

FURTHERING ASBESTOS CLAIM TRANSPARENCY  
(FACT) ACT OF 2013

OCTOBER 30, 2013.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 982]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 982) to amend title 11 of the United States Code to require the public disclosure by trusts established under section 524(g) of such title, of quarterly reports that contain detailed information regarding the receipt and disposition of claims for injuries based on exposure to asbestos; and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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## Purpose and Summary

H.R. 982, the “Furthering Asbestos Claim Transparency (FACT) Act of 2013” or the “FACT Act” adds a paragraph to subsection (g) of section 524 of title 11 of the United States Code to require a trust established pursuant to that subsection to file, each quarter, a public report with the bankruptcy court listing the name and exposure history of those who have filed a claim with such trust and any payments made to claimants and the basis for such payments.<sup>1</sup> The bill specifically prohibits the disclosure of confidential medical records and Social Security numbers of claimants. It further requires each such trust to provide, upon written request, information related to payment from, and demands for payment from, such trust to any party in an action involving liability for asbestos exposure.<sup>2</sup> The purpose of the bill is to prevent fraud by requiring greater transparency for asbestos trusts so that future claimants who have been truly harmed by asbestos exposure will be able to receive compensation for their injuries.

## Background and Need for the Legislation

### A. THE HISTORY OF ASBESTOS AND ASBESTOS-RELATED HEALTH CONDITIONS

Asbestos is a commercial name given to six minerals—amosite, crocidolite, tremolite, actinolite, anthophyllite, and chrysotile—that were widely used in the United States in industrial products throughout much of the 20th Century.<sup>3</sup> Humans have used asbestos for centuries.<sup>4</sup> The word “asbestos” comes from the Greek word for “indestructible,” and the ancient world used asbestos for everything from fabrics to lamp wicks.<sup>5</sup> In the 1860’s, it was first commercially used in the United States as insulation. Because asbestos is strong, durable, and has excellent fire-retardant capability, it was widely used in industrial and other work and residential settings through the early 1970’s. It was regarded as a miracle fiber, versatile enough to weave into textiles, integrate into insulation, line the brakes of automobiles, and construct flame-retardant hulls for naval and merchant ships. Asbestos consumption in the United States peaked in 1973 and then dropped dramatically over the next three decades.<sup>6</sup>

Despite the usefulness of asbestos in industrial and residential products, it was uncovered that asbestos fibers cause serious diseases when inhaled.<sup>7</sup> Inhalation of asbestos fibers has been linked to a number of diseases, including mesothelioma, lung cancer, as-

<sup>1</sup>Furthering Asbestos Claim Transparency (FACT) Act of 2013, H.R. 982, 113th Cong. §2 (2013).

<sup>2</sup>*Id.*

<sup>3</sup>S. REP. NO. 110–189, at 1 (citing *Asbestos*, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, [www.cdc.gov/niosh/topics/asbestos](http://www.cdc.gov/niosh/topics/asbestos) (last visited May 23, 2013)); *see also* Wylie, *A Report on the Asbestos Litigation Industry*, MANHATTAN INSTITUTE’S CENTER FOR LEGAL POLICY, 2008, at 4, available at <http://www.triallawyersinc.com/pdfs/TLI-ASBESTOS.pdf> (last visited May 31, 2013).

<sup>4</sup>Wylie, *supra* note 3, at 4.

<sup>5</sup>*Asbestos*, HERITAGE RESEARCH CENTER, <http://www.heritageresearch.com/ourlibrary/histories/asbestos.html> (last visited May 23, 2013).

<sup>6</sup>Wylie, *supra* note 3, at 4.

<sup>7</sup>*Asbestos Fibers and Other Elongate Mineral Particles: State of the Science and Roadmap for Research*, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, Apr. 2011, at 1, available at <http://www.cdc.gov/niosh/docs/2011-159/pdfs/2011-159.pdf> (last visited May 23, 2013).

bestosis, and pleural abnormalities.<sup>8</sup> Mesothelioma is a deadly cancer of the lining of the chest or abdomen.<sup>9</sup> Exposure to asbestos is the cause for most cases of mesothelioma.<sup>10</sup> Lung cancer is the other frequently claimed malignant disease that can be caused by asbestos, although some other forms of cancer may be related to asbestos exposure.<sup>11</sup> Asbestosis, a chronic lung disease resulting from inhalation of asbestos fibers, can be debilitating and even fatal.<sup>12</sup> Exposure to asbestos has been claimed to cause pleural abnormalities.<sup>13</sup> Pleural plaques, pleural thickening, and pleural effusion are abnormalities of the pleura, the membrane that lines the inside of the chest wall and covers the outside of the lung.<sup>14</sup> These abnormalities can affect breathing and may be an early warning sign for mesothelioma.<sup>15</sup>

#### B. ASBESTOS LITIGATION

Asbestos litigation is the longest-running mass tort litigation in the United States.<sup>16</sup> Personal injury litigation related to asbestos exposure “has continued for over 40 years in the United States with hundreds of thousands of claims filed and billions of dollars in compensation paid.”<sup>17</sup> Throughout this period asbestos litigation has evolved, presenting different challenges to the parties and courts involved.<sup>18</sup> The focus of the litigation shifted from Federal to state courts, and now, increasingly, to bankruptcy courts and the resulting bankruptcy asbestos trusts.<sup>19</sup>

Asbestos litigation arose as a result of individuals’ long-term and widespread exposure to asbestos, and as a result of many asbestos product manufacturers’ failure to protect workers against exposure and failure to warn their workers to take adequate precautions against exposure. The U.S. Court of Appeals for the Fifth Circuit upheld the first successful asbestos liability suit in 1973.<sup>20</sup> A worker sued the manufacturers of asbestos-containing products on a theory of product liability (a strict liability tort); the defendants’ affirmative defense that their products contained ample warning about the dangers of using the product proved insufficient.<sup>21</sup> Prior to the Fifth Circuit’s decision, employees exposed to asbestos had recourse only to workers’ compensation claims to recover for their asbestos-related injuries.

After the Fifth Circuit’s decision, the volume of asbestos litigation exploded—so much so that, in 1990, the Chief Justice of the United States Supreme Court appointed the Ad Hoc Committee on

<sup>8</sup> *Id.*

<sup>9</sup> *Asbestos Health Effects*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, [http://www.atsdr.cdc.gov/asbestos/asbestos/health\\_effects/](http://www.atsdr.cdc.gov/asbestos/asbestos/health_effects/) (last visited May 28, 2013).

<sup>10</sup> *Id.*

<sup>11</sup> See generally H.R. 4369, the “Furthering Asbestos Claim Transparency (FACT) Act of 2012”: *Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *Courts Subcomm. Hearing*] (testimony of Charles S. Siegel).

<sup>12</sup> AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, *supra* note 9.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Stephen J. Carroll et al., *Asbestos Litigation*, RAND INSTITUTE FOR CIVIL JUSTICE, 2005, at

xvii.

<sup>17</sup> Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND INSTITUTE FOR CIVIL JUSTICE, 2010, at xi.

<sup>18</sup> Carroll et al., *supra* note 16, at xx.

<sup>19</sup> *Id.*

<sup>20</sup> *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

<sup>21</sup> *Id.* at 1109.

Asbestos Litigation to address what the Court later referred to as the “asbestos-litigation crisis.”<sup>22</sup> The volume of claims filed against asbestos defendants has not abated over time.<sup>23</sup> On the contrary, annual claims filed against defendants have risen steadily, with sharp increases in recent years.<sup>24</sup> During the 1990’s, the number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000.<sup>25</sup> By 2002, approximately 730,000 claims had been filed,<sup>26</sup> with more than 100,000 claims filed in 2003 alone—“the most in a single year.”<sup>27</sup>

The recent growth in the number of asbestos claims is largely attributable to the significant increase of claimants with nonmalignant injuries, including those with little or no current functional impairment.<sup>28</sup> By the early 2000’s, “the overwhelming majority of claims—up to 90 percent—were filed on behalf of plaintiffs who were ‘completely asymptomatic.’ These claimants may have had some marker of exposure, such as changes in the pleural membrane of their lungs, but ‘are not now and never will be afflicted by disease.’”<sup>29</sup> Conversely, when asbestos litigation first arose in the 1960’s, most claimants were “workers suffering from grave and crippling maladies.”<sup>30</sup>

The number of asbestos litigation defendants has grown in commensurate fashion with the burgeoning asbestos claims. In 1983, there were approximately 300 asbestos litigation defendants.<sup>31</sup> By 2004, the number of asbestos litigation defendants increased to over 8,400, with over 90 percent of American industries subject to asbestos lawsuits.<sup>32</sup> These defendants included miners and manufacturers of asbestos or asbestos-containing products, purchasers of asbestos products, insurers, and businesses that used asbestos or asbestos-containing products in the course of their industry.<sup>33</sup>

Under the backdrop of amassing asbestos claims and an expanding defendant constituency, courts and affected parties have initiated several attempts to achieve a comprehensive resolution to asbestos litigation. Notwithstanding these efforts, no resolution has been reached. The Supreme Court rejected two comprehensive class action settlements and draft Federal legislative reforms were never enacted.<sup>34</sup> Accordingly, asbestos claimants and defendants likely will continue to operate within the existing state and Federal asbestos framework for the foreseeable future.

<sup>22</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

<sup>23</sup> Carroll et al., *supra* note 16, at xxiv.

<sup>24</sup> *Id.*

<sup>25</sup> *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 67 (1999) (statement of Christopher Edley, Jr.) [hereinafter Edley Testimony].

<sup>26</sup> Carroll et al., *supra* note 16, at xxiv.

<sup>27</sup> Editorial, *The Asbestos Blob, Cont.*, WALL ST. J., Apr. 6, 2004, at A16.

<sup>28</sup> Carroll et al., *supra* note 16, at xxiv.

<sup>29</sup> David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 J.L. & POL’Y 589, 595–96 (2008) (internal citations omitted).

<sup>30</sup> Edley Testimony, *supra* note 25.

<sup>31</sup> Landin, *supra* note 29, at 597.

<sup>32</sup> Carroll et al., *supra* note 16, at xxv (noting that the 8,400 figure likely was conservative given the reporting methodology).

<sup>33</sup> Dixon et al., *supra* note 17, at 2.

<sup>34</sup> See *Amchem Products v. Windsor*, 521 U.S. 591 (1997); see *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); see e.g., Asbestos Compensation Fairness Act, H.R. 1957, 109th Cong. (2005); Fairness in Asbestos Injury Resolution (FAIR) Act, S. 852, 109th Cong. (2005).

## C. ASBESTOS CLAIMS IN BANKRUPTCY

Asbestos litigation has driven nearly 100 companies into bankruptcy, with more than half of such companies filing since the beginning of the year 2000.<sup>35</sup> The cost of these bankruptcies is largely immeasurable but has been estimated to cost the American economy approximately 60,000 jobs and between \$1.4 and \$3.0 billion.<sup>36</sup> One of the most prominent bankruptcies was that of John Mansville Corporation, the dominant American producer of asbestos products. The Mansville bankruptcy redefined many aspects of the asbestos litigation system, including the inception of a trust system to compensate asbestos claimants in exchange for a broad injunction against future asbestos liability.<sup>37</sup>

Following the Mansville model and in response to a rising tide of asbestos defendants seeking relief from liability through chapter 11 bankruptcies, Congress amended the Bankruptcy Code in 1994 to include a provision, 11 U.S.C. § 524(g), to allow for the resolution of asbestos liability claims against a debtor through a trust-based system.<sup>38</sup> Under that section, a debtor is permitted to create, in its chapter 11 plan, a trust that is to be the exclusive source of post-confirmation compensation for the debtor's asbestos liability. If the trust meets certain prescribed requirements, the debtor, after its successful reorganization, is granted a channeling injunction that prohibits any asbestos plaintiff from suing the reorganized debtor for asbestos liability.<sup>39</sup> The balance intended by section 524(g) is simple—the asbestos claimants receive a trust funded in an amount and administered in a manner that is satisfactory to the presiding bankruptcy court and a majority of the debtor's known asbestos claimants in exchange for the debtor's ability to gain certainty regarding its asbestos liability exposure and a shield against future claims in order to allow the debtor to continue its business operations.

The institution of an asbestos trust has become a virtual inevitability in recent chapter 11 cases involving asbestos defendants. As of June 2012, 54 asbestos trusts had been formed, with an additional nine trusts expected in the near-term and a considerable acceleration of trust formations in the second half of the 2000's.<sup>40</sup> These trusts manage substantial assets reported in excess of \$18.2 billion at the end of 2008.<sup>41</sup> The asbestos trusts review and pay damages on account of millions of claims a year; between 2007 and 2008, selected asbestos trusts satisfied over four million claims.<sup>42</sup>

## D. FRAUD IN ASBESTOS LITIGATION THROUGH MASS SCREENINGS

A commentator likened the scale of fraud in asbestos litigation to that of the scandals of "Credit Mobilier, Teapot Dome, the Sav-

<sup>35</sup> Hanlon & Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 526–7 (2007); see also Dixon et al., *supra* note 17, at xii.

<sup>36</sup> *Id.* (citing Carroll et al., *supra* note 16, at 121 (data through 2002) and Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, SEBAGO ASSOCIATES, 2002, at 27–29, 42).

<sup>37</sup> Hanlon & Smetak, *supra* note 35, at 541.

<sup>38</sup> Bankruptcy Reform Act of 1994, § 111, 103d Cong. (1994) (enacted) (*codified at* 11 U.S.C. § 524).

<sup>39</sup> 11 U.S.C. § 524(g)(2)(B).

<sup>40</sup> Dixon et al., *supra* note 17, at xii.

<sup>41</sup> *Id.* (noting that this figure did not include the assets of at least four recently formed asbestos trusts).

<sup>42</sup> *Id.*

ings and Loan debacles, WorldCom, Enron and the vast Ponzi schemes that have recently unfolded.”<sup>43</sup> Fraud in asbestos litigation largely stems from plaintiffs’ lawyers utilizing mass screening measures to recruit hundreds of thousands of claimants.

Asbestos lawyers were found to have hired screening companies to recruit potential claimants who, although not currently suffering from asbestos-related injuries, exhibited symptoms of exposure. “Labor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.”<sup>44</sup> These screening companies used mobile X-ray vans to seek out potential clients in the parking lots of hotels and restaurants. The sole object of these screenings was to generate evidence—X-rays, pulmonary function tests, and medical reports—to support claims of asbestos-related injuries.<sup>45</sup> As former United States Attorney General Griffin Bell has observed, “[t]here often is no medical purpose for these screenings and claimants receive no medical follow-up.”<sup>46</sup>

These mass screenings were wildly successful and generated massive numbers of claims for plaintiffs’ attorneys. The claimant recruiting process was described by *U.S. News & World Report*:

To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: “Find out if YOU have MILLION DOLLAR LUNGS!”<sup>47</sup>

It is estimated that more than one million workers have undergone attorney-sponsored screenings.<sup>48</sup> As one worker explained, “it’s better than the lottery. If they find anything, I get a few thousand dollars I didn’t have. If they don’t find anything, I’ve just lost an afternoon.”<sup>49</sup> According to legal scholars, “without these claims, the ‘asbestos litigation crisis’ would never have arisen.”<sup>50</sup>

An American Bar Association Commission on Asbestos Litigation confirmed that claims filed by the non-sick generally arose from for-profit screening companies whose sole purpose was to identify large numbers of people with minimal X-ray changes consistent with asbestos exposure.<sup>51</sup> The Commission, with the help of the American Medical Association, consulted prominent occupational-medicine and pulmonary-disease physicians to craft legal standards for asbestos-related impairment. The Commission found: “[s]ome X-ray readers spend only minutes to make these findings, but are

<sup>43</sup> *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 8 (2011) [hereinafter *Constitution Subcomm. Hearing*] (testimony of Professor Lester Brickman).

<sup>44</sup> *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005).

<sup>45</sup> Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1233 (2008).

<sup>46</sup> Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2003).

<sup>47</sup> Pamela Sherrid, *Looking for Some Million Dollar Lungs, Best of Asbestos*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36.

<sup>48</sup> See Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 69 (2003).

<sup>49</sup> Andrew Schneider, *Asbestos Lawsuits Anger Critics*, ST. LOUIS POST-DISPATCH, Feb. 11, 2003, at A1.

<sup>50</sup> Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POLY REV. 243, 273 (2001).

<sup>51</sup> Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to be Turning*, 12 CONN. INS. L.J. 477, 480 (2006).

paid hundreds of thousands of dollars—in some cases, millions—in the aggregate by the litigation screening companies due to the volume of films read.”<sup>52</sup> The Commission also reported that litigation screening companies were finding X-ray evidence that was consistent with asbestos exposure at a “startlingly high” rate, often exceeding 50% and sometimes reaching 90%.<sup>53</sup>

Researchers at Johns Hopkins University compared the X-ray interpretations of professionals who are certified by the National Institute for Occupational Safety and Health to interpret pulmonary X-rays, referred to as “B Readers,” employed by plaintiffs’ counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the X-rays’ origins. The study found that, while B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in almost 96% of the X-rays, the independent B Readers found abnormalities in less than 5% of the same X-rays—a difference the researchers said was “too great to be attributed to inter-observer variability.”<sup>54</sup>

One physician, Dr. Lawrence Martin, has explained the reason why plaintiffs’ B Readers seem to see asbestos-related lung abnormalities on chest X-rays in numbers not seen by neutral experts. Dr. Martin has said, “the chest X-rays are not read blindly, but always with knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker’s behalf.”<sup>55</sup> In 2005, Senior U.S. District Court Judge John Fullam said that many B Readers hired by plaintiffs’ lawyers were “so biased that their readings were simply unreliable.”<sup>56</sup> As Dr. James Crapo, a leading medical expert on asbestos-related diseases, has observed, claimants are being compensated “for illnesses that, according to the clear weight of medical evidence, either are not caused by asbestos or do not result in a significant impairment—i.e., are not generally regarded by the medical profession as an illness.”<sup>57</sup> Professor Lester Brickman, an expert on asbestos litigation, concluded that “[a]sbestos litigation has become a malignant enterprise which mostly consists of a massive client-recruitment effort that accounts for as much as 90 percent of all claims currently being generated, supported by baseless medical evidence which is not generated by good-faith medical practice, but rather is primarily a function of the compensation paid, and by claimant testimony scripted by lawyers to identify exposure to certain defendants’ products.”<sup>58</sup>

Screening programs declined in prominence following a landmark ruling by U.S. District Court Judge Janis Jack, who issued a 300-plus page order detailing methods used to generate fraudulent asbestos and silica claims in 2005.<sup>59</sup> In the wake of Judge Jack’s opinion, which noted that many asbestos and silica cases are “driv-

<sup>52</sup>HON. NATHAN R. JONES, ABA COMM’N ON ASBESTOS LITIGATION, ABA REPORT TO THE HOUSE OF DELEGATES 8 (2003) available at <http://www.cdc.gov/niosh/docket/archive/pdfs/NIOSH-015/020103-Exhibit12.pdf>.

<sup>53</sup>*Id.*

<sup>54</sup>Joseph N. Gitlin et al., *Comparison of ‘B’ Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843, 852 (2004).

<sup>55</sup>David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 13 (2003) (quoting Lawrence Martin, M.D.).

<sup>56</sup>*Owens Corning*, 322 B.R. at 723.

<sup>57</sup>Lester Brickman & Harvey D. Shapiro, *Asbestos Kills—And More than Just People: Jobs, Ethics, and Elementary Justice*, NAT’L REV., Jan. 31, 2005.

<sup>58</sup>Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. at 33.

<sup>59</sup>*In re Silica Prods. Liab. Litig.*, 398 F.Supp.2d 563 (S.D. Tex. 2005).

en neither by health nor justice” and are instead “manufactured for money,”<sup>60</sup> Congress convened hearings on fraud and abuse in asbestos litigation.<sup>61</sup> A Federal grand jury was empanelled in the Southern District of New York.<sup>62</sup>

Many believed the decline in mass screenings and enactment of medical criteria statutes in major asbestos venue states marked the beginning of a new, fairer asbestos compensation system.<sup>63</sup> The Committee, however, has received testimony suggesting that screening programs may be, or soon will be, used to generate asbestos trust claims.<sup>64</sup> The asbestos bar is using new techniques to recruit potential trust claimants. While screenings were often advertised in break rooms, in local papers, and on local broadcast stations,<sup>65</sup> the modern asbestos plaintiffs’ bar spends billions of dollars on mass media advertisements designed to recruit potential asbestos tort plaintiffs and trust claimants.<sup>66</sup> Experts estimate that asbestos plaintiffs’ firms spent over \$950 million on television advertising in 2011.<sup>67</sup> Trial lawyers’ advertising campaigns extend beyond television, and experts estimate that the asbestos bar spends tens of millions each year on sophisticated online advertising campaigns.<sup>68</sup> “Mesothelioma” has become the single most expensive keyword on Google’s auction-style AdWords platform.<sup>69</sup>

There are signs that the suspect practices deployed in traditional asbestos state court tort litigation have been utilized against asbestos trusts. At least one firm advises lung cancer victims that billions of dollars have been set aside in “U.S. Compensation Trust Funds . . . to financially assist individuals with lung cancer” while making no mention of asbestos.<sup>70</sup> Further, with the advent of enhanced information technology tools, plaintiffs’ firms have the ability to focus their claimant recruiting efforts on a broader audience. The indications of fraud coupled with an environment conducive for fraud, as provided in more detail below, is cause for alarm.

#### E. THE OPAQUE ASBESTOS TRUST SYSTEM AND RELATED FRAUD

While the prerequisites for establishing a bankruptcy asbestos trust typically compel certain disclosures, these disclosures are sig-

<sup>60</sup>*Id.* at 635.

<sup>61</sup>*The Silicosis Story: Hearings Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 109th Cong. (2006).

<sup>62</sup>Adam Liptak, *Defendants See a Case of Diagnosing for Dollars*, N.Y. TIMES, Oct. 1, 2007, available at <http://www.nytimes.com/2007/10/01/us/01bar.html> (last accessed May 31, 2013) (“A grand jury was convened in Manhattan more than 2 years ago to look into potential fraud in silicosis cases. . .”).

<sup>63</sup>*See, e.g.*, Ohio Rev. Code Ann. §2307.91 *et. seq.* (enacted 2004), Tex. Civ. Prac. & Rem. §90.001 *et. seq.* (last amended 2007).

<sup>64</sup>*Constitution Subcomm. Hearing, supra* note 43 (testimony of Professor Lester Brickman).

<sup>65</sup>*See* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. LAW 525, 593 (2007); Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 10 (2006); Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 833–34 (2005).

<sup>66</sup>Kenneth M. Goldstein, Panel Discussion at U.S. Chamber Institute for Legal Reform’s 12th Annual Legal Reform Summit (Oct. 26, 2011) (associated slides available at [http://www.instituteforlegalreform.com/sites/default/files/Lawyers\\_Mass\\_Tort\\_Solicitation\\_Advertising\\_Oct2011.pdf](http://www.instituteforlegalreform.com/sites/default/files/Lawyers_Mass_Tort_Solicitation_Advertising_Oct2011.pdf)) (last visited May 31, 2013).

<sup>67</sup>*Id.*

<sup>68</sup>*See* NEW MEDIA STRATEGIES, THE PLAINTIFFS’ BAR GOES DIGITAL 3 (January 2012) available at <http://www.instituteforlegalreform.com/doc/the-plaintiffs-bar-goes-digital-0> (last visited May 23, 2013).

<sup>69</sup>*Id.* at 7 (“Trial attorneys spend as much as \$80 per click on mesothelioma-related search terms, far exceeding industry averages for search terms . . . ranked as most expensive by Google AdWords”).

<sup>70</sup>The David Law Firm—Lung Cancer, <http://www.calldavid.com/lung-cancer.html> (last visited May 31, 2013).



nificantly lacking. To obtain the principal benefit of the asbestos trust—the channeling injunction—a debtor must demonstrate to the court, among other things, that at the time of confirmation:

the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and value of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.<sup>71</sup>

In many cases, this requirement has caused the debtor to include a provision in its chapter 11 plan requiring it to file periodic disclosures with the court of the financial health of the asbestos liability trust.<sup>72</sup> Missing from these disclosures, however, is any statutory requirement that the trust identify claimants who seek compensation from the trust, the nature of their alleged injury, and the amount the trust paid them.

The trusts' limited disclosures are a result of the structure of section 524(g), which grants considerable control over asbestos bankruptcies and resulting asbestos trusts to plaintiffs' attorneys.<sup>73</sup> In particular, section 524(g) allows a channeling injunction to issue only if three-quarters of current asbestos claimants support a proposed chapter 11 plan.<sup>74</sup> This requirement is distinct from the usual requirements for plan confirmation, which must also be satisfied.<sup>75</sup> The requirement to gain the consent of a specified class is a departure from traditional bankruptcy procedures, which allow a chapter 11 plan to be confirmed over the objection of an impaired class so long as the plan is fair, non-discriminatory, and supported by another impaired class.<sup>76</sup>

In other words, the asbestos claimants class has a statutory blocking right to a proposed chapter 11 plan, which results in representatives of that class having considerable influence over the chapter 11 plan and the formation of any resulting asbestos trust. Generally speaking, representation of asbestos claimants is concentrated within a select group of law firms. As courts have noted, “[a] unique feature of asbestos . . . litigation is the fact that a small group of law firms represents hundreds of thousands of plaintiffs.”<sup>77</sup> Consequently, single firms or small groups of firms may effectively block confirmation of a chapter 11 plan.<sup>78</sup> As Professor S. Todd Brown has observed, “[asbestos firms] hold an unassailable veto power [that] leaves debtors and other parties in inter-

<sup>71</sup> 11 U.S.C. § 542(g)(2)(B)(ii)(V) (2011).

<sup>72</sup> Carroll et al., *supra* note 16, at 24.

<sup>73</sup> See generally S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841 (2008); see also Dixon et al., *supra* note 17, at 43 (listing asbestos firms most frequently represented on TAC's; Weitz and Luxenberg P.C. sits on TAC's of 11 trusts that control, combined, approximately 74% of all asbestos trust assets); see also Searcey & Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J., Mar. 11, 2013.

<sup>74</sup> 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2011).

<sup>75</sup> *In re Combustion Engineering, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004) (“[A] debtor must satisfy the prerequisites set forth in § 524(g) in addition to the standard plan confirmation requirements.”).

<sup>76</sup> 11 U.S.C. § 1129(b)(1) (2011) (allowing confirmation of a plan over the objection of a class of creditors).

<sup>77</sup> *In re Congoleum Corp.*, 426 F.3d 675, 679 (3d Cir. 2005).

<sup>78</sup> Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. at 868–69 (discussing asbestos bar's *de facto* control of bankruptcy process).

est with a classic Hobson’s choice—reorganization on the [firms’ terms or no reorganization at all.”<sup>79</sup>

Another unique feature of section 524(g) is that it looks only to the *number* of current asbestos claimants who support a proposed chapter 11 plan. In contrast, a traditional bankruptcy requires a majority in *number* and two-thirds in *amount* of a particular class in order to confirm a chapter 11 plan.<sup>80</sup> Plaintiffs’ firms exploit the express preference for claimant quantity over claim quality in section 524(g) by asserting their large numbers of claims in bankruptcy regardless of their likely value or merit, which typically will be evaluated following the voting period on a debtor’s chapter 11 plan.<sup>81</sup> Plaintiffs’ firms that historically have filed few tort cases against a debtor company sometimes file claims on behalf of their entire client list once bankruptcy has been declared.<sup>82</sup>

Section 524(g) also requires the appointment of a legal representative on behalf of individuals who may file claims with a proposed asbestos trust in the future, referred to as a “future claims representative” or an “FCR.”<sup>83</sup> Courts generally appoint an individual suggested by the current claimants and the debtor company.<sup>84</sup> Congress envisioned the appointment of an FCR as a due process protection for future claimants; however, the debtor company and the attorneys representing current claimants stand to benefit from the appointment of a weak or pliant representative.<sup>85</sup> Moreover, FCR work can be extremely lucrative,<sup>86</sup> and academic commentators have expressed concern that FCR’s are “punch-pulling”<sup>87</sup> in an effort to be seen as “reliable negotiating partners who [will] not ‘rock the boat’”<sup>88</sup> and increase the likelihood of future FCR appointments. Indeed, many representatives serve several trusts concurrently.<sup>89</sup>

Although asbestos trusts are nominally managed by court-approved trustees, virtually all trusts’ founding agreements require the trustee to seek approval of a post-confirmation FCR and a committee composed of current claimants’ representatives, most often characterized as a trust advisory committee or “TAC,” before amending the trust’s distribution plan or audit procedures.<sup>90</sup> The

<sup>79</sup> Brown, *supra* note 74, at 121.

<sup>80</sup> 11 U.S.C. § 1126(c) (2011) (“A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors. . . .”).

<sup>81</sup> See Brown, *supra* note 74, at 150 (“[A]n attorney can obtain a considerable negotiating position and sizeable fees by simply dumping their asbestos claim ‘inventory’ on a debtor [with] little to no prospect of sanctions for filing even grossly fraudulent or, at best, wholly unsubstantiated claims.”).

<sup>82</sup> *Id.*

<sup>83</sup> 11 U.S.C. § 524(g)(4)(B)(i) (2011).

<sup>84</sup> Mark D. Plevin, *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. 271, 301 (2006) (“In almost every . . . case to date . . . the debtor [has been granted] a presumptive right to select . . . an FCR acceptable to the current claimants.”).

<sup>85</sup> See Brown, *supra* note 52, at 158–59 (discussing parties’ incentive to propose weak representative).

<sup>86</sup> Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. at n. 144 (noting that Halliburton’s pre-petition futures representative was nearly \$5 million and retained by the resulting trust).

<sup>87</sup> See Richard A. Nagareda, *Mass Torts in a World of Settlement* 177 (2007).

<sup>88</sup> Mark D. Plevin, *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. at 292–93.

<sup>89</sup> See Dixon et al., *supra* note 17 (FCR’s for largest trusts set forth in Appendix A).

<sup>90</sup> Carroll et al., *supra* note 16, at 22 (noting that TAC must consent to, among other things, modifications to a trust’s distribution plan or audit procedures).

asbestos bars’ pre-confirmation influence extends to operating trusts, as many TAC seats are held by plaintiffs’ attorneys who represented large numbers of claimants in bankruptcy proceedings.<sup>91</sup>

The trust documents governing the operation of the asbestos trusts often include restrictions on sharing trust data, facilitating a lack of transparency in the trust system. A majority of the trusts’ distribution plans affirmatively require claims to be treated as confidential settlement negotiations.<sup>92</sup> As a result, tort litigants must engage in lengthy and expensive discovery disputes in order to gain access to basic information—including exposure information—routinely disclosed by defendant companies before they created trusts and exited the tort system.<sup>93</sup> In many instances, trusts’ procedures require a valid state-court-issued subpoena in order to provide information to state litigants.<sup>94</sup> Even in cases where a valid subpoena is served upon an asbestos trust, an asbestos trust may attempt to defeat the subpoena or require an additional subpoena from the presiding bankruptcy court judge.<sup>95</sup>

There was a time when asbestos trusts were willing to share claims information more freely. Prior to Judge Jack’s exposure of fraud in mass screened silica and asbestos cases, the Manville Trust sold its data to actuarial firms, law firms, and defendant companies.<sup>96</sup> The trust also licensed its data to occupational health researchers and provided custom datasets to academics upon request. But in the wake of Judge Jack’s opinion, the Manville Trust limited access to its data. Its current data license prohibits use of the trust’s data to process or contest trust and tort claims, prevents data recipients from revealing information regarding an individual claimant, and is otherwise structured to ensure that any analysis of the data is strictly empirical, unusable in litigation, and may not serve as a basis for other trusts to reject inconsistent or improper claims.<sup>97</sup>

Because the trusts’ current confidentiality provisions and practices make data sharing difficult, individual trusts and the trust system as a whole are susceptible to fraud and abuse. The GAO and the non-partisan RAND Corporation, in their respective reports on the trusts, both concluded that asbestos bankruptcy trusts are unlikely to identify and decline payment of improper claims, including claims that are supported by “altered work histories” or allege inconsistent exposure patterns.<sup>98</sup> The trusts, the plaintiffs’ bar, and the post-confirmation FCRs nonetheless contend that the trust system is free from fraud and that more robust anti-fraud measures would be costly and reduce the funds available to fulfill the trusts’ core mission—claimant compensation.<sup>99</sup>

<sup>91</sup> Dixon et al., *supra* note 17, at 14.

<sup>92</sup> Dixon et al., *supra* note 17, at 32.

<sup>93</sup> *Constitution Subcomm. Hearing*, *supra* note 43, at 94–95, 100–101 (written testimony of James Stengel).

<sup>94</sup> Carroll et al., *supra* note 16, at 28.

<sup>95</sup> *Courts Subcomm. Hearing*, *supra* note 11, at 14.

<sup>96</sup> *Courts Subcomm. Hearing*, *supra* note 11, at 207 (“The Manville Personal Injury trust offer[ed] a data extract of claim level information . . . to anyone willing to pay a \$10,000 licensing fee. Prior to 2002 the data could be purchased outright. . . .”).

<sup>97</sup> Manville Trust Single Use Data License Agreement, <http://www.claimsres.com/documents/MT/DataAgreement.pdf> (last visited May 31, 2013).

<sup>98</sup> Carroll et al., *supra* note 16, at 23; Dixon et al., *supra* note 17, at 45.

<sup>99</sup> *See, e.g., Courts Subcomm. Hearing*, *supra* note 11, at 224–36 (letter signed by six FCRs).

Although the eleven trusts interviewed by GAO in the course of its investigation reported that their audits have *never* identified an instance of fraud, the trusts paid over \$4 billion in 2010 alone and, combined, have paid 3.3 million alleged asbestos victims nearly \$17.5 billion since the Manville Trust was established.<sup>100</sup> The GAO Report stated that the internal audits of the asbestos trusts were designed to ensure compliance with internal trust procedures and not generally designed to detect duplicate or inconsistent claims among different asbestos trusts and the state courts.<sup>101</sup> Further, the complete absence of fraud reported by the eleven trusts interviewed in the GAO Report runs contrary to historical experiences with compensation and relief programs. Fraud and abuse have been uncovered in virtually every compensation and relief program undertaken in modern America, whether privately funded or government-sponsored.<sup>102</sup> Fraudulent claims against the 9/11 Victim's Compensation Fund and BP's gulf oil fund, for example, were detected and prosecuted.<sup>103</sup> As Professor Brown has observed, asbestos trusts are not "magically different" from other compensation trusts; that asbestos trusts' audits have uncovered no fraud whatsoever suggests that their internal controls are lacking.<sup>104</sup>

While the trust system operates with near-complete secrecy, the quality of medical evidence and the consistency of the allegations made by alleged asbestos victims are sometimes tested in the state court tort system. Although the trusts' confidentiality provisions and the generally combative nature of asbestos litigation have combined to limit the disclosure of trust information, defendants have successfully identified a number of cases of inconsistent and potentially fraudulent claiming.

In the best known example of fraud uncovered through the state court tort system, *Kananian v. Lorillard Tobacco*, a tort plaintiff claimed that he developed mesothelioma solely from smoking asbestos-filtered cigarettes and that he only passed through a naval ship yard while being deployed elsewhere by the Navy.<sup>105</sup> He simultaneously filed claims against multiple asbestos trusts alleging exposure to marine products while working as a "shipyard laborer."<sup>106</sup> Despite the inconsistency of his tort and trust claims, which the court described as a "fiction," Kananian received substantial payments from asbestos trusts.<sup>107</sup>

*Kananian* is not an isolated incident; the Committee received testimony detailing several additional examples of fraud, abuse, and inconsistent claiming in other jurisdictions, including Maryland cases in which inconsistent exposure information was presented in the tort system and trust systems in an attempt to circumvent

<sup>100</sup> Carroll et al., *supra* note 16, at 16.

<sup>101</sup> Carroll et al., *supra* note 16, at 23.

<sup>102</sup> *Courts Subcomm. Hearing*, *supra* note 11, at 25 (testimony of S. Todd Brown).

<sup>103</sup> See e.g., Nedra Pickler, *Ex-naval officer gets prison time for 9-11 fraud*, ASSOCIATED PRESS (Dec. 12, 2011), available at <http://www.washingtontimes.com/news/2011/dec/12/ex-naval-officer-gets-prison-time-911-fraud/>; DEPT. OF JUSTICE, DEEPWATER HORIZON (BP) OIL SPILL FRAUD, <http://www.justice.gov/criminal/oilspill/> (last visited May 31, 2013) (collecting cases involving fraud on the Gulf Coast Claims Facility).

<sup>104</sup> *Courts Subcomm. Hearing*, *supra* note 11, at 25 (testimony of S. Todd Brown).

<sup>105</sup> *Kananian v. Lorillard Tobacco Co.*, No. CV 442750 (Ohio Ct. Com. Pl. Cuyahoga County 2007).

<sup>106</sup> *Id.* at 5, 9.

<sup>107</sup> *Id.* at 6.

state-law caps on damages.<sup>108</sup> Further examples of inconsistent claiming have been identified in Delaware, Louisiana, New York, Oklahoma, and Virginia.<sup>109</sup>

Counsel in a Louisiana case, *Mary A. Robeson et al v. Amatek, Inc. et al*, filed sixteen trust claims that denied the plaintiff's father smoked and included detailed asbestos exposure information. When the plaintiff was deposed, however, he claimed his father was a smoker and that he had no knowledge of the exposures alleged in the claims. He also testified that counsel had never spoken to his father about his exposures to asbestos.<sup>110</sup>

In *Montgomery v. Foster Wheeler*, a Delaware case, the plaintiff's attorney disclosed a number of trust claims shortly before trial even though he had repeatedly represented to the defendant and the court that his client had no such claims. The court described the plaintiff's disclosure failure as "really seriously egregiously bad behavior" and lamented that "it happens a lot."<sup>111</sup> The court further observed that:

The core of this case had been fraudulent. . . . [T]his whole litigation is based on who was responsible. Nobody can say which fibers did what. But the most important thing is that a plaintiff disclose what they think caused their disease. And if they don't disclose honestly when they're asking [for] money from another company and they don't even let the defendant know about that, that's so dishonest. It is just so dishonest.<sup>112</sup>

In addition to the fraud uncovered through the state court system, the Wall Street Journal conducted an investigation that detailed numerous anomalies between individuals' state court filings and asbestos trust claim filings.<sup>113</sup> The Wall Street Journal found that individuals had claimed exposure to asbestos through industrial jobs that they held while under the age of twelve, disparate medical diagnoses asserted among different asbestos trusts and state court cases, and claims asserted by individuals that simply did not exist.<sup>114</sup>

The lack of meaningfully transparent trust disclosures, combined with published research, court decisions and investigations suggesting and highlighting fraud within the asbestos trust system provided the framework for bankruptcy bar and Congressional inquiry into potential mechanics to reduce and prevent fraudulent activity within the state court and asbestos trust systems. In March 2011, the Subcommittee on Business Issues of the Advisory Committee on Bankruptcy Rules considered a proposal to add a new Federal Rule of Bankruptcy Procedure to require 524(g) trusts to disclose the particulars of each demand for payment received by a

<sup>108</sup> *Constitution Subcomm. Hearing, supra* note 43, at 94–95, 103–105 (written testimony of James Stengel).

<sup>109</sup> *Courts Subcomm. Hearing, supra* note 11, at 9 (testimony of Leigh Ann Schell); e.g., *Montgomery v. Foster Wheeler*, Case No. 09C–11–215 ASB, Pretrial Hearing Trans. (Del. Super. Ct. Nov. 7, 2011).

<sup>110</sup> *Courts Subcomm. Hearing, supra* note 11, at 16 (written statement of Leigh Ann Schell).

<sup>111</sup> *Montgomery, supra* note 110, at 7–8.

<sup>112</sup> *Montgomery, supra* note 110, at 25.

<sup>113</sup> Searcey & Barry, *supra* note 74.

<sup>114</sup> Searcey & Barry, *supra* note 74.

trust during the preceding quarter.<sup>115</sup> The Subcommittee, in a memo to the Advisory Committee, examined the merits and demerits of the proposal, but ultimately concluded that if:

. . . it is determined that the trusts should be providing more information than they currently are, the Subcommittee's preliminary thought was that this may be a matter more appropriately addressed by a legislative solution—such as an amendment of § 524(g) that imposes additional requirements on trusts created under that provision.<sup>116</sup>

A second memo from the Subcommittee, dated September 19, 2011, collects comments the Subcommittee solicited from various bankruptcy and nonbankruptcy legal groups. The chair of the ABA Business Bankruptcy Committee established a task force to review the proposal, which ultimately supported the proposal, subject to a small number of qualifications. Others who submitted comments, including the FCRs, opposed the proposal.<sup>117</sup>

F. THE FURTHERING ASBESTOS CLAIMS TRANSPARENCY  
(FACT) ACT OF 2013

During the 112th Congress, the Subcommittee on the Constitution of the House Judiciary Committee held a hearing entitled “How Fraud and Abuse in the Asbestos Compensation System Affects Victims, Jobs, the Economy, and the Legal System.”<sup>118</sup> In light of the testimony received at that hearing, the study of the Advisory Committee on Bankruptcy Rules, and the experience of debtors who have used the Bankruptcy Code to manage their future asbestos liability and their attorneys, Rep. Quayle (R-AZ), together with Reps. Matheson (D-UT) and Ross (R-FL), introduced H.R. 4369, the Furthering Asbestos Claim Transparency (FACT) Act of 2012, on April 17, 2012.

The Subcommittee on Courts, Commercial and Administrative Law of the House Judiciary Committee held a hearing on H.R. 4369 on May 10, 2012.<sup>119</sup> Three of the four witnesses testified that transparency was sorely needed in the 524(g) asbestos trust compensation system.<sup>120</sup> The fourth witness, Mr. Siegel, conceded that no provision of the FACT Act would impede a claimant's filing of a claim with or receipt of compensation from a trust.<sup>121</sup> Mr. Siegel did argue that the FACT Act would impose “onerous” new administrative burdens on the trusts—a hypothesis that was contradicted by Mr. Scarcella's testimony founded in his experience working at a claims processing department at one of the largest trusts.<sup>122</sup>

<sup>115</sup> Letter from Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Nov. 22, 2010) (on file with Committee).

<sup>116</sup> Memorandum from Subcommittee on Business Issues to Advisory Committee on Bankruptcy Rules (Mar. 10, 2011) (on file with Committee).

<sup>117</sup> Memorandum from Subcommittee on Business Issues to Advisory Committee on Bankruptcy Rules (Sept. 19, 2011) (on file with Committee).

<sup>118</sup> See generally *Constitution Subcomm. Hearing*, *supra* note 43.

<sup>119</sup> See generally *Courts Subcomm. Hearing*, *supra* note 11.

<sup>120</sup> See *id.* (testimonies of Leigh Ann Schell, Prof. S. Todd Brown, and Marc Scarcella).

<sup>121</sup> *Id.* at 81.

<sup>122</sup> *Id.* (“As somebody who worked at a trust, the largest asbestos trust, the Manville Personal Injury Trust, back in 2001 as their quantitative data analyst and statistician, I can tell you that I understand Mr. Siegel's concern, and I think it is a legitimate concern, but I can assure everybody that it is not a problem.”)

On June 8, 2012, the Committee met in open session and ordered the bill H.R. 4369 to be reported favorably to the House with a manager’s amendment. The amendment adopted during the Committee’s consideration of H.R. 4369 incorporated comments received during its legislative consideration and clarified that section 107 of the Bankruptcy Code applies to the new requirements of the asbestos trusts and that asbestos trusts could require payment for costs related to third-party discovery requests. H.R. 4369 was not considered by the Full House of Representatives during the 112th Congress.

Given the necessity for transparency and the significant legislative record, Rep. Farenthold (R-TX), together with Rep. Matheson (D-UT), introduced H.R. 982, the Furthering Asbestos Claim Transparency (FACT) Act of 2013, on March 6, 2013, which is identical to H.R. 4369 as reported out of the Committee during the 112th Congress. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on H.R. 982 on March 13, 2013.<sup>123</sup> Three of the four witnesses testified that the current asbestos trust system lacked transparency and was conducive to fraudulent activity.<sup>124</sup> The fourth witness, Mr. Inselbuch, argued that the FACT Act would abrogate state discovery laws and would create administrative burdens on the trusts notwithstanding a record to the contrary on both accounts.<sup>125</sup>

The bill amends section 524(g) of the Bankruptcy Code to require asbestos trusts to file quarterly reports with the presiding bankruptcy court that detail claimants’ names, demands made by the claimants to the asbestos trust, any amounts paid to claimants, and the basis for such payments.<sup>126</sup> The FACT Act also requires asbestos trusts to provide information requested by parties to traditional asbestos tort litigation, subject to payment from the requesting party for costs associated with such a request.<sup>127</sup> As the bill amends a provision of the Bankruptcy Code, the reporting and information sharing requirements contained therein fall squarely within Congress’ bankruptcy power.<sup>128</sup>

The FACT Act includes several privacy protections. The bill provides that sensitive identifying information, such as complete Social Security numbers and confidential medical records, should not be published in the quarterly reports.<sup>129</sup> Additionally, the FACT Act subjects both the quarterly reporting requirements and the written discovery requests to section 107 of the Bankruptcy Code. Section 107 of the Bankruptcy Code and related Rule 9037 of the Federal Rules of Bankruptcy Procedure grant the presiding bankruptcy judge broad discretion to exclude confidential or sensitive information from the quarterly reports or in response to a written discovery request. Specifically, section 107(c) of the Bankruptcy Code provides a bankruptcy court with discretion to exclude from

<sup>123</sup> See generally H.R. 982, the “Furthering Asbestos Claim Transparency (FACT) Act of 2013”: *Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter the *Reg. Subcomm. Hearing*].

<sup>124</sup> See *id.* (testimonies of Hon. Peggy L. Ableman, Prof. S. Todd Brown, and Marc Scarcella).

<sup>125</sup> *Id.*; see also H.R. 982.

<sup>126</sup> H.R. 982 § 2.

<sup>127</sup> *Id.*

<sup>128</sup> U.S. CONST. art. I, § 8, cl. 4; see *Court Subcomm. Hearing*, *supra* note 11, at 85–89 (memorandum regarding Congress’ power to enact legal reform legislation prepared by former Solicitor General Paul D. Clement); see also *Reg. Subcomm. Hearing*, *supra* note 124 (testimony of Prof. S. Todd Brown).

<sup>129</sup> H.R. 982 § 2.

disclosure broad categories of information contained in any document filed in a chapter 11 case that would “create undue risk of identity theft or other unlawful injury. . . .”<sup>130</sup> Further, responses to written discovery requests are subject to any applicable protective orders.<sup>131</sup>

The FACT Act does not disturb or supersede any applicable state discovery laws or rules. On the contrary, any information received pursuant to a written request would remain subject to the discovery laws and rules applicable in the relevant state court proceeding.

The FACT Act is a measured amendment to the Bankruptcy Code provision governing asbestos trusts that will promote greater transparency among the asbestos trusts and the state court system. This information will reduce the potential for fraud and help to unveil any existing fraudulent activity. A reduction in fraud will help to ensure that the asbestos trusts achieve their designed goal—administering and preserving their funds to provide substantially similar recompense to future claimants that have been truly aggrieved by exposure to asbestos.

### Hearings

The Committee’s Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on H.R. 982 on March 13, 2013. Testimony was received from Hon. Peggy L. Ableman, former Delaware Superior Court Judge and special counsel at McCarter & English, LLP; S. Todd Brown, Professor of Law, SUNY Buffalo Law School; Elihu Inselbuch, Member, Caplin & Drysdale, Chartered; and Marc Scarcella of Bates White Consulting, with additional material submitted by Bill Cawfield, Asbestos & Mesothelioma Patient, Denver, CO; Courtney Davis, Daughter of Asbestos & Mesothelioma Victim, Raleigh, NC; Bob Guinn, Asbestos & Mesothelioma Patient, Ririe, ID; Julie Gundlach, Asbestos & Mesothelioma Patient, St. Louis, MO; Shelly Kozicki, Widow of Asbestos & Mesothelioma Victim, Detroit, MI; Mary Jane Williams, Asbestos & Mesothelioma Patient, Springfield, OH; Loring Williams, Spouse of Asbestos & Mesothelioma Patient, Springfield, OH; Forrest Wulf, Asbestos & Mesothelioma Patient, Alton, IL; Dan Young, Spouse of Asbestos & Mesothelioma Patient, St. Louis, MO; Susan Vento, Widow of Bruce Vento, Mesothelioma Victim and Former U.S. House Representative, St. Paul, MN; Nan Aron, Alliance for Justice; Joanne Doroshov, Center for Justice & Democracy; Thomas Cluderay, Environmental Working Group; Robert Kelley, Protect Missouri Workers; Robert Weissman, Public Citizen; Ed Mierzwinski, U.S. Public Interest Research Group; Michael J. Cramers, FCR for the Owens Corning/Fibreboard Asbestos Personal Injury Trust; Lawrence Fitzpatrick, FCR for the ACandS Asbestos Settlement Trust and the Durabla Manufacturing Company and Durabla Canada Ltd. Asbestos Trust; Prof. Eric D. Green, FCR for the Babcock & Wilcox Company Asbestos PI Trust, the DII Industries, LLC Asbestos PI Trust, the Federal-Mogul Asbestos Personal Injury Trust, and the Fuller-Austin Asbestos Settlement Trust; Martin J. Murphy, FCR for the Kaiser Alum. & Chem. Corp. As-

<sup>130</sup> 11 U.S.C. § 107(c) (2011); 18 U.S.C. § 1028(d) (2011); Fed. R. Bankr. P. 9037.

<sup>131</sup> H.R. 982 § 2.



bestos Personal Injury Trust; James L. Patton, Jr., FCR for the Celotex Asbestos Settlement Trust and the Leslie Controls, Inc. Asbestos Personal Injury Trust; The Honorable Dean M. Trafelet (Ret.), FCR for the Armstrong World Industries Asbestos Trust, the Plibrico Asbestos Trust, the MLC Asbestos PI Trust, and the United States Gypsum Asbestos Personal Injury Settlement Trust; Doug Campbell, Campbell & Levine, LLC; Genevieve Casey Bosilevac, Mesothelioma Victim; Judy Van Ness, Widow of Dickie Van Ness, Mesothelioma Victim; and the Asbestos Disease Awareness Organization.

**Committee Consideration**

On May 21, 2013, the Committee met in open session and ordered the bill H.R. 982 favorably reported, without amendment, by a rollcall vote of 17 ayes to 14 noes, a quorum being present.

**Committee Votes**

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following recorded votes were taken during the Committee’s consideration of H.R. 982.

1. The amendment offered by Mr. Conyers replaces the bill’s substantive provisions with a requirement that asbestos trusts report only aggregated information on demands received and payments made from the asbestos trusts. This amendment was defeated by a rollcall vote of 15–16.

**ROLLCALL NO. 1**

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....		X	
Mr. Coble (NC) .....		X	
Mr. Smith (TX) .....		X	
Mr. Chabot (OH) .....		X	
Mr. Bachus (AL) .....		X	
Mr. Issa (CA) .....			
Mr. Forbes (VA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....			
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....		X	
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....		X	
Mr. Amodei (NV) .....			
Mr. Labrador (ID) .....			
Ms. Farenthold (TX) .....		X	
Mr. Holding (NC) .....		X	
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....			
[Vacant] .....			

**ROLLCALL NO. 1—Continued**

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....	X		
Mr. Scott (VA) .....	X		
Mr. Watt (NC) .....	X		
Ms. Lofgren (CA) .....	X		
Ms. Jackson Lee (TX) .....			
Mr. Cohen (TN) .....	X		
Mr. Johnson (GA) .....	X		
Mr. Pierluisi (PR) .....	X		
Ms. Chu (CA) .....	X		
Mr. Deutch (FL) .....	X		
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....	X		
Mr. Richmond (LA) .....	X		
Ms. DelBene (WA) .....	X		
Mr. Garcia (FL) .....	X		
Mr. Jeffries (NY) .....	X		
<b>Total .....</b>	<b>15</b>	<b>16</b>	

2. The amendment offered by Mr. Cohen excepts from quarterly reporting trusts that already have an internal audit mechanism in place. This amendment was defeated by a rollcall vote of 13–19.

**ROLLCALL NO. 2**

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....		X	
Mr. Coble (NC) .....		X	
Mr. Smith (TX) .....		X	
Mr. Chabot (OH) .....		X	
Mr. Bachus (AL) .....		X	
Mr. Issa (CA) .....		X	
Mr. Forbes (VA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....			
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....		X	
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....		X	
Mr. Amodei (NV) .....			
Mr. Labrador (ID) .....		X	
Ms. Farenthold (TX) .....		X	
Mr. Holding (NC) .....		X	
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	
[Vacant] .....			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....	X		
Mr. Scott (VA) .....	X		
Mr. Watt (NC) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....			
Mr. Cohen (TN) .....	X		
Mr. Johnson (GA) .....	X		
Mr. Pierluisi (PR) .....	X		
Ms. Chu (CA) .....	X		
Mr. Deutch (FL) .....			
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....	X		
Mr. Richmond (LA) .....	X		
Ms. DelBene (WA) .....	X		
Mr. Garcia (FL) .....	X		
Mr. Jeffries (NY) .....	X		
Total .....	13	19	

3. The amendment offered by Mr. Nadler limits third party discovery to those parties who disclose information pertaining to the public safety or health to a law enforcement agency. This amendment was defeated by a rollcall vote of 14–18.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....		X	
Mr. Coble (NC) .....		X	
Mr. Smith (TX) .....			
Mr. Chabot (OH) .....		X	
Mr. Bachus (AL) .....		X	
Mr. Issa (CA) .....		X	
Mr. Forbes (VA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....			
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....		X	
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....		X	
Mr. Amodei (NV) .....			
Mr. Labrador (ID) .....		X	
Ms. Farenthold (TX) .....		X	
Mr. Holding (NC) .....		X	
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	
[Vacant] .....			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....	X		
Mr. Scott (VA) .....	X		
Mr. Watt (NC) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....			
Mr. Cohen (TN) .....	X		
Mr. Johnson (GA) .....	X		
Mr. Pierluisi (PR) .....	X		
Ms. Chu (CA) .....	X		
Mr. Deutch (FL) .....	X		
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....	X		
Mr. Richmond (LA) .....	X		
Ms. DelBene (WA) .....	X		
Mr. Garcia (FL) .....	X		
Mr. Jeffries (NY) .....	X		
Total .....	14	18	

4. The amendment offered by Mr. Scott treats certain medical information in the quarterly reports as protected health information under the Health Insurance Portability and Accountability Act. This amendment was defeated by a rollcall vote of 14–18.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....			
Mr. Coble (NC) .....		X	
Mr. Smith (TX) .....			
Mr. Chabot (OH) .....		X	
Mr. Bachus (AL) .....		X	
Mr. Issa (CA) .....		X	
Mr. Forbes (VA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....			
Mr. Jordan (OH) .....		X	
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....		X	
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....		X	
Mr. Amodei (NV) .....		X	
Mr. Labrador (ID) .....		X	
Ms. Farenthold (TX) .....		X	
Mr. Holding (NC) .....		X	
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	
[Vacant] .....			

**ROLLCALL NO. 4—Continued**

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....	X		
Mr. Scott (VA) .....	X		
Mr. Watt (NC) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....			
Mr. Cohen (TN) .....	X		
Mr. Johnson (GA) .....	X		
Mr. Pierluisi (PR) .....			
Ms. Chu (CA) .....	X		
Mr. Deutch (FL) .....	X		
Mr. Gutierrez (IL) .....	X		
Ms. Bass (CA) .....	X		
Mr. Richmond (LA) .....	X		
Ms. DelBene (WA) .....	X		
Mr. Garcia (FL) .....	X		
Mr. Jeffries (NY) .....	X		
<b>Total .....</b>	<b>14</b>	<b>18</b>	

5. The amendment offered by Mr. Scott exempts claimants who are veterans or servicemembers. This amendment was defeated by a rollcall vote of 14–15.

**ROLLCALL NO. 5**

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....		X	
Mr. Coble (NC) .....		X	
Mr. Smith (TX) .....			
Mr. Chabot (OH) .....			
Mr. Bachus (AL) .....		X	
Mr. Issa (CA) .....		X	
Mr. Forbes (VA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....			
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....			
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....		X	
Mr. Amodei (NV) .....			
Mr. Labrador (ID) .....		X	
Ms. Farenthold (TX) .....		X	
Mr. Holding (NC) .....		X	
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	
[Vacant] .....			

## ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....			
Mr. Scott (VA) .....	X		
Mr. Watt (NC) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....	X		
Mr. Cohen (TN) .....			
Mr. Johnson (GA) .....	X		
Mr. Pierluisi (PR) .....	X		
Ms. Chu (CA) .....	X		
Mr. Deutch (FL) .....	X		
Mr. Gutierrez (IL) .....	X		
Ms. Bass (CA) .....	X		
Mr. Richmond (LA) .....	X		
Ms. DelBene (WA) .....	X		
Mr. Garcia (FL) .....	X		
Mr. Jeffries (NY) .....	X		
Total .....	14	15	

6. The amendments offered en bloc by Mr. Johnson limits the terms upon which a trust may disclose information and to exclude personally identifiable information from the bill's public reporting and document production requirements. These amendments were defeated by a rollcall vote of 13–18.

## ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....			
Mr. Coble (NC) .....		X	
Mr. Smith (TX) .....		X	
Mr. Chabot (OH) .....			
Mr. Bachus (AL) .....		X	
Mr. Issa (CA) .....		X	
Mr. Forbes (VA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....		X	
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....			
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....		X	
Mr. Amodei (NV) .....		X	
Mr. Labrador (ID) .....		X	
Ms. Farenthold (TX) .....		X	
Mr. Holding (NC) .....		X	
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	

## ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
[Vacant] .....			
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....			
Mr. Scott (VA) .....	X		
Mr. Watt (NC) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....	X		
Mr. Cohen (TN) .....			
Mr. Johnson (GA) .....	X		
Mr. Pierluisi (PR) .....	X		
Ms. Chu (CA) .....	X		
Mr. Deutch (FL) .....	X		
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....	X		
Mr. Richmond (LA) .....	X		
Ms. DelBene (WA) .....	X		
Mr. Garcia (FL) .....	X		
Mr. Jeffries (NY) .....	X		
Total .....	13	18	

7. The amendments offered en bloc by Ms. Jackson Lee require the filing of certain certifications concerning claims against a third party before it may seek discovery from an asbestos trust and require the filing of certain certifications concerning asbestos-containing products before a third party may seek discovery from an asbestos trust. These amendments were defeated by a rollcall vote of 95–15.

## ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....			
Mr. Coble (NC) .....		X	
Mr. Smith (TX) .....			
Mr. Chabot (OH) .....		X	
Mr. Bachus (AL) .....		X	
Mr. Issa (CA) .....			
Mr. Forbes (VA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....			
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....			
Mr. Poe (TX) .....		X	
Mr. Chaffetz (UT) .....			
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....		X	
Mr. Amodei (NV) .....		X	
Mr. Labrador (ID) .....			

## ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Ms. Farenthold (TX) .....		X	
Mr. Holding (NC) .....		X	
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	
[Vacant] .....			
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....			
Mr. Scott (VA) .....	X		
Mr. Watt (NC) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....	X		
Mr. Cohen (TN) .....			
Mr. Johnson (GA) .....			
Mr. Pierluisi (PR) .....			
Ms. Chu (CA) .....			
Mr. Deutch (FL) .....	X		
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....	X		
Mr. Richmond (LA) .....			
Ms. DelBene (WA) .....	X		
Mr. Garcia (FL) .....	X		
Mr. Jeffries (NY) .....	X		
Total .....	9	15	

8. The amendment offered by Mr. Garcia prohibits defendants who were held liable for asbestos exposure from seeking information through the bill. This amendment was defeated by a rollcall vote of 11–18.

## ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....			
Mr. Coble (NC) .....		X	
Mr. Smith (TX) .....			
Mr. Chabot (OH) .....		X	
Mr. Bachus (AL) .....		X	
Mr. Issa (CA) .....			
Mr. Forbes (VA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....		X	
Mr. Poe (TX) .....		X	
Mr. Chaffetz (UT) .....			
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....		X	
Mr. Amodei (NV) .....		X	



ROLLCALL NO. 8—Continued

	Ayes	Nays	Present
Mr. Labrador (ID) .....		X	
Ms. Farenthold (TX) .....		X	
Mr. Holding (NC) .....		X	
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	
[Vacant] .....			
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....	X		
Mr. Scott (VA) .....	X		
Mr. Watt (NC) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....	X		
Mr. Cohen (TN) .....			
Mr. Johnson (GA) .....			
Mr. Pierluisi (PR) .....	X		
Ms. Chu (CA) .....			
Mr. Deutch (FL) .....	X		
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....	X		
Mr. Richmond (LA) .....			
Ms. DelBene (WA) .....	X		
Mr. Garcia (FL) .....	X		
Mr. Jeffries (NY) .....	X		
Total .....	11	18	

9. The amendment offered by Mr. Jeffries replaces the quarterly reporting requirements with a requirement that a trust provide discovery, upon written request, to a party to an action concerning liability for asbestos exposure if the requesting party cannot obtain such information under non-bankruptcy law. This amendment was defeated by a rollcall vote of 13–18.

ROLLCALL NO. 9

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....			
Mr. Coble (NC) .....		X	
Mr. Smith (TX) .....			
Mr. Chabot (OH) .....		X	
Mr. Bachus (AL) .....		X	
Mr. Issa (CA) .....			
Mr. Forbes (VA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....		X	
Mr. Poe (TX) .....		X	
Mr. Chaffetz (UT) .....			

ROLLCALL NO. 9—Continued

	Ayes	Nays	Present
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....		X	
Mr. Amodei (NV) .....		X	
Mr. Labrador (ID) .....		X	
Ms. Farenthold (TX) .....		X	
Mr. Holding (NC) .....		X	
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	
[Vacant] .....			
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....	X		
Mr. Scott (VA) .....	X		
Mr. Watt (NC) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....	X		
Mr. Cohen (TN) .....	X		
Mr. Johnson (GA) .....			
Mr. Pierluisi (PR) .....	X		
Ms. Chu (CA) .....	X		
Mr. Deutch (FL) .....	X		
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....	X		
Mr. Richmond (LA) .....			
Ms. DelBene (WA) .....	X		
Mr. Garcia (FL) .....	X		
Mr. Jeffries (NY) .....	X		
Total .....	13	18	

10. The bill was reported favorably without amendment by a rollcall vote of 17–14.

ROLLCALL NO. 10

	Ayes	Nays	T2Present
Mr. Goodlatte (VA), Chairman .....	X		
Mr. Sensenbrenner, Jr. (WI) .....			
Mr. Coble (NC) .....	X		
Mr. Smith (TX) .....			
Mr. Chabot (OH) .....	X		
Mr. Bachus (AL) .....	X		
Mr. Issa (CA) .....			
Mr. Forbes (VA) .....	X		
Mr. King (IA) .....	X		
Mr. Franks (AZ) .....	X		
Mr. Gohmert (TX) .....	X		
Mr. Jordan (OH) .....	X		
Mr. Poe (TX) .....		X	
Mr. Chaffetz (UT) .....			
Mr. Marino (PA) .....	X		

## ROLLCALL NO. 10—Continued

	Ayes	Nays	T2Present
Mr. Gowdy (SC) .....	X		
Mr. Amodei (NV) .....	X		
Mr. Labrador (ID) .....	X		
Ms. Farenthold (TX) .....	X		
Mr. Holding (NC) .....	X		
Mr. Collins (GA) .....	X		
Mr. DeSantis (FL) .....	X		
[Vacant] .....			
Mr. Conyers, Jr. (MI), Ranking Member .....		X	
Mr. Nadler (NY) .....		X	
Mr. Scott (VA) .....		X	
Mr. Watt (NC) .....		X	
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....		X	
Mr. Cohen (TN) .....		X	
Mr. Johnson (GA) .....			
Mr. Pierluisi (PR) .....		X	
Ms. Chu (CA) .....		X	
Mr. Deutch (FL) .....		X	
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....		X	
Mr. Richmond (LA) .....			
Ms. DelBene (WA) .....		X	
Mr. Garcia (FL) .....		X	
Mr. Jeffries (NY) .....		X	
Total .....	17	14	

### Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

### New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

### Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 982, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, June 7, 2013.*

Hon. BOB GOODLATTE, CHAIRMAN,  
*Committee on the Judiciary,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 982, the “Furthering Asbestos Claim Transparency (FACT) Act of 2013.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,  
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member

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**H.R. 982—Furthering Asbestos Claim Transparency  
(FACT) Act of 2013.**

As ordered reported by the House Committee on the Judiciary  
on May 21, 2013.

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H.R. 982 would require trusts set up through a Chapter 11 bankruptcy reorganization caused by asbestos liabilities to submit quarterly reports to the bankruptcy court concerning the damage claims and payments made by the trust. Based on information provided by the Administrative Office of the U.S. Courts (AOUSC), CBO estimates that implementing H.R. 982 would have no significant impact on the Federal budget because the AOUSC would incur only minor costs to make that information publicly available. Enacting H.R. 982 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 982 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

H.R. 982 would impose a private-sector mandate as defined in UMRA by requiring asbestos trusts to submit quarterly reports. According to studies by the Government Accountability Office (GAO) and the RAND Corporation, only a small number of asbestos trusts currently exist. Further, the GAO study indicates that the information to be submitted under the bill is already tracked by many of the asbestos trusts. Therefore, CBO expects that the incremental cost to comply with the reporting requirements in the bill would fall below the annual threshold established in UMRA for private-sector mandates (\$150 million in 2013, adjusted annually for inflation).

The CBO staff contacts for this estimate are Martin von Gnechten (for Federal costs) and Paige Piper/Bach (for the impact on the private sector). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

### **Duplication of Federal Programs**

No provision of H.R. 982 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

### **Disclosure of Directed Rule Makings**

The Committee estimates that H.R. 982 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 982 amends title 11, United States Code, to require the publication and disclosure of certain data by trusts created in a chapter 11 plan pursuant to section 524 of that title.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 982 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee.

*Section 1. Short Title.* Provides that the bill may be referred to as the “Furthering Asbestos Claim Transparency Act of 2013,” or “FACT Act of 2013.”

*Section 2. Amendments.* Adds to section 524(g) of the Bankruptcy Code a requirement that asbestos liability trusts publish quarterly public reports identifying claimants, amounts paid, and basis for paying claims on the court’s public docket. Further provides that trusts must comply with third-party discovery demands subject to third-party’s payment of reasonable discovery costs.

*Section 3. Effective Date; Application of Amendments.* Sets the effective date of the Act as date of enactment. Provides that the amendments made by the act apply retroactively and prospectively.

### **Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

**TITLE 11, UNITED STATES CODE**

\* \* \* \* \*  
**CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE**  
 \* \* \* \* \*

SUBCHAPTER II—DEBTOR’S DUTIES AND BENEFITS  
 \* \* \* \* \*

**§ 524. Effect of discharge**

- (a) \* \* \*
- \* \* \* \*
- (g)(1) \* \* \*
- \* \* \* \*

(8) *A trust described in paragraph (2) shall, subject to section 107—*

*(A) file with the bankruptcy court, not later than 60 days after the end of every quarter, a report that shall be made available on the court’s public docket and with respect to such quarter—*

*(i) describes each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant; and*

*(ii) does not include any confidential medical record or the claimant’s full social security number; and*

*(B) upon written request, and subject to payment (demanded at the option of the trust) for any reasonable cost incurred by the trust to comply with such request, provide in a timely manner any information related to payment from, and demands for payment from, such 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.*

\* \* \* \* \*

**Dissenting Views**

INTRODUCTION

H.R. 982, the “Furthering Asbestos Claim Transparency (FACT) Act of 2013,” is a thoroughly flawed bill that blatantly strengthens protections for the very entities that exposed millions of unsuspecting Americans to the toxic effects of asbestos. The bill accomplishes this end by giving asbestos defendants “new rights and advantages to be used against asbestos victims in state court” and it would “add new burdens” to asbestos bankruptcy trusts that would severely cripple “their ability to operate and pay claims.”<sup>1</sup>

<sup>1</sup>*Furthering Asbestos Claims Transparency Act: Hearing on H.R. 4369 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary, 112th Cong. 61–62 (2012) (testimony of Charles S. Siegel, Waters & Kraus LLP).*

Although the proponents of this legislation assert that it is intended to protect asbestos victims, not a single asbestos victim has expressed support for H.R. 982. For example, we heard from the widow of our former colleague Representative Bruce Vento (D-MN) who passed away from mesothelioma. She emphatically stated that H.R. 982 “does not do a single thing” to help asbestos victims and their families.<sup>2</sup>

H.R. 982 disrupts a reasonably well-functioning asbestos victim compensation process. Entities facing overwhelming mass tort liability for causing asbestos injuries may shed these liabilities and financially regain their stability in exchange for funding trusts established under chapter 11 of the Bankruptcy Code to pay the claims of their victims, under certain circumstances.<sup>3</sup> H.R. 982, however, interferes with this longstanding process in two ways. The FACT Act would require these trusts to: (1) file a publicly available quarterly report with the bankruptcy court that would include personally identifying information about such claimants, including their names, exposure history, and basis for any payment made to them; and (2) provide *any* information related to payment from and demands for payment from such trust to *any* party to *any* action in law or equity concerning liability for asbestos exposure.

The bill’s sponsors contend that these changes to the asbestos claims process are necessary to curb fraud in the system, but there is scant evidence that such a problem even exists. In fact, the multiple hearings held by this Committee have failed to identify any academic or other objective study demonstrating endemic fraud in the asbestos trust claims process. With the knowledge that there is no empirical evidence of fraud in the system, we are led to conclude that this measure is nothing more than an end run by asbestos defendants around the discovery process available under non-bankruptcy law.

The truth is that this legislation is a solution in search of a problem that will benefit the asbestos defendants and will re-victimize asbestos victims and their families by invading their privacy and slowing the claims payment process. Moreover, this legislation is fundamentally inequitable as it mandates disclosure by the trusts, but does not require solvent defendant companies to disclose information about the injurious effects of the products they manufactured or hazardous working conditions they imposed on their employees. Finally, the bill will divert critical funds and further decrease compensation to asbestos victims by forcing bankruptcy trusts to prepare burdensome reports.

Not surprisingly, this measure is opposed by various asbestos victims,<sup>4</sup> asbestos trusts,<sup>5</sup> and legal representatives for future as-

<sup>2</sup> Letter from Susan Vento, widow of Rep. Bruce Vento (D-MN), *et al.* to Chairman Bob Goodlatte (R-VA) of the H. Comm. on the Judiciary (May 20, 2013) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter Vento Letter].

<sup>3</sup> 11 U.S.C. § 524(g)(2)(B)(i)(I) (2013).

<sup>4</sup> *See, e.g.*, Vento Letter.

<sup>5</sup> *See, e.g.*, Supplemental letter from Douglas A. Campbell, counsel for various asbestos settlement trusts, to Chairman Bob Goodlatte (R-VA) of the H. Comm. on the Judiciary *et al.* (Mar. 20, 2013) (on behalf of four asbestos settlement trusts) (on file with H. Comm. on the Judiciary Democratic staff); letter from Douglas A. Campbell, counsel for various asbestos settlement trusts, to Chairman Bob Goodlatte (R-VA) of the H. Comm. on the Judiciary *et al.* (Mar. 11, 2013) (on behalf of four asbestos settlement trusts) (on file with H. Comm. on the Judiciary Democratic staff).

bestos personal injury claimants.<sup>6</sup> In addition, various organizations representing workers and consumers have registered their strong opposition, including the AFL–CIO,<sup>7</sup> Public Citizen, U.S. Public Interest Research Group, the Environmental Working Group, the Alliance for Justice, and Protect Missouri Workers.<sup>8</sup>

For these reasons and those described below, we respectfully dissent and urge our colleagues to reject this seriously flawed bill.

#### DESCRIPTION AND BACKGROUND

##### DESCRIPTION

H.R. 982 amends section 524(g) of the Bankruptcy Code in two significant respects. First, it requires a trust to file with the bankruptcy court not later than 60 days after the end of every quarter a report that must be made available on the court’s public docket. The report must describe each demand the trust received from a claimant, including the claimant’s name and exposure history as well as the basis for any payment from the trust made to such claimant. The report may not include any confidential medical record or the claimant’s full Social Security number. Second, the measure requires the trust, upon written request and subject to payment for any reasonable costs incurred in responding to such request at the option of the trust, to provide in a timely manner any information related to payments and demands for payment from the 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. The bill’s reporting and information disclosure requirements are subject to Bankruptcy Code section 107, which authorizes the bankruptcy court, for cause, to restrict public access to any document filed in a bankruptcy case if the court finds that the disclosure of the information contained in such document would create an “undue risk of identity theft or other unlawful injury.”<sup>9</sup>

##### BACKGROUND

###### A. *The Lethal Effects of Asbestos*

Asbestos is a fibrous material, extracted from the earth, that has been used for centuries because of its tensile strength and its heat resistance.<sup>10</sup> The modern industrial use of asbestos began around 1860, and the world’s annual use of raw asbestos increased from some 500,000 tons to 2.5 million tons between the years 1934 and

<sup>6</sup> See, e.g., Letter from Michael J. Cramers, future claimants’ representative for Owens Corning/Fibreboard Asbestos Personal Injury Trust *et al.*, to Chairman Bob Goodlatte (R–VA) of the H. Comm. on the Judiciary *et al.* (Mar. 11, 2013) (signed by six future claims representatives) (on file with H. Comm. on the Judiciary Democratic staff).

<sup>7</sup> See, e.g., Letter from William Samuels, Director, Government Affairs Dep’t, AFL–CIO, to Members of the House of Representatives (June 25, 2013) (expressing the view that “the bill is simply an effort by asbestos manufacturers who still are subject to asbestos lawsuits to avoid liability for diseases caused by their products”) (on file with H. Comm. on the Judiciary Democratic staff).

<sup>8</sup> See, e.g., Letter from Nan Aron, Alliance for Justice, *et al.*, to Chairman Spencer Bachus (R–AL) and Ranking Member Steve Cohen (D–TN) of the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (Mar. 12, 2013) (on file with H. Comm. on the Judiciary Democratic staff).

<sup>9</sup> 11 U.S.C. § 107(c)(1) (2013).

<sup>10</sup> *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. 1 (1975) (opening statement of Chairman William J. Hughes) [hereinafter *Asbestos Litigation Hearings*].



1964.<sup>11</sup> Asbestos has been widely used as an insulator and as a fire retardant by the construction and ship-building industries. Examples of asbestos-containing products include attic and wall insulation, roofing shingles, ceiling and vinyl floor tiles, paper and cement products, and friction products such as automobile clutch, brake and transmission parts.”<sup>12</sup>

Asbestos fibers, when released into the atmosphere and inhaled by humans, may cause various diseases, including asbestosis (a clogging and scarring of the lungs that can produce a reduced breathing capacity) and mesothelioma (a cancer of the lining of the chest and abdomen that is typically fatal).<sup>13</sup> Lung cancer and other diseases have also been associated with the inhalation of asbestos fibers.<sup>14</sup>

Although a link between asbestos and lung cancer was first reported in 1935, an estimated 21 million Americans were exposed to asbestos over the ensuing years,<sup>15</sup> some of whom began to manifest injuries during the 1960’s.<sup>16</sup> During the 1970’s, asbestos became the subject of significant regulation and was banned or declared hazardous by numerous federal agencies. For example, the Occupational Safety and Health Administration in 1986 stated that it was “aware of no instance in which exposure to a toxic substance more clearly demonstrated detrimental health effects on humans than has asbestos exposure. The diseases caused by asbestos exposure are life-threatening or disabling.”<sup>17</sup> The Environmental Protection Agency (EPA) in 1988 published a study of asbestos in public schools and found that its presence was “extremely hazardous.”<sup>18</sup> In 1989, the EPA promulgated a regulation banning the manufacture, processing, importation, and distribution of materials or products containing asbestos.<sup>19</sup> The rule, however, was later overturned.<sup>20</sup>

In 1973, the Fifth Circuit rendered the first appellate opinion upholding a product liability judgment against a manufacturer of asbestos-containing products.<sup>21</sup> As the Government Accountability Office (GAO) reported, “In the course of the first successful personal injury lawsuits against asbestos manufacturers, plaintiffs’ attorneys introduced evidence that these manufacturers had known but concealed information about the dangers of asbestos exposure or that such dangers were reasonably foreseeable.”<sup>22</sup> In the nearly four decades since, litigation over personal injuries resulting from exposure to asbestos has resulted in “hundreds of thousands of claims filed and billions of dollars in compensation paid,” according

<sup>11</sup> *Id.*

<sup>12</sup> U.S. Government Accountability Office, Report on Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts, GAO-11-819, at 6 (Sept. 2011) [hereinafter GAO Report].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> The Department of Labor provided this estimate. Asbestos Litigation Hearings at 2.

<sup>16</sup> Report of the Judicial Conference of the U.S. Courts Ad Hoc Committee on Asbestos Litigation, at 2 (Mar. 1991).

<sup>17</sup> Letter of transmittal dated July 21, 1983, *Chronic Hazards Advisory Panel on Asbestos, Report to the U.S. Consumer Product Safety Commission* (July 1983).

<sup>18</sup> U.S. Environmental Protection Agency, EPA Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress, at 5 (Feb. 1988).

<sup>19</sup> See EPA Asbestos Ban and Phasedown Regulations, 40 C.F.R. 763.160 *et seq.* (1989).

<sup>20</sup> Corrosion Proof Fittings v. Environmental Protection Agency, 947 F.2d 1201 (5th Cir. 1991).

<sup>21</sup> Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973).

<sup>22</sup> GAO Report at 8.

to the Rand Institute for Civil Justice.<sup>23</sup> “Asbestos litigation,” according to the GAO, “has been the longest-running mass tort litigation in U.S. history.”<sup>24</sup>

### *B. Overview of Asbestos Bankruptcy Trusts*

In 1994, Congress amended the Bankruptcy Code to authorize the imposition of a channeling injunction in chapter 11 cases involving asbestos claims. Codified as section 524(g), this provision allows a debtor, under certain circumstances, to shift its asbestos liabilities to a trust fund. Modeled on the injunction issued in the *Johns-Manville* bankruptcy case,<sup>25</sup> section 524(g) authorizes a court in a chapter 11 case, after making certain findings,<sup>26</sup> to issue an injunction preventing any entity from “taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment” for any claim or demand<sup>27</sup> that is to be paid in full or in part by a trust established under a confirmed plan of reorganization.<sup>28</sup> Funding for the trust is derived by the debtor’s securities and by the obligation of the debtor to make future payments, including dividends.<sup>29</sup> Upon confirmation, the trust assumes all of the debtor’s liabilities for personal injury, wrongful death, or property damages allegedly caused by the presence or exposure to asbestos or asbestos-containing products.<sup>30</sup> As the GAO observes, “neither the courts nor the U.S. Trustees have any specific statutory or other requirements to oversee a trust’s administration.”<sup>31</sup>

Once operational, the trust implements “a nonadversarial administrative process—independent of the court system—to review claimants’ occupational and medical histories before awarding compensation.”<sup>32</sup> The trusts are privately managed and typically consist of a trustee, a trust advisory committee, and a future claims representative.<sup>33</sup> The GAO explains:

Trustees manage the daily operations of the trusts, including managing the trusts’ investments, hiring and supervising support staff and advisors, filing taxes, and submitting annual reports to the bankruptcy court, as required by the trusts’ [trust agreement]. The trustees are to manage the trust for the sole benefit of the present and future claimant beneficiaries.<sup>34</sup>

<sup>23</sup> Lloyd Dixon *et al.*, Rand Institute for Civil Justice, Report: Asbestos Bankruptcy Trusts—An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts, at xi (2010).

<sup>24</sup> GAO Report at 1.

<sup>25</sup> Kane v. Johns-Manville Corp., 843 F.2d 636 (2nd Cir. 1988).

<sup>26</sup> 11 U.S.C. § 524(g)(2)(B)(ii) (2013).

<sup>27</sup> The provision defines “demand” as a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(I).

11 U.S.C. § 524(g)(5) (2013).

<sup>28</sup> 11 U.S.C. § 524(g)(1)(B) (2013).

<sup>29</sup> 11 U.S.C. § 524(g)(2)(B)(i) (2013).

<sup>30</sup> 11 U.S.C. § 524(g)(2)(B) (2013).

<sup>31</sup> GAO Report at 13.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.* at 15.

<sup>34</sup> *Id.*

Currently, there are 60 asbestos bankruptcy trusts in operation with a combined total of \$36.8 billion in assets as of 2011.<sup>35</sup>

Each trust establishes its own process by which claims are assessed and paid. Claims that meet the requisite criteria are paid a percentage of the scheduled value based on the nature of the asserted injury. The payment ratio varies among the trusts based on the availability of assets and anticipated present and future claims.<sup>36</sup> According to the GAO, the range of payment ranges from 1.1 percent to 100 percent for certain diseases, such as mesothelioma or asbestosis.<sup>37</sup> The GAO found that the median payment percentage among the various trusts was 25 percent.<sup>38</sup> The GAO reports that “[s]ince the establishment of the first trust in 1988 through 2010, available data indicate that asbestos trusts have paid about 3.3 million claims valued at about \$17.5 billion.”<sup>39</sup> In addition to seeking compensation from an asbestos bankruptcy trust, asbestos claimants may also seek compensation from liable companies that are not in bankruptcy through the tort system.<sup>40</sup>

#### CONCERNS WITH H.R. 982

##### I. H.R. 982 IS NOT NECESSARY GIVEN THE ABSENCE OF ANY EMPIRICAL EVIDENCE OF SYSTEMIC FRAUD

In order to justify the onerous new requirements the bill would impose on the asbestos trusts and the victims they serve, proponents of H.R. 982 allege that “there is growing evidence of fraud and abuse in the asbestos trust compensation system.”<sup>41</sup> In truth, however, there have been only isolated reports of fraudulent claims over the years and many of those instances were attributed to human error. For example, reports surfaced in 2004 regarding a series of incidences of abusive claim practices<sup>42</sup> and the Subcommittee on Regulatory Reform, Commercial and Antitrust Law (Subcommittee) conducted an oversight hearing into that issue as well as others presented with respect to the treatment of mass torts in bankruptcy cases.<sup>43</sup> In addition, the *Wall Street Journal* recently published an article purporting to document “numerous apparent anomalies” regarding various asbestos claims.<sup>44</sup> A close reading of this article, however, reveals that these instances were isolated or could be explained.<sup>45</sup> As noted in her response to this article, Joan Claybrook, president of Public Citizen from 1982 to

<sup>35</sup>*Id.* at 3.

<sup>36</sup>*Id.* at 17.

<sup>37</sup>*Id.* at 21.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 16.

<sup>40</sup>*Id.* at 15.

<sup>41</sup>*See, e.g.*, Unofficial Tr. of Markup of H.R. 982, the “Furthering Asbestos Claim Transparency (FACT) Act of 2013,” by the H. Comm. on the Judiciary, at 5 (May 21, 2013) (remarks of Chairman Bob Goodlatte, H. Comm. on the Judiciary) [hereinafter Full Committee Markup Tr.].

<sup>42</sup>*See, e.g.*, Editorial, *St. Francis of Asbestos*, WALL ST. J., June 14, 2004, at A14 (recommending that the House and Senate “bankruptcy subcommittees . . . [conduct] a full and public investigation of the rigged asbestos mess”); *The Latest Asbestos Scam—The Lawyers Are Now Rigging the Bankruptcy Process*, WALL ST. J., June 1, 2004, at A16 (observing that the “latest asbestos scandal is threatening the integrity of the judicial system itself”).

<sup>43</sup>*The Administration of Large Business Bankruptcy Reorganizations: Has Competition for Big Cases Corrupted the Bankruptcy System?; Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 108th Cong. (2004).

<sup>44</sup>*See, e.g.*, Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J., Mar. 11, 2013, at A1.

<sup>45</sup>*Id.*

2009 and head of the National Highway Traffic Safety Administration from 1977 to 1981, noted:

There is no evidence to support assertions of significant fraud in claims by asbestos victims. Human error in data entry is not fraud. Out of millions of claims filed at the company asbestos trusts, the Journal's extensive investigation identified an error and anomaly rate of only 0.35%, much of that due to mistakes by the trusts, not the victims.<sup>46</sup>

Likewise, the GAO is not aware of any subsequent reports of endemic fraud since 2004 with respect to asbestos claims and it did not uncover any evidence of overt fraud during its examination of asbestos trusts last year.<sup>47</sup> Instead, the GAO has detailed an already robust set of procedures that a claimant must follow to establish entitlement to compensation. The claimant completes a claim form supported with documented evidence of exposure to asbestos products. Such evidence may consist of the claimant's work history, employer records, Social Security records, and deposition testimony taken during any litigation.<sup>48</sup> The claimant must also submit medical records "sufficient to support a diagnosis for the specific disease being claimed or, if applicable, a copy of a death certificate."<sup>49</sup> In addition, 98 percent of the 52 trusts that the GAO reviewed required a claims audit program to be conducted. Based on interviews held with representatives from 11 trusts, GAO found that all the trusts "incorporate quality assurance measures into their intake, evaluation, and payment processes."<sup>50</sup> GAO also found that "each trust is committed to ensuring that no fraudulent claims are paid by the trust, which aligns with their goals of preserving assets for future claimants."<sup>51</sup> It is noteworthy that even with this heightened scrutiny, none of the trusts "indicated that these audits had identified cases of fraud."<sup>52</sup>

To draw attention to the fact that the current asbestos trust claims process generally has adequate fraud detection systems in place, Subcommittee Ranking Member Steve Cohen (D-TN) offered an amendment that would have excluded trusts that have a claims audit program from the bill. This thoughtful amendment, however, was defeated by a vote of 13 to 19.

With the knowledge that there is no empirical evidence of fraud in the system, we are led to conclude that this measure is nothing more than an attempt to improperly allow asbestos defendants to circumvent state and federal discovery procedures. As the Minority witness explained during the hearing on H.R. 982, "Solvent asbestos defendants remaining in the tort system are currently able to learn all information relevant to a claim against them, including information about a victim's trust claims, under state discovery

<sup>46</sup> Joan Claybrook, *Fraud Made the Asbestos Illness Situation Much Worse*, Letter to the Editor, WALL ST. J., May 19, 2013, at A16.

<sup>47</sup> Telephone interview with William Jenkins, Director, Homeland Security and Justice Issues, *et al.*, U.S. Government Accountability Office (May 7, 2012); GAO REPORT at 23.

<sup>48</sup> GAO Report at 18.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 23.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

rules.”<sup>53</sup> All information that would be relevant to claims against asbestos defendants—including information related to a victim’s trust claims—can be obtained using normal discovery tools available under state law, like interrogatories, document requests, and depositions. Nonetheless, the bill’s proponents offer no explanation as to why the bill’s potentially costly and burdensome information request provision is necessary or why federal law should subvert state law discovery processes.

In response to this particular flaw in the bill, Representative Hakeem Jeffries (D–NY) offered an amendment that would have required the trust to provide information relating to payments made by the trust and demands for such payment to any party to an action concerning asbestos liability exposure only if such party cannot otherwise obtain such information under applicable non-bankruptcy law. The amendment further provided that the information must relate to a trust claimant who is also a party to such action against the requesting party. Representative Jeffries’ amendment, however, failed by a vote of 13 to 18.

Representative Joe Garcia (D–FL) also offered an amendment that would have prohibited a party that has been found liable in court for asbestos-related harm to a plaintiff from seeking information about that plaintiff through the bill’s disclosure process. Essentially, this amendment would have prohibited an asbestos defendant who has already been found liable in court for causing harm to a plaintiff from using this bill to seek information that was already available to it in discovery. This amendment would have added a little more balance to what is a very unbalanced bill. Defendants that have already had their day in court and lost should not be allowed to then use this bill as a way to simply harass asbestos plaintiffs they have already harmed. Notwithstanding the clearly equitable bona fides of this amendment, it failed by a vote of 11 to 18.

## II. H.R. 982 WOULD HARM ASBESTOS VICTIMS IN MULTIPLE WAYS

### A. *The Bill’s Reporting and Disclosure Requirements Constitute an Assault on Asbestos Victims’ Privacy Interests*

H.R. 982’s mandatory reporting and disclosure requirements would threaten asbestos victims’ privacy when they seek payment for injuries from an asbestos bankruptcy trust. Specifically, the bill requires such information to be made part of the bankruptcy court’s case docket, which is easily accessible through the Internet with the payment of a nominal fee. As a result, information concerning claimants’ sensitive personal information—including their names and exposure histories—would be irretrievably released into the public domain.

It is readily apparent that these reports would provide a treasure trove of data that could be accessed by insurance companies, prospective employers, lenders, and data collectors who could then use such information for purposes having absolutely nothing to do with compensation for asbestos exposure and that could be used to the detriment of asbestos victims. In effect, this bill would allow

<sup>53</sup> *Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113 Cong. (2013) (prepared statement of Elihu Inselbuch).

unsuspecting asbestos victims to be further victimized, all in the name of helping those who harmed these victims in the first place. As the widow of our former colleague, Representative Bruce Vento (D-MN), who died of mesothelioma in 2000, warned, “The information on this public registry could be used to deny employment, credit, and health, life, and disability insurance. We are also concerned that victims would be more vulnerable to identity thieves, con men, and other types of predators.”<sup>54</sup>

It is notable that trusts already generally provide annual financial reports to the bankruptcy court, but the information disclosed typically consists of the total number of claims paid and the aggregate value of these claims, thus protecting claimants’ privacy.<sup>55</sup> Some reports are publically available, while others are filed under seal with the bankruptcy court “for reasons deemed appropriate by the court.”<sup>56</sup> Such reasons include protecting the interests of the reorganized company and its competitiveness.<sup>57</sup> In fact, of the 47 trust annual reports that the GAO reviewed, only one reported the amount paid to each individual and listed these individuals’ names.<sup>58</sup> Nevertheless, 65 percent of the trusts reviewed by GAO (33 out of 52 trusts) specifically provide that “claimant information submitted to the trust for purposes of obtaining compensation is confidential and should be treated as a settlement negotiation.”<sup>59</sup>

Proponents of more disclosure argue that it may reduce the “asbestos-related litigation burden on the remaining solvent defendants by demonstrating that the trusts have increased claimants’ overall compensation beyond the amount justified in relation to the harm caused.”<sup>60</sup> They also assert that the current system’s lack of transparency “could enable plaintiffs to file contradictory claims to different trusts while also pursuing recovery through the tort system.”<sup>61</sup>

These arguments lack any merit. As the GAO observed, “parties in the tort system are not required to disclose settlement negotiation or agreement information outside of the subpoena process” and that “trusts are analogous to any other settling party and related negotiations and payments are privileged.”<sup>62</sup> Equally important, the GAO noted that “all of the potentially relevant information in the trusts’ possession is available to the defense through pretrial discovery.”<sup>63</sup> Trust representatives are also very concerned about the “privacy rights of hundreds of thousands of individuals who did nothing except successfully seek compensation from a trust.”<sup>64</sup>

In attempt to protect asbestos victims from this unwarranted invasion of privacy, Ranking Member John Conyers, Jr. (D-MI) offered an amendment specifying that the quarterly reports required to be filed under the bill contain only aggregate information. In

<sup>54</sup> Vento Letter.

<sup>55</sup> GAO Report at 1, 24.

<sup>56</sup> *Id.* at 17.

<sup>57</sup> *Id.* at 4, note 7.

<sup>58</sup> *Id.* at 24–25.

<sup>59</sup> *Id.* at 26.

<sup>60</sup> *Id.* at 30.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 29.

<sup>63</sup> *Id.*

<sup>64</sup> Memorandum from Legal Representatives for Future Asbestos Personal Injury Claimants with Respect to Certain Asbestos Settlement Trusts to Prof. Troy McKenzie, Advisory Comm. on Bankruptcy Rules of the Judicial Conference of the United States, 2 (Aug. 10, 2011) (on file with the H. Comm. on the Judiciary Democratic staff).

support of his amendment, Representative Conyers argued that the bill would, in effect, subject unsuspecting asbestos victims to possible future abuse. The amendment also struck the bill's burdensome discovery requirement. This amendment would have ensured victims' privacy by not making individualized claimant information public. It also would have ensured that trusts could focus their resources on their primary mission of assuring fair compensation for asbestos victims, rather than participating in the discovery process for outside lawsuits. Notwithstanding these benefits, this amendment failed by a party-line vote of 15 to 16.

Representative Bobby Scott (D-VA) offered an amendment that would have required the trust to: (1) not identify the names of asbestos victims in the quarterly report; and (2) treat any information contained in the report pursuant to the privacy protections set forth in the Health Insurance Portability and Accountability Act (HIPAA).<sup>65</sup> This amendment would have simply ensured that trusts comply with the HIPAA Privacy Rule. This Rule, according to the U.S. Department of Health and Human Services, was promulgated to establish:

national standards to protect individuals' medical records and other personal health information and applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically. The Rule requires appropriate safeguards to protect the privacy of personal health information, and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization. The Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records, and to request corrections.<sup>66</sup>

Although asbestos victims who seek compensation for their injuries should be accorded at least the same privacy protections that are given to every other patient, this amendment failed by a vote of 13 to 19.

In another attempt to address the bill's privacy flaws, Representative Hank Johnson (D-GA) offered two further amendments that were considered *en bloc*. One amendment would have required the quarterly reports required by the bill to be protected from public disclosure. Access to such reports, pursuant to the amendment, would have been restricted to a party that is a defendant in an action concerning asbestos exposure, with the access limited to the information in the report that was relevant to the plaintiff in such action, and only when such information is relevant to such action. In sum, this amendment would have ensured that the privacy interests of asbestos victims are respected by restricting access to the information contained in the reports to only those parties that have a "need to know."

Representative Johnson's other amendment would have ensured that personally identifiable information about an asbestos victim

<sup>65</sup> Pub. L. No. 104-191, 110 Stat. 1936 (1996).

<sup>66</sup> U.S. Dep't of Health & Human Services, Health Information Privacy—The Privacy Rule, available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html> (last visited May 23, 2013).

claimant is protected from disclosure. It included within the amendment's definition of "personally identifiable information" any information pertaining to the claimant's health and finances. The unfettered release of personally identifiable information facilitates identity theft. According to the Federal Trade Commission (FTC), identity theft is one of the top complaints received by the agency. In fact, 18 percent of complaints that the FTC received in 2012 were related to identity theft.<sup>67</sup> As previously noted, identity theft is a serious concern of asbestos victims.<sup>68</sup> These amendments, however, failed by a vote of 13 to 18.

### *B. Asbestos Victims Vigorously Oppose this Legislation*

The proponents of this legislation assert that it is intended to assist asbestos victims. For example, the Subcommittee Chairman described the purpose of the bill as follows:

We are here for one purpose and one purpose only, and that is to protect those victims of asbestos exposure. That is our only motivation. We are not here to protect companies, we are not here to protect the defense bar, plaintiffs' bar. We are here for the victims, and we are here to protect their rights and to ensure that justice is served. We are not here to protect those who are not victims.<sup>69</sup>

Nevertheless, we are unaware of a *single* asbestos victim who supports H.R. 982. In fact, we received letters from asbestos victims in vigorous opposition to this bill.<sup>70</sup> It is notable, for instance, that the Majority failed to call an asbestos victim to testify at any of the hearings on this legislation in either this Congress<sup>71</sup> or in the last Congress when a similar measure was considered.<sup>72</sup>

To his credit, the Subcommittee Chairman suspended the markup of the bill by the Subcommittee on March 20, 2013 to give certain asbestos victims "the right to have their testimony recorded" and to allow "members to ask them questions."<sup>73</sup> The process ultimately offered to the victims, consisting of an informal information session that would have been closed to the public and neither transcribed nor recorded, was rejected by the victims because they

<sup>67</sup> Press Release, Federal Trade Commission, FTC Releases Top 10 Complaint Categories for 2012—Identity Theft Tops List for 13th Consecutive Year in Report of National Consumer Complaints (Feb. 26, 2013), available at <http://ftc.gov/opa/2013/02/sentineltop.shtm> (last visited May 23, 2013).

<sup>68</sup> See text accompanying note 54.

<sup>69</sup> Unofficial Tr. of Hearing on H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013," by the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 2 (Mar. 13, 2013) (statement of Chairman Spencer Bachus, Subcomm. on Regulatory Reform, Commercial and Antitrust Law).

<sup>70</sup> See, e.g., Vento Letter.

<sup>71</sup> See, e.g., Unofficial Tr. of Hearing on H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013," by the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 2 (Mar. 13, 2013).

<sup>72</sup> See, e.g., *Furthering Asbestos Claims Transparency Act: Hearing on H.R. 4369 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary*, 112th Cong. (2012); *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011).

<sup>73</sup> Unofficial Tr. of Markup of H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013," by the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 21, 23 (Mar. 20, 2013) [hereinafter Subcommittee Markup Tr.].



rightly deemed this process to be woefully deficient.<sup>74</sup> As these victims observed:

Instead of a public hearing as originally promised, we were invited to participate in an informal and private “information session” that would be closed off to the public and everyone else, except subcommittee members and their staff. We were told that this would be a closed door “conversation” that would not be recorded or become part of the official record of the legislation. This was insulting, and disturbingly ironic for a bill with the word “transparency” in its title.

We may not be Washington insiders, but we know the difference between being official witnesses and being treated as invisible people who need to be hidden behind closed doors and then forgotten. We rejected this offer because we felt it was not a serious effort to ensure that our views and those of other asbestos victims—who would be most affected by this one-sided legislation—were heard and considered before the bill moves forward.<sup>75</sup>

### *C. H.R. 982 Will Be Particularly Harmful to Veterans*

Although millions of unsuspecting Americans have been exposed to asbestos, there are certain populations who had greater levels of exposure as the result of their work. For example, members of the Armed Forces of the United States have been disproportionately affected by asbestos. Even though veterans make up only eight percent of the population, they comprise 30 percent of all mesothelioma deaths.<sup>76</sup> Military.com, the largest military and veteran membership organization in the United States, explains:

Virtually every ship commissioned by the United States Navy between 1930 and about 1970 contained several tons of asbestos insulation in the engine room, along the miles of pipe aboard ship and in the walls and doors that required fireproofing. The sailors that manned these ships and the men who repaired them in Navy shipyards were prime candidates for asbestos exposure, a fact borne out by the disease statistics.<sup>77</sup>

In response to the special concerns presented by servicemembers and asbestos exposure, Representative Scott offered an amendment that would have exempted claimants who have or who are currently serving in the Armed Forces of the United States from the bill’s disclosure requirements.<sup>78</sup> The amendment, however, failed by a vote of 14 to 15.

<sup>74</sup>Letter from Susan Vento *et al.*, to Chairman Spencer Bachus (R-AL) of the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (Apr. 5, 2013) (on file with H. Comm. on the Judiciary Democratic staff).

<sup>75</sup>*Id.*

<sup>76</sup>Military.com, Asbestos and the Military, History, Exposure & Assistance, *available at* <http://www.military.com/benefits/veteran-benefits/asbestos-and-the-military-history-exposure-assistance.html> (last visited May 23, 2013).

<sup>77</sup>*Id.*

<sup>78</sup>It should be noted that shipbuilders and dockworkers over the years have been extensively exposed to asbestos. For example, it has been reported that “[s]hipbuilding in World War II is a significant aetiology of the malignancies caused by asbestos.” John Hedly-Whyte & Deborah R. Milamed, *Asbestos and Ship-Building: Fatal Consequences*, 77(3) *ULSTER MEDICAL J.* 191 (Sept. 2008), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2604477/>.

*D. H.R. 982 Heightens the Risk of More Discrimination Against Victims*

H.R. 982 will make asbestos victims more vulnerable to employment discrimination by making their disease status a matter of public record. Both Ranking Member Conyers and Representative Johnson raised serious concerns that current and potential employers could use the information required to be disclosed about asbestos victim claimants to engage in employment discrimination. In response, Representative Farenthold argued that the “American [sic] Disabilities Act would protect folks with the jobs.”<sup>79</sup> He continued:

They talk about employers using this information. There is [sic] volumes of existing law. The Americans with Disabilities Act, for instance, would prohibit discrimination based on the information disclosed in here.<sup>80</sup>

While we would hope that Representative Farenthold’s analysis is correct, it is not clear that this would prove to be the case under the Americans with Disabilities Act (ADA).<sup>81</sup> To begin with, these victims would face potential problems with proof. How, for example, would an applicant or employee ever be able to prove that an employer had accessed and relied on the information in the database?

Even if this problem of proof could be overcome, the applicant or employee would then have to prove that he or she was an individual with a “disability,” as defined in the ADA, to obtain its protection from discrimination. The information in the database concerns *exposure* to asbestos, while the ADA protects individuals who have, had, or are regarded as having physical or mental *impairments*. It is not clear how, or whether, mere exposure to asbestos would qualify as an impairment or being regarded as having an impairment, thereby creating the risk that individuals could face discrimination based on their prospective or current employer’s knowledge of their exposure to asbestos outside the ADA’s protection.

While we believe that a court could, and should, find that reliance on exposure to asbestos in making an adverse employment decision is unlawful under the ADA, we have very real concerns that this would not be the case based on our experience under this law. For example, following the enactment of the ADA in 1990, employers and the courts seized on the Act’s definition of disability as a means of denying protection to individuals with disabilities that Congress unquestionably intended to protect, such as workers with diabetes, multiple sclerosis, HIV, and similar limiting impairments.

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According to the White Lung Association:

During World War II a new Liberty Ship hit the water in Baltimore every 37 hours and a few hundred miles South, in Hampton Roads Virginia, three ships hit the water each day. Trucks and ships delivered thousands of pounds of asbestos and asbestos products to the shipyards. . . . Workers in all trades breathed the asbestos used by insulators, boiler mechanics, carpenters, machinists, painters and joiners.

James Fite, U.S. Shipyards: A History of Massive Asbestos Exposure and Disease, World Asbestos Report (2004), available at [http://worldasbestosreport.org/conferences/gac/gac2004/ws\\_H\\_2\\_e.php](http://worldasbestosreport.org/conferences/gac/gac2004/ws_H_2_e.php).

<sup>79</sup> Full Committee Markup Tr. at 137.

<sup>80</sup> *Id.* at 31.

<sup>81</sup> The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), was subsequently amended by the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101 *et seq.* (2013)).

To remedy this misinterpretation of the law, Congress, in 2008, had to amend the ADA to ensure sufficient coverage.<sup>82</sup>

In addition, our experience with a closely analogous problem—discrimination by employers and others based on genetic information, i.e., a marker for a disease or impairment that has not yet developed—provides additional cause to question whether the ADA would be interpreted to prohibit discrimination based on information about exposure to asbestos. With regard to genetic information, Congress was sufficiently concerned that the ADA might not reach discrimination on this basis and therefore passed the Genetic Information Nondiscrimination Act of 2008.<sup>83</sup> Congress understood that, while it was possible that the courts might interpret the ADA to prohibit discrimination based on genetic information, there also was a significant risk that they could fail to do so.

Thus, while we again would hope that the ADA would protect individuals from discrimination based on information revealing exposure to asbestos, protection under current law is too uncertain to risk.

### III. H.R. 982 IS FUNDAMENTALLY INEQUITABLE BECAUSE IT REQUIRES DISCLOSURE BY THE TRUSTS, BUT DOES NOT REQUIRE SOLVENT DEFENDANT COMPANIES TO DISCLOSE THEIR CONFIDENTIAL SETTLEMENT AGREEMENTS

H.R. 982 is fundamentally inequitable because it imposes additional burdens on asbestos bankruptcy trusts while easing the process by which solvent defendant companies can obtain discovery. This is particularly galling given the history of asbestos manufacturers in affirmatively concealing the dangers of their products from the public.

Many defendant companies insist on confidentiality agreements before entering into settlement agreements specifically in order to prevent evidence of their wrongdoing from becoming public. More importantly, because of the secrecy of these settlements, other people who have been injured have no way of gaining important information about their exposure, their illnesses, or the settled liability of the companies that made them sick. Information about the concealment of wrongdoing never becomes public, and the people who have suffered have no way of knowing about that wrongdoing or its extent. Governmental agencies that are charged with protecting public health—whether in the workplace or in the home—are deprived of the information they need to enforce the laws Congress has passed.

To highlight the problem of H.R. 982's inequitable disclosure obligations, Representative Jerrold Nadler (D-NY) offered an amendment requiring a party that requests information from a bankruptcy asbestos trust to meet certain criteria. Under the amendment, such a party would have been required to agree to disclose information relevant to such action that pertains to the protection of public health or safety to any other person or to any federal or state agency with authority to enforce laws regulating an activity relating to such information upon request of such party or agency. The goal of this amendment was to ensure that the transparency

<sup>82</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>83</sup> Pub. L. No. 110-233, 122 Stat. 881 (2008).

that H.R. 982's proponents demand from the victims of the asbestos industry would also apply to the corporations that inflicted so much damage and so much suffering over the years. The amendment would have addressed the longstanding efforts by these corporations to conceal the facts from the public, from their victims, and from government agencies charged with enforcing our health and safety laws. Notwithstanding the equitable value of this amendment, it failed by a vote of 14 to 18.

Similarly, Representative Sheila Jackson Lee (D-TX) offered two amendments *en bloc* that would have provided balance to the bill's disclosure requirements. One of these amendments would have required a trust to provide certain information to a defendant providing such defendant first disclosed the median settlement amount that it paid for claims settled or paid within 5 years of the date of the request, by disease category, for the state in which the plaintiff's action was filed. Her other amendment would have similarly allowed the trust to supply information in response to a request from a defendant providing the defendant first made available to the plaintiff and the trust certain information regarding the defendant's asbestos-containing products and work sites under the defendant's control, unless such information is a trade secret. These amendments, however, failed by a vote of 9 to 15.

#### IV. H.R. 982 WILL DIVERT CRITICAL FUNDS AND FURTHER DECREASE COMPENSATION TO ASBESTOS VICTIMS BY FORCING BANKRUPTCY TRUSTS TO PREPARE BURDENSOME REPORTS

H.R. 982 would effectively shift the cost of discovery away from solvent asbestos defendants to the bankruptcy trusts, ultimately diminishing the available pool of money to compensate the victims of bankrupt asbestos defendants. By imposing reporting and information demand requirements on trusts, H.R. 982 could significantly increase the administrative costs of trusts in meeting these requirements and force them to divert their limited resources from paying the claims of asbestos victims to satisfying the information requests of those who caused injuries to millions of Americans. The GAO, for example, noted that one trust reported that it incurred \$1 million in attorneys' fees to respond to a request to disclose every document on every claimant.<sup>84</sup> Several legal representatives for future asbestos personal injury claimants fear that "unnecessary and unreasonable reporting and discovery obligations would divert resources from the trusts' limited funds, which were specifically created to pay the claims of individuals stricken with asbestos-related diseases, for the benefit of third party defendants in non-bankruptcy, asbestos-tort litigation."<sup>85</sup>

The bill includes only a modest compensation provision with respect to its information demand requirements, which allows a trust to seek payment for "any reasonable cost" that it incurred in responding to such demands. The "reasonableness" of reimbursement requests, of course, can be subject to dispute and litigation. Ultimately, the trusts will incur costs to implement the bill's requirements, leaving less money to compensate asbestos victims. This is particularly problematic in light of the fact that defendants can al-

<sup>84</sup> GAO Report at 27.

<sup>85</sup> Legal Representatives Memorandum at 2.

ready obtain the information they want using existing discovery tools.

H.R. 982's retroactive application only adds to this unnecessary burden. The vast bulk of asbestos trusts that would be affected by this legislation have long been in existence, one of which dates back to 1988. According to the GAO, these trusts have already paid 3.3 million claims valued at about \$17.5 billion.<sup>86</sup> Yet, after the passage of more than 20 years since the first trust was established, the proponents of H.R. 982 now insist that these trusts issue reports and provide documentation.

#### CONCLUSION

The only beneficiaries of H.R. 982 will be the very entities that knowingly produced a toxic substance that killed or seriously injured unsuspecting American consumers and workers. The legislation does nothing to protect victims or to improve the claims process and is based on the false assertion that there is endemic fraud in the asbestos trust system that must be addressed. In truth, this legislation is simply an end run by defendants around the discovery process that threatens to prevent or delay adequate compensation for asbestos victims.

Further, H.R. 982's reporting and disclosure requirements are an assault against asbestos victims' privacy interests and are fundamentally inequitable because solvent defendant companies are not similarly required to disclose their confidential settlement agreements. Finally, these burdensome new reporting requirements will divert critical funds and further decrease compensation to asbestos victims.

Accordingly, we urge our colleagues to stand on the side of justice for asbestos victims and to oppose H.R. 982.

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 JERROLD NADLER.  
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 KAREN BASS.  
 CEDRIC RICHMOND.  
 SUZAN DELBENE  
 JOE GARCIA.  
 HAKEEM JEFFRIES.

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<sup>86</sup>GAO Report at 16.