

United States House of Representatives
**Judiciary Committee's Subcommittee on Courts, Commercial and
Administrative Law**

**Marc Scarcella
Bates White, LLC
1300 Eye Street, NW
Suite 600
Washington, D.C. 2005**

**Hearing on H.R. 4369, the "Furthering Asbestos Claim
Transparency (FACT) Act of 2012"**

May 10, 2012

Summary

Chairman Coble, Ranking Member Cohen, and members of the subcommittee, thank you for holding today's hearing on H.R. 4369 -- the Furthering Asbestos Claims Transparency (FACT) Act of 2012. My name is Marc Scarcella, and I appreciate the opportunity to provide testimony in support of H.R. 4369. As an economist who has been studying trends in asbestos claim filings and compensation for over ten years, I believe that transparency between the asbestos civil tort and bankruptcy trust systems is critical for the proper allocation of indemnification to asbestos claimants, and necessary for ensuring accountability in claiming behavior as a deterrent to potential specious claiming practices.

During the past decade, I have had the opportunity to work with both defendants who are actively litigating cases in the asbestos civil tort, as well as with legal representatives for asbestos claimants and trustee boards to some of the largest asbestos bankruptcy trusts. It is from that balanced experience of seeing the world from both the tort and trust systems, and working for both defendants and claimants, that I've gained a great deal of knowledge about how these two compensation systems interact with one other, or in some instances, fail to interact with each other.

After reviewing the provisions outlined in H.R. 4369, I believe that this bill will serve as an effective step towards bridging the transparency gap between asbestos bankruptcy trusts and the civil tort system, and will do so in an efficient and cost-effective manner. The reporting requirements of H.R. 4369 will also serve as a deterrent to specious claiming across bankruptcy trusts.

The key takeaway points from my testimony are:

1. **H.R. 4369 will advance transparency within the asbestos bankruptcy trust system.**

H.R. 4369 will mandate quarterly reports disclosing: (i) who has filed a claim against the trust; and (ii) what exposures have been alleged in each claim. This information is akin to what is publically available for civil tort claims through a complaint listing all the defendants named in the lawsuit in addition to general allegations of exposure, and the case docket providing status information on each defendant.

2. **H.R. 4369 will act as a deterrent to potential fraudulent claiming across trusts.**

Currently, billions of dollars in claim payments are distributed by the asbestos bankruptcy trusts each year, with virtually no external oversight or public accountability. Individual trusts operate in vacuums, so not only are the claimant demands made across trusts not publically available to solvent defendants in the civil tort system, but also not available to other trusts. In most cases, the only individuals who know the full breadth of claims made and corresponding alleged exposures are plaintiffs' counsel. To the extent that this lack of transparency and accountability may incentivize specious and inconsistent claiming across the tort and trust systems, it may result in trust funds being depleted by erroneous payments, which in turn takes funds away from those asbestos victims who are most deserving in the future.

3. **The quarterly reporting requirements of H.R. 4369 will not result in overly**

burdensome efforts or costs to the trusts. Asbestos bankruptcy trusts receive and collect claim level data electronically, store and process claim level data electronically, and track claim status and payment information electronically. As a result, extracting quarterly summary tables at the claim level is an efficient process and an exercise that is well within the average competencies of database programmers already employed or contracted with by the trusts and claim processing facilities.

4. **The third party disclosure requirements of H.R. 4369 will not result in overly**

burdensome efforts or costs to the trusts. H.R. 4369 will require the trusts to provide filing and payment information upon request from a third party under appropriate protective orders. Some trusts already respond to third party requests by searching their claims database for individual claimants and providing information as to whether or not a claim on behalf of the individual has been made. Once the search has been conducted, producing the additional claim information that may be required under H.R. 4369 would require a minimal level of additional effort.

Background

Currently, I am an economic consultant with the Environmental and Product Liability practice of Bates White, LLC. I've been with Bates White for three years, and during that time I have been retained by defendants and insurers as an expert on the governance, procedures, processing systems, and compensation criteria of asbestos personal injury trusts established under section 524(g) of the U.S. Bankruptcy Code. Prior to joining Bates White, I spent seven years with Analysis Research Planning Corporation ("ARPC") as an asbestos liability estimation consultant for legal representatives and trustee boards associated with high profile 524(g) bankruptcy reorganizations and resulting bankruptcy trusts. Prior to that time, I was the data analyst and statistician for Claims Resolution Management Corporation ("CRMC"), a wholly owned subsidiary of the Manville Personal Injury Settlement Trust ("Manville") established to process and resolve asbestos claims against the trust.

Experience specific to asbestos bankruptcy trusts and claim processing systems¹

During my time with CRMC, the facility was in the process of developing an electronic claim filing system ("E-ClaimsTM") to allow claim filers to not only submit individual claim forms electronically, but also to upload thousands of claim forms at one time. Similar technology has since been adopted by other claim processing facilities.² These technologies have been designed to be compatible with the electronic claim databases that claimant law firms may have developed for internal

¹ The information in my testimony is based on: (i) publically available information and general experience gained during my employment at both Claims Resolution Management Corporation ("CRMC") and ARPC; and (ii) general industry knowledge with respect to the construction and functionality of electronic claim databases, and the ability to query and extract subsets of those databases. Information about the claims management and processing services provided by ARPC can be found at <http://arpc.com/solutions/product-liability-and-environmental-consulting/claims-management-processing>

² See for example: DCPF Requirements and Instructions for Bulk Upload Tool <http://www.armstrongworldasbestostrust.com/files/Trust%20Online%20Bulk%20Upload%20Tool.pdf>
See for example: Verus Asbestos PI Trust Online Filing User's Guide http://www.cetrust.org/docs/Online_Filing_User_Guide.pdf
See for example: Western Asbestos Settlement Trust Claim Filing Instructions and Electronic Claim Template <http://wastrust.com/claims-packet>

use, thus minimizing the administrative cost and burden of transferring claim and claimant data to the facility.³

The system used by CRMC, as well as other similar systems are designed to not only receive and maintain an electronic database of claim and claimant information, but to also allow for the ability to efficiently extract and analyze data as needed. For example, during my time with the CRMC, I maintained a monthly data extract of individual claim filing, processing, and settlement data that was produced for internal analytical and claim management tasks. Additionally, upon third party requests for data, CRMC would provide a similar extract for minimal cost, including expansive medical and exposure data extracts.⁴

During my tenure with ARPC the firm was retained as advisor to a number of future claim representatives or trustee boards of asbestos personal injury and property damage trusts (“Trusts”), including all of the trusts currently processing and resolving claims at the Delaware Claims Processing Facility (“DCPF”) and its predecessor, the Celotex Asbestos Settlement Trust (“Celotex”), as well as certain Trusts currently processing and resolving claims at Verus Claims Services (“Verus”), the Claims Processing Facility, Inc. (“CPF”), Trust Services, Inc. (“TSI”), MFR Claims Processing (“MFR”), and the Western Asbestos Settlement Trust (“WAST”) facility⁵ In addition to the firm’s role as advisor to Trusts

³ See for example: Sample Excel file for Electronic Filing offered by Verus
<http://www.kaiserasbestostrust.com/Files/KACC%20Sample%20Excel%20Files.zip>

⁴ Such an extract is still available today on a limited basis
Reference: Distribution of Manville Trust Data for Use Solely by Other Trusts
<http://www.claimsres.com/documents/MT/DataPolicy.pdf>
Reference: Manville Trust Single Use Data License Agreement
<http://www.claimsres.com/documents/MT/DataAgreement.pdf>

⁵ In most cases, to the extent that any of these engagements were performed during the pending bankruptcy confirmation of a trust, any time records detailing the work performed by myself or other employees of ARPC would be publically available as fee applications in the bankruptcy case docket, along with any formal retention applications filed with the court.

In most cases, to the extent that any of these engagements were performed following the bankruptcy confirmation of a trust, the retention of ARPC and the general nature of the retention (e.g. Executive Director to the trust, claims administration consultant, liability estimation consultant, etc.) is disclosed in trust annual reports filed with the bankruptcy court and publically available on the case docket.

and future claim representatives, ARPC was also retained by Celotex, DCPF, CPF, and the WAST facilities to help develop new, or enhance existing, electronic claim processing systems.⁶

Assessment of H.R. 4369

After reviewing the provisions outlined in H.R. 4369, I believe that it will serve as an effective step towards bridging the transparency gap between the asbestos trust and civil tort systems, and will do so in an efficient and cost-effective manner. The reporting requirements of H.R. 4369 will also serve as a deterrent to fraudulent claiming across bankruptcy trusts. This opinion is based on my experience and general industry knowledge with respect to the construction and functionality of electronic claim databases, and the ability to query and extract subsets of those databases.

H.R. 4369 will advance transparency within the asbestos bankruptcy trust system

Currently, the asbestos civil tort system provides a level of claiming and resolution transparency that the asbestos bankruptcy trust system lacks. Each lawsuit that is filed in the tort system includes a publically available complaint that identifies the plaintiff and each defendant from which compensation is sought. In most cases, the complaint also provides general exposure allegations that resulted in the alleged asbestos-related injury and, in some cases, a detail work history and alleged exposure sites. Furthermore, as the case progresses, publically available dockets track the status of each named

To the extent that a particular client cited in my testimony is not publically disclosed in any of the above mentioned sources, each of the ARPC clients referenced in my testimony are also referenced in the “Application For Order Authorizing The Proposed Future Claimants' Representative To Retain And Employ Analysis, Research, And Planning Corporation As Claims Evaluation Consultants” filed on October 11, 2010 in re: Specialty Products Holding Corp., et al In The United States Bankruptcy Court For The District Of Delaware (case no. 10-11780). This document is available for public download from the bankruptcy court docket.

⁶ See for example: First Annual Report And Accounting Of Western Asbestos Settlement Trust, filed May 16, 2005 with the United States Bankruptcy Court Northern District Of California Oakland Division (Case No. 02-46284-T), pg. 12, line 10:

“Analysis Research Planning Corporation (“ARPC”): Consulting firm hired to help the Trust to develop a claims manual and claims processing procedures. Also hired to create a system to process claims after it was discovered that no existing vendor would be able to meet the requirements of the Matrix and TDP in a timely manner. Also offer ongoing advice concerning improvements to the system.”

defendant, including dispositions such as dismissals with and without prejudice, and orders granting summary judgments

In contrast, the asbestos bankruptcy trust system provides no public disclosure on individual claimants seeking compensation, or the corresponding alleged exposures. In fact, each individual trust operates in a vacuum, which eliminates the ability for claim comparisons across trusts. Currently, the only trust I have been able to identify that has provided a public disclosure of claim filings and payments is the API, Inc. Asbestos Settlement Trust.⁷ With tens of thousands of claims being paid each year that lead to billions of dollars in claimant compensation, it's surprising that there is virtually no public accountability or oversight beyond the trustees and advisors who were selected as part of bankruptcy reorganization by the same plaintiffs' attorneys that are currently receiving trust payments on behalf of their clients. H.R. 4329 would require trusts to provide a level of transparency akin to the tort system, and a degree of public accountability that will deter inconsistent and possibly fraudulent claiming across trusts.

H.R. 4369 will act as a deterrent to potential fraudulent claiming across trusts

The primary purpose of asbestos bankruptcy trusts confirmed under 524(g) is to efficiently process and pay qualifying claims for individuals who suffer from asbestos related diseases. As mentioned previously, individual bankruptcy trusts operate in a vacuum, so not only are the claimant demands made across trusts not publically available to solvent defendants in the civil tort, but also not available to other trusts. In the absence of a mechanism that will allow trusts to cross-reference the claiming allegations made to other trusts, inconsistent and specious claiming may go unchecked. By establishing transparency across trusts as it relates to the demands and corresponding exposure allegations supporting those claims, H.R. 4369 will offer a necessary check and balance to the bankruptcy system and ensure that inconsistent claiming across trusts does not occur, thereby preserving trust assets for legitimate asbestos claimants.

⁷ API, Inc. Asbestos Settlement Trust 2011 Annual Report of the Trustee, filed April 23, 2012 (case no. 05-30073)

The quarterly reporting requirements of H.R. 4369 will not result in overly burdensome efforts or costs to the trusts

Asbestos bankruptcy trust claim processing systems store individual claim data for hundreds of thousands of claimants. As I described above, asbestos bankruptcy trusts receive, store, process, and pay these individual claims electronically through systems designed to both import and export claim and aggregate level data efficiently and with relative ease. For example, the Manville trust maintains a data extract of individual claim filing, processing, and settlement data that is available for license to approved third parties at a minimal cost of \$1,000.⁸ Extracting quarterly summary tables at the claim level from these types of data extracts is an exercise that is well within the average competencies of database programmers already employed or contracted with by the trusts and claim processing facilities. Furthermore, any computer program used to create these quarterly summary tables can easily be limited to the specific fields of data mandated in H.R. 4369, while avoiding the production of any privileged medical information or disclosure of any proprietary trade secrets or confidential information belonging to the Claim Facilities.⁹

The third party disclosure requirements of H.R. 4369 will not result in overly burdensome efforts or costs to the trusts.

H.R. 4369 will require the trusts to provide filing and payment information upon request from third parties under appropriate protective orders. Some trusts already respond to third party requests by searching their claims database for the individual claimant and providing information as to whether or not a claim on behalf of the individual has been made. For example, the API, Inc. Asbestos Settlement Trust charges a fee of \$18.50 per individual claim search, and the Third Party Disclosure Policy of the Western Asbestos Settlement Trust does not appear to charge for individual claim searches when the results are

⁸ *Supra* 6.

⁹ While at CRMC, I provided third-parties with Manville Trust data extracts without revealing any proprietary trade secrets, nor did I ever receive any proprietary trade secrets when provided with data extracts from claim processing facilities for my analysis work at ARPC.

limited to whether or not a claim has been filed.¹⁰ Once the search has been conducted, producing the additional claim information that may be required under H.R. 4369 would require little additional effort.

Furthermore, to the extent that trust procedures and protocols require that they serve notice on claimants prior to releasing certain information to third parties, this can also be done efficiently and at minimal cost. In my experience working with trust facilities and processing systems, the overwhelming majority of claimants are represented by attorneys, with whom claim processing facilities routinely correspond regarding claim resolution (e.g. claim deficiency notices, requests for additional supporting information, etc.), and settlement matters. Therefore the process of notifying these attorneys of third party data requests does not represent a significant burden outside the standard operations of the Claim Facilities.

Need for asbestos bankruptcy trust transparency

The issue of asbestos bankruptcy trust transparency that sits at the heart of H.R. 4369 has been the focus of academic, judicial, and legislative debate across the country in recent years. Even though asbestos bankruptcies and resulting bankruptcy trusts have been around for decades, it's only been in the past few years that the trust system as a whole has become a substantial source of plaintiff compensation. Until 2000, there were only a handful of confirmed trusts actively processing and paying claims.

Then beginning in 2000 and extending through 2003, there was a rash of asbestos bankruptcy filings that included dozens of primary asbestos defendants such as Owens Corning, Fibreboard, Babcock & Wilcox, Armstrong World Industries, and United States Gypsum, to name just a few. As these primary asbestos defendants were going through the bankruptcy reorganization process, an automatic stay was placed on claims that prevented plaintiffs from pursuing civil action against them in the tort system. As a result, these bankruptcy defendants had effectively exited the tort system, and with them went a

¹⁰ API, Inc. Asbestos Settlement Trust Instructions for Requesting Claim Searches
<http://apiincasbestossettlementtrust.com/disclosurePolicy.html>
Western Asbestos Settlement Trust Third Party Disclosure Policies
<http://wastrust.com/third-party-disclosure>

substantial source of plaintiff compensation. In fact, some analysts believe that these primary defendants were responsible for upwards of 80% of what plaintiffs were receiving as compensation in the tort system during the late 1990s.

As one can imagine, this marked a significant shift in the asbestos litigation as plaintiff attorneys were faced with having to fill the massive void in compensation left behind by these bankruptcy defendants. Plaintiff attorneys had to refocus their litigation strategy, and begin pursuing more actively those solvent defendants whom to that point had been peripheral sources of plaintiff compensation. In addition to peripheral defendants, plaintiff attorneys also began developing exposure cases against new defendants that had rarely, if ever, been named in the tort system prior to 2000.

As a result, these peripheral and new defendants experienced a dramatic increase in both the number lawsuits in which they were named, and the overall settlement demands that plaintiff attorneys were seeking as new sources of compensation. And because of joint and several liability, and allocation rules that govern the asbestos tort in many jurisdictions, the absence of the primary defendants, whom for decades were considered the most culpable contributors to the onset of asbestos-related disease, placed an extraordinary level of liability risk on the peripheral and new defendants. This is a key component to the current issues of asbestos bankruptcy trust transparency that H.R. 4369 is addressing. Joint and several liability rules and allocation of liability to “empty chair” defendants such as 524(g) trusts are designed to ensure that plaintiffs and victims can still be fully compensated for their injuries even when certain culpable defendants are insolvent or otherwise unavailable to pay their share.

This raises the question of whether the peripheral and new defendants did in fact pick up the liability share(s) of companies who have entered reorganization. Certain experts claim that the average award a mesothelioma victim receives from defendants in an asbestos tort action has stayed the same or gone up marginally since 2000. You will hear other experts and professionals claim that average compensation has increased by multiples. It is rare that you will hear anyone, if ever, say that average claim compensation has gone down. What that tells me as an economist viewing this litigation as a whole is that the joint and several liability and allocation systems worked just as they were designed to. Even

with the traditional sources of significant plaintiff compensation leaving the tort system in the early part of the 2000s, asbestos plaintiffs were still being paid as they were before the increase in bankruptcies. And that's because the peripheral and new co-defendants that remained in the asbestos tort system were forced to stand in the shoes of those defendants who sought bankruptcy reorganization.

What's happened in recent years, however, is that many of the bankruptcy reorganizations filed in the early 2000s have been confirmed and trusts have been created to pay current and future claims. Under section 524(g), trusts are established to assume the legal responsibility of the debtor's asbestos-related liability post-confirmation. Since 2006, 24 asbestos bankruptcies have been confirmed, funding trusts with \$20 billion in assets to pay present and future qualifying claimants, with an additional \$10 billion in proposed trust assets currently pending bankruptcy confirmation. To show how fast the trust compensation system has grown, as of year-end 2005, the entire trust system only had \$8 billion in assets. From 2007 through 2010, asbestos claimants have received nearly \$12 billion from trusts and an additional \$5.5 billion from bankruptcy negotiated settlements paid by debtors as part of their reorganizations.

Part of the reason why payments have been so large since 2007 is because the recently confirmed trusts had to clear out claim inventories, some of which dated back to the late 1990s prior to filing for bankruptcy. Taking that fact into consideration if you total up all the trust claim payments beginning in 2000, claimants have been paid a total of \$15 billion. When you add the \$5.5 billion from the bankruptcy negotiated settlements it totals over \$20 billion in payments, all of which occurred outside the tort system. That's an annual average of \$1.9 billion in aggregate claim payments over that eleven year span. Now, you may hear that individual trusts only pay cents on the dollar to individual claims, but with billions being paid out each year, it's hard to believe that individuals aren't receiving substantial compensation in addition to what they receive in the tort system.

In summary, the number of confirmed asbestos bankruptcy trusts and level of trust claim payments has increased significantly over the past five years, creating an alternative compensation system to the civil tort system where solvent defendants continue to indemnify claimants in full. Asbestos

bankruptcy trust transparency is not about determining how much money a victim of an asbestos-related injury should receive, but rather determining the appropriate amount that each culpable party should pay, including the bankruptcy trusts. As an economist I believe that, by and large, more transparency regarding the exposure to the products of reorganized defendants will result in more appropriate and just outcomes in the civil tort system and deter any future attempts at fraudulent claiming against trusts.