

Dissenting Views

INTRODUCTION

H.R. 982, the “Furthering Asbestos Claim Transparency (FACT) Act of 2013,” is a thoroughly flawed bill that blatantly strengthens protections for the very entities that exposed millions of unsuspecting Americans to the toxic effects of asbestos. The bill accomplishes this end by giving asbestos defendants “new rights and advantages to be used against asbestos victims in state court” and it would “add new burdens” to asbestos bankruptcy trusts that would severely cripple “their ability to operate and pay claims.”¹ Although the proponents of this legislation assert that it is intended to protect asbestos victims, not a single asbestos victim has expressed support for H.R. 982. For example, we heard from the widow of our former colleague Representative Bruce Vento (D–MN) who passed away from mesothelioma. She emphatically stated that H.R. 982 “does not do a single thing” to help asbestos victims and their families.²

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

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

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

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

³11 U.S.C. § 524(g)(2)(B)(i)(I) (2013).

tos defendants around the discovery process available under non-bankruptcy law.

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

Not surprisingly, this measure is opposed by various asbestos victims,⁴ asbestos trusts,⁵ and legal representatives for future asbestos personal injury claimants.⁶ In addition, various organizations representing workers and consumers have registered their strong opposition, including the AFL-CIO,⁷ Public Citizen, U.S. Public Interest Research Group, the Environmental Working Group, the Alliance for Justice, and Protect Missouri Workers.⁸

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

DESCRIPTION AND BACKGROUND

DESCRIPTION

H.R. 982 amends section 524(g) of the Bankruptcy Code in two significant respects. First, it requires a trust to file with the bankruptcy court not later than 60 days after the end of every quarter a report that must be made available on the court's public docket. The report must describe each demand the trust received from a claimant, including the claimant's name and exposure history as well as the basis for any payment from the trust made to such claimant. The report may not include any confidential medical record or the claimant's full Social Security number. Second, the measure requires the trust, upon written request and subject to payment for any reasonable costs incurred in responding to such request at the option of the trust, to provide in a timely manner

⁴ See, e.g., Vento Letter.

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

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

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

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

any information related to payments and demands for payment from the trust, subject to appropriate protective orders, to any party to any action in law or equity if the subject of such action concerns liability for asbestos exposure. The bill's reporting and information disclosure requirements are subject to Bankruptcy Code section 107, which authorizes the bankruptcy court, for cause, to restrict public access to any document filed in a bankruptcy case if the court finds that the disclosure of the information contained in such document would create an "undue risk of identity theft or other unlawful injury."⁹

BACKGROUND

A. The Lethal Effects of Asbestos

Asbestos is a fibrous material, extracted from the earth, that has been used for centuries because of its tensile strength and its heat resistance.¹⁰ The modern industrial use of asbestos began around 1860, and the world's annual use of raw asbestos increased from some 500,000 tons to 2.5 million tons between the years 1934 and 1964.¹¹ Asbestos has been widely used as an insulator and as a fire retardant by the construction and ship-building industries. Examples of asbestos-containing products include attic and wall insulation, roofing shingles, ceiling and vinyl floor tiles, paper and cement products, and friction products such as automobile clutch, brake and transmission parts.¹²

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).¹³ Lung cancer and other diseases have also been associated with the inhalation of asbestos fibers.¹⁴

Although a link between asbestos and lung cancer was first reported in 1935, an estimated 21 million Americans were exposed to asbestos over the ensuing years,¹⁵ some of whom began to manifest injuries during the 1960's.¹⁶ During the 1970's, asbestos became the subject of significant regulation and was banned or declared hazardous by numerous federal agencies. For example, the Occupational Safety and Health Administration in 1986 stated that it was "aware of no instance in which exposure to a toxic substance more clearly demonstrated detrimental health effects on humans than has asbestos exposure. The diseases caused by asbestos exposure

⁹ 11 U.S.C. § 107(c)(1) (2013).

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

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 *Id.*

¹⁴ *Id.*

¹⁵ The Department of Labor provided this estimate. *Asbestos Litigation Hearings* at 2.

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

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 promulgated a regulation banning the manufacture, processing, importation, and distribution of materials or products containing asbestos.¹⁹ The rule, however, was later overturned.²⁰

In 1973, the Fifth Circuit rendered the first appellate opinion upholding a product liability judgment against a manufacturer of asbestos-containing products.²¹ As the Government Accountability Office (GAO) reported, “In the course of the first successful personal injury lawsuits against asbestos manufacturers, plaintiffs’ attorneys introduced evidence that these manufacturers had known but concealed information about the dangers of asbestos exposure or that such dangers were reasonably foreseeable.”²² In the nearly four decades since, litigation over personal injuries resulting from exposure to asbestos has resulted in “hundreds of thousands of claims filed and billions of dollars in compensation paid,” according to the Rand Institute for Civil Justice.²³ “Asbestos litigation,” according to the GAO, “has been the longest-running mass tort litigation in U.S. history.”²⁴

B. Overview of Asbestos Bankruptcy Trusts

In 1994, Congress amended the Bankruptcy Code to authorize the imposition of a channeling injunction in chapter 11 cases involving asbestos claims. Codified as section 524(g), this provision allows a debtor, under certain circumstances, to shift its asbestos liabilities to a trust fund. Modeled on the injunction issued in the *Johns-Manville* bankruptcy case,²⁵ section 524(g) authorizes a court in a chapter 11 case, after making certain findings,²⁶ 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 demand²⁷ that is to be paid in full or in part by a trust established under a confirmed plan of reorganization.²⁸ Funding for the trust is derived by the debtor’s securities and by the obligation of the debtor to make future payments,

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

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

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

²² GAO Report at 8.

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

²⁴ GAO Report at 1.

²⁵ *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2nd Cir. 1988).

²⁶ 11 U.S.C. § 524(g)(2)(B)(ii) (2013).

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

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

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

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

¹¹ U.S.C. § 524(g)(5) (2013).

²⁸ 11 U.S.C. § 524(g)(1)(B) (2013).

including dividends.²⁹ Upon confirmation, the trust assumes all of the debtor’s liabilities for personal injury, wrongful death, or property damages allegedly caused by the presence or exposure to asbestos or asbestos-containing products.³⁰ 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.”³¹

Once operational, the trust implements “a nonadversarial administrative process—independent of the court system—to review claimants’ occupational and medical histories before awarding compensation.”³² The trusts are privately managed and typically consist of a trustee, a trust advisory committee, and a future claims representative.³³ 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.³⁴

Currently, there are 60 asbestos bankruptcy trusts in operation with a combined total of \$36.8 billion in assets as of 2011.³⁵

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.³⁶ According to the GAO, the range of payment ranges from 1.1 percent to 100 percent for certain diseases, such as mesothelioma or asbestosis.³⁷ The GAO found that the median payment percentage among the various trusts was 25 percent.³⁸ The GAO reports that “[s]ince the establishment of the first trust in 1988 through 2010, available data indicate that asbestos trusts have paid about 3.3 million claims valued at about \$17.5 billion.”³⁹ In addition to seeking compensation from an asbestos bankruptcy trust, asbestos claimants may also seek compensation from liable companies that are not in bankruptcy through the tort system.⁴⁰

CONCERNS WITH H.R. 982

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

In order to justify the onerous new requirements the bill would impose on the asbestos trusts and the victims they serve, proponents of H.R. 982 allege that “there is growing evidence of fraud

²⁹ 11 U.S.C. § 524(g)(2)(B)(i) (2013).

³⁰ 11 U.S.C. § 524(g)(2)(B) (2013).

³¹ GAO Report at 13.

³² *Id.* at 3.

³³ *Id.* at 15.

³⁴ *Id.*

³⁵ *Id.* at 3.

³⁶ *Id.* at 17.

³⁷ *Id.* at 21.

³⁸ *Id.*

³⁹ *Id.* at 16.

⁴⁰ *Id.* at 15.

and abuse in the asbestos trust compensation system.”⁴¹ In truth, however, there have been only isolated reports of fraudulent claims over the years and many of those instances were attributed to human error. For example, reports surfaced in 2004 regarding a series of incidences of abusive claim practices⁴² and the Subcommittee on Regulatory Reform, Commercial and Antitrust Law (Subcommittee) conducted an oversight hearing into that issue as well as others presented with respect to the treatment of mass torts in bankruptcy cases.⁴³ In addition, the *Wall Street Journal* recently published an article purporting to document “numerous apparent anomalies” regarding various asbestos claims.⁴⁴ A close reading of this article, however, reveals that these instances were isolated or could be explained.⁴⁵ 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, noted:

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

Likewise, the GAO is not aware of any subsequent reports of endemic fraud since 2004 with respect to asbestos claims and it did not uncover any evidence of overt fraud during its examination of asbestos trusts last year.⁴⁷ Instead, the GAO has detailed an already robust set of procedures that a claimant must follow to establish entitlement to compensation. The claimant completes a claim form supported with documented evidence of exposure to asbestos products. Such evidence may consist of the claimant’s work history, employer records, Social Security records, and deposition testimony taken during any litigation.⁴⁸ 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.”⁴⁹ In addition, 98 percent of the 52 trusts that the GAO reviewed required a claims audit program to be conducted. Based on inter-

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

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

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

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

⁴⁵*Id.*

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

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

⁴⁸GAO Report at 18.

⁴⁹*Id.*

views held with representatives from 11 trusts, GAO found that all the trusts “incorporate quality assurance measures into their intake, evaluation, and payment processes.”⁵⁰ 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.”⁵¹ It is noteworthy that even with this heightened scrutiny, none of the trusts “indicated that these audits had identified cases of fraud.”⁵²

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

With the knowledge that there is no empirical evidence of fraud in the system, we are led to conclude that this measure is nothing more than an attempt to improperly allow asbestos defendants to circumvent state and federal discovery procedures. As the Minority witness explained during the hearing on H.R. 982, “Solvent asbestos defendants remaining in the tort system are currently able to learn all information relevant to a claim against them, including information about a victim’s trust claims, under state discovery rules.”⁵³ All information that would be relevant to claims against asbestos defendants—including information related to a victim’s trust claims—can be obtained using normal discovery tools available under state law, like interrogatories, document requests, and depositions. Nonetheless, the bill’s proponents offer no explanation as to why the bill’s potentially costly and burdensome information request provision is necessary or why federal law should subvert state law discovery processes.

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

Representative Joe Garcia (D-FL) also offered an amendment that would have prohibited a party that has been found liable in court for asbestos-related harm to a plaintiff from seeking information about that plaintiff through the bill’s disclosure process. Essentially, this amendment would have prohibited an asbestos defendant who has already been found liable in court for causing harm to a plaintiff from using this bill to seek information that was already available to it in discovery. This amendment would have added a little more balance to what is a very unbalanced bill. De-

⁵⁰ *Id.* at 23.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *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).

defendants that have already had their day in court and lost should not be allowed to then use this bill as a way to simply harass asbestos plaintiffs they have already harmed. Notwithstanding the clearly equitable bona fides of this amendment, it failed by a vote of 11 to 18.

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

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

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

It is readily apparent that these reports would provide a treasure trove of data that could be accessed by insurance companies, prospective employers, lenders, and data collectors who could then use such information for purposes having absolutely nothing to do with compensation for asbestos exposure and that could be used to the detriment of asbestos victims. In effect, this bill would allow unsuspecting asbestos victims to be further victimized, all in the name of helping those who harmed these victims in the first place. As the widow of our former colleague, Representative Bruce Vento (D-MN), who died of mesothelioma in 2000, warned, "The information on this public registry could be used to deny employment, credit, and health, life, and disability insurance. We are also concerned that victims would be more vulnerable to identity thieves, con men, and other types of predators."⁵⁴

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

Proponents of more disclosure argue that it may reduce the "asbestos-related litigation burden on the remaining solvent defend-

⁵⁴ Vento Letter.

⁵⁵ GAO Report at 1, 24.

⁵⁶ *Id.* at 17.

⁵⁷ *Id.* at 4, note 7.

⁵⁸ *Id.* at 24–25.

⁵⁹ *Id.* at 26.

ants by demonstrating that the trusts have increased claimants' overall compensation beyond the amount justified in relation to the harm caused."⁶⁰ 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."⁶¹

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

In attempt to protect asbestos victims from this unwarranted invasion of privacy, Ranking Member John Conyers, Jr. (D-MI) offered an amendment specifying that the quarterly reports required to be filed under the bill contain only aggregate information. In support of his amendment, Representative Conyers argued that the bill would, in effect, subject unsuspecting asbestos victims to possible future abuse. The amendment also struck the bill's burdensome discovery requirement. This amendment would have ensured victims' privacy by not making individualized claimant information public. It also would have ensured that trusts could focus their resources on their primary mission of assuring fair compensation for asbestos victims, rather than participating in the discovery process for outside lawsuits. Notwithstanding these benefits, this amendment failed by a party-line vote of 15 to 16.

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

national standards to protect individuals' medical records and other personal health information and applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically. The Rule requires appropriate safeguards to protect the privacy of personal health information, and sets limits and conditions on the uses and disclo-

⁶⁰*Id.* at 30.

⁶¹*Id.*

⁶²*Id.* at 29.

⁶³*Id.*

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

⁶⁵Pub. L. No. 104-191, 110 Stat. 1936 (1996).

tures that may be made of such information without patient authorization. The Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records, and to request corrections.⁶⁶

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

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

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

B. Asbestos Victims Vigorously Oppose this Legislation

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

We are here for one purpose and one purpose only, and that is to protect those victims of asbestos exposure. That is our only motivation. We are not here to protect companies, we are not here to protect the defense bar, plaintiffs' bar. We are here for the victims, and we are here to pro-

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

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

⁶⁸See text accompanying note 54.

tect their rights and to ensure that justice is served. We are not here to protect those who are not victims.⁶⁹

Nevertheless, we are unaware of a *single* asbestos victim who supports H.R. 982. In fact, we received letters from asbestos victims in vigorous opposition to this bill.⁷⁰ It is notable, for instance, that the Majority failed to call an asbestos victim to testify at any of the hearings on this legislation in either this Congress⁷¹ or in the last Congress when a similar measure was considered.⁷²

To his credit, the Subcommittee Chairman suspended the markup of the bill by the Subcommittee on March 20, 2013 to give certain asbestos victims “the right to have their testimony recorded” and to allow “members to ask them questions.”⁷³ The process ultimately offered to the victims, consisting of an informal information session that would have been closed to the public and neither transcribed nor recorded, was rejected by the victims because they rightly deemed this process to be woefully deficient.⁷⁴ As these victims observed:

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

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

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

⁷⁰See, e.g., Vento Letter.

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

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

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

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

⁷⁵*Id.*

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

Although millions of unsuspecting Americans have been exposed to asbestos, there are certain populations who had greater levels of exposure as the result of their work. For example, members of the Armed Forces of the United States have been disproportionately affected by asbestos. Even though veterans make up only eight percent of the population, they comprise 30 percent of all mesothelioma deaths.⁷⁶ 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.⁷⁷

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

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

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

They talk about employers using this information. There is [sic] volumes of existing law. The Americans with Disabil-

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

⁷⁷ *Id.*

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

According to the White Lung Association:

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

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

⁷⁹ Full Committee Markup Tr. at 137.

ities Act, for instance, would prohibit discrimination based on the information disclosed in here.⁸⁰

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

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

While we believe that a court could, and should, find that reliance on exposure to asbestos in making an adverse employment decision is unlawful under the ADA, we have very real concerns that this would not be the case based on our experience under this law. For example, following the enactment of the ADA in 1990, employers and the courts seized on the Act’s definition of disability as a means of denying protection to individuals with disabilities that Congress unquestionably intended to protect, such as workers with diabetes, multiple sclerosis, HIV, and similar limiting impairments. To remedy this misinterpretation of the law, Congress, in 2008, had to amend the ADA to ensure sufficient coverage.⁸²

In addition, our experience with a closely analogous problem—discrimination by employers and others based on genetic information, i.e., a marker for a disease or impairment that has not yet developed—provides additional cause to question whether the ADA would be interpreted to prohibit discrimination based on information about exposure to asbestos. With regard to genetic information, Congress was sufficiently concerned that the ADA might not reach discrimination on this basis and therefore passed the Genetic Information Nondiscrimination Act of 2008.⁸³ Congress understood that, while it was possible that the courts might interpret the ADA to prohibit discrimination based on genetic information, there also was a significant risk that they could fail to do so.

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

⁸⁰ *Id.* at 31.

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

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

⁸³ Pub. L. No. 110-233, 122 Stat. 881 (2008).

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

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

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

To highlight the problem of H.R. 982's inequitable disclosure obligations, Representative Jerrold Nadler (D-NY) offered an amendment requiring a party that requests information from a bankruptcy asbestos trust to meet certain criteria. Under the amendment, such a party would have been required to agree to disclose information relevant to such action that pertains to the protection of public health or safety to any other person or to any federal or state agency with authority to enforce laws regulating an activity relating to such information upon request of such party or agency. The goal of this amendment was to ensure that the transparency that H.R. 982's proponents demand from the victims of the asbestos industry would also apply to the corporations that inflicted so much damage and so much suffering over the years. The amendment would have addressed the longstanding efforts by these corporations to conceal the facts from the public, from their victims, and from government agencies charged with enforcing our health and safety laws. Notwithstanding the equitable value of this amendment, it failed by a vote of 14 to 18.

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

defendant's control, unless such information is a trade secret. These amendments, however, failed by a vote of 9 to 15.

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

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

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.

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

CONCLUSION

The only beneficiaries of H.R. 982 will be the very entities that knowingly produced a toxic substance that killed or seriously injured unsuspecting American consumers and workers. The legislation does nothing to protect victims or to improve the claims process and is based on the false assertion that there is endemic fraud in the asbestos trust system that must be addressed. In truth, this

⁸⁴ GAO Report at 27.

⁸⁵ Legal Representatives Memorandum at 2.

⁸⁶ GAO Report at 16.

legislation is simply an end run by defendants around the discovery process that threatens to prevent or delay adequate compensation for asbestos victims.

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

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

JOHN CONYERS, JR.
JERROLD NADLER.
ROBERT C. "BOBBY" SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
STEVE COHEN.
HENRY C. "HANK" JOHNSON, JR.
PEDRO R. PIERLUISI.
JUDY CHU.
TED DEUTCH.
LUIS V. GUTIERREZ.
KAREN BASS.
CEDRIC RICHMOND.
SUZAN DELBENE
JOE GARCIA.
HAKEEM JEFFRIES.

