United States Senate Committee on the Judiciary
Hearing on "The Need for Transparency in the Asbestos Trusts"

Mr. Inselbuch's Responses to Written Questions

Written Questions of Senator Patrick Leahy

1. *Proponents of the FACT Act claim that protections in 11 U.S.C. § 107 and Bankruptcy Rule 9037 are sufficient to preserve the privacy of asbestos victims from the release of sensitive personal information in the reports the asbestos trusts are required to file on the public docket.*

   Do you agree? What steps must an individual go through to ensure his or her identity and personal information is adequately protected under Section 107 or Bankruptcy Rule 9037?

No. The FACT Act mandates that each asbestos trust file quarterly reports on the bankruptcy court's public docket that "shall describe each demand the trust received from a claimant, including the name and exposure history of the claimant, and the basis for any payment from the trust made to such claimant; and shall not include any confidential medical record or the claimant's full social security number."[1] At a minimum, the public filing will have to include the victim's name, partial social security number, the illness suffered, whether alive or dead, marital status, and financial situation where relevant.

While this filing, like all bankruptcy court filings, is subject to Section 107 of the United States Code, that provision actually creates a default situation in which "the dockets of a bankruptcy court are public records."[2] The United States Bankruptcy Court for the District of Delaware, which supervised many of the bankruptcies that led to the trusts' creation and would therefore receive many of the reports mandated by the FACT Act, has observed that "[p]ursuant to 11 U.S.C. § 107(a), filing for bankruptcy is a public act and, accordingly, all papers filed in bankruptcy cases and the dockets of bankruptcy courts are public documents subject to examination by members of the public."[3]

The statute provides three exceptions to this public status, two of which – trade secrets and defamation – are not relevant here.[4] The third potential exception states that "[t]he bankruptcy court, for cause, may protect an individual, with respect to [certain] information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property . . . ."[5]

This provision is certainly not an automatic protection for an asbestos victim concerned that his or her personal information will be publicly posted on a court's docket and thereby accessible on the internet. Under 11 U.S.C. § 107 the Bankruptcy Court has discretion as to whether this information would be protected ("for cause, may protect an individual"). The possibility of protection is subject to a balancing test ("create *undue* risk of identity theft"), and any such consideration begins with the presumption that "[m]otions to seal pleadings and other documents are disfavored as a general rule."[6] And, perhaps most importantly, the victim has the burden of seeking this protection. In other words, once the trust reports are filed on the docket, victims will be fighting an uphill battle against a presumption that the details about their trust claims are available to the public. This means that each claimant would have to pay to retain an attorney and then, for *each* trust claim submitted, file a motion in each bankruptcy case (since each trust was created in a separate bankruptcy proceeding). In sum – after paying to retain an attorney and filing a motion in each bankruptcy case, the victim would still have to overcome the presumption that information, once it appears on the docket, is public.

This leads to another issue. The larger trusts receive thousands of claims each quarter. It is highly unlikely that the Bankruptcy Courts are equipped to hear and rule on hundreds of thousands of motions to redact personal information every year.

Rule 9037 only requires that the filing be limited to the last four digits of the social-security number and the year (not the day and month) of the individual's birth.[7] It says nothing about the other information the trusts would be required to file.

Is there a risk to asbestos victims of identity theft or fraud if the information required to be filed in quarterly reports by the asbestos trusts is placed on the public docket? Why?

There is a grave risk. As I note in my response to the previous question, the FACT Act requires the publication of a considerable amount of information about asbestos victims, many of whom are elderly veterans or their widows, when they enter into confidential settlements with trusts. The "basis of a claim" includes such information as who they are, where they live, how old they are, the fact that they are sick or dying, (and, what disease they have), if they are recently widowed, and that they have recently resolved a claim and are in possession of funds – and through the electronic court dockets and the internet this information will be available for anyone to see.

2. *The FACT Act is premised on the proposition that there is evidence of widespread fraud in the asbestos trusts and so-called "double dipping" by asbestos victims who recover from both solvent companies and asbestos trusts.*

   Can you explain whether or not fraudulent claims and double-dipping are truly problems occurring in asbestos trusts and/or litigation? Why is so-called "double dipping" both a legal and factual impossibility?

Asbestos defendants (like those represented by the law firms employing Ms. Ableman, Mr. Behrens, and Mr. McKenna,[8] who testified at the February 3rd hearing) argue that asbestos lawsuits and claims against the trusts constitute "double dipping" because claimants may potentially recover both from defendants in the state court system and from bankruptcy trusts. The inference the asbestos defendants want to be drawn is that, as a result, claimants can recover more than what they are entitled to. The claim is false and reflects a deliberate

mischaracterization of the way both the bankruptcy system and state court lawsuits operate by people who know better. If any court anywhere—any state or federal, trial or appellate court hearing asbestos cases, or any bankruptcy court—had found any merit in this contention, it might have credibility, but no court ever has – including the *Garlock* court.

Plaintiffs can recover in the both state court system and from the trusts because a plaintiff has the right to recover from each and every entity that contributed to his or her injury. Just as someone who is in the sixth car of a six-car accident can sue (and recover from) all five of the other drivers who hit him, so too can someone with mesothelioma who was exposed to thirty manufacturers' asbestos-containing products recover from all thirty. Asbestos disease is typically the result of being exposed to multiple asbestos-containing products over the course of a person's working lifetime. The law in every state is settled that any victim can recover from every asbestos defendant who substantially contributed to his or her illness or injury; this includes asbestos trusts because the trusts essentially step into the place of former defendants.

The amount to which a claimant is entitled is only fixed in the rare case that goes to verdict and the verdict is paid. Trials to verdict and payment occur in less than one percent of the cases filed, and when this occurs, the claimant cannot recover more money from asbestos bankruptcy trusts as a matter of law. After the verdict is paid, the tort system defendant who paid the verdict succeeds to any rights the claimant may have had against any remaining tort system defendants and trusts and can recover from those defendants and trusts in the claimant's stead. This is the law of contribution among joint tortfeasors. Of course, also as a matter of law, the amount of any tort system verdict is reduced to account for any amounts previously received in settlement by the claimant whether from other tort system defendants or from asbestos bankruptcy trusts. This is the tort law of set-off. There cannot be any "double dipping" as a

matter of law. In the more than 99% of tort system cases where no verdict is ever reached, over time the claimant and the tort system defendants reach voluntary settlements just as the claimant reaches settlements with asbestos bankruptcy trusts. The claimant's ultimate recovery is the sum of all these settlements and whether or not it achieves what might have been a jury's verdict is not – and cannot ever be – determined.

Finally, there is no evidence that the trusts are being depleted by fraudulent claims. The majority of the trusts that I work with have implemented sophisticated audit programs designed to ensure that the carefully-drawn distribution procedures are being carefully enforced. On average the trusts reject more than half of the claims they receive – claims that now total in the millions. They are rejected not because they are fraudulent, but rather because they do not present sufficient evidence to justify payment. Please see my written testimony at pages 5-7 for more details.

Supporters of the FACT Act claim that U.S. Bankruptcy Judge George Hodges' opinion in In re Garlock Sealing Techs., LLC, 504 B.R. 71 (W.D.N.C. Bankr. 2014), and related proceedings provides evidence of the need for this legislation. What is your response?

In the press release announcing introduction of this bill, Judiciary Committee Member Flake says that in 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."[9] He repeated this statement in his opening remarks before this Committee during the hearing, as did the witnesses called by the Majority. In fact, referencing the *Garlock* estimation opinion does not offer any proof of the need for the FACT Act.

While this is not the forum for review of the *Garlock* estimation decision,[10] which is not yet ripe for appeal, this Committee should understand that the *Garlock* case is wholly irrelevant to the issue 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. One has little to do with the other.

In that opinion, the bankruptcy court estimated Garlock's liability to all present and future victims of mesothelioma over the next 35 years at just $125 million. In doing so, the court rejected Garlock's equally long history of resolving mesothelioma cases in the tort system throughout the United States, during which it paid over $600 million to compensate its victims. Although Garlock's settlement average per mesothelioma claim for the five years before its bankruptcy was more than $76,000, the bankruptcy court's estimate implied a per claim average of just over $7,000 going forward.

While bankruptcy law categorizes and prioritizes claims, it does not alter their values. Tort and contract claims are governed by state law and they retain their elements and values in bankruptcy. Accordingly, in *all* other asbestos bankruptcies where estimation was contested, the court's estimate of the bankrupt defendant's liability for asbestos claims has been based on its settlement history in the tort system – since the best measure of what cases will settle for is what previous cases have settled for.[11] If the *Garlock* case had followed these precedents, the estimate of Garlock's liability would have exceeded $1.2 billion.

To avoid this result, Garlock argued to the bankruptcy court that it was driven to bankruptcy by "fraud" committed by plaintiffs and their lawyers, who disclaimed knowledge of exposure to products of bankrupt defendants in tort-system lawsuits against Garlock, while at the same time presenting proof of such exposure in trust claim filings and bankruptcy ballots.

Garlock argued that this "fraud" so permeated its recent tort-system experience that the history could not be relied upon to estimate its ongoing liability. Regrettably, this argument misled the bankruptcy court, unfamiliar with tort litigation.

Nonetheless, nothing in the *Garlock* case debate supports any need for the FACT Act. Nowhere in the *Garlock* case did Garlock assert any fraud on the *trusts* or any impropriety in *trust* system filings or processing. Indeed, to the contrary, Garlock pointed to and the court relied on the accuracy of trust filings in the mistaken belief that they contradicted tort system evidence.

The Garlock estimation decision, whatever its correctness, *is no support* for the legislation. The underlying facts of the cases discussed by *Garlock* do not demonstrate fraud upon the trusts, nor do they demonstrate that defendants need the trusts to report this information. For a more detailed criticism of the *Garlock* decision see my 2015 testimony before the Subcommittee on Regulatory Reform, Commerce and Antitrust Law of the House Committee on the Judiciary.[12]

3. *The FACT Act forces the asbestos trusts to disclose detailed information about claims made to the trusts and the individuals who have made them. Who does this bill help and why would those entities seek this information?*

Over the decades, our fifty states have each evolved a tort litigation system through court decisions and acts of their legislatures. Those fifty separate systems are designed to establish methods of dispute resolution fair both to individuals and corporations, plaintiffs and defendants. Each system specifies what information parties must share in discovery and when they must share it with, in every case, a neutral judge to decide disputes. This bill, in blunderbuss fashion, overrides them all. It does nothing to help the trusts or the asbestos victims who submit claims to the trusts for compensation. Instead, it helps asbestos *defendants* – those

bearing responsibility for the victims' injuries – by creating a shortcut around the well-established state court discovery mechanisms.

Solvent defendants in the tort system can already obtain everything state law requires. A worker who is injured by exposure to asbestos and who brings a lawsuit against solvent defendants is required to answer questions in discovery about where he worked and what he did, and, if he has filed any trust claims.

Through discovery in an individual case, therefore, a defendant can routinely obtain the following information:

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

This information is specific to the individual plaintiff in the case in which the defendant is involved. The discovery process is supervised by the state courts in which the litigation is pending which can impose protective orders as appropriate.

Under the proposed FACT Act, while those who can request information under § 8(B) are limited to parties in asbestos cases, the information they are entitled to request is not limited to those cases. Instead, they can request "any information related to payment from, and demands for payment from, such trust . . . ."[13]

In addition, while information about whether a claim has been made is available in

discovery, the amount for which the claim was settled is not disclosed to a defendant until after there has been an award of damages by a jury – which happens very rarely. Presumably the differences in available information and the timing of the availability must be of significant value to the defendants or they would not be asking Congress to enact this bill.

Discovery is a fundamental part of the legal system in the United States, implementing checks and balances enshrined in policies adopted by states over decades, and asbestos litigation should not be treated differently – there is no need for the federal government to tip the scales across the board in favor of asbestos defendants to the detriment of the victims they have poisoned over the years.

Questions for the Record from Senator Sheldon Whitehouse

1. *The FACT Act would require the trusts to respond to any request from a party to any action if the subject of such action concerns liability for asbestos exposure.*
    a. *What would prevent a trust from receiving hundreds or even thousands of these requests during any given year?*

There is nothing in the bill or otherwise to prevent asbestos defendants from blanketing the trusts with such requests.

    b. *What would the effect of that be on the trusts and on the efficiency of paying out claims to asbestos victims?*

As the Trusts noted in their February 1, 2016 letter to this Committee, "[t]his broadly drafted provision could arguably require a trust to provide information regarding every claim that it has ever received to multiple parties, with each request being unique in some manner, an unimaginable burden."[14] While the bill has a proviso requiring the requesting party to pay "reasonable cost[s],"[15] the very word "reasonable" is nothing more than an invitation to potentially expensive disputes between the trusts and the requesting parties. To the extent that

the trusts divert resources from the processing and payment of claims, this will slow down the process of timely compensating victims while increasing transaction costs at the expense of those victims.

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. Could the FACT Act slow down state court litigation? If yes, what effect would it have on plaintiffs?

The ultimate goal of asbestos defendants is to delay, if not avoid, paying the victims who were exposed to their asbestos-containing products and who fell ill as a result of that exposure. For more than eighty years, corporations that produced and distributed asbestos-containing products — and their insurance companies — have attempted to escape responsibility for the deaths and injuries of millions of American workers caused by those products. 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.

It is in this context that they seek passage of the FACT Act. It 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. In a state tort suit, delay is the asbestos defendants' friend – a person diagnosed with mesothelioma is unlikely to live more than 18 months,[16] and juries value the claims of living victims higher than those who have died, and victims may be forced to accept lower settlements rather than hold out for trial. To some extent it is unclear what effect the FACT Act will have on its own in the state

tort system – the full damage will not be known until we see the mischief that asbestos defendants wreak with the data – but it is likely to cause delays as defendants insert baseless arguments about the trusts into the litigation. In addition, as I have already noted, it will require the trusts to spend time and resources complying with the bill's various requirements, potentially causing trust recoveries to be delayed as well.

2. *Proponents of the FACT Act claim it protects claimant privacy by excluding "any confidential medical record" from the reports the asbestos trusts are required to file on the public docket. Is this possible given the bill's explicit requirement that the trusts report the "basis for any payment"?*

The FACT Act requires the asbestos trusts to file reports which include "the basis for any payment from the trust made to such claimant."[17] While the text of the bill purports to exclude "any confidential medical record", the required description of "the basis for any payment" effectively trumps this purported protection.

Payments to asbestos victims from the asbestos trusts are based on claimants meeting exposure and medical requirements.[18] The value of a victim's claim is established by his or her disease – therefore a critical element of the basis for any payment is establishing what disease the claimant suffers from. The trusts require that a claimant meet certain criteria to document that he or she has a disease, including submitting various types of medical reports. While the actual documents may not have to be filed, the information in the reports is the basis for payment and on its face be required under the FACT Act.

3. *How do the trusts protect the interests of future victims?*

The trusts are structured so as to protect the interests of both present and future victims equally. Each 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.[19] The trustees of the trusts with which I am associated annually project the expected claims liability over the life of the trust and then monitor the value of claims paid through that year; there are mechanisms built into the trust to ensure that if too great a portion of the trust's assets are being paid out in a given year, an "emergency brake" is activated to slow payments and ensure assets are preserved for the future.

As I explained in my written testimony, there is no financial motivation for the trusts or any of the parties involved to countenance fraudulent claiming at the expense of future claimants. 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, the trusts are governed by responsible fiduciaries who are obliged by law to safeguard the rights of all beneficiaries. In a sample of twenty trusts that I work with as counsel to the trust advisory committees, there are 47 trustee positions. Of these 47 trustee positions, eighteen are filled by retired judges, including one by a federal court of appeals judge; four by a retired federal district judge, three by a retired state supreme court judge, and ten by a lower state court judge. In addition, three are filled by elected officials and one by the dean of a prominent law school. The trustees have a fiduciary duty to act in the best interests of all claimants, including the future claimants who have yet to manifest disease and make claims with the trusts.

In addition, each trust has a Future Claimants' Representative, or "FCR", who represents the interests of future claimants. The FCR has rights equal to those of the trust advisory committee, and the consent of both the trust advisory committee and the FCR is required for any significant changes to the trust's documents or its procedures. Of the 20 FCR positions associated with these trusts, eleven are filled by either a retired corporate or defense-side attorney or professional, five by a retired state court judge, and three by a professional neutral. They are strong advocates for future claimants and are a check against potential inappropriate conduct.

ENDNOTES

[1] FACT Act of 2015, S. 357, 114th Cong., § 2 (8)(B).

[2] 11 U.S.C. § 107(a).

[3] *In re Joyce*, 399 B.R. 382, 385 (Bankr. D. Del. 2009).

[4] 11 U.S.C. §§ 107(b)(1)-(2).

[5] 11 U.S.C. §107(c)(1).

[6] *In re Sherman-Noyes & Prairie Apartments Real Estate Inv. P'Ship*, 59 B.R. 905, 909 (Bankr. N.D. Ill. 1986) (*citing, inter alia*, 11 U.S.C. § 107(b)(2)).

[7] Fed. R. of Bankr. P. 9037. Disclosure of even the last four digits of the SSN can be dangerous – identity protection experts recommend not disclosing them. *See, e.g.,* http://idt911.com/ KnowledgeCenter/ ProtectYourself/TipDetail.aspx?a=%7B7FE75FF5-3B33-4E0D-BD2D-38B44AA24A46%7D (last visited 2/22/2016).

[8] Ms. Ableman's firm, McCarter & English, represents Owens-Illinois and has represented General Electric Co. as an asbestos defendant. *See* Notice of Adoption of Standard Answer to Complaint, Jury Demand, and Demand for Answers to Interrogatories, *Coleman v. Bradco Supply Corp.*, Case No. MID-L-4713-14 (N.J. Super. Ct. Middlesex Div.) (Filed Nov. 3, 2014); Khadijah M. Britton, GE Claims Contractor Immunity in Removing Asbestos Suit, Law 360 (Nov. 25, 2014); *see also* McCarter & English, Product Liability, available at http://www.mccarter.com/ Product-Liability-Practice/ (last visited 2/22/2016) ("Our diverse clientele includes … distributers and manufacturers of asbestos…"). Mr. Behrens' firm, Shook, Hardy & Bacon, regularly files amicus briefs on behalf of industry groups and Mr. Behrens himself is listed as a "leading product liability defense attorney" in his online biography. *See* http://www.shb.com/professionals/b/behrens-mark (last visited 2/22/2016). And Mr. McKenna's firm, Orrick, is national counsel for asbestos litigation for Union Carbide Corporation. *See* https://www.orrick.com/Practices/Mass-Torts-Product-Liability/Pages/default.aspx (last visited 2/22/2016); https://www.orrick.com/lawyers/james-stengel/Pages/default.aspx (last visited 2/22/2016).

[9] Flake Reintroduces Bill to Increase Transparency, Reduce Fraud in Asbestos Settlement Trusts, Jeff Flake (Feb. 4, 2015), http://www.flake.senate.gov/public/index.cfm/2014/5/flake-introduces-bill-to-increase-transparency-reduce-fraud-in-asbestos-settlement-trusts.

[10] My firm is counsel to the Official Committee of Asbestos Personal Injury Claimants in the *Garlock* case, *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C.).

[11] *See, e.g.*, *In re Armstrong World Indus., Inc.*, 348 B.R. 111 (D. Del. 2006); *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 721-25 (D. Del. 2005); *In re Federal-Mogul Global, Inc.*, 330 B.R. 133, 155 (D. Del. 2005).

[12] *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).

[13] S. 357 §2 (8)(B).

[14] Letter from Douglas A. Campbell, to Committee on the Judiciary, 114th Cong. (Feb. 1, 2016).

[15] S. 357 § 2 (8)(B).

[16] *See* Penn Medicine, Mesothelioma Prognosis, http://www.pennmedicine.org/mesothelioma/what-is-mesothelioma/mesothelioma-prognosis.html (last visited 2/23/2016) ("The mesothelioma survival rate is typically 4-18 months after diagnosis.").

[17] S. 357, § 2 (8)(A)(ii)(I).

[18] The Babcock & Wilcox Company, Asbestos PI Settlement Trust Distribution Procedures § 2.1 (2015), http://www.bwasbestostrust.com/wp-content/uploads/2015/12/BW.-Amended-TDP.12.2.2015-C0463536x9DB18.pdf.

[19] *See* United States Gypsum, Asbestos Personal Injury Settlement Trust Distribution Procedures §§ 2.3 and 4.2, http://www.usgasbestostrust.com/wp-content/uploads/2014/04/ USGTDP.pdf ; see also *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 114, 136 (D. Del. 2006).