hurt
2 the companies. The companies are pretty much gone, as they
3 should be. It is going to hurt some victim who is later on
4 in line, correct?

5 Mr. Inselbuch. I do not understand the hypothetical.

6 Senator Vitter. It is very real, and, Mr. Inselbuch,
7 in your testimony you say, "The trust has fixed assets that
8 will be insufficient to pay the full value of all claims."

9 Mr. Inselbuch. That is correct.

10 Senator Vitter. Correct?

11 Mr. Inselbuch. Correct.

12 Senator Vitter. So, therefore, if somebody ahead in
13 line is getting more than they should because not all their
14 claims are fully understood at the time, someone behind them
15 in line is going to be the one to suffer, correct?

16 Mr. Inselbuch. And that is why the trusts are very
17 careful how they process the claims, and that is why fewer
18 than half of the claims that are filed get paid.

19 Senator Vitter. So, I mean, you are basically saying
20 there is no problem, that never happens?

21 Mr. Inselbuch. There is no problem that involves
22 fraudulent claiming at the trusts.

23 Senator Vitter. That is very carefully worded. You
24 are a very good lawyer. That is very carefully worded.
25 There is a problem that leads to "double dipping," broadly

1 defined. Do you deny--

2 Mr. Inselbuch. No, sir, there is no such problem
3 either.

4 Senator Vitter. Okay. Well, I would just--

5 Mr. Inselbuch. Technically and legally impossible--

6 Senator Vitter. --point out--let me reclaim my time.
7 I would just point out that there is a mountain of evidence
8 and nonpartisan like judges involved who strongly disagree
9 and have documented the opposite. And I would suggest the
10 victims, the double victims, are going to be those folks
11 later on in line who are not going to have those sufficient
12 assets. I mean, these claims are still being filed at a
13 significant rate, correct?

14 Mr. Inselbuch. Oh, yes.

15 Senator Vitter. And when is that expected to stop?

16 Mr. Inselbuch. Decades from now.

17 Senator Vitter. Okay. Again, you are making my point.

18 Let me go to a second big issue, which is privacy. I
19 think all of us want to protect privacy, but--and, again,
20 maybe I am missing something. Does this bill we are talking
21 about require the disclosure of any sort of information that
22 is not typical to disclose when you file, say, a tort claim
23 in court?

24 Mr. McKenna. Senator, in fact, it requires less
25 disclosure than is typical when you file a claim in tort.

1 It requires--it says expressly in the Act that no report
2 made by the trust or the bankruptcy court shall include any
3 confidential medical records or the claimant's full Social
4 Security number.

5 Senator Vitter. Okay. So, Mr. Inselbuch, when you
6 represent a client in a tort claim, are you shredding their
7 privacy rights when you file that information in court?

8 Mr. Inselbuch. Well, first, Mr. McKenna is absolutely
9 wrong. If you look at complaints that are filed in the tort
10 system, apart from the name of the plaintiff, which does
11 appear, very little of this other information appears.
12 Other information is gathered during discovery, but it is
13 not organized in one courthouse filed in one place so that
14 predators can access it. And there is no protection in the
15 Bankruptcy Code for this.

16 Senator Vitter. So let us be specific. What
17 specifically, what information specific in the bill, do you
18 object to on privacy grounds?

19 Mr. Inselbuch. All of it.

20 Senator Vitter. Okay. That is real specific. Let us
21 try to be a little more specific. Name something that poses
22 this privacy threat.

23 Mr. Inselbuch. Well, what is--I am not even sure what
24 the bill thinks it means when it says that the trusts, when
25 they file this information, shall describe each demand the

1 trust received from a claimant, including the name and
2 exposure history of the claimant and the basis for any
3 payment from the trust made to such claimant.

4 Senator Vitter. When you file a tort claim, you do not
5 file a body of facts that is similar to that?

6 Mr. Inselbuch. No. You look at complaints that are
7 filed in the tort system, they are usually just bare bones
8 complaints in the State courts and in the Federal courts.
9 This private information, if you look at a complaint in a
10 State court, you will see a plaintiff's name, it says he has
11 been damaged by somebody, and he has a wherefore why he gets
12 a conclusion.

13 Yes, the plaintiff has to develop all of that evidence,
14 but all of that evidence is part of a court record that is
15 supervised by an individual judge in an individual case and
16 does not see the light of day anywhere.

17 What this bill does is it says you have to put all this
18 information in one place in Delaware, for example, because
19 the Delaware bankruptcy court supervised most of these
20 reorganizations, and anybody can access it there, because
21 the bill says not only shall it be made available, it shall
22 be made available on the court's public docket.

23 Senator Vitter. Okay. My time has expired. Thank
24 you, Mr. Chairman.

25 Senator Flake. Thank you.

1 Senator Tillis?

2 Senator Tillis. Thank you, Mr. Chairman.

3 First off, I think that we all want victims to be
4 properly compensated. With respect to veterans, on the
5 Veterans' Affairs Committee I have been working hard for the
6 last year to make sure victims at Camp Lejeune get the
7 proper care that they deserve for being exposed to toxic
8 substances down there, and I feel no differently than people
9 who may have contracted the disease as a result of some of
10 the manufacturers that have created these trusts.

11 I want to start with Judge Ableman, and I was doing a
12 count. I am not an attorney--I think I am the only non-
13 attorney on the panel right now--so I cannot parse through a
14 lot of the legal terms, but I can read body language. And
15 as Mr. Inselbuch was responding to Senator Vitter's
16 questions, I counted at least five instances of open-jawed
17 disbelief. So I would like to know what you were thinking
18 when that discourse was going on.

19 Judge Ableman. I guess I am not a good poker face.

20 Senator Tillis. Expressive.

21 Judge Ableman. Right. I have seen complaints that
22 have a myriad of facts and information in these asbestos
23 cases. They can be as much as 30 and 40 pages long. So
24 when Mr. Inselbuch tells you that the only thing on the
25 complaint is, "I am injured and this is who injured me," it

1 is not--that is just not so. Not the ones I have seen. And
2 I can tell you I have seen--maybe not as much as Mr.
3 Inselbuch because I do not believe I am quite as old as he
4 is, but I have seen a lot.

5 Senator Tillis. Well, you know, the other thing I
6 wanted to mention, too, is that when we get into the
7 possible fraud--and I do want to, hopefully, have time to
8 get to Mr. Inselbuch. But I do not necessarily think it is
9 the victims who are constructing these cases and willingly
10 being fraudulent. I do not believe that that is the case in
11 the vast majority of instances, but really well-trained,
12 successful lawyers, maybe so. And they are doing what they
13 are supposed to be doing based on the way that the law is
14 structured to this point.

15 But, Mr. Behrens, you mentioned--I think there are some
16 estimate \$30 billion plus in these trusts collectively. You
17 said in your testimony that there were 35--we may see this
18 for 35 to 50 years. And, Mr. McKenna, you were talking
19 about how this abuse is going to be--the true victims of
20 this are going to be the people who have claims in the
21 future when the trusts are simply going to be depleted.

22 So can you talk a little bit, how do I reconcile as a
23 non-attorney Mr. Inselbuch saying that there is no pattern
24 of fraud and you all saying that there is a clear pattern of
25 fraud, either with respect to the trusts or with respect to

1 torts?

2 Mr. Behrens. Senator, I think Mr. Inselbuch is--he is
3 a very good lawyer, and I think he is very careful to use
4 the word "fraud," which is not a word that was used by Judge
5 Hodges in the Garlock opinion. What he said is he has found
6 a "startling pattern of misrepresentation," and he said that
7 he found "widespread and significant suppression of
8 evidence."

9 Senator Tillis. Well, let me hold you for a minute
10 then. Mr. Inselbuch, I cannot ask lawyerly questions to get
11 down the specific, but how do you react to what Mr. Behrens
12 just said there?

13 Mr. Inselbuch. Judge Hodges was not talking about
14 trust filings. I said before there is no evidence of
15 widespread misuse of the trust filing system, whether you
16 want to use the word "fraud" or any other word you want to
17 use. There is just no evidence of it. The trusts audit
18 their claims. They cross-audit across trusts. There is
19 just--I mean, I sit here and I am mystified by people saying
20 that there is a mountain of evidence of fraudulent filings
21 with trusts. There is just no evidence of it. Mr.
22 Behrens has found one case once out of 500,000 filings.

23 Mr. Behrens. I would say, How do you know that? When
24 a plaintiff is saying one story in the tort system and a
25 contradictory story to the trust system, how do you know

1 which is the truth?

2 Senator Tillis. That is where I was going to go--

3 Mr. Behrens. He is telling the truth in one and not
4 the other.

5 Mr. Inselbuch. That is not true--

6 Senator Tillis. Mr. McKenna, would you like to opine
7 on this?

8 Mr. McKenna. Senator, the point Mr. Behrens made is
9 exactly the right point, and it is what court after court
10 has found. They have found inconsistencies in many filings
11 from the tort system to the bankruptcy system. Whether that
12 rises to the level of criminal fraud, which has a very
13 specific standard and meaning in our system of law, on
14 behalf of the claimant is not the point. The point is that
15 they cannot be telling one story that is contradicted by
16 another story in the two different systems and both be true.
17 And that in turn results in payouts from trusts where they
18 are not deserved, which in turn means that money is not
19 available to a future claimant which the system is designed
20 to and intended to protect.

21 Senator Tillis. Well, I just think that to me I am
22 more concerned with the folks out here on this particular--
23 the legislation we are considering, which I tend to support.
24 The victims out there are the ones who do not know that they
25 are victims yet. If we do not get this right, if we have

1 some \$30 billion or more in trust and they get depleted, let
2 us assume it is only 5 percent--that the misrepresentations
3 only represent 5 percent of all the trust claims paid. That
4 is hundreds of millions of dollars that could potentially go
5 to someone who is legitimately a victim and deserves some
6 form of restitution. So that is why I think we have to
7 continue forward, and thank you, Mr. Chair, for holding this
8 hearing.

9 Senator Flake. Thank you, Senator Tillis.

10 Senator Durbin, you had some follow-up questions?

11 Senator Durbin. Mr. Chairman, I am going to try to
12 make this brief. There are a number of countries which have
13 banned asbestos. After you have heard this hearing, can you
14 understand why? Do you understand the danger that it
15 creates for workers, innocent victims and such?

16 One of the countries that has not banned asbestos is
17 our country. So when we start talking about projecting how
18 long these trusts will last, projecting how much money is
19 there, sadly the exposure is still there today. You do not
20 know it, and I do not know it. It is virtually invisible.
21 And when these claimants file and they are asked 30 or 40
22 years ago--and that is how far back it can go, sometimes
23 even longer. Do you remember where you were working and
24 what happened?

25 It has been said by one of the witnesses here that they

1 are coached to misrepresent. I think most of the people are
2 doing their darnedest to remember as best they can some
3 things which most of us would never be able to remember.
4 Never. And yet that is the cause of their serious illness
5 and threatening death.

6 I think we need to do something about this beyond this
7 hearing, beyond dreaming up ways of reducing the exposure of
8 the companies that made the asbestos products. I think we
9 need to be talking about what we need to do in America to
10 finally put this issue to rest.

11 I want to thank Senator Blumenthal for bringing up the
12 bill that I have introduced, Reducing Exposure to Asbestos
13 Database Act, or the READ Act. It would create a Federal
14 database of known products and locations that contain
15 asbestos so we can avoid them and products we can avoid.
16 Asbestos manufacturers and importers would be required to
17 report this information annually to a searchable, online
18 database.

19 Is this an ongoing problem? Last year, asbestos was
20 identified in children's crayons and toy detective kits
21 imported from China. How about that, fathers and
22 grandfathers in the audience? That gift you just gave your
23 grandchild may have asbestos in it. Isn't it time to put an
24 end to this?

25 Ms. Vento, I remember we were speculating what was the

1 cause of the mesothelioma in Bruce. I think he worked--tell
2 me.

3 Ms. Vento. He worked in factories on the east side of
4 St. Paul as he was working his way through college, and I
5 want to thank you for identifying or pointing out the word
6 "coaching." If Bruce had lived long enough to give his
7 deposition--his deposition was scheduled for the day that
8 ended up being the day of his funeral--he would not have
9 been coached. Bruce Vento would not have been coached.

10 I gave a deposition, and the only coaching I got--the
11 only coaching I got was to answer the questions honestly,
12 and if I did not know the answer, to just say I did not know
13 the answer. No words were put in my mouth, and I have yet
14 to meet a patient or a family member who has any interest in
15 taking money that their loved ones justly deserve from these
16 funds. We do not want to take money from future claimants.
17 We want to help protect those. But you pointed out a very
18 important thing, Senator Durbin. This asbestos is still
19 present in our country, and until it is gone, we are going
20 to have decades and decades and decades of this issue coming
21 back to future Congresses and to too many families.

22 Senator Durbin. I just happen to think that instead of
23 dreaming up ways, introducing legislation that makes it more
24 difficult for those who are sick and those who are making
25 these claims to get what they deserve, wouldn't it be great

1 if there was a bipartisan effort to pass this bill that puts
2 an end to this scourge once and for all in America?

3 Mr. Chairman, I yield back.

4 Senator Flake. Thank you.

5 Just as a follow-up, Mr. Behrens, in Mr. Inselbuch's
6 testimony he mentions that we do not need this additional
7 disclosure or transparency because the trustees have a
8 fiduciary responsibility to ensure that only valid claims
9 are paid. Is that sufficient? Or why is that not
10 sufficient?

11 Mr. Behrens. Senator, in my opinion, it is not
12 sufficient because there is no mechanism today for the
13 trusts to talk to one another any more than there is for the
14 trusts and the tort system to talk to one another. And the
15 story that I gave that some of my colleagues found out
16 several years ago in their trust claims showed quite clearly
17 that even within the trust system, the plaintiff in that
18 case was telling different stories of his exposure to try to
19 maximize his recovery from different trusts. And I believe
20 that these claimants--they are honest people. They are
21 following what their lawyer believes is going to help them.

22 On this coaching point, it probably does happen
23 sometimes. Plaintiffs' lawyers tell me that what really
24 happens is that the plaintiffs come in and they really have
25 no idea what they were exposed to. And so the lawyers sit

1 down with them in the tort case before their deposition, and
2 they refresh their recollection about products that they
3 worked around that were the solvent defendant's. And they
4 tell them, "It is not fraud because we do not say go in
5 there and lie about exposures." But the reality is they
6 only know the exposures that their memory--that they are
7 refreshed to remember.

8 So in the tort deposition, magically they remember the
9 20 defendants in the tort case, and they do not remember the
10 bankrupts. And it is not because they are lying. It is
11 because they have not had their recollection refreshed about
12 that.

13 And then the tort case will settle, and then the
14 lawyers sit down with them again, and they refresh their
15 recollection. And they say, "It is not fraud because we are
16 not telling him to lie about things. We are telling him
17 about exposures that we believe that he had."

18 But this is the way the system works, and that is why I
19 think it is important to get all the transparency so the
20 truth comes out about really what exposures were happening.

21 Senator Flake. Thank you.

22 Senator Blumenthal, do you have any follow-up?

23 Senator Blumenthal. Mr. Chairman, yes.

24 With all due respect, Mr. Behrens--and I was a
25 litigator for a while--have you ever refreshed the

1 recollection of any of your witnesses in a deposition or at
2 trial? Because I have. I have. And it is done because
3 sometimes people do forget. So I am just asking you whether
4 as a professional you have engaged in that practice.

5 Mr. Behrens. I know that the plaintiffs' lawyers that
6 do that will say that that is their job, and so they are
7 trying to do what they believe is within their power to do
8 to get their client the most money they can, and that is
9 their job.

10 Senator Blumenthal. Well, but, you know, we are not
11 going to have a disagreement about this issue because it is
12 a very well known and legitimate procedure to show a witness
13 a document and say, "Does this refresh your recollection
14 about the date you bought your house?" And it does not
15 change the fact; it simply gives the witness, whether it is
16 a hostile witness or one that the attorney has presented,
17 the opportunity to have some document that, in fact, gives
18 him or her a way to tell the truth. That is the truth.

19 Mr. Behrens. Senator, I think--and Judge Hodges did
20 deal with this in the Garlock opinion, where he was
21 perceptive enough to know that this is what is going on.
22 But he explained, well, it is not suppression of evidence
23 for a plaintiff to be unable to identify exposures. In
24 other words, for the person who says, "I really do not
25 recall," he said that is not suppression of evidence.

1 What is suppression of evidence, the judge said, is for
2 a plaintiff to be unable to identify the exposure in the
3 tort case but then later and in some cases previously to be
4 able to identify it in the trust system. And that is where
5 I think the system has broken down and where we need this
6 type of legislation.

7 I am not saying that there is a fraud. I am saying
8 that there is widespread evidence of suppression of evidence
9 and clear, inconsistent claiming activity between the tort
10 and trust systems. I do not--

11 Senator Blumenthal. But you have refreshed witnesses'
12 recollection, have you not?

13 Mr. Behrens. It has been a long time since I practiced
14 in courtroom litigation, but I am sure that that happens.
15 And I am not saying that that is--

16 Senator Blumenthal. Let me ask Mr. McKenna--

17 Mr. Inselbuch. --unethical behavior, but, again, it is
18 somehow when a witness says, "I do not remember it now," and
19 then somehow later they are able to--

20 Senator Blumenthal. Let me turn to Mr. McKenna, who is
21 a former colleague as an Attorney General and a very
22 distinguished one, and I appreciate your being here. Maybe
23 you have a comment on this conversation.

24 Mr. McKenna. It is good to see you again, Senator. I
25 would say that, you know, my litigation practice focused on

1 appellate law, so I did not deal with witnesses or
2 depositions at all. But I also would like to say that I
3 think the issue here is not the fact that it is hard for
4 people to remember what they were exposed to 30 or 40 years
5 ago. What matters is not what happened 30 or 40 years ago
6 in terms of what they knew or did not know. What matters is
7 what they said in the tort case and why that changes so
8 dramatically in some cases when they are in the trust
9 system, or vice versa. It is hard to believe their memory
10 has shifted that much in that short period of time between
11 the tort system and the bankruptcy system.

12 Senator Blumenthal. I am going to turn to Mr.
13 Inselbuch. Maybe you have a comment.

14 Mr. Inselbuch. I do. First of all, that is not what
15 is happening. The witness does not change his or her
16 testimony in either place. They do not remember who
17 manufactured the products. Yes, they filed claims against
18 those manufacturers in the trust system, but the evidence
19 that proves up their exposure does not come from them. It
20 cannot come from them because they do not know it. It comes
21 from the work records or in many cases from the concessions
22 that these trusts make when they file site lists to say if
23 you worked there this period of time, our stuff was there.
24 It is there, and they get paid by the trust, not because
25 they remembered that that product--what its name was and it

1 is not there because they misrepresented in either situation
2 what their evidence was.

3 Senator Blumenthal. And if they changed their
4 testimony, as has been implied is the danger here, or if
5 they offer inconsistent testimony, they can be impeached,
6 they can be destroyed, their credibility is at stake.

7 Mr. Inselbuch. I loved that when I was at trial, to
8 find some witness who changes a story.

9 Senator Blumenthal. I do not want to prolong this
10 discussion, but I do thank you, Mr. Chairman. I think that
11 we have a common interest here. As Senator Durbin has said,
12 maybe we have some common ground, some bipartisan agreement
13 on helping to prevent these injuries by eliminating the
14 presence of asbestos, by shining a light on some of the
15 settlements that may occur in secret, not relating only to
16 asbestos but to all potentially defective products and the
17 awards that are made, whether it is a defective tire on a
18 car or a defective substance in another kind of product, so
19 that we can help save lives and prevent injuries, which
20 ultimately have tremendous costs in our society.

21 So I am sympathetic to the overarching goals that bring
22 you here today, and I hope that maybe we can find some
23 common ground. Thank you all for being here.

24 Senator Flake. Thank you.

25 With that, the thanks of the Committee. Thank you for

1 your testimony. Thank you for the preparation and the
2 endurance at a long hearing today.

3 The hearing record will remain open for 7 days. We
4 would ask you to respond quickly to questions that may come.
5 Thank you so much for your testimony. Thank you for being
6 here.

7 This hearing is adjourned.

8 [Whereupon, at 11:53 a.m., the Committee was
9 adjourned.]

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