

FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT)
ACT OF 2017

FEBRUARY 24, 2017.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 906]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 906) to amend title 11 of the United States Code to require the public disclosure by trusts established under section 524(g) of such title, of quarterly reports that contain detailed information regarding the receipt and disposition of claims for injuries based on exposure to asbestos, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

H.R. 906, the “Furthering Asbestos Claim Transparency (FACT) Act of 2017” or the “FACT Act” adds a paragraph to subsection (g) of section 524 of title 11 of the United States Code to require a trust established pursuant to that subsection to file, each quarter, a public report with the bankruptcy court listing the name and exposure history of those who have filed a claim with such trust and any payments made to claimants and the basis for such payments.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

Background and Need for Legislation

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

Asbestos is a commercial name given to six minerals—amosite, crocidolite, tremolite, actinolite, anthophyllite, and chrysotile—that were widely used in the United States in industrial products throughout much of the 20th Century.³ Humans have used asbestos for centuries.⁴ The word “asbestos” comes from the Greek word for “indestructible,” and the ancient world used asbestos for everything from fabrics to lamp wicks.⁵ 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.⁶

Despite the usefulness of asbestos in industrial and residential products, it was uncovered that asbestos fibers cause serious diseases when inhaled.⁷ Inhalation of asbestos fibers has been linked to a number of diseases, including mesothelioma, lung cancer, asbestosis, and pleural abnormalities.⁸ Mesothelioma is a deadly can-

¹ Furthering Asbestos Claim Transparency (FACT) Act of 2017, H.R. 906, 115th Cong. § 2 (2017).

² *Id.*

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

⁴ Wylie, *supra* note 3, at 4.

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

⁶ Wylie, *supra* note 3, at 4.

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

⁸ *Id.*

cer of the lining of the chest or abdomen.⁹ Exposure to asbestos is the cause for most cases of mesothelioma.¹⁰ 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.¹¹ Asbestosis, a chronic lung disease resulting from inhalation of asbestos fibers, can be debilitating and even fatal.¹² Exposure to asbestos has been claimed to cause pleural abnormalities.¹³ 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.¹⁴ These abnormalities can affect breathing and may be an early warning sign for mesothelioma.¹⁵

B. ASBESTOS LITIGATION

Asbestos litigation is the longest-running mass tort litigation in the United States.¹⁶ 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.”¹⁷ Throughout this period, asbestos litigation has evolved presenting different challenges to the parties and courts involved.¹⁸ The focus of the litigation shifted from Federal to state court, and now, increasingly, to bankruptcy courts and the resulting bankruptcy asbestos trusts.¹⁹

Asbestos litigation arose as a result of individuals’ long-term and widespread exposure to asbestos, and as a result of many asbestos product manufacturers’ failure to protect workers against exposure and failure to warn their workers to take adequate precautions against exposure. The U.S. Court of Appeals for the Fifth Circuit upheld the first successful asbestos liability suit in 1973.²⁰ 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.²¹ 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

⁹ *Asbestos Health Effects*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, http://www.atsdr.cdc.gov/asbestos/asbestos/health_effects/ (last visited May 28, 2013).

¹⁰ *Id.*

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

¹² AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, *supra* note 9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Stephen J. Carroll et al., *Asbestos Litigation*, RAND INSTITUTE FOR CIVIL JUSTICE, 2005, at xvii.

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

¹⁸ Carroll et al., *supra* note 16, at xx.

¹⁹ *Id.*

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

²¹ *Id.* at 1109.

the “asbestos-litigation crisis.”²² The volume of claims filed against asbestos defendants has not abated over time.²³ On the contrary, annual claims filed against defendants have risen steadily, with sharp increases in recent years.²⁴ During the 1990’s, the number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000.²⁵ By 2002, approximately 730,000 claims had been filed,²⁶ with more than 100,000 claims filed in 2003 alone—“the most in a single year.”²⁷

The recent growth in the number of asbestos claims is largely attributable to the significant increase of claimants with nonmalignant injuries, including those with little or no current functional impairment.²⁸ 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.’”²⁹ Conversely, when asbestos litigation first arose in the 1960’s, most claimants were “workers suffering from grave and crippling maladies.”³⁰

The number of asbestos litigation defendants has grown in commensurate fashion with the burgeoning asbestos claims. In 1983, there were approximately 300 asbestos litigation defendants.³¹ By 2004, the number of asbestos litigation defendants increased to over 8,400, with over 90 percent of American industries subject to asbestos lawsuits.³² 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.³³

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

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

²³ Carroll et al., *supra* note 16, at xxiv.

²⁴ *Id.*

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

²⁶ Carroll et al., *supra* note 16, at xxiv.

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

²⁸ Carroll et al., *supra* note 16, at xxiv.

²⁹ 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).

³⁰ Edley Testimony, *supra* note 25.

³¹ Landin, *supra* note 29, at 597.

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

³³ Dixon et al., *supra* note 17, at 2.

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

C. ASBESTOS CLAIMS IN BANKRUPTCY

Asbestos litigation has driven nearly 100 companies into bankruptcy, with more than half of such companies filing since the beginning of the year 2000.³⁵ The cost of these bankruptcies is largely immeasurable but has been estimated to cost the American economy approximately 60,000 jobs and between \$1.4 and \$3.0 billion.³⁶ One of the most prominent bankruptcies was that of John Mansville Corporation, the dominant American producer of asbestos products. The Mansville bankruptcy redefined many aspects of the asbestos litigation system, including the inception of a trust system to compensate asbestos claimants in exchange for a broad injunction against future asbestos liability.³⁷

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

The institution of an asbestos trust has become a virtual inevitability in recent chapter 11 cases involving asbestos defendants. There are 60 asbestos trusts with current and anticipated assets totaling between \$30 billion and \$37 billion.⁴⁰ The asbestos trusts review and pay damages on millions of claims a year; between 2007 and 2008, selected asbestos trusts satisfied over four million claims.⁴¹

D. FRAUD IN ASBESTOS LITIGATION THROUGH MASS SCREENINGS

A commentator likened the scale of fraud in asbestos litigation to that of the scandals of “Credit Mobilier, Teapot Dome, the Savings and Loan debacles, WorldCom, Enron and the vast Ponzi

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

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

³⁷ Hanlon & Smetak, *supra* note 35, at 541.

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

³⁹ 11 U.S.C. § 524(g)(2)(B).

⁴⁰ H.R. 526, the “Furthering Asbestos Claim Transparency (FACT) Act of 2015”: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. (2015) (RRCAL Subcomm. Hearing) (testimony of Lester Brickman), at 2.

⁴¹ *Id.*

schemes that have recently unfolded.”⁴² Fraud in asbestos litigation largely stems from plaintiffs’ lawyers utilizing mass screening measures to recruit hundreds of thousands of claimants.

Asbestos lawyers were found to have hired screening companies to recruit potential claimants who, although not currently suffering from asbestos-related injuries, exhibited symptoms of exposure. “Labor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.”⁴³ 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.⁴⁴ 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.”⁴⁵

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

To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: “Find out if YOU have MILLION DOLLAR LUNGS!”⁴⁶

It is estimated that more than one million workers have undergone attorney-sponsored screenings.⁴⁷ As one worker explained, “it’s better than the lottery. If they find anything, I get a few thousand dollars I didn’t have. If they don’t find anything, I’ve just lost an afternoon.”⁴⁸ According to legal scholars, “without these claims, the ‘asbestos litigation crisis’ would never have arisen.”⁴⁹

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.⁵⁰ 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-

⁴² *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 8 (2011) [hereinafter *Constitution Subcomm. Hearing*] (testimony of Professor Lester Brickman).

⁴³ *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005).

⁴⁴ Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1233 (2008).

⁴⁵ Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2003).

⁴⁶ Pamela Sherrid, *Looking for Some Million Dollar Lungs, Best of Asbestos*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36.

⁴⁷ 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).

⁴⁸ Andrew Schneider, *Asbestos Lawsuits Anger Critics*, ST. LOUIS POST-DISPATCH, Feb. 11, 2003, at A1.

⁴⁹ Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POLY REV. 243, 273 (2001).

⁵⁰ Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to be Turning*, 12 CONN. INS. L.J. 477, 480 (2006).

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.”⁵¹ 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%.⁵²

Researchers at Johns Hopkins University compared the X-ray interpretations of professionals who are certified by the National Institute for Occupational Safety and Health to interpret pulmonary X-rays, referred to as “B Readers,” employed by plaintiffs’ counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the X-rays’ origins. The study found that, while B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in almost 96% of the X-rays, the independent B Readers found abnormalities in less than 5% of the same X-rays—a difference the researchers said was “too great to be attributed to inter-observer variability.”⁵³

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.”⁵⁴ 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.”⁵⁵ 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.”⁵⁶ Professor Lester Brickman, an expert on asbestos litigation, concluded that “[a]sbestos litigation has become a malignant enterprise which mostly consists of a massive client-recruitment effort that accounts for as much as 90 percent of all claims currently being generated, supported by baseless medical evidence which is not generated by good-faith medical practice, but rather is primarily a function of the compensation paid, and by claimant testimony scripted by lawyers to identify exposure to certain defendants’ products.”⁵⁷

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 as-

⁵¹HON. NATHAN R. JONES, ABA COMM’N ON ASBESTOS LITIGATION, ABA REPORT TO THE HOUSE OF DELEGATES 8 (2003) available at <http://www.cdc.gov/niosh/docket/archive/pdfs/NIOSH-015/020103-Exhibit12.pdf>.

⁵²*Id.*

⁵³Joseph N. Gitlin et al., *Comparison of ‘B’ Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843, 852 (2004).

⁵⁴David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 13 (2003) (quoting Lawrence Martin, M.D.).

⁵⁵*Owens Corning*, 322 B.R. at 723.

⁵⁶Lester Brickman & Harvey D. Shapiro, *Asbestos Kills—And More than Just People: Jobs, Ethics, and Elementary Justice*, NAT’L REV., Jan. 31, 2005.

⁵⁷Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. at 33.

bestos and silica claims in 2005.⁵⁸ 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,”⁵⁹ Congress convened hearings on fraud and abuse in asbestos litigation.⁶⁰ A Federal grand jury was empanelled in the Southern District of New York.⁶¹

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.⁶² The Committee, however, has received testimony suggesting that screening programs may be, or soon will be, used to generate asbestos trust claims.⁶³ The asbestos bar is using new techniques to recruit potential trust claimants. While screenings were often advertised in break rooms, in local papers, and on local broadcast stations,⁶⁴ the modern asbestos plaintiffs’ bar spends billions of dollars on mass media advertisements designed to recruit potential asbestos tort plaintiffs and trust claimants.⁶⁵ Experts estimate that asbestos plaintiffs’ firms spent over \$950 million on television advertising in 2011.⁶⁶ Trial lawyers’ advertising campaigns extend beyond television, and experts estimate that the asbestos bar spends tens of millions each year on sophisticated online advertising campaigns.⁶⁷ “Mesothelioma” has become the single most expensive keyword on Google’s auction-style AdWords platform.⁶⁸

There are signs that the suspect practices deployed in traditional asbestos state court tort litigation have been utilized against asbestos trusts. At least one firm advises lung cancer victims that billions of dollars have been set aside in “U.S. Compensation Trust Funds . . . to financially assist individuals with lung cancer” while making no mention of asbestos.⁶⁹ Further, with the advent of enhanced information technology tools, plaintiffs’ firms have the ability to focus their claimant recruiting efforts on a broader audience. The indications of fraud coupled with an environment conducive for fraud, as provided in more detail below, is cause for alarm.

⁵⁸ *In re Silica Prods. Liab. Litig.*, 398 F.Supp.2d 563 (S.D. Tex. 2005).

⁵⁹ *Id.* at 635.

⁶⁰ *The Silicosis Story: Hearings Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 109th Cong. (2006).

⁶¹ Adam Liptak, *Defendants See a Case of Diagnosing for Dollars*, N.Y. TIMES, Oct. 1, 2007, available at <http://www.nytimes.com/2007/10/01/us/01bar.html> (last accessed May 31, 2013) (“A grand jury was convened in Manhattan more than 2 years ago to look into potential fraud in silicosis cases. . .”).

⁶² See, e.g., Ohio Rev. Code Ann. §2307.91 *et. seq.* (enacted 2004), Tex. Civ. Prac. & Rem. §90.001 *et. seq.* (last amended 2007).

⁶³ *Constitution Subcomm. Hearing*, *supra* note 42 (testimony of Professor Lester Brickman).

⁶⁴ 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).

⁶⁵ Kenneth M. Goldstein, Panel Discussion at U.S. Chamber Institute for Legal Reform’s 12th Annual Legal Reform Summit (Oct. 26, 2011) (associated slides available at http://www.instituteforlegalreform.com/sites/default/files/Lawyers_Mass_Tort_Solicitation_Advertising_Oct2011.pdf) (last visited May 31, 2013).

⁶⁶ *Id.*

⁶⁷ See NEW MEDIA STRATEGIES, THE PLAINTIFFS’ BAR GOES DIGITAL 3 (January 2012) available at <http://www.instituteforlegalreform.com/doc/the-plaintiffs-bar-goes-digital-0> (last visited May 23, 2013).

⁶⁸ *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”).

⁶⁹ The David Law Firm—Lung Cancer, <http://www.calldavid.com/lung-cancer.html> (last visited May 31, 2013).

E. THE OPAQUE ASBESTOS TRUST SYSTEM AND RELATED FRAUD

While the prerequisites for establishing a bankruptcy asbestos trust typically compel certain disclosures, these disclosures are significantly lacking. To obtain the principal benefit of the asbestos trust—the channeling injunction—a debtor must demonstrate to the court, among other things, that at the time of confirmation:

the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and value of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.⁷⁰

In many cases, this requirement has caused the debtor to include a provision in its chapter 11 plan requiring it to file periodic disclosures with the court of the financial health of the asbestos liability trust.⁷¹ Missing from these disclosures, however, is any statutory requirement that the trust identify claimants who seek compensation from the trust, the nature of their alleged injury, and the amount the trust paid them.

The trusts' limited disclosures are a result of the structure of section 524(g), which grants considerable control over asbestos bankruptcies and resulting asbestos trusts to plaintiffs' attorneys.⁷² In particular, section 524(g) allows a channeling injunction to issue only if three-quarters of current asbestos claimants support a proposed chapter 11 plan.⁷³ This requirement is distinct from the usual requirements for plan confirmation, which must also be satisfied.⁷⁴ The requirement to gain the consent of a specified class is a departure from traditional bankruptcy procedures, which allow a chapter 11 plan to be confirmed over the objection of an impaired class so long as the plan is fair, non-discriminatory, and supported by another impaired class.⁷⁵

In other words, the asbestos claimants class has a statutory blocking right to a proposed chapter 11 plan, which results in representatives of that class having considerable influence over the chapter 11 plan and the formation of any resulting asbestos trust. Generally speaking, representation of asbestos claimants is concentrated within a select group of law firms. As courts have noted, “[a] unique feature of asbestos . . . litigation is the fact that a small group of law firms represents hundreds of thousands of

⁷⁰ 11 U.S.C. § 542(g)(2)(B)(ii)(V) (2011).

⁷¹ Carroll et al., *supra* note 16, at 24.

⁷² See generally S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841 (2008); see also Dixon et al., *supra* note 17, at 43 (listing asbestos firms most frequently represented on TAC's; Weitz and Luxenberg P.C. sits on TAC's of 11 trusts that control, combined, approximately 74% of all asbestos trust assets); see also Searcey & Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J., Mar. 11, 2013.

⁷³ 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2011).

⁷⁴ *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.”).

⁷⁵ 11 U.S.C. § 1129(b)(1) (2011) (allowing confirmation of a plan over the objection of a class of creditors).

plaintiffs.”⁷⁶ Consequently, single firms or small groups of firms may effectively block confirmation of a chapter 11 plan.⁷⁷ 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.”⁷⁸

Another unique feature of section 524(g) is that it looks only to the *number* of current asbestos claimants who support a proposed chapter 11 plan. In contrast, a traditional bankruptcy requires a majority in *number* and two-thirds in *amount* of a particular class in order to confirm a chapter 11 plan.⁷⁹ 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, which typically will be evaluated following the voting period on a debtor’s chapter 11 plan.⁸⁰ Plaintiffs’ firms that historically have filed few tort cases against a debtor company sometimes file claims on behalf of their entire client list once bankruptcy has been declared.⁸¹

Section 524(g) also requires the appointment of a legal representative on behalf of individuals who may file claims with a proposed asbestos trust in the future, referred to as a “future claims representative” or an “FCR.”⁸² Courts generally appoint an individual suggested by the current claimants and the debtor company.⁸³ 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.⁸⁴ Moreover, FCR work can be extremely lucrative,⁸⁵ and academic commentators have expressed concern that FCR’s are “punch-pulling”⁸⁶ in an effort to be seen as “reliable negotiating partners who [will] not ‘rock the boat’”⁸⁷ and increase the likelihood of future FCR appointments. Indeed, many representatives serve several trusts concurrently.⁸⁸

⁷⁶ *In re Congoleum Corp.*, 426 F.3d 675, 679 (3d Cir. 2005).

⁷⁷ Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. at 868–69 (discussing asbestos bar’s *de facto* control of bankruptcy process).

⁷⁸ Brown, *supra* note 74, at 121.

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

⁸⁰ See Brown, *supra* note 74, at 150 (“[A]n attorney can obtain a considerable negotiating position and sizeable fees by simply dumping their asbestos claim ‘inventory’ on a debtor [with] little to no prospect of sanctions for filing even grossly fraudulent or, at best, wholly unsubstantiated claims.”).

⁸¹ *Id.*

⁸² 11 U.S.C. § 524(g)(4)(B)(i) (2011).

⁸³ 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.”).

⁸⁴ See Brown, *supra* note 52, at 158–59 (discussing parties’ incentive to propose weak representative).

⁸⁵ 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).

⁸⁶ See Richard A. Nagareda, *Mass Torts in a World of Settlement* 177 (2007).

⁸⁷ 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.

⁸⁸ See Dixon et al., *supra* note 17 (FCR’s for largest trusts set forth in Appendix A).

Although asbestos trusts are nominally managed by court-approved trustees, virtually all trusts' founding agreements require the trustee to seek approval of a post-confirmation FCR and a committee composed of current claimants' representatives, most often characterized as a trust advisory committee or "TAC," before amending the trust's distribution plan or audit procedures.⁸⁹ 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.⁹⁰

The trust documents governing the operation of the asbestos trusts often include restrictions on sharing trust data, facilitating a lack of transparency in the trust system. A majority of the trusts' distribution plans affirmatively require claims to be treated as confidential settlement negotiations.⁹¹ 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.⁹² In many instances, trusts' procedures require a valid state-court-issued subpoena in order to provide information to state litigants.⁹³ Even in cases where a valid subpoena is served upon an asbestos trust, an asbestos trust may attempt to defeat the subpoena or require an additional subpoena from the presiding bankruptcy court judge.⁹⁴

There was a time when asbestos trusts were willing to share claims information more freely. Prior to Judge Jack's exposure of fraud in mass screened silica and asbestos cases, the Manville Trust sold its data to actuarial firms, law firms, and defendant companies.⁹⁵ 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.⁹⁶

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 al-

⁸⁹ Carroll et al., *supra* note 16, at 22 (noting that TAC must consent to, among other things, modifications to a trust's distribution plan or audit procedures).

⁹⁰ Dixon et al., *supra* note 17, at 14.

⁹¹ Dixon et al., *supra* note 17, at 32.

⁹² *Constitution Subcomm. Hearing, supra* note 42, at 94–95, 100–101 (written testimony of James Stengel).

⁹³ Carroll et al., *supra* note 16, at 28.

⁹⁴ *Courts Subcomm. Hearing, supra* note 11, at 14.

⁹⁵ *Courts Subcomm. Hearing, supra* note 11, at 207 ("The Manville Personal Injury trust offer[ed] a data extract of claim level information . . . to anyone willing to pay a \$10,000 licensing fee. Prior to 2002 the data could be purchased outright. . . .").

⁹⁶ Manville Trust Single Use Data License Agreement, <http://www.claimsres.com/documents/MT/DataAgreement.pdf> (last visited May 31, 2013).

lege inconsistent exposure patterns.⁹⁷ The trusts, the plaintiffs’ bar, and the post-confirmation FCRs nonetheless contend that the trust system is free from fraud and that more robust anti-fraud measures would be costly and reduce the funds available to fulfill the trusts’ core mission—claimant compensation.⁹⁸

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.⁹⁹ The GAO Report stated that the internal audits of the asbestos trusts were designed to ensure compliance with internal trust procedures and not generally designed to detect duplicate or inconsistent claims among different asbestos trusts and the state courts.¹⁰⁰ Further, the complete absence of fraud reported by the eleven trusts interviewed in the GAO Report runs contrary to historical experiences with compensation and relief programs. Fraud and abuse have been uncovered in virtually every compensation and relief program undertaken in modern America, whether privately funded or government-sponsored.¹⁰¹ Fraudulent claims against the 9/11 Victim’s Compensation Fund and BP’s gulf oil fund, for example, were detected and prosecuted.¹⁰² 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.¹⁰³

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

In the best known example of fraud uncovered through the state court tort system, *Kananian v. Lorillard Tobacco*, a tort plaintiff claimed that he developed mesothelioma solely from smoking asbestos-filtered cigarettes and that he only passed through a naval ship yard while being deployed elsewhere by the Navy.¹⁰⁴ He simultaneously filed claims against multiple asbestos trusts alleging exposure to marine products while working as a “shipyard laborer.”¹⁰⁵ Despite the inconsistency of his tort and trust claims, which the court described as a “fiction,” Kananian received substantial payments from asbestos trusts.¹⁰⁶

⁹⁷ Carroll et al., *supra* note 16, at 23; Dixon et al., *supra* note 17, at 45.

⁹⁸ See, e.g., *Courts Subcomm. Hearing*, *supra* note 11, at 224–36 (letter signed by six FCRs).

⁹⁹ Carroll et al., *supra* note 16, at 16.

¹⁰⁰ Carroll et al., *supra* note 16, at 23.

¹⁰¹ *Courts Subcomm. Hearing*, *supra* note 11, at 25 (testimony of S. Todd Brown).

¹⁰² See e.g., Nedra Pickler, *Ex-naval officer gets prison time for 9–11 fraud*, ASSOCIATED PRESS (Dec. 12, 2011), available at <http://www.washingtontimes.com/news/2011/dec/12/ex-naval-officer-gets-prison-time-911-fraud/>; DEPT. OF JUSTICE, DEEPWATER HORIZON (BP) OIL SPILL FRAUD, <http://www.justice.gov/criminal/oilspill/> (last visited May 31, 2013) (collecting cases involving fraud on the Gulf Coast Claims Facility).

¹⁰³ *Courts Subcomm. Hearing*, *supra* note 11, at 25 (testimony of S. Todd Brown).

¹⁰⁴ *Kananian v. Lorillard Tobacco Co.*, No. CV 442750 (Ohio Ct. Com. Pl. Cuyahoga County 2007).

¹⁰⁵ *Id.* at 5, 9.

¹⁰⁶ *Id.* at 6.

Kananian is not an isolated incident; the Committee has 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.¹⁰⁷ Further examples of inconsistent claiming have been identified in Delaware, Louisiana, New York, Oklahoma, and Virginia.¹⁰⁸

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.¹⁰⁹

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."¹¹⁰ 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.¹¹¹

In addition to the fraud uncovered through the state court system, the Wall Street Journal conducted an investigation that detailed numerous anomalies between individual's state court filings and asbestos trust claim filings.¹¹² The Wall Street Journal found that individuals had claimed exposure to asbestos through industrial jobs that they held while under the age of twelve, disparate medical diagnoses asserted among different asbestos trusts and state court cases, and claims asserted by individuals that simply did not exist.¹¹³

Recently, a number of discrepancies between bankruptcy and state court claims were uncovered in a bankruptcy case in North Carolina.¹¹⁴ In the bankruptcy case of Garlock Sealing Technologies, LLC, plaintiffs' counsel requested \$1.3 billion in asbestos

¹⁰⁷ *Constitution Subcomm. Hearing, supra* note 42, at 94–95, 103–105 (written testimony of James Stengel).

¹⁰⁸ *Courts Subcomm. Hearing, supra* note 11, at 9 (testimony of Leigh Ann Schell); e.g., *Montgomery v. Foster Wheeler*, Case No. 09C–11–215 ASB, Pretrial Hearing Trans. (Del. Super. Ct. Nov. 7, 2011).

¹⁰⁹ *Courts Subcomm. Hearing, supra* note 11, at 16 (written statement of Leigh Ann Schell).

¹¹⁰ *Montgomery, supra* note 110, at 7–8.

¹¹¹ *Montgomery, supra* note 110, at 25.

¹¹² Searcey & Barry, *supra* note 74.

¹¹³ Searcey & Barry, *supra* note 74.

¹¹⁴ *In re Garlock Sealing Techs. LLC*, Case No. 10–BK–31607 (Bankr. W.D.N.C. 2014).

claims damages.¹¹⁵ In a series of rulings, the presiding judge dramatically reduced the requested damages claim from \$1.3 billion to \$125 million and noted a number of alarming discrepancies between the claims filed against Garlock in state court and claims filed by the same plaintiffs against other bankruptcy asbestos trusts. As reported by the Wall Street Journal, in the fifteen cases filed in state court against Garlock, the plaintiffs disclosed that they were exposed to a total of 32 products.¹¹⁶ However, as uncovered in subsequent *Garlock* court documents, these same plaintiffs asserted claims in other forums that alleged exposure to 284 different products.¹¹⁷

Some particularly egregious examples of fraud from the *Garlock* case include a California case in which the plaintiff settled with Garlock for \$9 million in state court litigation. The plaintiff affirmatively denied exposure to any other asbestos products. Nevertheless, the court later discovered that this plaintiff had filed fourteen bankruptcy asbestos trust claims, and included in those claims were statements made under penalty of perjury that directly contrasted with statements made to the jury in the state court case.¹¹⁸

In another *Garlock* example, a plaintiff's lawyers responded to written interrogatories that the plaintiff had "no personal knowledge" of exposure to any other asbestos products. Yet 6 weeks earlier, those exact same lawyers filed a statement in connection with an asbestos bankruptcy trust claim that the plaintiff "frequently, regularly, and proximately" was exposed to other asbestos products. In that case, the plaintiff filed claims against twenty other asbestos products and made statements that contradicted state court pleadings in fourteen of the asbestos bankruptcy trust claims.¹¹⁹

Other *Garlock* examples include a plaintiff denying any exposure to other asbestos products in a state court case and then filing asbestos bankruptcy trust claims within 24 hours of settling the case, and a plaintiff denying exposure to a particular asbestos product in state court only for it to be uncovered later in discovery that his lawyers had filed an asbestos bankruptcy trust claim against that very product the day before his denial statement.¹²⁰ These instances of fraud have been uncovered in spite of the current lack of transparency, and are a clear indication of the potential for significant, currently undetected fraud.

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

¹¹⁵ Editorial, *The Double-Dipping Legal Scam*, WALL ST. J., Dec. 25, 2014.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ RRCAL Subcomm. Hearing, *supra* note 40 (testimony of Lester Brickman), at 29.

¹¹⁹ *Id.*, at 30.

¹²⁰ *Id.*

trust during the preceding quarter.¹²¹ That subcommittee, in a memo to the Advisory Committee, examined the merits and demerits of the proposal, but ultimately concluded that if:

it is determined that the trusts should be providing more information than they currently are, the Subcommittee’s preliminary thought was that this may be a matter more appropriately addressed by a legislative solution—such as an amendment of § 524(g) that imposes additional requirements on trusts created under that provision.¹²²

A second memo from the Subcommittee, dated September 19, 2011, collects comments the Subcommittee solicited from various bankruptcy and nonbankruptcy legal groups. The chair of the ABA Business Bankruptcy Committee established a task force to review the proposal, which ultimately supported the proposal, subject to a small number of qualifications. Others who submitted comments, including the FCRs, opposed the proposal.¹²³

F. THE FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT
OF 2017

During the 112th Congress, the Subcommittee on the Constitution of the House Judiciary Committee held a hearing entitled “How Fraud and Abuse in the Asbestos Compensation System Affects Victims, Jobs, the Economy, and the Legal System.”¹²⁴ In light of the testimony received at that hearing, the study of the Advisory Committee on Bankruptcy Rules, and the experience of debtors who have used the Bankruptcy Code to manage their future asbestos liability and their attorneys, Rep. Quayle (R-AZ), together with Reps. Matheson (D-UT) and Ross (R-FL), introduced H.R. 4369, the Furthering Asbestos Claim Transparency (FACT) Act of 2012, on April 17, 2012.

The Subcommittee on Courts, Commercial and Administrative Law of the House Judiciary Committee held a hearing on H.R. 4369 on May 10, 2012.¹²⁵ Three of the four witnesses testified that transparency was sorely needed in the 524(g) asbestos trust compensation system.¹²⁶ 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.¹²⁷ Mr. Siegel did argue that the FACT Act would impose “onerous” new administrative burdens on the trusts—a hypothesis that was contradicted by Mr. Scarcella’s testimony founded in his experience working at a claims processing department at one of the largest trusts.¹²⁸

¹²¹ Letter from Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Nov. 22, 2010) (on file with Committee).

¹²² Memorandum from Subcommittee on Business Issues to Advisory Committee on Bankruptcy Rules (Mar. 10, 2011) (on file with Committee).

¹²³ Memorandum from Subcommittee on Business Issues to Advisory Committee on Bankruptcy Rules (Sept. 19, 2011) (on file with Committee).

¹²⁴ See generally *Constitution Subcomm. Hearing*, *supra* note 42.

¹²⁵ See generally *Courts Subcomm. Hearing*, *supra* note 11.

¹²⁶ See *id.* (testimonies of Leigh Ann Schell, Prof. S. Todd Brown, and Marc Scarcella).

¹²⁷ *Id.* at 81.

¹²⁸ *Id.* (“As somebody who worked at a trust, the largest asbestos trust, the Manville Personal Injury Trust, back in 2001 as their quantitative data analyst and statistician, I can tell you that I understand Mr. Siegel’s concern, and I think it is a legitimate concern, but I can assure everybody that it is not a problem.”)

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

During the 113th Congress, on March 6, 2013, Rep. Farenthold (R-TX), together with Rep. Matheson, introduced H.R. 982, the Furthering Asbestos Claim Transparency (FACT) Act of 2013, which was identical to H.R. 4369 as reported out of the Committee during the 112th Congress. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on H.R. 982 on March 13, 2013.¹²⁹ Three of the four witnesses testified that the current asbestos trust system lacked transparency and was conducive to fraudulent activity.¹³⁰ The fourth witness, Mr. Inselbuch, again argued that the FACT Act would abrogate state discovery laws and would create administrative burdens on the trusts notwithstanding a record to the contrary on both accounts.¹³¹ On May 21, 2013, the Committee met in open session and ordered the bill H.R. 982 to be reported favorably to the House without amendment. On November 13, 2013, the House considered H.R. 982 and passed the bill. The provisions of H.R. 526 were included in separate legislation, H.R. 1927, which passed the House of Representatives on January 8, 2016, by a vote of 211–188, with one Member voting present. H.R. 1927 was not considered by the Senate during the 114th Congress.

During the 114th Congress, on January 26, 2015, Rep. Farenthold, together with Rep. Marino (R-PA), introduced H.R. 526, the Furthering Asbestos Claim Transparency (FACT) Act of 2015, which was identical to H.R. 982 as passed by the House during the 113th Congress. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on H.R. 526 on February 4, 2015.¹³² Three of the four witnesses testified that the current asbestos trust system lacked transparency and was conducive to fraudulent activity.¹³³ The fourth witness, Mr. Inselbuch, argued that the FACT Act would abrogate state discovery laws and would create administrative burdens on the trusts notwithstanding a record to the contrary on both accounts.¹³⁴ On November 30, 2015, the Committee met in open session and ordered the bill H.R. 526 to be reported favorably to the House without amendment. H.R. 526 was not considered by the Full House of Representatives during the 114th Congress.

Given the necessity for transparency and the significant legislative record, Rep. Farenthold, together with Rep. Goodlatte (R-VA)

¹²⁹ See generally *H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013": Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. (2013) (Reg. Subcomm. Hearing)*.

¹³⁰ See *id.* (testimonies of Hon. Peggy L. Ableman, Prof. S. Todd Brown, and Marc Scarcella).

¹³¹ *Id.*; see also H.R. 982.

¹³² See generally *RRCAL Subcomm. Hearing*.

¹³³ See *id.* (testimonies of Nicholas Vari, Marc Scarcella, and Prof. Lester Brickman).

¹³⁴ See *id.* (testimonies of Elihu Inselbuch, Nicholas Vari, Marc Scarcella, and Prof. Lester Brickman).

and Rep. Marino, introduced H.R. 906, the Furthering Asbestos Claim Transparency (FACT) Act of 2017, on February 7, 2017, which is identical to H.R. 526 as reported out of the Committee during the 114th Congress. H.R. 906 amends section 524(g) of the Bankruptcy Code to require asbestos trusts to file quarterly reports with the presiding bankruptcy court that detail claimants' names, demands made by the claimants to the asbestos trust, any amounts paid to claimants, and the basis for such payments.¹³⁵ The FACT Act also requires asbestos trusts to provide information requested by parties to traditional asbestos tort litigation, subject to payment from the requesting party for costs associated with such a request.¹³⁶ As the bill amends a provision of the Bankruptcy Code, the reporting and information sharing requirements contained therein fall squarely within Congress' bankruptcy power.¹³⁷

The FACT Act includes several privacy protections. The bill provides that sensitive identifying information, such as complete Social Security numbers and confidential medical records, should not be published in the quarterly reports.¹³⁸ Additionally, the FACT Act subjects both the quarterly reporting requirements and the written discovery requests to section 107 of the Bankruptcy Code. Section 107 of the Bankruptcy Code and related Rule 9037 of the Federal Rules of Bankruptcy Procedure grant the presiding bankruptcy judge broad discretion to exclude confidential or sensitive information from the quarterly reports or in response to a written discovery request. Specifically, section 107(c) of the Bankruptcy Code provides a bankruptcy court with discretion to exclude from disclosure broad categories of information contained in any document filed in a chapter 11 case that would "create undue risk of identity theft or other unlawful injury. . . ." ¹³⁹ Further, responses to written discovery requests are subject to any applicable protective orders.¹⁴⁰

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

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

¹³⁵ H.R. 982 § 2.

¹³⁶ *Id.*

¹³⁷ U.S. CONST. art. I, § 8, cl. 4; see *Court Subcomm. Hearing, supra* note 11, at 85–89 (memorandum regarding Congress' power to enact legal reform legislation prepared by former Solicitor General Paul D. Clement); see also *Reg. Subcomm. Hearing, supra* note 124 (testimony of Prof. S. Todd Brown).

¹³⁸ H.R. 982 § 2.

¹³⁹ 11 U.S.C. § 107(c) (2011); 18 U.S.C. § 1028(d) (2011); Fed. R. Bankr. P. 9037.

¹⁴⁰ H.R. 982 § 2.

Hearings

H.R. 906 is identical to both a 2015 and 2013 bill on which the Committee held two separate hearings. The Committee also held additional hearings on the subject matter in 2011 and 2012, respectively.

Committee Consideration

On February 15, 2017, the Committee met in open session and ordered the bill H.R. 906 favorably reported, without amendment, by a rollcall vote of 17 ayes to 14 nays, 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 rollcall votes occurred during the Committee's consideration of H.R. 906.

1. Amendment #1, offered by Mr. Conyers, to replace the bill's substantive provisions with a requirement that asbestos trusts report only aggregated information on demands received and payments made from the asbestos trusts. The amendment was defeated by a rollcall vote of 11 to 20.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Bishop (MI)		X	
Ms. Roby (AL)		X	
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)	X		
Mr. Lieu (CA)	X		
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	11	20	

2. Amendment #2, 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. The amendment was defeated by a rollcall vote of 12 to 21.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)			
Mr. DeSantis (FL)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)			
Mr. Bishop (MI)		X	
Ms. Roby (AL)		X	
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)			
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)	X		
Mr. Lieu (CA)	X		
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	12	21	

3. Amendment #3, offered by Ms. Jackson Lee, to require the filing of certain information regarding settlement amounts paid by a third-party before such third-party can seek discovery from an asbestos trust. The amendment was defeated by a rollcall vote of 12 to 20.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)			
Mr. DeSantis (FL)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Bishop (MI)		X	
Ms. Roby (AL)		X	
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Biggs (AZ)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)	X		
Mr. Lieu (CA)	X		
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)			
Mr. Schneider (IL)	X		
Total	12	20	

4. Amendment #4, offered by Mr. Johnson, to exclude personally identifiable information relating to the claimant from the bill's public reporting and document production requirement. The amendment was defeated by a rollcall vote of 12 to 20.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)			
Mr. DeSantis (FL)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Bishop (MI)		X	
Ms. Roby (AL)		X	

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)	X		
Mr. Lieu (CA)	X		
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)			
Mr. Schneider (IL)	X		
Total	12	20	

5. Amendment #5, offered by Mr. Jeffries, to replace the quarterly reporting requirements with a requirement that a trust provide discovery, upon written request, to a party to an action concerning liability for asbestos exposure if the requesting party cannot obtain such information under non-bankruptcy law. The amendment was defeated by a rollcall vote of 13 to 19.

ROLLCALL NO. 5

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

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Bishop (MI)		X	
Ms. Roby (AL)		X	
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)	X		
Mr. Lieu (CA)	X		
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	13	19	

6. Amendment #6, offered by Mr. Cicilline, to exclude members of the Armed Forces and their families and civilian employees of the Department of Defense and their families from the requirements of the FACT Act. The amendment was defeated by a rollcall vote of 11 to 18.

ROLLCALL NO. 6

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

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Farenthold (TX)		X	
Mr. Collins (GA)			
Mr. DeSantis (FL)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Bishop (MI)		X	
Ms. Roby (AL)		X	
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)			
Mr. Biggs (AZ)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)	X		
Mr. Lieu (CA)	X		
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	11	18	

7. Motion to report H.R. 906 favorably to the House of Representatives. The motion was agreed to by a rollcall vote of 19 to 11.

ROLLCALL NO. 7

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

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)	X		
Mr. Collins (GA)			
Mr. DeSantis (FL)	X		
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Mr. Bishop (MI)	X		
Ms. Roby (AL)	X		
Mr. Gaetz (FL)	X		
Mr. Johnson (LA)	X		
Mr. Biggs (AZ)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)		X	
Mr. Swalwell (CA)		X	
Mr. Lieu (CA)		X	
Mr. Raskin (MD)		X	
Ms. Jayapal (WA)		X	
Mr. Schneider (IL)		X	
Total	19	11	

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. 906, 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, February 17, 2017.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 906, the “Furthering Asbestos Claims Transparency (FACT) Act of 2017.”

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

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

**H.R. 906—Furthering Asbestos Claims Transparency (FACT)
Act of 2017.**

As ordered reported by the House Committee on the Judiciary
on February 15, 2017.

H.R. 906 would require trusts set up through a Chapter 11 bankruptcy reorganization caused by asbestos liabilities to submit quarterly reports to the relevant bankruptcy court concerning the damage claims and payments made by the trust. Bankruptcy courts would then be required to make the information from such reports publicly available.

Based on an analysis of information provided by the Administrative Office of the U.S. Courts about the costs associated with making the required information publicly available, CBO estimates that implementing the bill would have no significant effect on the Federal budget. Enacting H.R. 906 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 906 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 906 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

H.R. 906 would impose a private-sector mandate as defined in UMRA by requiring asbestos trusts to submit quarterly reports. According to studies by the Government Accountability Office (GAO) and the RAND Corporation, only a small number of asbestos trusts currently exist (about 60). Further, the GAO study indicates that the information to be submitted under the bill is already tracked by many of the asbestos trusts. Therefore, CBO expects that the in-

cremental cost to comply with the reporting requirements in the bill would fall below the annual threshold established in UMRA for private-sector mandates (\$156 million in 2017, adjusted annually for inflation).

The CBO staff contacts for this estimate are Robert Reese (for Federal costs) and Paige Piper/Bach (for private-sector mandates). The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 906 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 906 specifically directs to be completed no specific rule makings within the meaning of 5 § U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 906 amends title 11, United States Code, to require the publication and disclosure of certain data by trusts created in a chapter 11 plan pursuant to section 524 of that title.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 906 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

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

Section 1. Short Title. Provides that the bill may be referred to as the “Furthering Asbestos Claim Transparency Act of 2017,” or “FACT Act of 2017.”

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 the 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 payment of reasonable discovery costs.

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

Changes in Existing Law Made by the Bill, as Reported

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

TITLE 11, UNITED STATES CODE

* * * * *

CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE

* * * * *

SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

* * * * *

§ 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such

spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at

which the debtor shall appear in person and at such hearing the court shall—

- (1) inform the debtor—
 - (A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and
 - (B) of the legal effect and consequences of—
 - (i) an agreement of the kind specified in subsection (c) of this section; and
 - (ii) a default under such an agreement; and
- (2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.
- (e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.
- (f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.
- (g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.
 - (B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.
- (2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.
 - (B) The requirements of this subparagraph are that—
 - (i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—
 - (I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as 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 asbestos-containing products;
 - (II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the

obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values 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.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made

against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

- (bb) a past or present affiliate of the debtor; or
- (cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term “demand” means a demand for payment, present or future, that—

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

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

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

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(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.

(h) APPLICATION TO EXISTING INJUNCTIONS.—For purposes of subsection (g)—

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and
(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), com-

pleted as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms “Amount Reaffirmed” and “Annual Percentage Rate” shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases “Before agreeing to reaffirm a debt, review these important disclosures” and “Summary of Reaffirmation Agreement” may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms “Amount Reaffirmed” and “Annual Percentage Rate” must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: “Part A: Before agreeing to reaffirm a debt, review these important disclosures.”;

(B) Under the heading “Summary of Reaffirmation Agreement”, the statement: “This Summary is made pursuant to the requirements of the Bankruptcy Code”;

(C) The “Amount Reaffirmed”, using that term, which shall be—

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the “Amount Reaffirmed”, the statements—

(i) “The amount of debt you have agreed to reaffirm”;

and
(ii) “Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.”.

(E) The “Annual Percentage Rate”, using that term, which shall be disclosed as—

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms “credit” and “open end credit plan” are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms “credit” and “open end credit plan” are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating “The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.”

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following—

(i) by making the statement: “Your first payment in the amount of \$ _____ is due on _____ but the future pay-

ment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.”, and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: “Your payment schedule will be:”, and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor’s repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: “Note: When this disclosure refers to what a creditor ‘may’ do, it does not use the word ‘may’ to give the creditor specific permission. The word ‘may’ is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don’t have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.”.

(J)(i) The following additional statements:

“Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

“1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

“2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

“3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

“4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

“5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

“6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

“7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must at-

tend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A lien is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the property securing the lien if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you must make a single payment to the creditor equal to the amount of the allowed secured claim, as agreed by the parties or determined by the court."

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court."

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that, in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$_____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$_____, leaving \$_____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.".

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.".

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

“Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

“I am not represented by an attorney in connection with this reaffirmation agreement.

“I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

“Therefore, I ask the court for an order approving this reaffirmation agreement.”.

(8) The court order, which may be used to approve such agreement, shall consist of the following:

“Court Order: The court grants the debtor’s motion and approves the reaffirmation agreement described above.”.

(l) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor’s monthly income less the debtor’s monthly expenses as shown on the debtor’s completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor’s discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

* * * * *

Dissenting Views

H.R. 906, the “Furthering Asbestos Claim Transparency (FACT) Act of 2017,” would benefit the very entities that knowingly produced a toxic substance that killed or seriously injured unsuspecting American consumers and workers. Specifically, the bill would require a trust—established under bankruptcy law to pay the claims of individuals injured as a result of their exposure to asbestos—to: (1) file a quarterly, publicly-available report with the bankruptcy court that includes certain personal information concerning these claimants; and (2) provide information relating to any payment demands or payments made to such claimants upon written request of any party to any action concerning liability for asbestos exposure. As a result, asbestos victims’ private information will be irretrievably released into the public domain and available via the Internet.

The principal concerns presented by the bill are the following: (1) its reporting and disclosure requirements are a blatant assault on asbestos victims’ privacy interests; (2) it is fundamentally inequitable in that the measure mandates disclosure by the trusts, but does not impose comparable disclosure demands on defendant companies, even though they exposed millions of unsuspecting Americans to their toxic products; (3) it addresses a non-existent problem as there is no evidence of systemic fraud; (4) it is an end-run by defendant companies 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 recognition of these concerns, this legislation is opposed by numerous asbestos victims and their families;¹ various veterans service organizations, including the Military Order of the Purple Heart, AMVETS, and the Vietnam Veterans of America;² privacy and civil liberties organizations;³ various consumer and environmental organizations, including

¹See, e.g., Letter from Sue Vento *et al.* to Representatives Bob Goodlatte (R-VA), Chair, & John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary (Feb. 14, 2017) (signed by 138 asbestos victims and family members of asbestos victims) (on file with H. Comm. on the Judiciary Democratic staff); Op. Ed., Susan Vento, *Asbestos Victims Call on Congress to Stop Fast-Tracking Legislation That Would Violate Victim’s Privacy*, ROLL CALL, May 14, 2015, at 11 (describing the bill as “offensive”).

²Letter from Aleks Morosky, Nat’l Legislative Dir., Military Order of the Purple Heart *et al.* to Representative Paul Ryan (R-WI) *et al.* (Feb. 14, 2017) (“Forcing our veterans to publicize their work histories, medical conditions, majority of their social security numbers, and information about their children and families is an offensive invasion of privacy to the men and women who have honorably served, and it does nothing to assure their adequate compensation or to prevent future asbestos exposures and deaths.”) (on file with H. Comm. on the Judiciary Democratic staff).

³Letter from Essential Information *et al.* to Representatives Bob Goodlatte (R-VA), Chair, & John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary (Feb. 14, 2017) (expressing concern that H.R. 906 will “subject consumers to likely fraud and abuse stemming from release of their personal information”) (on file with H. Comm. on the Judiciary Democratic staff).

Earthjustice, Public Citizen, and US PIRG;⁴ labor organizations and occupational health and safety organizations;⁵ the Alliance for Justice;⁶ and a legal representative for future asbestos personal injury claimants with respect to asbestos bankruptcy trusts.⁷ In addition, the Obama Administration issued a veto threat regarding legislation that included a measure that was substantially identical to H.R. 906 considered in the last Congress.⁸

DESCRIPTION AND BACKGROUND

DESCRIPTION

H.R. 906 amends Bankruptcy Code section 524(g) to add a provision consisting of two components. First, it requires a trust, subject to Bankruptcy Code section 107, to file with the bankruptcy court not later than 60 days after the end of every quarter a report that must be made available on the court’s public docket. The report must describe each demand the trust received from a claimant, including the claimant’s name and exposure history as well as the basis for any payment from the trust made to such claimant. The report must not include any confidential medical record or the claimant’s full Social Security number. Second, the provision requires the trust, upon written request and, at the trust’s option, subject to payment for any reasonable costs incurred in responding to such 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. The bill’s reporting and information disclosure requirements are subject to Bankruptcy Code section 107, which authorizes the bankruptcy court, for cause, to restrict public access to any document filed in a bankruptcy case if the court finds that the disclosure of such information would create an “undue risk of identity theft or other unlawful injury.”⁹

BACKGROUND

I. THE LETHAL EFFECTS OF ASBESTOS

Asbestos is a fibrous material, extracted from the earth that has been used for centuries because of its tensile strength and heat re-

⁴Letter from the Alliance for Justice *et al.* to Representatives Bob Goodlatte (R-VA), Chair, & John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary (Feb. 14, 2017) (observing that the “bill is extremely misguided”) (on file with H. Comm. on the Judiciary Democratic staff).

⁵Letter from Asbestos Disease Awareness Organization *et al.* to Representatives Bob Goodlatte (R-VA), Chair, & John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary (Feb. 14, 2017) (calling on Congress “to stand with our nation’s workforce and other victims of asbestos diseases”) (on file with H. Comm. on the Judiciary Democratic staff).

⁶Alliance for Justice, Protect Asbestos Victims—Oppose H.R. 906, the so-called “FACT Act” (undated) (on file with H. Comm. on the Judiciary Democratic staff).

⁷*See, e.g.*, Letter from Douglas A. Campbell, counsel for various asbestos settlement trusts, to Representative Bob Goodlatte, Chair, H. Comm. on the Judiciary, *et al.* (Feb. 14, 2017) (on file with H. Comm. on the Judiciary Democratic staff).

⁸Executive Office of the President, Statement of Administration Policy—H.R. 1927, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2015 (Jan. 6, 2016) (noting that the bill’s disclosure requirement “would threaten their privacy, make them more vulnerable to identity thieves and other predators, and potentially disadvantage them in many ways unrelated to asbestos exposure, including in their efforts to obtain employment, credit, and insurance”).

⁹11 U.S.C. § 107(c)(1) (2017).

sistance.¹⁰ The modern industrial use of asbestos dates back to around 1860. Between 1934 and 1964, the world’s annual use of raw asbestos increased from about 500,000 tons to 2.5 million tons.¹¹ Asbestos was often utilized as an insulator and as a fire retardant by the construction and ship-building industries. Examples of asbestos-containing products include attic and wall insulation, “roofing shingles, ceiling and vinyl floor tiles, paper and cement products, and friction products such as automobile clutch, brake and transmission parts.”¹² The Department of Labor estimates that approximately 21 million Americans have been significantly exposed to asbestos.¹³

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.¹⁴ Lung cancer and other diseases have also been associated with the inhalation of asbestos fibers.¹⁵

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 their injuries began to manifest in the 1960’s.¹⁶ For example, the Occupational Safety and Health Administration stated in 1986 that it was “aware of no instance in which exposure to a toxic substance more clearly demonstrated detrimental health effects on humans than has asbestos exposure. The diseases caused by asbestos exposure are life-threatening or disabling.”¹⁷ The Environmental Protection Agency (“EPA”) in 1988 published a study of asbestos in public schools and found that its presence was “extremely hazardous.”¹⁸

In 1989, the EPA issued a regulation pursuant to the Toxic Substances Control Act¹⁹ banning most asbestos-containing products. This regulation, however, was remanded by the Fifth Circuit Court of Appeals²⁰ and, “[a]s a result, most of the original ban on the manufacture, importation, processing, or distribution in commerce for the majority of the asbestos-containing products originally cov-

¹⁰ *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcommittee on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Congress 1 (1975) (Opening Statement of Chairman Hughes) [hereinafter *Asbestos Litigation Hearings*].

¹¹ *Id.*

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

¹³ *Asbestos Litigation Hearings* at 2.

¹⁴ *Id.*

¹⁵ *Id.*

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

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

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

¹⁹ Pub. L. No. 94–469, 90 Stat. 2003 (1976) (codified in 15 U.S.C. §§ 2601 *et seq.* (2017)). Section 6 of the Act authorizes the agency to prohibit the manufacture of certain products “[i]f the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment[.]” 15 U.S.C. § 2605 (2017).

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

ered in the 1989 final rule was overturned.”²¹ Currently, the use of asbestos is banned in the manufacture of certain products,²² but it continues to be used in many other products, such as disk brake pads, vinyl floor tiles, and clothing.²³

The first appellate opinion upholding a product liability judgment against a manufacturer of asbestos-containing products was rendered in 1973 by the Fifth Circuit.²⁴ As reported by the Government Accountability Office (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.”²⁵ In the more than four decades since, litigation over personal injuries resulting from exposure to asbestos has resulted in “hundreds of thousands of claims filed and billions of dollars in compensation paid,” according to the Rand Institute for Civil Justice.²⁶ “Asbestos litigation,” according to the GAO, “has been the longest-running mass tort litigation in U.S. history.”²⁷

II. OVERVIEW OF BANKRUPTCY ASBESTOS TRUSTS

In 1994, Congress amended the Bankruptcy Code to authorize the imposition of a channeling injunction in chapter 11 cases involving asbestos claims.²⁸ Codified as section 524(g), this provision allows a debtor, under certain circumstances, to shift its asbestos liabilities to a trust fund. Modeled on the injunction issued in the *Johns-Manville* bankruptcy case,²⁹ section 524(g) authorizes a court in a chapter 11 case, after making certain findings, to issue an injunction preventing any entity from “taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment” for any claim or demand³⁰ that is to be paid in full or in part by a trust established under a confirmed plan of reorganization.³¹ The trust is typically funded with newly issued securities of the recapitalized debtor and by the debtor’s obligation to make future payments.³² Upon confirmation, the trust assumes all of the debtor’s liabilities for personal injury, wrongful death, or

²¹ U.S. ENVIRONMENTAL PROTECTION AGENCY, U.S. FEDERAL BANS ON ASBESTOS—REGULATORY HISTORY OF ASBESTOS BANS, <http://www2.epa.gov/asbestos/us-federal-bans-asbestos> (last visited Feb. 17, 2017).

²² See, e.g., 16 C.F.R. Parts 1304–05 (2017) (banning the use of asbestos in certain spackling compounds).

²³ Other products that are permitted to be manufactured with asbestos include: cement corrugated sheets, cement flat sheet, pipeline wrap, roofing felt, cement shingle, millboard, cement pipe, automatic transmission components, clutch facings, friction materials, drum brake linings, brake blocks, and gaskets. U.S. Environmental Protection Agency, U.S. Federal Bans on Asbestos, <http://www2.epa.gov/asbestos/us-federal-bans-asbestos> (last visited Feb. 17, 2017).

²⁴ *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973).

²⁵ GAO Report at 8.

²⁶ 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).

²⁷ GAO Report at 1. Approximately 100 companies have filed for bankruptcy relief at least in part due to asbestos-related liability. *Id.* at 2.

²⁸ Pub. L. No. 103-394, § 111(a), 108 Stat. 4108 (1994).

²⁹ *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2nd Cir. 1988).

³⁰ The provision defines “demand” as a means a demand for payment, present or future, that—(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization; (B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and (C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(D). 11 U.S.C. § 524(g)(5) (2017).

³¹ 11 U.S.C. § 524(g)(1)(B) (2017).

³² 11 U.S.C. § 524(g)(2)(B)(i) (2017).

property damages allegedly caused by the presence or exposure to asbestos or asbestos-containing products.³³ As the GAO observes, “neither the courts nor the U.S. Trustees have any specific statutory or other requirements to oversee a trust’s administration.”³⁴

Once operational, the trust implements “a nonadversarial administrative process—independent of the court system—to review claimants’ occupational and medical histories before awarding compensation.”³⁵ The trusts are privately managed and typically consist of a trustee, a trust advisory committee, and a future claims representative.³⁶ The GAO explains:

Trustees manage the daily operations of the trusts, including managing the trusts’ investments, hiring and supervising support staff and advisors, filing taxes, and submitting annual reports to the bankruptcy court, as required by the trusts’ [trust agreement]. The trustees are to manage the trust for the sole benefit of the present and future claimant beneficiaries.³⁷

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.³⁸ According to the GAO, payments range from 1.1% to 100% for certain diseases, such as mesothelioma or asbestosis and the median payment percentage among the various trusts was 25%.³⁹ The GAO reports that since the establishment of the first trust in 1988, “asbestos trusts have paid about 3.3 million claims valued at about \$17.5 billion,” as of 2010.⁴⁰

To establish entitlement to compensation, the claimant completes a claim form supported by 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.⁴¹ 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.”⁴² In addition to seeking compensation from an asbestos bankruptcy trust, asbestos claimants may seek compensation from liable companies that are not in bankruptcy through the tort system.⁴³

CONCERNS WITH H.R. 906

The principal beneficiaries of H.R. 906 would be the very entities that knowingly produced a toxic substance that killed or seriously injured unsuspecting American consumers and workers. The legis-

³³ 11 U.S.C. § 524(g)(2)(B) (2017).

³⁴ GAO Report at 13.

³⁵ *Id.* at 3.

³⁶ *Id.* at 15.

³⁷ *Id.*

³⁸ *Id.* at 17.

³⁹ *Id.* at 21.

⁴⁰ *Id.* at 16.

⁴¹ *Id.* at 18.

⁴² *Id.*

⁴³ *Id.* at 15.

lation does nothing to protect victims or to improve the claims process and is based on the false assertion that there is endemic fraud in the asbestos trust system that must be addressed. The legislation is an end-run by defendants around the current discovery process. Further, H.R. 906's reporting and disclosure requirements are an assault on asbestos victims' privacy interests and are fundamentally inequitable because solvent defendant companies are not similarly required to disclose their confidential settlement agreements. Finally, the measure's burdensome new reporting requirements will divert critical funds and further decrease compensation to asbestos victims.

I. H.R. 906 IS UNNECESSARY GIVEN THE ABSENCE OF ANY EMPIRICAL EVIDENCE OF SYSTEMIC FRAUD

To justify the bill's onerous new requirements that would be borne by asbestos trusts and asbestos victims, proponents of H.R. 906 allege that there is pervasive fraud and abuse in the asbestos trust compensation system,⁴⁴ even though there have been only isolated reports of fraudulent claims over the years. For example, although the *Wall Street Journal* in 2013 purported to document "numerous apparent anomalies" regarding various asbestos claims,⁴⁵ a close reading of its report shows that these instances typically resulted from human error or that protocols for rooting out fraud worked as intended.⁴⁶ As noted in her response to this article, Joan Claybrook, president of Public Citizen from 1982 to 2009 and head of the National Highway Traffic Safety Administration From 1977 to 1981, observed:

There is no evidence to support assertions of significant fraud in claims by asbestos victims. Human error in data entry is not fraud. Out of millions of claims filed at the company asbestos trusts, the Journal's extensive investigation identified an error and anomaly rate of only 0.35%, much of that due to mistakes by the trusts, not the victims.⁴⁷

It is also important to note that the GAO is not aware of any subsequent reports of endemic fraud since 2004 with respect to asbestos claims and it did not uncover any evidence of overt fraud during its examination of asbestos trusts.⁴⁸ Instead, the GAO detailed a robust set of procedures that a claimant must follow to establish entitlement to compensation by which the claimant has to complete a claim form supported with documented evidence of exposure to asbestos products. Such evidence may consist of the

⁴⁴ See, e.g., Memorandum from Representative Bob Goodlatte, Chairman, to Members of the H. Comm. on the Judiciary, at 5 (Feb. 14, 2017) ("Fraudulent activity has occurred persistently throughout the long history of asbestos litigation. . . . [T]he Committee received testimony indicating that trusts formed in bankruptcy for the purpose of funding payments to asbestos victims were reducing their public disclosures. . . . Accordingly, funds dedicated in a bankruptcy case for the relief of asbestos victims likely were being used to satisfy fraudulent claims.") (on file with the H. Comm. on the Judiciary Democratic staff).

⁴⁵ See, e.g., Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J., Mar. 11, 2013, at A1.

⁴⁶ *Id.*

⁴⁷ Joan Claybrook, *Fraud Made the Asbestos Illness Situation Much Worse*, Letter to the Editor, WALL ST. J., (May 19, 2013, at A16).

⁴⁸ 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.

claimant’s work history, employer records, Social Security records, and deposition testimony taken during any litigation.⁴⁹ 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.”⁵⁰ In addition, 98% of the 52 trusts that the GAO reviewed required a claims audit program to be conducted. Based on interviews held with representatives from 11 trusts, GAO found that all the trusts “incorporate quality assurance measures into their intake, evaluation, and payment processes.”⁵¹ 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.”⁵² It is noteworthy that even with this heightened scrutiny, none of the trusts “indicated that these audits had identified cases of fraud.”⁵³

As the Minority witness explained during a hearing on a substantially identical bill held before the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law in 2013, “[s]olvent asbestos defendants remaining in the tort system are currently able to learn all information relevant to a claim against them, including information about a victim’s trust claims, under state discovery rules.”⁵⁴ All information that would be relevant to claims against asbestos defendants—including information related to a victim’s trust claims—can be obtained using normal discovery tools available under state law, such as interrogatories, document requests, and depositions. Nonetheless, the bill’s proponents offer no explanation as to why the bill’s potentially costly and burdensome information request provision is necessary or why Federal law should override state law discovery processes.

II. H.R. 906 WOULD HARM ASBESTOS VICTIMS IN MULTIPLE WAYS

A. *The Bill’s Reporting and Disclosure Requirements Would Invade Asbestos Victims’ Privacy Interests*

H.R. 906’s mandatory reporting and disclosure requirements would violate an asbestos victim’s privacy if he or she seeks payment for injuries from an asbestos bankruptcy trust. Specifically, the bill requires the victim’s personal information, including their name and exposure history, to be made part of the bankruptcy court’s public case docket, which is easily accessible through the Internet with the payment of a nominal fee. As a result, information concerning claimants’ sensitive personal information would be irretrievably released into the public domain.

Such disclosures could be a treasure trove of data easily accessible by insurance companies, prospective employers, lenders, and data collectors who then can use such information for purposes having absolutely nothing to do with compensation for asbestos exposure and to the detriment of asbestos victims. In effect, this bill would allow unsuspecting asbestos victims to be further victimized,

⁴⁹ GAO Report at 18.

⁵⁰ *Id.*

⁵¹ *Id.* at 23.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113 Cong. (2013) (prepared statement of Elihu Inselbuch).

all in the name of helping those who harmed these victims in the first place. As the widow of former Representative Bruce Vento (D-MN), who died of mesothelioma in 2000, warned, “The information on this public registry could be used to deny employment, credit, and health, life, and disability insurance. We are also concerned that victims would be more vulnerable to identity thieves, con men, and other types of predators.”⁵⁵

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.”⁵⁶ 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.”⁵⁷

Nevertheless, as the GAO has observed, “parties in the tort system are not required to disclose settlement negotiation or agreement information outside of the subpoena process” and “trusts are analogous to any other settling party and related negotiations and payments are privileged.”⁵⁸ Equally important, the GAO noted that “all of the potentially relevant information in the trusts’ possession is available to the defense through pretrial discovery.”⁵⁹ In addition, asbestos bankruptcy trust representatives are concerned about the “privacy rights of hundreds of thousands of individuals who did nothing except successfully seek compensation from a trust.”⁶⁰ According to the Federal Trade Commission (FTC), identity theft is one of the top complaints received by the agency. In 2015, for example, the FTC received more than 490,220 identity theft complaints a 47% increase over the number of these complaints it received in 2014.⁶¹

To highlight these concerns with the legislation, Ranking Member John Conyers, Jr. (D-MI) offered an amendment that would have replaced the substantive text of the bill with a requirement that the bankruptcy asbestos trust report quarterly an aggregate list of demands received and payments made. Unfortunately, this amendment failed by a party-line vote of 11 to 20.⁶² Representative Henry C. “Hank” Johnson, Jr. (D-GA) similarly expressed concern about the bill’s potentially adverse impact on the privacy interests of asbestos victims and offered an amendment that would have required disclosures mandated under the bill to exclude all person-

⁵⁵ Letter from Susan Vento, widow of Rep. Bruce Vento (D-MN), *et al.*, to Members of the House of Representatives (Feb. 4, 2015), at 2 (on file with Comm. on the Judiciary Democratic staff).

⁵⁶ GAO Report at 30.

⁵⁷ *Id.*

⁵⁸ *Id.* at 29.

⁵⁹ *Id.*

⁶⁰ Memorandum from Legal Representatives for Future Asbestos Personal Injury Claimants with Respect to Certain Asbestos Settlement Trusts to Prof. Troy McKenzie, Advisory Comm. ittee on Bankruptcy Rules of the Judicial Conference of the United States, at 2 (Aug. 10, 2011) (on file with the H. Comm. on the Judiciary Democratic staff).

⁶¹ Christine DiGangi, *Identity Theft Complaints Leap by 47%*, USA TODAY, Jan. 30, 2016, at <http://www.usatoday.com/story/money/personalfinance/2016/01/30/identity-theft-complaints-leap-47/79410150>.

⁶² Unofficial Tr. of Markup of H.R. 906, the “Furthering Asbestos Claim Transparency (FACT) Act of 2017,” by the H. Comm. on the Judiciary, 115th Cong. at 28 (Feb. 15, 2017) [hereinafter Markup Tr.].

ally identifiable information relating to the claimant. This amendment also failed by a party-line vote of 12 to 20.⁶³

B. Asbestos Victims Vigorously Oppose this Legislation

The proponents of this legislation assert that it is intended to assist asbestos victims. For example, Representative Blake Farenthold (R-TX), the bill's sponsor, claims that H.R. 906 "will protect current and future victims of asbestos exposure."⁶⁴ Yet, not a *single* asbestos victim has expressed support for this legislation over the many years it has been considered by Congress. In fact, asbestos victims have vigorously opposed such legislative initiatives.⁶⁵ It should also be noted that the Majority has never asked an asbestos victim to testify at any of the hearings held on this legislation held in prior Congresses.⁶⁶ And, "[t]o add insult to injury," the relatives of asbestos victims who were sitting silently in the audience at the hearing held on the predecessor to H.R. 906 in the last Congress were asked by Representative Darrell Issa (R-CA) to stand and then to shake their heads "yes or no" in response to his question ("Do you all either have current cases or have you settled?"),⁶⁷ which he then sought to use to support his arguments in support of the legislation.⁶⁸ The victims observed, "Not one of us was given an opportunity to voice our opinions of the legislation, and yet, a member of the committee was permitted to use our presence in the hearing room to further his own position that is in direct contravention of our views."⁶⁹

C. H.R. 906 Will Be Particularly Harmful to Veterans

Although vast swaths of unsuspecting Americans have been exposed to asbestos, there are certain populations who had greater levels of exposure as the result of their work. For example, members of the Armed Forces of the United States have been disproportionately affected by asbestos. Even though veterans make up only

⁶³ *Id.* at 90.

⁶⁴ See, e.g., Press Release, Bob Goodlatte, Chair, H. Comm. on the Judiciary, Goodlatte and Farenthold Praise House Judiciary Approval of FACT Act (Feb. 15, 2017).

⁶⁵ See, e.g., Op. Ed., Susan Vento, *Asbestos Victims Call on Congress to Stop Fast-Tracking Legislation That Would Violate Victim's Privacy*, ROLL CALL, May 14, 2015, at 11 (describing the bill as "offensive"); Letter from Susan Vento widow of Rep. Bruce Vento (D-MN), *et al.* to U.S. House of Representative Members (May 13, 2015) (on file with H. Comm. on the Judiciary Democratic staff) (warning that H.R. 526 "will make it harder for victims to seek justice and easier for asbestos companies to delay cases and pay less to victims"); Michael Valach, son of deceased victim of mesothelioma, to Representative Tom Marino (R-PA), Chair, Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (May 13, 2015) (on file with H. Comm. on the Judiciary Democratic staff) (expressing concern that the legislation will "place personal information about asbestos victims and their families . . . on a public database accessible to the entire world"). Vento Letter.

⁶⁶ See, e.g., *Furthering Asbestos Claims Transparency (FACT) Act of 2015: Hearing on H.R. 526 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 114th Cong.* (2015); *Furthering Asbestos Claims Transparency (FACT) Act of 2013: Hearing on H.R. 928 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 113th Cong.* (2013); *Furthering Asbestos Claims Transparency (FACT) Act of 2012: Hearing on H.R. 4369 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary, 112th Cong.* (2012); *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong.* (2011).

⁶⁷ *Furthering Asbestos Claim Transparency (FACT) Act: Hearing on H.R. 526 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust and Law of the H. Comm. on the Judiciary, 114th Cong.* 111 (2015).

⁶⁸ Letter from Susan Vento widow of Rep. Bruce Vento (D-MN), *et al.* to U.S. House of Representative Members (May 13, 2015), at 1 (on file with H. Comm. on the Judiciary Democratic staff).

⁶⁹ *Id.*

8% of the population, they comprise 30% of all mesothelioma deaths.⁷⁰ Military.com, the largest military and veteran membership organization in the United States, explains:

Virtually every ship commissioned by the United States Navy between 1930 and about 1970 contained several tons of asbestos insulation in the engine room, along the miles of pipe aboard ship and in the walls and doors that required fireproofing. The sailors that manned these ships and the men who repaired them in Navy shipyards were prime candidates for asbestos exposure, a fact borne out by the disease statistics.⁷¹

In addition, civilian Department of Defense workers, such as shipbuilders and dockworkers, were extensively exposed to asbestos. For example, it has been reported that “[s]hipbuilding in World War II is a significant aetiology of the malignancies caused by asbestos.”⁷² According to the White Lung Association:

During World War II a new Liberty Ship hit the water in Baltimore every 37 hours and a few hundred miles South, in Hampton Roads Virginia, three ships hit the water each day. Trucks and ships delivered thousands of pounds of asbestos and asbestos products to the shipyards. . . . Workers in all trades breathed the asbestos used by insulators, boiler mechanics, carpenters, machinists, painters and joiners.⁷³

The American Legion last year passed a resolution noting that veterans “comprise up to 30 percent of deaths from asbestos-caused lung cancer” and that the “flame-retardant material was widely used in Navy ships and buildings until 1980.”⁷⁴ In addition the resolution observed that “[c]ompanies that produced it . . . sometimes hid its dangers.”⁷⁵ Although the resolution expressed support for “legislation requiring public disclosure by trusts regarding the receipt and disposition of claims for injuries based on exposure to asbestos,” it also noted such disclosure should “protect[] veterans’ private medical and work history, as well as Social Security numbers,” which H.R. 906 does not adequately do.⁷⁶

To address this shortcoming of the bill, Representative David N. Cicilline, Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust, offered an amendment that would have added a requirement to the bill specifying that the bankruptcy asbestos trust not disclose any information with respect to a claimant who is a member of the Armed Forces, a veteran, a ci-

⁷⁰ Military.com, *Asbestos and the Military, History, Exposure & Assistance*, <http://www.military.com/benefits/veteran-benefits/asbestos-and-the-military-history-exposure-assistance.html> (last visited Feb. 17, 2017).

⁷¹ *Id.*

⁷² John Hedly-Whyte & Deborah R. Milamed, *Asbestos and Ship-Building: Fatal Consequences*, 77(3) *ULSTER MEDICAL J.* 191 (Sept. 2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2604477/>.

⁷³ James Fite, U.S. Shipyards: A History of Massive Asbestos Exposure and Disease, World Asbestos Report (2004), http://worldasbestosreport.org/conferences/gac/gac2004/ws_H_2_e.php.

⁷⁴ Ninety-Eighth Nat’l Convention of the American Legion, Resolution No. 368, Increase the Transparency of Asbestos Claims (Aug. 30, 31, Sept. 1, 2016).

⁷⁵ *Id.*

⁷⁶ *Id.*

vilian employee of the Defense Department, or a family member of any of these. His amendment, however, failed by a party-line vote of 11 to 18.⁷⁷

III. H.R. 906 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. 906 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 problematic given the history of asbestos manufacturers in affirmatively concealing the dangers of their product from the public.

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

To illustrate the inequitable impact of H.R. 906, Representative Jerrold Nadler (D-NY) offered an amendment that would have required any party requesting information from a bankruptcy asbestos trust to make available certain information pertaining to the protection of public health and safety. This amendment, however, failed by a party-line vote of 12 to 21.⁷⁸ In addition, Representative Sheila Jackson Lee offered an amendment that would have limited disclosures mandated under the bill to a party that is a defendant in a pending court action in a pending court action directly related to the plaintiff's claim in that action and requires the defendant to first disclose to such plaintiff and such trust payments made by the defendant within the preceding 5 years. This amendment too failed by a party-line vote of 12 to 20.⁷⁹

IV. H.R. 906 WILL DIVERT CRITICAL FUNDS AND FURTHER DECREASE COMPENSATION TO ASBESTOS VICTIMS BY FORCING BANKRUPTCY TRUSTS TO PREPARE BURDENSOME REPORTS

H.R. 906 would effectively shift the cost of discovery away from solvent asbestos defendants to the bankruptcy trusts, ultimately diminishing the amount of funds available to compensate the victims of bankrupt asbestos defendants. By imposing reporting and information demand requirements on trusts, the bill could significantly increase the administrative costs of trusts in meeting these re-

⁷⁷ Markup Tr. at 114.

⁷⁸ *Id.* at 40.

⁷⁹ *Id.* at 80.

quirements and force them to divert their limited resources from paying the claims of asbestos victims to satisfying the information requests of those who caused injuries to millions of Americans. For example, trust representatives explain that they are often required to keep such information confidential and they are concerned about the substantial costs involved in responding to requests for such information.⁸⁰ In fact, one trust reported to the GAO that it incurred \$1 million in attorneys' fees to respond to a request to disclose every document on every claimant.⁸¹ Several legal representatives for future asbestos personal injury claimants also 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."⁸²

The bill includes only a modest compensation provision with respect to its information demand requirements, which allows a trust to seek payment for "any reasonable cost" that it incurred in responding to such demands. The "reasonableness" of reimbursement requests, of course, can be subject to dispute and litigation. Ultimately, the trusts will incur costs to implement the bill's requirements, leaving less money to compensate asbestos victims. This is particularly problematic in light of the fact that defendants can already obtain the information they want using existing discovery tools. To underscore this shortcoming of the bill, Representative Hakeem Jeffries (D-NY) offered an amendment that would have replaced the substantive text of the bill with a requirement that a bankruptcy asbestos trust provide payment and demand information to any party to any action concerning liability for asbestos exposure if such party cannot otherwise obtain such information under applicable non-bankruptcy law. His amendment, however, failed by a party-line vote of 13 to 19.⁸³

H.R. 906's retroactive application only adds to this unnecessary burden. The vast bulk of asbestos trusts that would be affected by this legislation have long been in existence, one of which dates back to 1988. According to the GAO, these trusts have already paid 3.3 million claims valued at about \$17.5 billion.⁸⁴ Yet, after the passage of more than 20 years since the first trust was established, H.R. 906 would now require these trusts to issue reports and provide documentation.

CONCLUSION

The only beneficiaries of H.R. 906 will be the very entities that knowingly produced a toxic substance that killed or seriously injured millions of unsuspecting American consumers and workers. The legislation does nothing to protect victims or to improve the claims process and is based on the false assertion that there is en-

⁸⁰ GAO Report at 30.

⁸¹ GAO Report at 27.

⁸² 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).

⁸³ Markup Tr. at 101.

⁸⁴ GAO Report at 16.

demic fraud in the asbestos trust system that must be addressed. In truth, this legislation is simply an end-run by defendants around the discovery process that already exists. Further, H.R. 906's reporting and disclosure requirements are an assault on asbestos victims' privacy interests and are fundamentally inequitable because solvent defendant companies are not similarly required to disclose their confidential settlement agreements. Finally, these burdensome new reporting requirements will divert critical funds and further decrease compensation to asbestos victims.

Accordingly, we respectfully dissent and urge our colleagues to stand on the side of justice for asbestos victims and to oppose H.R. 906.

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