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REPORT
112–687

FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2012

SEPTEMBER 21, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH OF TEXAS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4369]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4369) 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 the filing of such reports with the Executive Office for United States Trustees, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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19–006

The Amendments

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Furthering Asbestos Claim Transparency (FACT) Act of 2012".

SEC. 2. AMENDMENTS.

Section 524(g) of title 11, United States Code, is amended by adding at the end the following:

"(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.".

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—The amendments made by this Act shall apply with respect to cases commenced under title 11 of the United States Code before, on, or after the date of the enactment of this Act.

Amend the title so as to read:

A bill 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.

Purpose and Summary

H.R. 4369, the Furthering Asbestos Claim Transparency (FACT) Act of 2012, adds a paragraph to subsection (g) of section 524 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.,* 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 (*viz.* exposure to asbestos) of those who have filed a claim with such trust.[1] 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.[2]

[1] Furthering Asbestos Claim Transparency (FACT) Act of 2012, H.R. 4369, 112th Cong. § 2 (2012).

[2] *Id.*

Background and Need for Legislation

A. ASBESTOS AND ASBESTOS-RELATED HEALTH CONDITIONS

Asbestos is the name given to a number of naturally occurring fibrous minerals that were widely used in the United States in industrial products throughout much of the 20th Century. Humans have used asbestos for centuries. The word "asbestos" comes from the Greek word for "indestructible," and the ancient world used asbestos for everything from fabrics to lamp wicks.[3] 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.[4]

Despite the usefulness of asbestos in industrial products, asbestos fibers are toxic when inhaled. Inhalation of asbestos fibers has been linked to a number of injuries, including mesothelioma, lung cancer, asbestosis, and pleural abnormalities. Mesothelioma is a deadly cancer of the lining of the chest or abdomen for which asbestos is the only known cause. 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. Asbestosis, a chronic lung disease resulting from inhalation of asbestos fibers, can be debilitating and even fatal. 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.

B. ASBESTOS LITIGATION

Asbestos litigation is the longest-running mass tort litigation in the United States.[5] 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."[6] Asbestos litigation's distinguishing feature has been its tendency to reshape itself over time. The focus of the litigation has shifted from Federal to state courts, and now, increasingly, to asbestos bankruptcy trusts.

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. Over time, asbestos litigation "has been shaped by changes in substantive and procedural law, the rise of a sophisticated and well-capitalized plaintiff bar, heightened media atten-

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[3] MANHATTAN INSTITUTE, A REPORT ON THE ASBESTOS LITIGATION INDUSTRY, 4 (2008), *available at* http://www.triallawyersinc.com/pdfs/TLI-ASBESTOS.pdf (last visited Aug. 1, 2012).

[4] *Id.* ("The asbestos industry in the United States grew astronomically in the twentieth century: asbestos consumption went from only 956 metric tons in 1890 to a peak of 803,000 tons in 1973.").

[5] STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION, xvii (2005).

[6] LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS, xi (2010).

tion to litigation in general and toxic tort litigation in particular, and the information science revolution." [7]

The U.S. Court of Appeals for the Fifth Circuit upheld the first successful asbestos liability suit in 1973.[8] 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.[9] 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 Asbestos Litigation to address what the Court later referred to as the "asbestos-litigation crisis." [10]

The crisis has not abated. 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.'" [11] Conversely, when asbestos litigation first arose in the 1960's, most claimants were "workers suffering from grave and crippling maladies." [12]

Thus, the hallmark of the litigation has been the mass filing of lawsuits by plaintiffs with little or no physical impairment and claims made by plaintiffs without reliable proof of causation, both of which have helped force scores of defendant companies into bankruptcy and have threatened payments to the truly sick. A 2005 RAND report estimated that, through 2002, approximately 730,000 people had filed asbestos claims against at least 8,400 corporate defendants.[13] 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. Awards, legal fees, and other claim-related costs have risen into the tens of billions of dollars. To date, asbestos-related liabilities and litigation have driven approximately 100 companies into bankruptcy.[14]

Inundated with cases involving thousands of plaintiffs and dozens of defendants, courts had great difficulty in resolving asbestos cases. Several factors contributed to the courts' difficulty in resolving the litigation: "the widespread use of asbestos, which exposed as many as 27.5 million Americans to asbestos in the course of their employment; a long latency period for asbestos diseases; a segment of the plaintiffs' bar that sought to capitalize on the asbes-

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[7] CARROLL, *supra* note 5, at xvii.
[8] *Borel v. Fibreboard Paper Prods. Corp.,* 493 F.2d 1076 (5th Cir. 1973).
[9] *Id.* at 1109.
[10] *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 597 (1997).
[11] 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).
[12] *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., Professor, Harvard Law School).
[13] Carroll et al., *supra* note 5, at 71.
[14] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS, GAO-11-819 (2011), at 2.

tos litigation boom by seeking settlements for plaintiffs with no known diseases; and the failure of global settlements through class-action lawsuits." [15]

Various Federal reform efforts have been offered in order to better manage the resolution of the massive number of asbestos claims and to provide compensation for asbestos claimants.[16] But "[d]espite the judicial remedies, legislative wrangling, and more than 40 years of lawsuits, asbestos claims continue to this day." [17]

C. ASBESTOS LITIGATION FRAUD

Courts, overwhelmed by asbestos claims developed special asbestos rules to facilitate the management of the asbestos claims on their dockets. These special rules, however, "tipped the scale of justice in favor of plaintiffs by compelling defendant companies to settle mass quantities of claims at one time." [18] With the scale tipped in their favor "plaintiffs' firms responded opportunistically to their success by developing screening measures to recruit hundreds of thousands of claimants, asbestos litigation reached crisis status." [19]

Asbestos lawyers 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." [20] 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.[21] 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." [22]

These mass screening 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!'" [23] It is estimated that more than one million workers have undergone attorney-sponsored screenings.[24] As one worker explained, "it's better than the lottery. If they find anything, I get a few thousand dollars I didn't have.

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[15] Dixon et al, *supra* note 6, at 2.

[16] *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).

[17] *Id.*

[18] Elise Gelinas, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolutions Act,* 69 MD. L. REV. 162 (2009).

[19] *Id.*

[20] *Owens Corning v. Credit Suisse First Boston,* 322 B.R. 719, 723 (D. Del. 2005).

[21] Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?,* 61 SMU L. REV. 1221, 1233 (2008).

[22] Griffin B. Bell, *Asbestos & The Sleeping Constitution,* 31 *Pepp. L. Rev.* 1, 5 (2003).

[23] Pamela Sherrid, "Looking for Some Million Dollar Lungs," *U.S. News & World Rep.,* Dec. 17, 2001, at 36.

[24] *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).

If they don't find anything, I've just lost an afternoon." [25] According to legal scholars, "without these claims, the 'asbestos litigation crisis' would never have arisen." [26]

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.[27] 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 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." [28] 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%.[29]

Researchers at Johns Hopkins University compared the X-ray interpretations of 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." [30]

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." [31] 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." [32] 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." [33]

Professor Lester Brickman, an expert on asbestos litigation, concluded that

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[25] Andrew Schneider, "Asbestos Lawsuits Anger Critics," *St. Louis Post-Dispatch,* Feb. 11, 2003, at A1.

[26] Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation,* 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 273 (2001).

[27] Mark A. Behrens and Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to be Turning,* 12 CONN. INS. L.J. 477, 480 (2006).

[28] ABA COMM'N ON ASBESTOS LITIGATION, ABA REPORT TO THE HOUSE OF DELEGATES 8 (2003).

[29] *Id.*

[30] Joseph N. Gitlin et al., *Comparison of 'B' Readers' Interpretations of Chest Radiographs for Asbestos Related Changes,* 11 ACAD. RADIOLOGY 843, 852 (2004).

[31] David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation,* 31 PEPP. L. REV. 11, 13 (2003) (quoting Lawrence Martin, M.D.).

[32] *Owens Corning,* 322 B.R. at 723.

[33] Lester Brickman & Harvey D. Shapiro, "Asbestos Kills—And More than Just People: Jobs, Ethics, and Elementary Justice," *Nat'l. Rev.,* Jan. 31, 2005.

> Asbestos 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.[34]

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.[35] In the wake of Judge Jack's opinion, which noted that many asbestos and silica cases are "driven neither by health nor justice" and are instead "manufactured for money,"[36] Congress convened hearings on fraud and abuse in asbestos litigation.[37] A Federal grand jury was empanelled in the Southern District of New York.[38]

Many believed the decline of mass screenings and enactment of medical criteria statutes in major asbestos venue states marked the beginning of a new, fairer asbestos compensation system;[39] however, the Committee has recently received testimony suggesting that screening programs are being used to generate asbestos trust claims.[40]

The asbestos bar is also using new techniques to recruit potential trust claimants. While screenings were often advertised in break rooms, in local papers, and on local broadcast stations,[41] the modern asbestos plaintiffs' bar spends billions of dollars on mass media advertisements designed to recruit potential asbestos tort plaintiffs and trust claimants.[42] Experts estimate that asbestos plaintiffs' firms spent over $950 million on television advertising in 2011.[43] Trial lawyers' ad campaigns extend beyond television, and experts estimate that the asbestos bar spends tens of millions each year on sophisticated online advertising campaigns.[44] "Mesothelioma" has

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[34] Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality,* 31 PEPP. L. REV. at 33.

[35] *In re Silica Products Liability Litigation,* 398 F.Supp.2d 563 (S.D. Tex. 2005).

[36] *Id.* at 635.

[37] *The Silicosis Story: Hearings Before the Subcomm. on Oversight and Investigations of the Committee on Energy and Comm.*, 109th Cong. (2006).

[38] Adam Liptak, *Defendants See a Case of Diagnosing for Dollars, N.Y. Times*, October 1, 2007, *available at* http://www.nytimes.com/2007/10/01/us/01bar.html (last accessed Sep. 18, 2012) ("A grand jury was convened in Manhattan more than 2 years ago to look into potential fraud in silicosis cases. . . .").

[39] *See e.g.,* Ohio Rev. Code Ann. § 2307.91 *et. seq.* (enacted 2004), Tex. Civ. Prac. & Rem. § 90.001 *et. seq.* (last amended 2007).

[40] *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System: Hr'g Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 112th Cong. 5–6 (2011) [hereinafter *Constitution Subcommittee Hr'g*] (testimony of Professor Lester Brickman).

[41] *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).

[42] Kenneth M.Goldstein, Panel discussion at U.S. Chamber Institute for Legal Reform's 12th Annual Legal Reform Summit (October 26, 2011) (associated slides available at http://www.instituteforlegalreform.com/sites/default/files/Lawyers__Mass__Tort__Solicitation__Advertising__Oct2011.pdf).

[43] *Id.*

[44] *See* New Media Strategies, *The Plaintiffs' Bar Goes Digital* (January 2012), a*vailable at;* http://www.instituteforlegalreform.com/doc/the-plaintiffs-bar-goes-digital-0 (last accessed Sep. 18, 2012).

become the single most expensive keyword on Google's auction-style AdWords platform.[45]

Many asbestos firms' advertisements are designed to attract the attention of unimpaired individuals, smokers stricken by lung cancer, and others whose claims would be difficult to pursue in the modern tort system.[46] 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.[47]

D. ASBESTOS CLAIMS IN BANKRUPTCY

The accumulation of liability on the part of asbestos defendants throughout the 1980's and early 1990's, and the widespread use by those companies of chapter 11 bankruptcy to manage their liability, led Congress in 1994 to amend the Bankruptcy Code to include a section, 11 U.S.C. § 524(g), to provide for the resolution of asbestos liability claims against the debtor.[48] Under that section, a debtor is permitted to create, in its plan of reorganization, a trust that is to be the exclusive source of post-confirmation compensation for the debtor's future 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.[49]

The current requirements for obtaining a channeling injunction include, but are not limited to, the trust's ability, at the time of confirmation, to prove to the court that

> the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or period 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.[50]

In many cases, this requirement has caused the debtor to include a provision in its reorganization plan requiring it to file periodic disclosures with the court of the financial health of the asbestos liability trust.[51] 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 bank-

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[45] *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").

[46] *See e.g.* Weitz & Luxenberg P.C. Television Ad, http://www.youtube.com/watch?v=6yrieyZtfr4 (last visited September 18, 2012) ("You are entitled to compensation even if you've been a smoker!").

[47] The David Law Firm—Lung Cancer, http://www.calldavid.com/lung-cancer.html (last visited Sept. 18, 2012).

[48] Bankruptcy Reform Act of 1994, § 111, 103d Cong. (1994) (*codified at* 11 U.S.C. § 524).

[49] 11 U.S.C. 524(g)(2)(B).

[50] *Id.* § 542(g)(2)(B)(ii)(V).

[51] *See, e.g.,* HISTORY OF JOHNS MANVILLE TRUST, http://www.mantrust.org/history.htm (last visited September 18, 2012).

ruptcies and resulting asbestos trusts to plaintiffs' attorneys.[52] In particular, section 524(g) allows a channeling injunction to issue only if three-quarters of current asbestos claimants support a proposed plan of reorganization.[53] This requirement is distinct from the usual requirements for plan confirmation, which must also be satisfied.[54] This is a departure from traditional bankruptcy procedures, which allow a 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.[55]

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."[56] Consequently, single firms or small groups of firms may effectively block confirmation of a plan of reorganization.[57] And as Professor S. Todd Brown has observed, "[asbestos firms] hold an unassailable veto power [that] leaves debtors and other parties in interest with a classic Hobson's choice—reorganization on the [f]irms' terms or no reorganization at all."[58]

Another unique feature of 524(g) is that it looks only to the number of current asbestos claimants who support a proposed plan of reorganization. In contrast, a majority of class members and members who represent a majority of the debtor's liabilities to the class must *both* support plan confirmation in order to satisfy section 1129(a)(8) in a traditional bankruptcy.[59] Plaintiffs' firms exploit section 524(g)'s express preference for claimant quantity over claim quality by asserting their large numbers of claims in bankruptcy regardless of their likely value or merit.[60] Plaintiffs' firms that have historically filed few tort cases against a debtor company sometimes file claims on behalf of their entire client list once bankruptcy has been declared.[61]

Despite Congress' clear intent that asbestos trusts "pay[] present claims and future demands . . . in substantially the same manner,"[62] current claimants' counsel used their leverage to secure "two tiered" trusts solutions in a number of pre-2008 bankruptcies, [63] with their clients' claims directed to a limited-duration "pre-petition" trust that paid nearly full value and future claims channeled to a "post-petition" trust that paid only a fraction of full value and,

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[52] *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* RAND Corporation, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts,* TR-872-ICJ (2010) 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).

[53] 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

[54] *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.").

[55] 11 U.S.C. § 1129(b)(1) (allowing confirmation of a plan over the objection of a class of creditors).

[56] *In re Congoleum Corp.,* 426 F.3d 675, 679 (3d Cir. 2005).

[57] Lester Brickman, *Ethical Issues in Asbestos Litigation,* 33 HOFSTRA L. REV. at 868–69 (discussing asbestos bar's *de facto* control of bankruptcy process).

[58] Brown, *supra* note 52, at 121.

[59] 11 U.S.C. § 1126(c) ("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. . . .").

[60] *See* Brown, *supra* note 52, 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.").

[61] *Id.*

[62] 11 U.S.C. § 524(g)(2)(B)(ii)(V).

[63] Mark D. Plevin, *Pre-Packaged Asbestos Bankruptcies,* 44 S. TEX. L. REV. 883, 911–13 (2003).

often, subjected claims to more rigorous criteria.[64] Although it appears that courts now frown on such staggered trusts,[65] inequality between current and future claimants persists. For example, the T H Agriculture & Nutrition ("THAN") trust was created in November 2009 and promptly began distributing payments to "Qualified Asbestos [Personal Injury] Voting Claims" at full value.[66] Consideration of claims filed by individuals who had not participated in the THAN bankruptcy was deferred.[67] By the time the trust opened its doors to future claimants, in April 2011, over $325 million had been paid to the plan's supporters and the trust lacked the funds needed to settle further claims at full value. [68] In less than eighteen months, the THAN trust was forced to decrease its payment percentage to a mere 30%.[69]

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.[70] Courts generally appoint an individual suggested by the current claimants and the debtor company.[71] 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.[72] Moreover, FCR work can be extremely lucrative,[73] and academic commentators have expressed concern that FCR's are "punch-pulling" [74] in an effort to be seen as "reliable negotiating partners who [will] not 'rock the boat'" [75] and increase the likelihood of future FCR appointments. Indeed, many representatives serve several trusts concurrently,[76] and an FCR well versed in asbestos compensation matters supported the plan that resulted in the inequitable distribution of the THAN trust's funds.[77]

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 com-

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[64] *Id.*

[65] *See In re Congoleum Corp.,* 426 F.3d at 693 (criticizing pre-petition conduct of asbestos plaintiffs' attorneys and debtor and noting that "leaving the procedures for allocation of resources predominantly in the hands of private, conflicting interests has led to problems of fair and equal resolution.").

[66] *See* Kirk T. Hartley, *Pre-packaged plan of inequity: the financial abuse of future claimants in the T H Agriculture & Nutrition 524(g) asbestos bankruptcy,* 11:4 MEALEY'S ASBESTOS BANKR. REP. 34 (Nov. 2011).

[67] *Id.*

[68] *Id.*

[69] *Id.* at 39–40.

[70] 11 U.S.C. § 524(g)(4)(B)(i).

[71] 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.").

[72] *See* Brown, *supra* note 52, at 158–59 (discussing parties' incentive to propose weak representative).

[73] 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).

[74] *See* Richard A. Nagareda, *Mass Torts in a World of Settlement* 177 (2007).

[75] 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.

[76] *See* RAND CORPORATION, ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS, TR-872-ICJ (2010) (FCR's for largest trusts set forth in Appendix A).

[77] Hartley, *supra* note 66, at 35 (discussing asbestos experience of THAN FCR and valuation experts).

mittee composed of current claimants' representatives, most often characterized as a trust advisory committee ("TAC"), before amending the trust's distribution plan or audit procedures.[78] The 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.[79]

Members of the asbestos bar who represent current claimants in bankruptcies and on TAC's have frequently benefitted from trusts' lack of transparency. A majority of the trusts' distribution plans affirmatively require claims to be treated as confidential settlement negotiations.[80] 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.[81] In many instances, trusts' distribution procedures were amended to include confidentiality provisions after tort litigants demanded and received access to documents filed in support of individual trust claims.[82]

There was a time when asbestos trusts were willing to share claims information relatively 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.[83] 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.[84]

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.[85] The trusts, the plaintiffs' bar, and the post-confirmation future claims representatives nonetheless contend that the trust system is free from fraud and that

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[78] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 14, at 22 (noting that TAC must consent to, among other things, modifications to a trust's distribution plan or audit procedures).

[79] RAND CORPORATION, *supra* note 76, at 14.

[80] *Id.* at 32.

[81] *Constitution Subcommittee Hr'g, supra* note 40, at 94–95, 100–101 (written testimony of James Stengel).

[82] Legal redlines of TDP's amended after confirmation are on file with the Judiciary Committee.

[83] *Furthering Asbestos Claim Transparency(FACT) Act of 2012: Hearing Before the Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary,* 112th Cong. 207 (2012) [hereinafter *CCAL Subcommittee Hr'g*] ("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. . . .").

[84] Manville Trust Single Use Data License Agreement, http://www.claimsres.com/documents/MT/DataAgreement.pdf (last updated February, 2010) (last accessed Sep. 18, 2012).

[85] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 14, at 23; RAND CORPORATION, *supra* note 76, at 45.

more robust anti-fraud measures would be costly and reduce the funds available to fulfill the trusts' core mission—claimant compensation.[86]

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.[87] Fraud and abuse have been uncovered in virtually every compensation and relief program undertaken in modern America, whether privately funded or government sponsored.[88] Fraudulent claims against the 9/11 Victim's Compensation Fund and BP's gulf oil fund, for example, were detected and prosecuted.[89] 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.[90]

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 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 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.[91] He simultaneously filed claims against multiple asbestos trusts alleging exposure to marine products while working as a "shipyard laborer."[92] Despite the inconsistency of his tort and trust claims, which the court described as a "fiction," Kananian received substantial payments from asbestos trusts.[93]

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 state-law caps on damages.[94] Further examples of inconstant

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[86] *See e.g. CCAL Subcommittee Hr'g, supra* note 83, at 224–36 (letter signed by six FCRs).
[87] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 14, at 16.
[88] *CCAL Subcommittee Hr'g, supra* note 83, at 25 (testimony of S. Todd Brown).
[89] *See e.g.,* Nedra Pickler, "Ex-naval officer gets prison time for 9–11 fraud," Associated Press (Dec. 12, 2011); DEEPWATER HORIZON (BP) OIL SPILL FRAUD, http://www.justice.gov/criminal/oil-spill/(last accessed Sep. 18, 2012) (collecting cases involving fraud on the Gulf Coast Claims Facility).
[90] *CCAL Subcommittee Hr'g, supra* note 83, at 25 (testimony of S. Todd Brown).
[91] *Kananian v. Lorillard Tobacco Co.,* No. CV 442750 (Ohio Ct. Com. Pl. Cuyahoga County 2007).
[92] *Id.* at 5, 9.
[93] *Id,* at 6.
[94] *Constitution Subcommittee Hr'g, supra* note 42, at 94–95, 103–105 (written testimony of James Stengel).

claiming have been identified in Delaware, Louisiana, New York, Oklahoma, and Virginia.[95]

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.[96]

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."[97] 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.[98]

The lack of meaningfully transparent trust disclosures, combined with published research, court decisions suggesting fraud on behalf of claimants/plaintiffs who sometimes use two completely different fact patterns to support claims against asbestos trusts and other related solvent defendants in the state tort system, and the prevalence of attorney advertising designed to cultivate trust claims raises the question of whether Congress should require 524(g) asbestos trusts to disclose information that, when analyzed with other data, would facilitate analysis to determine the extent and cost of any fraud between the two systems. Similarly, some lawmakers question whether asbestos trusts ought to be required to produce third-party discovery under the Federal Rules of Civil Procedure when a defendant in the state tort system seeks information that is probative of its civil liability.

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 542(g) trusts to disclose the particulars of each demand for payment received by a trust during the preceding quarter.[99] That subcommittee, in a memo to the Advisory Committee, examined the merits and demerits of the proposal, but ultimately concluded that if

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[95] *CCAL Subcommittee Hr'g, supra* note 83, at 9 (testimony of Leigh Ann Schell); *e.g., Montgomery v. Foster Wheeler,* Case No. 09C-11-215 ASB, Pretrial Hr'g Trans. (Del. Super. Ct. Nov. 7, 2011).

[96] *CCAL Subcommittee Hr'g, supra* note 83, at 16 (written statement of Leigh Ann Schell).

[97] *Montgomery, supra* note 95, at 7–8.

[98] *Id.* at 25.

[99] Letter dated November 22, 2010, 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 (on file with Committee).

> 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 solutions—such as an amendment of § 524(g) that imposes additional requirements on trusts created under that provision.[100]

A second memo from the Subcommittee, dated September 19, 2011, collects comments it solicited from various bankruptcy and non-bankruptcy 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 few qualifications. Others who submitted comments, including the future claims representatives, opposed the proposal.[101]

E. THE FURTHERING ASBESTOS CLAIMS TRANSPARENCY (FACT) ACT OF 2012

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."[102] 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 bill amends section 524(g) of the Bankruptcy Code to require asbestos trusts to file quarterly reports with the court and the United States Trustee for the respective region that detail claimants' names, the amount paid to each claimant, and the basis for such payment. The bill specifically provides that sensitive identifying information, such as Social Security numbers and confidential medical records, should not be published. The FACT Act also requires trusts to provide information requested by parties to traditional asbestos tort litigation. The reporting and information sharing requirements are fall squarely within Congress' bankruptcy power.[103]

The Subcommittee on Courts, Commercial and Administrative Law of the House Judiciary Committee held a hearing on the FACT Act on May 10, 2012.[104] Three of the four witnesses testified that transparency was sorely needed in the 524(g) asbestos trust compensation system.[105] 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.[106] He did argue that the FACT Act would impose "onerous" new administrative burdens on the trusts—a hypothesis controverted by Mr.

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[100] Memorandum dated March 10, 2011, from Subcommittee on Business Issues to Advisory Committee on Bankruptcy Rules (on file with Committee).

[101] Memorandum dated September 19, 2011, from Subcommittee on Business Issues to Advisory Committee on Bankruptcy Rules (on file with Committee).

[102] *See generally Constitution Subcommittee Hr'g, supra* note 40.

[103] *See CCAL Subcommittee Hr'g, supra* note 83, at 85–89 (memorandum regarding Congress' power to enact legal reform legislation prepared by former Solicitor General Paul D. Clement).

[104] *See generally CCAL Subcommittee Hr'g, supra* note 83.

[105] *See id.* (testimonies of Leigh Ann Schell, Prof. S. Todd Brown, and Marc Scarcella).

[106] *Id.* at 81.

Scarcella's experience working on claims processing department at one of the largest trusts.[107]

Hearings

On May 10, 2012, the Subcommittee on Courts, Commercial and Administrative Law held a legislative hearing on H.R. 4369 and heard testimony from: Leigh Ann Schell, Esq., a partner at Kuchler Polk Schell Weiner & Richeson, LLC; S. Todd Brown, Professor of Law, SUNY Buffalo Law School; Charles S. Siegel, Partner, Waters & Kraus LLP; and Marc Scarcella of Bates White Consulting.

Committee Consideration

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 an amendment by a rollcall vote of 15 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. 4369.

1. Amendment offered by Mr. Johnson to limit the terms upon which a trust may disclose information. Not agreed to by vote of 10 ayes to 12 noes.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin			
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross			
Ms. Adams		X	
Mr. Quayle		X	

[107] *Id.*

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch			
Ms. Sánchez	X		
Mr. Polis			
Total	10	12	

2. Amendment offered by Mr. Conyers to limit the quarterly publication of information to statistics on demands received and claims paid by the trust. Not agreed to by vote of 10 ayes to 11 noes.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin			
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross			
Ms. Adams			
Mr. Quayle		X	
Mr. Amodei		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis			
Total	10	11	

3. Amendment offered by Mr. Scott to treat certain medical information in the quarterly reports as protected health information under the Health Insurance Portability and Accountability Act. Not agreed to by vote of 10 ayes to 11 noes.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin			
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross			
Ms. Adams			
Mr. Quayle		X	
Mr. Amodei		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis			
Total	10	11	

4. Amendment offered by Mr. Watt to require a GAO study on fraudulent claims made against asbestos trusts. Not agreed to by vote of 10 ayes to 13 noes.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross			
Ms. Adams			
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis			
Total	10	13	

5. Amendment offered by Ms. Jackson Lee to require the filing of certain certifications concerning claims against a third party before it may seek discovery from asbestos trust. Not agreed to by vote of 10 ayes to 11 noes.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks			
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross			
Ms. Adams			
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis			
Total	10	11	

6. Amendment offered by Ms. Jackson Lee to require the filing of certain certifications concerning asbestos-containing products before a third party may seek discovery from asbestos trust. Not agreed to by vote of 8 ayes to 14 noes.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross			
Ms. Adams			
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member	X		

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Berman			
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis			
Total	8	14	

7. Amendment offered by Mr. Cohen to except from quarterly reporting trusts that already have an internal audit mechanism in place. Not agreed to by vote of 11 ayes to 11 noes.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross			
Ms. Adams			
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis			
Total	11	11	

8. Amendment offered by Mr. Nadler to limit third party discovery to those parties who disclose information pertaining to the public safety or health to a law enforcement agency. Not agreed to by vote of 7 ayes to 10 noes.

ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Griffin			
Mr. Marino			
Mr. Gowdy			
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			

ROLLCALL NO. 8—Continued

	Ayes	Nays	Present
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson, Jr.			
Mr. Pierluisi			
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez			
Mr. Polis	X		
Total	7	10	

9. Amendment offered by Mr. Polis to limit third party discovery only to to contexts in which applicable nonbankruptcy discovery law is insufficient to produce disclosure. Not agreed to by vote of 11 ayes to 12 noes.

ROLLCALL NO. 9

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin			
Mr. Marino			
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			

ROLLCALL NO. 9—Continued

	Ayes	Nays	Present
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez			
Mr. Polis	X		
Total	11	12	

10. Motion to report H.R. 4369, as amended, favorable to the House of Representatives. Agreed to by vote of 15 ayes to 14 noes.

ROLLCALL NO. 10

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Chabot	X		
Mr. Issa	X		
Mr. Pence			
Mr. Forbes	X		
Mr. King			
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan	X		
Mr. Poe			
Mr. Chaffetz	X		
Mr. Griffin	X		
Mr. Marino			
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Amodei	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman		X	
Mr. Nadler		X	
Mr. Scott		X	

ROLLCALL NO. 10—Continued

	Ayes	Nays	Present
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Cohen		X	
Mr. Johnson, Jr.			
Mr. Pierluisi		X	
Mr. Quigley		X	
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez		X	
Mr. Polis		X	
Total	15	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. 4369, 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, August 2, 2012.

Hon. LAMAR SMITH, 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. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012."

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

H.R. 4369—Furthering Asbestos Claim Transparency (FACT) Act of 2012.

As ordered reported by the House Committee on the Judiciary on August 2, 2012.

H.R. 4369 would require trusts set up through a Chapter 11 bankruptcy reorganization caused by asbestos liabilities to submit quarterly reports to the bankruptcy court on damage claims and payments. Based on information provided by the Administrative Office of the U.S. Courts (AOUSC), CBO estimates that implementing H.R. 4369 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. 4369 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 4369 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

H.R. 4369 would impose private-sector mandates as defined in UMRA by requiring asbestos trusts to submit quarterly reports. Information from the Government Accountability Office and the RAND Corporation indicates that about 60 asbestos trusts existed in 2011. Based on that information, CBO expects that the cost to comply with the reporting requirements in the bill would fall well below the annual threshold established in UMRA for private-sector mandates ($146 million in 2012, 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.

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. 4369 amends title 11, United States Code, to require the publication of certain data by trusts created in a chapter 11 plan of reorganization 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. 4369 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

Section 1. Short Title. Provides that the bill may be referred to as the "Furthering Asbestos Claim Transparency Act of 2012," or "FACT Act of 2012."

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 (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, 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) * * *

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(g)(1) * * *

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(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.

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Dissenting Views

INTRODUCTION

H.R. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012," as amended, is problematic because it would give 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 cripple "their ability to operate and pay claims."[1] Congress established asbestos trusts under the Bankruptcy Code to pay the claims of asbestos claimants through a court-authorized process that permits these trusts to assume the liabilities of an entity that is "a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or other asbestos-containing products."[2] H.R. 4369 inteferes with this longstanding process in two ways. First, the trust would have to file with the bankruptcy court publicly available quarterly reports disclosing personal information about asbestos victims who seek payment from these trusts, including their names and exposure histories. Second, the trust would have to provide *any* information related to payment from and demands for payment from such trust to *any* party to any action in law or equity if such action concerns liability for asbestos exposure.

H.R. 4369 is troubling because: (1) its reporting and disclosure requirements are an assault against asbestos victims' privacy interests; (2) it is fundamentally inequitable in that it requires disclosure by the trusts, but does not require solvent defendant companies to disclose their confidential settlement agreements; (3) it is not necessary given the absence of any evidence of systemic fraud with asbestos trusts; (4) it is nothing more than an end run by asbestos defendants around the discovery process available under non-bankruptcy law; and (5) it will divert critical funds and further decrease compensation to asbestos victims by forcing bankruptcy trusts to prepare burdensome reports. In light of these concerns, the Asbestos Disease Awareness Organization,[3] the Environmental Working Group,[4] the Center for Justice and Democracy,[5] and var-

[1] *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) (testimony of Charles S. Siegel, Waters & Kraus LLP)

[2] 11 U.S.C. § 524(g)(2)(B)(i)(I) (2012).

[3] Letter from Linda Reinstein, President & Co-Founder, Asbestos Disease Awareness Organization, to Representative Lamar Smith, Chair, & Representative John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary (June 5, 2012) (on file with H. Comm. on the Judiciary Democratic staff).

[4] Letter from Heather B. White, Chief of Staff & General Counsel, Environmental Working Group, to Representative Lamar Smith, Chair, & Representative John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary (June 4, 2012) (on file with H. Comm. on the Judiciary Democratic staff).

[5] Letter from Joanne Doroshow, Executive Director, Center for Justice & Democracy, to Representative Lamar Smith, Chair, & Representative John Conyers, Jr., Ranking Member, H.

Continued

ious legal representatives for future asbestos personal injury claimants with respect to asbestos bankruptcy trusts[6] all oppose H.R. 4369.

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

DESCRIPTION AND BACKGROUND

Under the guise of promoting transparency with respect to claims made against trusts established under the Bankruptcy Code to compensate asbestos victims, H.R. 4369 imposes burdensome reporting and disclosure requirements on these trusts. Specifically, the bill would require a trust to submit quarterly reports to the bankruptcy court, which would be posted on the court's public case docket, and to respond to virtually unlimited discovery demands by any party to litigation concerning asbestos exposure. The only beneficiaries of this measure will be the very entities that produced or utilized asbestos, a toxic substance that killed or seriously injured unsuspecting American consumers and workers. In particular, H.R. 4369's reporting requirements will impose additional costs and burdens on the trusts, notwithstanding changes made in the substitute amendment, diminishing the available pools of money and other resources to compensate the victims of bankrupt asbestos defendants. Additionally, this bill would allow unsuspecting asbestos victims to be further victimized by requiring information about their illness to be made available publicly to anyone who has access to the Internet.

Representative Ben Quayle (R-AZ) introduced H.R. 4369 on April 17, 2012 together with Representatives Jim Matheson (D-UT) and Dennis Ross (R-FL) as original cosponsors. Thereafter, the Subcommittee on Courts, Commercial and Administrative Law (CCAL) held a hearing on the bill on May 10, 2012 at which Professor S. Todd Brown, SUNY Buffalo Law School; Marc Scarcella, Bates White Economic Consulting; and Leigh Ann Schell, Kuhler Polk Schell Weiner & Richeson, testified on behalf of the Majority. The Minority witness was Charles S. Siegel, Esq., a partner with the law firm of Waters & Kraus. The Committee marked up the bill over two days, during which the Majority voted down every amendment offered by the Minority. Thereafter, the Committee ordered the bill to be reported favorably as a single amendment in the nature of a substitute by a vote of 15 to 14, along party lines, on June 8, 2012.[7]

A summary of the bill's substantive provisions as amended by the substitute amendment follows. Section 2 of the bill amends Bankruptcy Code section 524(g)[8] to add a provision comprised of

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Comm. on the Judiciary (June 5, 2012) (on file with H. Comm. on the Judiciary Democratic staff).

[6] *See, e.g.,* Letter from Douglas A. Campbell, counsel for various asbestos settlement trusts, to Representative Lamar Smith, Chair, H. Comm. on the Judiciary, *et al.* (June 5, 2012) (signed by six future claims representatives) (on file with H. Comm. on the Judiciary Democratic staff); Letter from Michael J. Crames, Future Claims Representative for Owens Corning/Fibreboard Asbestos Personal Injury Trust, *et al.* to Representative Lamar Smith, Chair, H. Comm. on the Judiciary, *et al.* (May 9, 2012) (signed by six future claims representatives) (on file with H. Comm. on the Judiciary Democratic staff).

[7] Unofficial Tr. of Markup of H.R. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012," by the H. Comm. on the Judiciary, 112th Cong. 40–41 (June 9, 2012) [hereinafter June 8 Markup Transcript].

[8] 11 U.S.C. § 524(g) (2012).

two components. 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 claimant's confidential medical records or full Social Security number cannot be included in this report.

Second, Section 2 requires the trust, upon written request, to provide in a timely manner any information related to payment from 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. Section 2, as amended, authorizes the trust to require the entity seeking such information to pay the trust for the cost of providing it. The bill's reporting and information disclosure requirements are subject to Bankruptcy Code section 107, which authorizes the bankruptcy court to restrict public access to any document filed in a bankruptcy case if the information contained in such document would create an "undue risk of identity theft or other unlawful injury." [9]

CONCERNS WITH H.R. 4369

I. H.R. 4369'S REPORTING AND DISCLOSURE REQUIREMENTS ARE AN ASSAULT AGAINST ASBESTOS VICTIMS' PRIVACY INTERESTS

One of H.R. 4369's most fundamental flaws is that it would require the disclosure of personal information about victims who seek payment for injuries from an asbestos bankruptcy trust and that such information would have to be made available in a public forum, namely, the bankruptcy court's case docket. As a result, this bill could further victimize unsuspecting asbestos victims by requiring information about their illness to be made publically available to anyone who has access to the Internet.

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.[10] Some reports are publically available, while others are filed under seal with the bankruptcy court "for reasons deemed appropriate by the court." [11] Such reasons include protecting the interests of the reorganized company and its competitiveness.[12] In fact, of the 47 trust annual reports that the Government Accountability Office (GAO) reviewed, only one reported the amount paid to each individual and listed these individuals' names.[13] 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 obtain-

[9] 11 U.S.C. § 107 (2012).
[10] U.S. Government Accountability Office, Report on Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts, GAO-11-819, at 1, 24 (Sept. 2011) [hereinafter GAO Report].
[11] *Id.* at 17.
[12] *Id.* at 4, note 7.
[13] *Id.* at 24–25.

ing compensation is confidential and should be treated as a settlement negotiation." [14]

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." [15] 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." [16] Trust representatives, however, are very concerned about the "privacy rights of hundreds of thousands of individuals who did nothing except successfully seek compensation from a trust." [17]

The proponents' arguments are without 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." [18] Equally important, the GAO noted that "all of the potentially relevant information in the trusts' possession is available to the defense through pretrial discovery." [19]

In addition, trust representatives state that the trusts are often required to keep such information confidential and they are concerned about the substantial costs involved in responding to requests for such information.[20] For example, one trust reported that it incurred $1 million in attorneys' fees to respond to a request to disclose every document on every claimant, according to the GAO.[21] 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." [22]

H.R. 4369's reporting requirements would irretrievably release into the public domain asbestos claimants' sensitive personal information, such as their names and exposure histories. Under the bill, this information would have to be posted on the court's public docket, which is easily accessibly through the Internet with the payment of a nominal fee. This information could then be used by data collectors and other entities for purposes that have absolutely nothing to do with compensation for asbestos exposure.

It is readily apparent that these reports would provide a treasure trove of data that could be accessed by insurance companies, prospective employers, and lenders who could then use that information to the detriment of asbestos victims. In effect, this bill would

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[14] *Id.* at 26.
[15] *Id.* at 30.
[16] *Id.* at 30.
[17] Memorandum from Legal Representatives for Future Asbestos Personal Injury Claimants with Respect to Certain Asbestos Settlement Trusts to Prof. Troy McKenzie, Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, at 2 (Aug. 10, 2011) [hereinafter Legal Representatives Memorandum].
[18] GAO Report at 29.
[19] *Id.*
[20] *Id.* at 30.
[21] *Id.*
[22] Legal Representatives Memorandum at 2.

allow unsuspecting asbestos victims to be further victimized, all in the name of helping those who harmed these victims in the first place.

To rectify this flaw in the bill, Representative Hank Johnson (D-GA) offered an amendment replacing the bill's reporting and document production provisions with a requirement that the trust file a report describing demands it received, including the names and exposure histories of the claimants, as well as the basis for any payments, on a confidential basis. Access 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. 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." This amendment, however, failed by a vote of 10 to 12.[23]

Similarly, Judiciary Committee Ranking Member John Conyers, Jr., (D-MI) offered an amendment that would have amended the bill to require the quarterly reports to contain only aggregate information and deleted the bill's burdensome discovery requirement. This would have ensured victims' privacy by not making public individualized claimant information. 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 vote of 10 to 11.[24]

In yet another attempt to address the bill's privacy flaws, Representative Bobby Scott (D-VA) offered an amendment that would have deleted the bill's requirement that the names of asbestos victims be identified in the quarterly report. The amendment would have also stricken the bill's discovery provisions and replaced them with a requirement that the trust treat any information contained in the report pursuant to the privacy protections set forth in the Health Insurance Portability and Accountability Act (HIPAA).[25] This amendment would have simply ensured that trusts comply with the HIPAA Privacy Rule that, according to the U.S. Department of Health and Human Services:

> [E]stablishes 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

[23] Unofficial Tr. of Markup of H.R. 4369, the "Furthering Asbestos Claim Transparency (FACT) Act of 2012," by the H. Comm. on the Judiciary, 112th Cong. 206 (June 6, 2012) [hereinafter June 6 Markup Transcript].

[24] *Id.* at 215.

[25] Pub. L. No. 104–191, 110 Stat. 1936 (1996).

and obtain a copy of their health records, and to request corrections.[26]

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 10 to 11.[27]

II. H.R. 4369 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. 4369 is fundamentally inequitable because it will impose 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 concealing the dangers of their product from the public for many years.

Asbestos is a fibrous material, extracted from the earth, that has been used for centuries because of its tensile strength and its heat resistence.[28] 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 1964.[29] The Department of Labor estimates that approximately 21 million Americans have been significantly exposed to asbestos.[30]

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).[31] Lung cancer and other diseases have also been associated with the inhalation of asbestos fibers.[32]

Although a link between asbestos and lung cancer was first reported in 1935, millions of Americans were exposed to asbestos over the ensuing years and injuries began to manifest in the 1960's.[33] The first appellate opinion upholding a product liability judgment against a manufacturer of asbestos-containing products was rendered in 1973 by the Fifth Circuit.[34] As reported by the GAO, "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**."[35]

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[26] 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 June 21, 2012).

[27] June 6 Markup Transcript at 228.

[28] *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary,* 102nd Congress 1 (1975) [hereinafter Asbestos Litigation Hearings].

[29] *Id.*

[30] *Id.* at 2.

[31] *Id.*

[32] *Id.*

[33] Report of the Judicial Conference of the U.S. Courts Ad Hoc Committee on Asbestos Litigation, at 2 (Mar. 1991).

[34] Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973).

[35] GAO Report at 8 (emphasis added).

As of 2002, approximately 730,000 individuals filed asbestos-related lawsuits and $49 billion had been paid in compensation.[36] In the nearly four decades since 1973, 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 to the Rand Institute for Civil Justice.[37] "Asbestos litigation," according to the GAO, "has been the longest-running mass tort litigation in U.S. history."[38]

As this history illustrates, the asbestos industry, like some other industries, tried to hide the dangers of its product from the public. In the context of settlement agreements, cases are too often settled by defendant companies 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 the public health—whether in the workplace or in the home—are deprived of the information they need to enforce the laws Congress has enacted. There has been too long a record, over too many decades, of concealment, dissembling, and lawlessness, and too many lives destroyed because of that illegal conduct.

To highlight the problem of inequitable disclosure obligations under H.R. 4369, 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 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 that H.R. 4369'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 7 to 10.[39]

Similarly, Representative Sheila Jackson Lee (D-TX) offered an amendment that would have provided balance to the bill's reporting requirements and ensured privacy. Her amendment would have required the report to be filed under seal and mandated that the party requesting such report certify the following:

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[36] Lloyd Dixon & Geoffrey McGovern, Report: Asbestos Bankruptcy Trusts and Tort Compensation, Rand Institute for Civil Justice, at xi (2011).

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

[38] GAO Report at 1.

[39] June 8 Markup Transcript at 13.

(1) that it is a party in an action seeking compensation for asbestos exposure;

(2) the number of claims made against such party for injuries resulting from asbestos;

(3) the name of the state in which such claim arose;

(4) the condition for which the claim for injury is alleged;

(5) the amount of the payment sought in such action; and

(6) the history of exposure and occupation of the claimants in such action.

In addition, the amendment specified that the certification could not include any personally identifiable information. Finally, the amendment struck the bill's document production provisions. This amendment, however, failed by a vote of 10 to 11.[40]

Representative Jackson Lee offered a second amendment in another effort to add some parity to H.R. 4369. This amendment would have required the report to be filed under seal and mandated that the party requesting such report certify:

(1) that it is a party in an action seeking compensation for asbestos exposure;

(2) the names of asbestos containing products that the party manufactured;

(3) the locations where those products were sold or in use;

(4) an estimate of the number of individuals in the U.S. who were exposed to each asbestos product; and

(5) product identification affidavits for every case ever settled by such party.

The amendment specified that the certification must not include any personally identifiable information. In addition, the amendment also struck the bill's document production provisions. Representative Jackson Lee's amendment, however, failed by a vote of 8 to 14.[41]

III. H.R. 4369 IS NOT NECESSARY GIVEN THE ABSENCE OF ANY EVIDENCE OF SYSTEMIC FRAUD

H.R. 4369's proponents have failed to provide any evidence of systemic fraud in the asbestos bankruptcy trust system. Therefore, this bill is a solution in search of a problem.

In 2004, reports of allegedly fraudulent claims being made against asbestos bankruptcy trusts and solvent companies surfaced.[42] The CCAL Subcommittee conducted an oversight hearing

[40] June 6 Markup Transcript at 254.

[41] *Id.* at 265.

[42] *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").

into that issue as well as others presented with respect to the treatment of mass torts in bankruptcy cases.[43]

GAO, however, informed Minority Committee staff that it was unaware of any subsequent reports of endemic fraud with respect to asbestos claims and that it did not uncover any evidence of overt fraud during its examination of asbestos trusts last year.[44] In fact, the GAO reports that 98 percent of the 52 trusts that it 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."[45] 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."[46] In addition, it found that none of the trusts "indicated that these audits had identified cases of fraud."[47]

Indeed, trusts maintain an elaborate process for determining whether a claim is legitimate. Once operational, the trust implements "a nonadversarial administrative process—independent of the court system—to review claimants' occupational and medical histories before awarding compensation."[48] The GAO explains that the "trustees are to manage the trust for the sole benefit of the present and future claimant beneficiaries."[49]

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, the GAO reports.[50] 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."[51]

Notwithstanding the obvious lack of any empirical evidence of endemic fraud, and notwithstanding the existence of trust processes designed to ensure the validity of claims, H.R. 4369's proponents argue that its reporting and other information-sharing requirements are necessary in order to ensure that asbestos victims are not committing fraud by recovering money from trusts and through the tort system, thereby "double dipping." At most, however, they were only able to identify isolated instances of fraud, which were promptly addressed through the court system. As

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[43] *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).

[44] 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.

[45] GAO Report at 23.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 3.

[49] *Id.* 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. According to the GAO, the range of payment ranges from 1.1 percent to 100 percent for certain diseases, such as mesothelioma or asbestosis. The GAO found that the median payment percentage among the various trusts was 25 percent. *Id.* at 17, 21.

[50] *Id.* at 18.

[51] *Id.*

Charles Siegel, the Minority witness, testified at the hearing on this legislation:

> The few examples that we have of fraud in the system today I think show that the system works. The Kananian case is a terrible example. That lawyer was disbarred, and that claim was dismissed. And so once in a while we have a situation like that, the system deals with it, and the parties go on down the road.[52]

To underscore the obvious lack of evidence of any endemic fraud and why it is premature to consider H.R. 4369, Representative Mel Watt (D-NC) offered an amendment that would have replaced the bill with a directive to the GAO to quantify the extent to which fraudulent claims are, in fact, made against asbestos bankruptcy trusts and the extent to which they are paid. This amendment, however, was defeated by a vote of 10 to 13.[53]

IV. H.R. 4369 IS NOTHING MORE THAN AN END RUN BY ASBESTOS DEFENDANTS AROUND THE DISCOVERY PROCESS AVAILABLE UNDER NON-BANKRUPTCY LAW

H.R. 4369 improperly allows asbestos defendants to circumvent state and federal discovery procedures. Its reporting and document production requirements for asbestos bankruptcy trusts are designed to allow defendants to obtain information that they can already obtain under existing law. From this, it is evident that the bill's true intent is simply to hamper trusts from fulfilling their obligation to compensate asbestos victims appropriately.

In response to this particular flaw in the bill, Representative Jared Polis (D-CO) 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 Polis's amendment, however, failed by a vote of 11 to 12.[54]

V. H.R. 4369 WILL DIVERT CRITICAL FUNDS AND FURTHER DECREASE COMPENSATION TO ASBESTOS VICTIMS BY FORCING BANKRUPTCY TRUSTS TO PREPARE BURDENSOME REPORTS

H.R. 4369's reporting and document production requirements on trusts will raise their administrative costs significantly, notwithstanding changes that the substitute amendment made to the bill's base text. Money used to pay these costs ultimately means less money to compensate asbestos victims. This is particularly problematic in light of the fact that defendants can already obtain the information they want using existing discovery tools without undermining compensation for legitimate claims. The GAO, for exam-

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[52] *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) (testimony of Charles S. Siegel, Waters & Kraus LLP)

[53] June 6 Markup Transcript at 243.

[54] June 8 Markup Transcript at 243

ple, 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, according to the GAO.[55]

H.R. 4369's retroactive application only adds to this unnecessary burden. It is important to note that 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.[56] Yet, after the passage of more than 20 years since the first trust was established, the proponents of H.R. 4369 now insist that these trusts issue reports and provide documentation.

The only beneficiaries of H.R. 4369 will be the very entities that knowingly produced a toxic substance that killed or seriously injured unsuspecting American consumers and workers. This bill 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.

To reduce the cost of compliance imposed by H.R. 4369, Representative Steve Cohen (D-TN), CCAL Subcommittee Ranking Member, offered an amendment that would have exempted from the bill any trust that has an internal fraud detection program. Had this commonsense amendment been adopted, H.R. 4369 would not have applied to a trust that has an internal claims audit program, which ensures that claims are valid and supported. Meanwhile, trusts that had such anti-fraud measures in place would not have to bear the costs, burdens, and privacy risks presented by HR. 4369's requirements. Indeed, this amendment would have provided a meaningful incentive for trusts to ensure that they have a viable claims audit program. This amendment balanced the need to be vigilant against potential fraud with the underlying purpose of asbestos trusts, which is to ensure adequate compensation for asbestos victims. Notwithstanding this balanced approach, Representative Cohen's amendment narrowly failed by a vote of 11 to 11.[57]

CONCLUSION

H.R. 4369 is troubling because: (1) its reporting and disclosure requirements are an assault against asbestos victims' privacy interests; (2) it is fundamentally inequitable in that it requires disclosure by the trusts, but does not require solvent defendant companies to disclose their confidential settlement agreements; (3) it is not necessary given the absence of any evidence of systemic fraud with asbestos trusts; (4) it is nothing more than an end run by asbestos defendants around the discovery process available under non-bankruptcy law; and (5) it will divert critical funds and further decrease compensation to asbestos victims by forcing bankruptcy trusts to prepare burdensome reports. More broadly, H.R. 4369 is just the latest in a string of bills advocated by the asbestos industry to prevent or delay adequate compensation for victims of the industry's dangerous product and its efforts to hide information about such dangers from the public.

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[55] GAO Report at 27.
[56] *Id.* at 16.
[57] June 6 Markup Transcript at 276.

We urge our colleagues to stand on the side of justice for asbestos victims and to oppose H.R. 4369.

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