

**Elihu Inselbuch
Member
Caplin & Drysdale, Chartered
600 Lexington Avenue, 21st Floor
New York, NY 10022**

**Written Testimony for Hearing on
“The Need for Transparency in the Asbestos Trusts”**

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**UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

I would like to thank Committee Chairman Grassley, Ranking Member Leahy, and the members of this Committee for the opportunity to testify about the issue of asbestos trusts and about S. 357, the “Furthering Asbestos Claim Transparency Act of 2015” (the “FACT Act”). My name is Elihu Inselbuch. I am a member of the firm of Caplin & Drysdale, Chartered in New York, and much of my work over the last 30 years has involved representing victims’ rights in asbestos bankruptcy proceedings. I was first retained in 1985 to act for the asbestos claimants’ committee in the Manville reorganization. Since then I’ve represented the interests of claimants in a number of large asbestos-related bankruptcies and class actions, including, for example, Armstrong World Industries, Inc., the Babcock & Wilcox Company, DII Industries, LLC (Halliburton), Federal-Mogul Corporation, Fibreboard Corporation, Jim Walter Corporation, G-I Holdings Inc., Raytech Corporation, Kaiser Aluminum Corporation, Owens Corning, Pittsburgh Corning Corporation, USG Corporation, and W.R. Grace & Co. I and my firm currently serve as counsel to the Official Committee of Asbestos Personal Injury Claimants in the *Garlock* bankruptcy case.¹ In addition, I serve as counsel to many of the Trust Advisory Committees appointed under plans of reorganization in asbestos-driven bankruptcies to serve as fiduciaries to present claimants of the trusts created by the plans.

As a result of this work, I’ve become intimately familiar with the horrors of the asbestos-disease epidemic, this country’s attempts to grapple with how to compensate such large numbers of victims over decades of disease, and the operations of the asbestos trusts.

I. Summary

The FACT Act is the latest, but not the first, attempt by asbestos defendants to reduce, minimize and ultimately extinguish their liability to their victims in the tort system. These defendants—which are the only beneficiaries of this bill—are the same asbestos companies who for decades have been determined to be liable for recklessly and willfully exposing unknowing workers and their families to the companies’ deadly products. Had these companies shared the information they knew about the dangers of asbestos, or at the very least, provided adequate safety gear, countless lives would have been saved, and you would not be sitting here today.

What many people do not realize is that asbestos disease is the longest-running public health epidemic in our history. Asbestos exposure kills thousands of Americans every year and it will continue to do so for many decades to come. For more than eighty years, corporations that produced and distributed asbestos-containing products — and their insurance companies — have attempted to avoid responsibility for the deaths and injuries of millions of American workers caused by those products. Since before 1930, these corporations have hidden the dangers of asbestos and lied about their knowledge of those dangers, lobbied to make it harder for workers to sue for their injuries, and fought to weaken protective legislation.

The FACT Act is yet another example of their tactics, designed only to interfere with the operation of the victims’ compensation trusts and provide advantages to defendants not otherwise available in the tort systems of fifty states. Why else are they here and why does every victims’ group oppose this legislation! The bill is predicated on a fundamental misunderstanding of why asbestos trusts were created, how they work, and the false belief that there is significant fraud in the trust system. And the people this bill harms are the same ones harmed by the

asbestos companies – the victims of asbestos disease. It is their privacy that is compromised and their personal information that would be disclosed pursuant to the FACT Act.

II. Asbestos Disease and Litigation

a. The Dangers of Asbestos

Asbestos is a naturally occurring mineral that was widely used during the twentieth century for industrial, commercial, and residential purposes.² Because of its tensile strength, flexibility, durability, and acid- and fire-resistant capacities, asbestos was used extensively in industrial settings and in a wide range of manufactured goods.³ Diseases caused by exposure to asbestos kill thousands of Americans every year because asbestos is inherently dangerous. Whenever materials containing asbestos are altered, damaged, or disturbed, microscopic fibers become airborne, and can be inhaled into the lungs and cause disease.⁴ The most serious asbestos-related disease is mesothelioma, for which no cause exists other than exposure to asbestos. Mesothelioma is a virulent cancer of the lining of the chest cavity that can be caused by even a short period of asbestos exposure, and is inevitably painfully fatal, often within months of diagnosis.⁵ Other illnesses caused by asbestos include lung cancer, asbestosis, and pleural disease.⁶ The bulk of asbestos liabilities are for mesothelioma and other asbestos-related cancers.

Tens of millions of American workers have been exposed to asbestos; more than 27 million people were occupationally exposed between 1940 and 1979.⁷ Millions of those exposed have fallen ill, or will fall ill in the future; many have died and many more will die as a result of their exposure. Manufacturers — but not workers — were for decades well aware of the significant health hazards posed by asbestos, but production and distribution of new asbestos-containing products continued virtually unabated until the 1970s,⁸ and in some cases until 2000.⁹ Asbestos diseases have long latency periods; a person exposed while working may not fall ill for forty years or fifty years, or even longer.¹⁰ Thus, even though asbestos production and use has declined, the epidemic of asbestos-related illnesses is expected to continue for decades into the future.

By the early 1900s, medical scientists and researchers had uncovered “persuasive evidence of the health hazards associated with asbestos.”¹¹ Manufacturers and insurers knew this, and even as evidence mounted they continued to hide these findings and deny responsibility. In 1918, a Prudential Insurance Company report revealed excess deaths from pulmonary disease among asbestos workers, and noted that life insurance companies generally declined to cover asbestos workers because of the “assumed health-injurious conditions of the industry.”¹² There is compelling evidence that at least since the 1930s asbestos manufacturers and distributors who were aware of the growing knowledge of the dangers of asbestos sought to conceal this information from workers and the general public.¹³

b. The Response of the Courts

For years, the asbestos industry disputed victims’ claims, falsely denying their knowledge of the asbestos risk, and arguing, among other things, that claims were barred by statutes of limitations, which ran soon after exposure but decades before illness was manifested, and that

plaintiffs could not identify the particular asbestos that caused their injury. In 1973 the Fifth Circuit decided the landmark case of *Borel v. Fibreboard Paper Products Corp.*¹⁴ *Borel* established that manufacturers and distributors of asbestos products are liable to persons injured as a result of using their products because of their failure to warn workers of the danger of those products.¹⁵ Recognizing that because of the very nature of their employment many persons have been exposed to a variety of asbestos products made by a large number of manufacturers, under circumstances that make it impossible to ascribe resulting disease to one particular product or exposure, the *Borel* court found that each and every exposure to asbestos could constitute a substantial contributing factor in causing asbestos diseases, and that each and every defendant who contributed to the plaintiff's aggregate asbestos exposure is legally responsible for the plaintiff's asbestos-related injuries.¹⁶ The overwhelming majority of courts throughout the country have accepted the legal principles set out in *Borel*.¹⁷

With this development in the law, and amendment of the New York statute of limitations, the thousands of people killed and maimed by exposure to asbestos and asbestos-containing products began to successfully sue the manufacturers and distributors of those products. So many people had been injured or killed by asbestos that twenty-five thousand lawsuits were commenced in the next decade.¹⁸

Juries responded to the gruesome history, awarding many large verdicts for compensatory and punitive damages.

III. The Creation of the Asbestos Trust System

Thousands of people each year for decades to come will fall ill and die as a result of asbestos exposure. The overwhelming numbers of people who asbestos manufacturers made sick and who are dead or dying from exposure to the manufacturers' asbestos-containing products and the large numbers of future claims have forced many asbestos manufacturers to resort to bankruptcy to deal with their liabilities. Private asbestos trusts were created during these bankruptcies to ensure that the tens of thousands of people who are currently sick and dying and the tens of thousands more who science tells us will sicken and die in the future as a result of their asbestos exposure can receive some compensation for their injuries. Asbestos corporations are required to fund asbestos trusts in order to pay victims before the corporations can emerge from bankruptcy free and clear of all asbestos liability.

a. Manville

The Johns-Manville Corporation was the largest manufacturer and distributor of asbestos products in the United States in the twentieth century. Manville officers and directors knew of the dangers of asbestos since at least 1934, and in concert with other industry members kept this knowledge secret to prevent workers from learning that their exposure to asbestos could kill them. As evidence of Manville's responsibility became known, it was faced with tens of thousands of lawsuits. Recognizing that liability for the present claims and the thousands yet to come made it insolvent, Manville filed its Chapter 11 petition for reorganization in August of 1982.¹⁹ To solve the problem of how to deal fairly with future claims, the Manville plan of reorganization pioneered the use of a trust dedicated to the resolution and payment of all asbestos

claims, present and future, which were directed to the Trust by an injunction — a “cornerstone” of the plan²⁰ — channeling all asbestos claims from the reorganized Manville Corporation to the Manville Trust. The channeling injunction was issued pursuant to the bankruptcy court’s general equitable powers.²¹ It was hoped that this arrangement would make it possible for the Manville business to prosper free of claims, and thus to provide value to the Manville Trust in the form of its equity and debt securities.

b. Congress Acts

To alleviate concerns about the validity of the *Manville* injunction, which had made the marketability of Manville’s securities questionable, and to foster reorganization of other asbestos debtors, in 1994 Congress enacted Bankruptcy Code Section 524(g), which statutorily validates the trust and channeling injunction mechanisms pioneered in the *Manville* case.²² As Senator Brown then explained, “[w]ithout a clear statement in the code of a court’s authority to issue such injunctions, the financial markets tend to discount the securities of the reorganized debtor. This in turn diminishes the trust’s assets and its resources to pay victims.”²³

Section 524(g) satisfies due process concerns with respect to future claimants by providing for appointment of a legal representative to protect their interests.²⁴ The statute gives a debtor the right to propose and have confirmed a plan that will create a trust to which all of the debtor’s present and future asbestos personal injury liabilities will be transferred, or channeled, for post-confirmation claims evaluation and resolution.²⁵ The debtor is freed of asbestos claims, in return for funding the trust, and present and future asbestos claimants have recourse to the assets of the trust.

By 2000, there were sixteen asbestos personal injury trusts; by 2011, there were nearly sixty, with trusts formed by many large asbestos defendants, including Armstrong World Industries Inc., the Babcock & Wilcox Company, DII Industries, LLC (Halliburton), Owens Corning, and USG Corporation.²⁶

IV. Asbestos Trusts and Victim Compensation Today

a. Structure of the Trusts

According to the GAO, as of 2011, there were sixty private asbestos trusts.²⁷ Since then a handful of others have been created.²⁸ Most of these trusts work the same way. Pursuant to the mandate of 11 U.S.C. § 524(g), an asbestos trust must treat all similar claimants in substantially the same manner.²⁹ When it is formed, therefore, a trust will estimate the number of claims it expects to receive and determine the value of those claims based on the values set forth in the trust’s formation documents, which values are based on the settlement values the trust’s predecessor would have paid to settle the claims had they been brought in the tort system.³⁰ The trust has fixed assets that will be insufficient to pay the full value of all claims; it therefore sets a payment percentage, and each present and future claimant is paid a liquidated settlement value for his or her claim discounted by the payment percentage.³¹ The functioning of the trusts approximates the process through which lawsuits in the tort system are settled.

An asbestos trust is a private trust; there are no government monies involved. Each private trust is governed by its trust agreement and the trust agreement exhibits, which include a document containing a series of trust distribution procedures (“TDP”), approved by the bankruptcy court when confirming a plan of reorganization providing for creation of the trust.³² The TDP sets forth procedures for the administration of the trust and establishes a process for assessing and paying valid claims. The TDP also includes the settlement amounts that the trust will offer a claimant with an asbestos-related disease who meets the exposure and medical criteria set out in the TDP, and thus can presumptively establish the liability of the trust’s predecessor.³³ The Trust Agreements and TDPs are publicly available documents.

For a claimant to recover from an asbestos trust, he or she must provide all of the information required by that trust. This typically includes medical evidence demonstrating that the claimant has an asbestos-related disease, and evidence satisfactory to the trust that its predecessor had responsibility for the claimant’s injuries.³⁴ The evidence required depends on the nature of the claimant’s disease. A claimant with mesothelioma, for example, must provide a diagnosis of that disease by a physician who physically examined the claimant, or a diagnosis by a board-certified pathologist or a pathology report prepared at or on behalf of an accredited hospital, as well as appropriate evidence of product identification as noted above.³⁵

Claimants who believe that they are entitled to a larger payment from a trust because, for example, they have higher than normal damages, or manifested illness at an early age, can reject the standard settlement process and seek “individual review” of their claims.³⁶ In either case, the trust is designed to value claims at the tort-system settlement share of its debtor — not the joint and several total value of the claim against all responsible parties that would be fixed by a jury. In other words, each private asbestos trust is responsible only for its debtor’s portion of the harm caused; trust payments do not take into account harm caused by any other wrongdoer.

b. Trust Audit Programs

The claims payment criteria are combined with audit programs to ensure that the trusts do not pay unsupported claims.³⁷ The trusts do not pay every claim that is filed, but routinely reject those that are deficient.³⁸

The majority of trust documents provide the trusts with the authority to “develop methods for auditing the reliability of medical evidence, including additional reading of X-rays, CT scans and verification of pulmonary function tests, as well as the reliability of evidence of exposure to asbestos, including exposure to asbestos-containing products for which the trust is responsible.”³⁹

Most trusts, certainly all of the larger trusts with which I am familiar, have adopted regular audit procedures, both random across all filings and special audits triggered by particular questions about a claim. Some trusts that share claims processing facilities also compare the evidence a claimant has submitted across trusts during the audit. A law firm may not choose not to participate in the audit process – if a firm does not respond to an audit request, the trust will stop processing the firm’s claims as the firm will be deemed to have failed the audit.

These audit programs are designed to be thorough. If there are misrepresentations or irregularities in filed claims, the audit procedures implemented by the trusts will find them.

The audits based on random sampling occur on a regular basis, multiple times each year. The auditors choose a random sample, weighted, in many cases, to select claims with more serious disease levels and claims from firms with the most filings. The auditors will request significant supporting information about the sampled claimant from the filing law firm, including additional medical documentation (such as diagnostic imaging and reports) and exposure documentation (such as depositions of the claimant and co-workers and employment records).

In some trusts the auditors investigate the claims on three levels: administrative, medical, and exposure.

- For the administrative investigation, the auditors review all documents to ensure that forms are complete; they will also check signatures, dates, and notarizations.
- For the medical assessment, the medical reports and records are referred to independent, Board-certified physicians for review. A pulmonologist reviews all medical information and assesses the plausibility of the original diagnosis, and, for malignancy cases, a pathologist reviews relevant pathology slides where applicable.
- The exposure review evaluates all the documentation provided by the law firm to affirm the exposure requirements of the TDP are met, including company exposure, Significant Occupational Exposure where necessary, and cumulative asbestos exposure, where relevant. Each and every exposure alleged will be reviewed and affirmed, and verified by information generated by independent third parties such as Social Security records, co-worker affidavits, and depositions or interrogatories. In addition, for exposures that did not occur at a site on a trust's site list, the claimant will be required to prove exposure to the company's product.

Should an audit reveal errors or inconsistencies with one of the claims, the auditors will then proceed to investigate additional claims from the law firm or physician. If that larger audit reveals that questionable information has been provided to one or more of the trusts, the TDP authorizes the trusts to take significant actions, which may include

- disallowing the claim;
- increasing scrutiny on other claims from that firm or physician;
- refusing to accept claims from that firm or physician; or
- seeking prosecution of the claimant or claimant's attorney for presenting a fraudulent claim.

What trust audits have shown is that the overwhelming percentage of the tens of thousands of claims filings allege factual matters that are solidly supported by underlying evidence in the files of the many hundreds of law firms throughout the country. I am confident that the trusts that I observe regularly, both through their careful initial claims review mechanisms and through their audit processes, are seeing to it with reasonable certainty that the

scarce resources of the trusts are being devoted to meritorious claimants and are not being wasted.

c. There Is No Motivation to Countenance Fraudulent Claims and No Evidence That They Are a Factor

There is no financial motivation for the trusts or any of the parties involved to countenance fraudulent claiming. The trustees have a fiduciary responsibility to ensure that only valid claims are paid. The members of the trust advisory committees are lawyers representing asbestos victims – any fraudulent claims paid mean less money for their deserving clients. And the future claimants’ representatives want to ensure that only valid claims are paid so as to preserve resources for future claimants. Given this diversity of interests aligned against the payment of fraudulent claims, it is difficult to see who would benefit.

Indeed, in my experience, nearly half of the claims filed with trusts go unpaid.⁴⁰ As with any compensation funding program designed to pay hundreds of thousands of claims, there is no guaranteed method to completely prevent each and every attempt to abuse the trust system. There is, however, simply no evidence that such practices are widespread, nor is there any reason to doubt that the current auditing mechanisms aren’t operating efficiently and to the benefit of all victims.

What seems to be missing from this discussion is that the simple fact that a claimant sues an asbestos defendant in the state tort system while filing claims against (and potentially receiving payment from) multiple trusts is not inappropriate or abusive; indeed, it is fully appropriate and in fact is the only route through which the claimant has the opportunity to be fairly compensated. As the Fifth Circuit reflected in the *Borel* case many years ago, most asbestos victims were exposed to asbestos-containing products from multiple defendants and, unless there is an adjudication of liability and award and payment of damages, each defendant or trust remains responsible for its portion of the harm caused.

d. The Trusts Collectively Pay a Small Portion of Claimants’ Damages

The private asbestos trusts replace asbestos defendants after those defendants go through the 524(g) process, and are settlement vehicles. The trusts are not tort defendants; rather, they settle claims created by the liability of their predecessors. Unlike solvent defendants, a trust does not contest liability when a plaintiff proves exposure to products for which the trust is responsible.

Given the fact that the trusts pay a percentage of the settlement value of a claim, the amounts being paid to claimants vary widely from trust to trust, but are invariably a small fraction of the tort system recoveries. The GAO survey found the median payment percentage across trusts is 25%.⁴¹ The scheduled values for a claim, which are based on each defendant’s historical settlement averages, vary widely as well, reflecting the share of total settlements paid by each defendant in the tort system. The following table illustrates some of this data. This information is publicly available.

Sample Trust Recoveries⁴²

Trust	Payment %	Scheduled Value — Mesothelioma	Paid to Claimant
AWI	35%	\$110,000	\$38,500
B&W	11.9%	\$90,000	\$10,710
Fibreboard	10.4%	\$135,000	\$14,040
Kaiser	35%	\$70,000	\$24,500
Manville	6.25%	\$350,000	\$21,875
OC	11.1%	\$215,000	\$23,865
USG	28.2%	\$155,000	\$43,710
Total		\$1,125,000	\$177,200

As shown, none of these major trusts have the funds to pay the full scheduled value to all present and future claimants. Indeed, most recoveries are quite small. For example, recovering from all of the trusts listed above would yield a claimant roughly \$177,000 out of what would have been over one million dollars in the tort system.

V. Facts About Asbestos Litigation

The asbestos defendants who advocate for this legislation have created myths of wrongdoing made possible by the trust system and used by them to justify legislation which they hope will change the results in the tort system.

a. There Is No “Double-Dipping”

One of these myths is what they call “double-dipping.” Supporters of this legislation claim that “transparency” is necessary to prevent “double-dipping” on the part of victims — that is, fraudulent multiple recoveries for the same injury, through lawsuits against remaining solvent defendants and trust claims. This assertion is deliberately misleading. Because of the ubiquitous presence of asbestos in industry, multiple companies are almost always at fault for asbestos-related diseases and deaths. Think of the shipyard worker, for example, assisting in the repair of countless U.S. Navy warships. The asbestos-containing products that were causes of his injury included boilers, pipe and thermal insulation, gaskets, and many others. A person so injured can legally recover from every company responsible, including both those he sues in the tort system and the trusts that stand in the shoes of bankrupt defendants. Strikingly, while “transparency” is sought here for settlements victims reach with private asbestos trusts, no “transparency” is sought by asbestos corporations for settlements victims reach in the tort system with defendants. Surely, if the goal were to truly identify other exposures and the sum of settlements received by any one victim, the tort system settlements which these same defendants demand be held confidential would have to be included.

There is nothing inappropriate or illegal when an asbestos victim files a claim against multiple asbestos trusts or sues multiple corporations, as it is almost always the case that a victim’s disease was caused by exposure to a number of different asbestos corporations’ products. This is no different than if a victim is mugged by five criminals; each of those criminals would be prosecuted for the crime because each is responsible for causing harm. But

by an asbestos corporation's logic, so long as one criminal can be prosecuted for the group mugging, the remaining four criminals should be allowed to go free.

It is a fundamental principle of American tort law that an injured person can recover damages from every entity that has harmed him. This is especially necessary in asbestos cases because it is scientifically impossible to look at a picture of a person's lungs and identify which asbestos product ultimately led to a person's disease; rather, science tells us that it is the cumulative exposure to all asbestos products over the course of a person's life that leads to disease.

Once a victim files a claim against the group of asbestos corporations responsible for causing harm, and litigation progresses, a victim can settle his claim against one or another of the wrongdoers as both parties may agree. His compensation for his injury is, then, the sum of all the settlements reached. Only in the very rare case that goes to verdict, judgment, and payment (where the payment amount is reduced to account for payments by settling co-defendants or bankruptcy trusts), is the victim's claim fully satisfied.

b. Asbestos Defendants Can Already Receive Relevant Exposure Information

The defendants assert that they need this legislation to obtain information relevant in the tort system cases, but such an assertion is patently false, because defendants can seek the information they need through current legal mechanisms. State law discovery rules require plaintiffs to produce copies of any trust claims they have filed. Moreover, asbestos litigation has been going on in earnest for more than thirty years. The defendants and their lawyers are experienced hands and have available the proof of product exposure at sites throughout the country. There are precious few job sites for which defendants do not have a library of data demonstrating which other defendants' products were present, if that is what they want to show.

This information does not come only from victims. An individual victim often does not know what corporations provided the asbestos products present at a site where he worked decades earlier. Indeed, he is usually a sick or dying worker, or the widow of such a person, and he (or his widow) will only know where he worked and the kinds of materials he worked with, though not necessarily the materials his co-workers worked with. Proof of the identity of the supplier of the asbestos at those locations often comes through discovery of suppliers and sales records, and depositions of co-workers, not the victims' memories.

The defendants' claim that having access to victims' individualized, personal trust claim information would solve a problem, therefore, is false. Should a defendant wish to lay off liability on an asbestos trust or other asbestos corporation, the tort system allows it to do so. In addition to their institutional knowledge, the remaining defendants in the tort system have the same discovery devices available to them as victims do, and can prove the fault of the absent asbestos corporation as easily as plaintiffs originally could. Defendants can obtain, for example, the victims' work histories, employer records, and depositions of the victims and co-workers to determine the asbestos-containing products to which the victims were exposed. Defendants can also consult the trusts' websites, which generally contain searchable lists of sites where the products for which the trusts have responsibility were concededly used, and which are easily

compared to a victim's work history.⁴³

Defendants, then, can build a case that a plaintiff's disease was caused by exposure to others' products without the disclosures mandated by the FACT Act and the burdens it places on victims and the trusts. With access to exposure and product identification from decades of litigation and state law discovery rules allowing discovery of trust information, asbestos defendants have access to the information they need to defend themselves in court.

c. Asbestos Defendants Are Not Made to Pay More Than Their Fair Share

States have different laws about how and when multiple wrongdoers can be held accountable, a situation not caused by or related to the existence of asbestos trusts. The principal difference between so-called several-only and joint-and-several jurisdictions is whether the victim or solvent defendant bears the risk of another responsible defendant's inability to pay. An individual defendant's share of the liability for an injury is its "several" liability. In states that apply several-only liability rules, when a responsible defendant cannot pay, the victim cannot recover that defendant's liability share from co-defendants; the victim bears the loss.⁴⁴ With joint-and-several liability, each defendant the jury finds at fault can be required to pay the entire judgment and then seek contribution from others jointly responsible, whether another tort system defendant or a trust, bearing the risk that one or more of those jointly responsible cannot pay. The nature of each state's regime is a public policy choice of its legislature.

Underlying all of these systems is the fact that each defendant is assigned a share of liability. When verdicts are molded, courts typically reduce the verdict amount before entering judgment in order to reflect settlement payments a victim has recovered from other tort system defendants and trusts.⁴⁵ Thus, trust recoveries are taken into account.

VI. The "FACT Act": A Solution In Search of A Problem

The FACT Act's provisions are designed to grant asbestos defendants new rights and advantages to be used against asbestos victims in state court and to impose new time-consuming burdens on the trusts. Further, the bill is intended to help defendants skirt state laws regarding rules of discovery and joint and several liability. And it would accomplish all of these objectives by needlessly forcing the public disclosure of victims' personal information. The FACT Act would require each trust to publically disclose the fact of each settlement it reaches together with extensive individual and personal claim information, including information about a victim's exposure and work history, and would allow asbestos defendants to demand any additional information from the trusts at any time and for virtually any reason.

The proposed amendments to Section 524(g) of Title 11 of the United States Code, Sections 8(A) and 8(B), operate together to put burdensome and unnecessary reporting requirements on the trusts, giving asbestos defendants informational advantages while also slowing down the ability of trusts to pay claims. Section 8(A) of the bill would force trusts to publicly report highly personal, individual claimant data. According to the bill, this would include "the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant." And, if the information reported pursuant to this provision were not

enough for asbestos defendants to use to deny liability, section 8(B) requires the trusts to “provide in a timely manner *any* information related to payment from, and demands for payment from, such a trust, subject to appropriate protective orders, to *any party to any action* in law or equity if the subject of such action concerns liability for asbestos exposure.” (Emphasis added.) Section 3 of the bill makes the bill’s provisions retroactive and would force every trust to look at and report on every claim it ever paid. In other words, it creates burdens for both the victims and the trusts.

a. The Burden on Victims: Privacy Violations

The primary burden is on the claimants whose privacy is being violated. The bill threatens the privacy of asbestos victims, many of whom are elderly veterans or their widows, by placing information about their confidential settlements on the internet for anyone to see. Who they are, where they live, how old they are, the fact that they are sick or dying, or recently widowed, and that they have recently resolved a claim and are in possession of funds – this will be available for anyone to see. The quarterly reports required by the FACT Act will be a resource for scammers.

The release and misuse of private data is a serious threat. Last summer it was revealed that the personal data of 4.2 million federal employees, as well as sensitive information such as addresses, health, and financial history from the more than 20 million people who had undergone a government background check in the last fifteen years, had been stolen from the Office of Personnel Management.⁴⁶ This Committee held hearings on this data breach. So why is it not concerned here?

Indeed, while this Congress is concerned that the healthcare.gov website may be releasing information that *might* lead to a company being able to assemble a user’s age, income, zip code, and medical information,⁴⁷ the FACT Act would *require* that this same information be published about sick and dying cancer victims just because their cancer was caused by exposure to asbestos. The Chairman of this very Committee has complained that the HealthCare.gov website is failing to protect “very sensitive information about millions of Americans, including their names, addresses, social security numbers, employment status, and health history” by sharing it with “third parties”⁴⁸ yet this bill that does exactly that.

The bill also creates a burden on victims by slowing down the trust process such that many victims could die before receiving compensation since victims of mesothelioma typically only live for 8 to 18 months after their diagnosis.⁴⁹ The bill will require the trusts to spend time and resources complying with the bill’s various requirements, potentially causing trust recoveries to be delayed.

b. The Financial Burden on the Trusts

Counsel for five substantial trusts – the Babcock & Wilcox Company Asbestos Personal Injury Trust, the Federal-Mogul Asbestos Personal Injury Trust, the Owens Corning/Fibreboard Asbestos Personal Injury Trust, the United States Gypsum Asbestos Personal Injury Settlement Trust, and the WRG Asbestos Personal Injury Trust – wrote a letter to this Committee on

February 1, 2016 addressing the burden the Act would place on the trusts.⁵⁰ The five trusts estimated that each trust like one of them receiving 10,000 claims per quarter and paying 5,000 of the claims over time would require experienced managers and claim reviewers to spend an aggregate of 20,000 hours per year on that trust's compliance with the Act⁵¹ – the equivalent of ten new full-time employees. The trusts explain that the data for “exposure history” and “basis for payment” required by the Act cannot be collected using pre-set data or information from a claim form, but must be extracted from a review of the supporting documentation submitted by the claimant.⁵² In the aggregate this will reduce trust funds available to compensate victims by millions of dollars.

The quarterly reporting requirement alone would place this significant burden on the trusts. Moreover, the language requiring trusts to provide information on historical claims on a demand-by-demand and victim-by-victim basis is so broad as to make the impact in terms of cost and time potentially vast and yet unquantifiable.⁵³ And, of course, this provision also leads to further privacy concerns. It opens up the medical and financial information of hundreds of thousands of cancer victims and their family members to any party in an asbestos case. The privacy violations are too many to count.

c. The Bill is Unwarranted and Unbalanced and Interferes with State Tort Systems

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

It is also important to note that the bill only changes what the trust must report with respect to an asbestos victim; the bill says nothing of the right of asbestos defendants to demand confidentiality. A typical asbestos defendant who settles a case in the tort system demands confidentiality as a condition of settlement in order to ensure that other victims do not learn how much the defendant paid. Trust payments represent settlements of former asbestos defendants. The remaining asbestos defendants now want the trusts to disclose specific settlement amounts and other information that they themselves do not provide and that the bankrupt asbestos defendants who created the trusts did not provide when they were defendants in the tort system. At the same time, as I note above, the bill threatens the privacy of asbestos victims, many of whom are elderly veterans, by placing information about their confidential settlements on the public record.

Furthermore, the bill seemingly ignores the fact that much trust information is already public. Trusts already disclose far more information than solvent defendants do about their settlement practices and amounts – the settlement criteria used by a trust and the offer the trust will make if the criteria are met are publicly available in the Trust Distribution Procedures for that trust. Trusts also file annual reports with the bankruptcy courts and often publish lists of the products for which they have assumed responsibility. Ironically, then, the trusts are already far more “transparent” than the solvent defendants who now seek to transform the trusts into

discovery clearinghouses for their benefit.

Lastly, the bill also ignores the fact that despite trying to find instances of widespread fraud and abuse, there is none. Senator Jeff Flake (R-AZ) justified its introduction on the grounds that it would “combat fraud within the asbestos-settlement system”⁵⁴ However, there is no evidence of such fraud. Former House Committee on the Judiciary Chairman Lamar Smith asked the U.S. Government Accountability Office (the “GAO”) to examine asbestos trusts set up pursuant to § 524(g), and the GAO published a report in 2011. The GAO did not find any trusts that indicated their audits had identified cases of fraud.⁵⁵ Had the GAO believed that nonetheless there was reason to suspect systemic fraud, surely it would so have advised the Committee.

VII. The *Garlock* Opinion Does Not Demonstrate Fraud in Trust Claims

In the same press release announcing introduction of the FACT Act, Senator Flake says, referring to the *Garlock* case, “that another example of fraud in the trust system emerged when a federal judge issued an opinion in which he described a ‘startling pattern of misrepresentation’ in filings and withholding of evidence by plaintiffs’ attorneys in asbestos-related cases against a gasket maker.”⁵⁶ First, let’s be clear as to what the *Garlock* case is about: *Garlock* is a former asbestos products manufacturer that is reorganizing under Chapter 11 of the bankruptcy code; the primary issue in the case is how much money *Garlock* should pay into a trust to compensate victims of asbestos disease exposed to its products. Unsurprisingly, *Garlock* would like to pay less than the amount the victims are asking; this is what is at issue in the *Garlock* case.

I and my firm are counsel to the Official Committee of Asbestos Personal Injury Claimants in the *Garlock* case. We are not here to debate the merits of the *Garlock* interlocutory estimation opinion, although we think it is wrong. But the Judiciary Committee should note that taken on its face the premise of the *Garlock* estimation opinion is the opposite of what the proponents of this legislation seem to think – there, the judge started with the assumption that all trust claims are valid and provable – meaning it is nonsensical to apply any supposed lessons from the *Garlock* case to the question of whether the FACT Act is sound policy. The *Garlock* case is about how much money an asbestos corporation should set aside to compensate its victims; the FACT Act is about putting additional burdens on private asbestos trusts and victims of asbestos disease. One has little to do with the other. For more detail about the *Garlock* opinion, please see my response to a question from members of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary.⁵⁷

VIII. Conclusions

Under the rubric of arguing that “transparency” is necessary to prevent supposed fraud, asbestos companies continue their efforts to change the laws at a state and federal level to receive whatever benefits they can from the existence of private asbestos trusts. These laws that force claims, regulate timing of trust claims, and put additional burdens on these trusts, such as the FACT Act, are unjust and unfair to asbestos victims.

This increased so-called “transparency” is apparently only a one-way imperative for asbestos corporations because nothing in the FACT Act would require asbestos defendants to provide “transparency” for the locations where they know their product was used or for all the

settlements that they demand be held confidential and hidden from public view. Presumably asbestos defendants don't want asbestos victims to know what they pay to other victims to resolve their liability.

Yet, with this bill, private information becomes public. Whose? Thousands of your constituents, many aging veterans, who might prefer the world not know who they are, where they live, that they are sick, that they have recently resolved a claim, and that they are in possession of funds.

These legislative proposals were never designed — nor intended — to address any purported fraud in the trust system. Indeed, there is no evidence of any such problem. The real purpose of these laws is to allow asbestos defendants to take advantage of the bankruptcies of their co-wrongdoers by shifting to victims the burdens of the shortfalls caused by the bankruptcies, as well as the burdens of discovery and proof of the bankrupt wrongdoers' responsibility. These proposals are simply the latest stratagem by corporations that produced and distributed asbestos-containing products to avoid responsibility for the deaths and injuries of millions of Americans caused by those products. Legislators should not allow asbestos corporations to evade accountability by shifting blame to the victims of asbestos exposure, and Congress should be vigilant to protect the rights of injured workers and their families.

Endnotes

¹ *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C.).

² U.S. Government Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 6 (Sept. 23, 2011) (“GAO Report”).

³ Agency for Toxic Substances & Disease Registry, U.S. Department of Health & Human Services, *Asbestos Fact Sheet* 1 (2001).

⁴ EPA, *Learn About Asbestos*, <http://www.epa.gov/asbestos> (last visited Jan. 31, 2015).

⁵ National Cancer Institute, NIH, *Malignant Mesothelioma*, <http://www.cancer.gov/cancertopics/types/malignantmesothelioma> (last visited Jan. 31, 2015).

⁶ See Antti Tossavainen et al., *Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution*, 23 *Scandinavian Journal of Work Environment & Health* 313 (1997) (“All 4 major histological types [of lung cancer] (squamous, adeno-, large-cell and small-cell carcinoma) can be related to asbestos.”); World Health Organization, *Elimination of Asbestos-Related Diseases* 1-2 (2006) (“All types of asbestos cause cancer in humans No threshold has been identified for the carcinogenic risk of chrysotile.”). See also American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Disease Related to Asbestos*, 170 *American Journal of Respiratory and Critical Care Medicine* 692, 697 (2004).

⁷ See William J. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality — 1980-2030*, 3 *American Journal of Industrial Medicine* 259, 259 (1982); see also American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 *American Review of Respiratory Disease* 363, 363 (1986).

⁸ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 737-38 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993) (“Manville I”).

⁹ See *Enpro Industries Inc. Form 10-K* (Mar. 3, 2009) at 84.

¹⁰ Muriel L. Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 *British Journal of Industrial Medicine* 261, 265 (1965) (latency period can be as long as 55 years); C. Bianchi et al., *Latency Periods In Asbestos-Related Mesothelioma of the Pleura*, 6 *European Journal of Cancer Prevention* 162, 162 (1997) (the latency period in one case was 72 years).

¹¹ *Manville I*, 129 B.R. at 737.

¹² Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 5-6 (Aspen Pub. 5th ed. 2005). See also *Manville I*, 129 B.R. at 737 (internal citation omitted).

¹³ *Manville I*, 129 B.R. at 737-38 (internal citation omitted). See also *id.* at 739 (noting that reports of mesothelioma among asbestos workers had emerged in journals of industrial medicine and hygiene in the late-1940s).

¹⁴ *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

¹⁵ See *id.* at 1089.

¹⁶ See *id.* at 1095.

¹⁷ See, e.g., *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214 (Cal. 1997) (plaintiff may meet the burden of proving exposure to defendant’s product caused lung cancer by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff’s or decedent’s risk of developing cancer); *Jones v. John Crane, Inc.*, 350 Cal. Rptr. 3d 144, 151 (Ct. App. 2005) (“The testimony of the experts provided substantial evidence that Jones’s lung cancer was caused by cumulative exposure, with each of many separate exposures having constituted substantial factors contributing to his risk of injury.”); *John Crane, Inc. v. Linkus*, 988 A.2d 511, 531 (Md. Ct. Spec.

App. 2010) (“We conclude that lay testimony describing the amount of dust created by handling the products in question, coupled with expert testimony describing the dose response relationship and the lack of a safe threshold of exposure (above ambient air levels), was sufficient to create a jury question [as to whether the plaintiff’s mesothelioma was caused by defendant’s asbestos-containing products.]”); *John Crane, Inc. v. Wommack*, 489 S.E.2d 527, 532 (Ga. Ct. App. 1997) (“Expert testimony showed that it is universally agreed that asbestos fibers are intrinsically dangerous and that the respiration of each fiber is cumulatively harmful”); *Blancha v. Keene Corp.*, Civ. A. No. 87-6443, 1991 WL 224573, at *6 (E.D. Pa. Oct. 24, 1991) (every occupational exposure to asbestos “is a substantial factor in bringing about mesothelioma”); *Held v. Avondale Indus., Inc.*, 672 So. 2d 1106, 1109 (La. Ct. App. 1996) (medical evidence showed “no known level of asbestos [exposure] which would be considered safe . . . any [asbestos] exposure, even slight exposures, to asbestos . . . [found to be] a significant contributing cause of the [decendent’s] malignant pleural mesothelioma”); *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684 (Wash. Ct. App. 1997) (any exposure to asbestos above background contributes to development of mesothelioma); *Kurak v. A.P. Green Refractories Co.*, 689 A.2d 757, 766 (N.J. Super. Ct. App. Div. 1997) (“Where there is competent evidence that one or a *de minimis* number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff’s injury.”); *ACandS, Inc. v. Abate*, 710 A.2d 944, 989 (Md. Ct. Spec. App. 1998), *abrogated by, John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002) (expert medical witness testified that “each and every [asbestos] exposure that [the decedent] had was a substantial contributing factor in the causation of his disease”); *Caruolo v. ACandS, Inc.*, No. 93 Civ. 3752 9RWS, 1999 WL 147740, at *9 (S.D.N.Y. Mar. 18, 1999) *aff’d in part, vacated in part*, 226 F.3d 46 (2d Cir. 2000) (expert medical witness testimony that “[T]here is no way one can say [each asbestos exposure] didn’t contribute. To the contrary. All of his exposures contributed to his mesothelioma, including this one.”).

¹⁸Brodeur at 73.

¹⁹*See In re Johns-Manville Corp.*, 68 B.R. 618, 620 (Bankr. S.D.N.Y. 1986), *aff’d*, 78 B.R. 407 (S.D.N.Y. 1987), *aff’d*, 843 F.2d 636 (2d Cir. 1988).

²⁰*See id.* at 624.

²¹*See id.*

²²*See, e.g., In re Combustion Eng’g, Inc.*, 391 F.3d 190, 235 n.47 (3d. Cir. 2004). *See also* H.R. Rep. No. 103-835 at 3 (1994) (explaining that Section 524(g) is intended to emulate the “creative solution to help protect the future asbestos claimants, in the form of a trust into which would be placed stock of the emerging debtor company and a portion of future profits, along with contributions from [the debtor’s] insurers” devised in the *Manville* case). Section 524(h), which was enacted at the same time, makes clear that the channeling injunction in *Manville* is deemed retroactively to comply with Section 524(g), and thus is valid.

²³Bankruptcy Amendments Act of 1993, Amendment No. 1633, 140th Cong. (2d Sess. 1994) (*amending* 11 U.S.C. § 524).

²⁴*See* 11 U.S.C. § 524(g)(4)(B)(i).

²⁵*See id.*

²⁶GAO Report at 3.

²⁷GAO Report at 3. This number may not be accurate, as some trusts are dormant and other bankruptcy cases which were expected to lead to new trusts are still active.

²⁸ For example, the WRG Asbestos PI Trust began accepting claims on August 25, 2014 (Letter from WRG Asbestos PI Trust Trustees to Prospective Claimant or Claimant Counsel, August 15, 2014, available at <http://wrgraceasbestostrust.com/wp-content/uploads/2014/02/WRG-Final-POC-Instructions-8.14.2014.pdf>); the Flintkote Asbestos Trust on December 14, 2015 (Flintkote Asbestos Trust, Overview, available at <http://www.flintkoteasbestostrust.com/> (last visited January 29, 2016)); and the Yarway Asbestos Personal Injury Trust began accepting claims on December 21, 2015 (Yarway Trust, www.yarwaytrust.com (last visited January 29, 2016)).

²⁹See 11 U.S.C. § 524(g)(2)(B)(i)(III).

³⁰See, e.g., *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 722 (D. Del. 2005); see also United States Gypsum Asbestos Personal Injury Settlement Trust, Trust Distribution Procedures §§ 2.3, 4.2 (revised Mar. 29, 2010), <http://www.usgasbestostrust.com/wp-content/uploads/2014/04/USGTDP.pdf> (“USG TDP”).

³¹See USG TDP §§ 2.3 and 4.2; see also *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 114, 136 (D. Del. 2006).

³²See, e.g., *In re Burns & Roe Enters., Inc.*, 08-4191(GEB), 2009 WL 438694, at *32, *37 (D.N.J. Feb. 23, 2009).

³³See, e.g., USG TDP § 5.3(a).

³⁴See, e.g., *id.* §§ 5.3(a)(3); 5.7(a), (b).

³⁵See, e.g., *id.*

³⁶See, e.g., *id.* § 5.3(b).

³⁷GAO Report at 29.

³⁸GAO Report at 19.

³⁹ United States Gypsum Asbestos Personal Injury Trust Distribution Procedures § 5.8 (available at <http://www.usgasbestostrust.com/wp-content/uploads/2015/12/USG.-Amended-TDP.12.2.2015-C0463535x9DB18.pdf>) (“USG TDP”).

⁴⁰ The following table shows the number of unliquidated claims each trust has received between its formation and December 31, 2014 and the number that had been paid as of that date.

Trust	Claims Received	Claims Paid	%
AWI	579,458	226,294	39%
B&W	537,002	252,997	47%
OC (OC)	603,799	272,183	45%
OC (FB)	592,499	262,349	44%
USG	560,079	237,359	42%

See *Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust’s Notice of Filing of Annual Report for the Year Ended December 31, 2014* at 2, *In re Armstrong World Indus., Inc.*, Case No. 00-4471 (Bankr. D. Del. Apr. 29, 2015) [Dkt. No. 10807-3]; *Annual Report and Account of the Babcock & Wilcox Company Asbestos PI Trust for the Fiscal Year Ending December 31, 2014* at 9, *In re Babcock & Wilcox Co.*, Case No. 00-10992 (Bankr. E.D. La. Apr. 29, 2015) [Dkt. No. 7844-1]; *Annual Report and Account of the Owens Corning/Fibreboard Asbestos Personal Injury Trust for the Fiscal Year Ending December 31, 2014* at 10-11, *In re Owens Corning*, Case No. 00-03837 (Bankr. D. Del. Apr. 29, 2015) [Dkt. No. 21099]; *Annual Report and Account of the United States Gypsum Asbestos Personal Injury Settlement Trust for the Fiscal Year Ending December 31, 2014* at 7, *In re USG Corp.*, Case No. 01-02094 (Bankr. D. Del. Apr. 29, 2015) [Dkt. No. 12708].

⁴¹GAO Report at 21.

⁴²See *Manville Personal Injury Settlement Trust, 2002 Trust Distribution Process* § D (Jan. 2012 Revision), <http://www.claimsres.com/documents/MT/2002%20TDPJanuary%202012%20Revision.pdf>; Letter to Manville Trust Beneficiaries and their Counsel from the Manville Trustees (August 19, 2014) (available at <http://www.claimsres.com/documents/MT/Pro%20rata%20announcement%2019AUG2014.pdf>); *Amended and Restated Armstrong World Industries, Inc. Asbestos Personal Industry Settlement Trust Distribution Procedures* § 5.3(b)(4) (updated July 31, 2015) (available at <http://www.armstrongworldasbestostrust.com/wp-content/uploads/2015/11/AWI-Second-Amended-and-Restated-Trust-Distribution-Procedures-TDP-as-of-July-31-2015.pdf>); *Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust Notice of Payment Percentage Increase* (December 11, 2013) (available at <http://www.armstrongworldasbestostrust.com/wp-content/uploads/2014/04/121113-AWI-Notice-of-Payment-Percentage-Increase.pdf>) ; *The Babcock & Wilcox*

Company Asbestos PI Settlement Trust Distribution Procedures § 5.3(b)(3), [bwasbestoatrust.com](http://www.bwasbestoatrust.com) (revised Dec. 2, 2015) (available at <http://www.bwasbestoatrust.com/wp-content/uploads/2015/12/BW.-Amended-TDP.12.2.2015-C0463536x9DB18.pdf>); Letter to Claimants and Claimants' Counsel from James McMonagle, Managing Trustee, *The Babcock & Wilcox Company Asbestos PI Settlement Trust* (Dec. 2, 2015); *Third Amended Trust Distribution Procedures* § 5.3(b)(3), [kaiser-asbestoatrust.com](http://www.kaiser-asbestoatrust.com) (Nov. 20, 2007), <http://www.kaiser-asbestoatrust.com/Files/Third%20Amended%20Trust%20Distribution%20Procedures%2000013238.pdf>; *Notice of Payment Percentage Adjustment*, [kaiser-asbestoatrust.com](http://www.kaiser-asbestoatrust.com) (May 13, 2011), http://www.kaiser-asbestoatrust.com/Files/20110513_KACC_Payment_Percentage_Notice.pdf; *Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures* (Revised Dec. 2, 2015) § 5.3(b)(4) (available at: <http://www.ocfbasbestoatrust.com/wp-content/uploads/2015/12/OC-FB.-Amended-TDP.12.2.2015-C0463534x9DB18.pdf>); Letters to Claimants and Claimants' Counsel from Dean M. Trafalet, Managing Trustee, Owens-Corning/Fibreboard Asbestos Personal Injury Trust (Dec. 2, 2015) available at <http://www.ocfbasbestoatrust.com/wp-content/uploads/2015/12/OC-Sub-Account-Trustee-Executed-Payment-Percentage-Change-C0457461x9DB18.pdf> and <http://www.ocfbasbestoatrust.com/wp-content/uploads/2015/12/FB-Sub-Account-Trustee-Executed-Payment-Percentage-Change-C0457460x9DB18.pdf>); *United States Gypsum Asbestos Personal Injury Settlement Trust Distribution Procedures* (Revised Dec. 2, 2015) § 5.3(b)(3) (available at <http://www.usgasbestoatrust.com/wp-content/uploads/2015/12/USG.-Amended-TDP.12.2.2015-C0463535x9DB18.pdf>); Letter to Claimants and Claimants' Counsel from Philip A. Pahigian (Dec. 2, 2015) (available at <http://www.usgasbestoatrust.com/wp-content/uploads/2015/12/USG-Trustee-Executed-Payment-Percentage-Change-C0457544x9DB18.pdf>).

⁴³ See, e.g., *USG Approved Site List*, [usgasbestoatrust.com](http://www.usgasbestoatrust.com) (updated July 31, 2015) <http://www.usgasbestoatrust.com/updated-usg-site-list-7312015/>.

⁴⁴ See *Bondex Int'l v. Ott*, 774 N.E.2d 82, 86-87 (Ind. Ct. App. 2002); *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 172 P.3d 410, 413 (Ariz. 2007).

⁴⁵ See Paul D. Kheingold, *Litigating Mass Tort Cases* § 10:65 (2012).

⁴⁶ http://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html?_r=0

⁴⁷ *HealthCare.gov Privacy Questions Raised at Congressional Hearing*, iHealthBeat (Jan. 28, 2015), available at <http://www.ihealthbeat.org/articles/2015/1/28/healthcaregov-privacy-questions-raised-at-congressional-hearing>; Cory Bennett, *Lawmakers Grill Officials on Healthcare.gov Data*, The Hill (Jan. 27, 2015), available at <http://thehill.com/policy/cybersecurity/230912-house-worried-about-healthcaregov-data>.

⁴⁸ Letter from Orrin G. Hatch, Chairman, Committee on Finance and Charles E. Grassley, Chairman, Committee on Judiciary to Marilyn Tavenner, Administrator, CMS (January 20, 2015).

⁴⁹ Mesothelioma Applied Research Foundation, *Mesothelioma Statistics, Mesothelioma Facts, Meso Foundation*, available at http://www.curemeso.org/site/c.duIWJfNqKiL8G/b.8578843/k.AF18/Mesothelioma_Statistics__Mesothelioma_Facts__Meso_Foundation.htm.

⁵⁰ See Letter from Douglas A. Campbell, Campbell & Levine, LLC, to The Honorable Charles Grassley, Chairman, Comm. on Judiciary, The Honorable Patrick Leahy, Ranking Member, Comm. on Judiciary (Jan. 29, 2016) ("January 29, 2016 Campbell Letter").

⁵¹ January 29, 2016 Campbell Letter, at 3.

⁵² January 29, 2016 Campbell Letter, at 3.

⁵³ January 29, 2016 Campbell Letter, at 3.

⁵⁴ Press Release, Sen. Jeff Flake (R-AZ), *Flake Reintroduces Bill to Increase Transparency, Reduce Fraud in Asbestos Settlement Trusts* (Feb. 4, 2015); available at <http://www.flake.senate.gov/public/index.cfm/2015/2/flake-reintroduces-bill-to-increase-transparency-reduce-fraud-in-asbestos-settlement-trusts> (last visited January 27, 2016). Mr. Flake also referred to "inconsistent claims" – a misleading concept I address in Section V.a above.

⁵⁵ GAO Report at 23.

⁵⁶ Flake Press Release, Feb. 4, 2015.

⁵⁷ *See* Furthering Asbestos Claim Transparency (FACT) Act of 2015: Hearing on H.R. 526 Before the Subcomm. on Reg. Reform, Com. and Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. 170-173 (2015) (Response to Questions for the Record from Elihu Inselbuch).