310 Grant Street, Suite 1700
Pittsburgh, PA 15219-2399
Telephone: 412-261-0310
Facsimile: 412-261-5066

Philip E. Milch • pem@camlev.com

Campbell & Levine, LLC
Attorneys at Law

November 8, 2013

Via Electronic Mail

The Honorable John Boehner
Speaker
U.S. House of Representatives
H-232 U.S. Capitol Building
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol Building
Washington, DC 20515

The Honorable Eric Cantor
Majority Leader
U.S. House of Representatives
303 Cannon House Office Building
Washington, DC 20515

The Honorable Steny Hoyer
Minority Whip
U.S. House of Representatives
1705 Longworth House Office Building,
Washington , DC 20515

Dear Speaker Boehner, Minority Leader Pelosi, Majority Leader Cantor and Minority Whip Hoyer:

We understand that The Furthering Asbestos Claims Transparency Act of 2013, or H.R. 982, as an amendment to Section 524(g) of the Bankruptcy Code, may be taken up for consideration by the House of Representatives next week. The bill would impact the operation of asbestos settlement trusts established to facilitate the implementation of chapter 11 plans of reorganization that comply with the requirements of Section 524(g). The asbestos settlement trusts named hereafter, represented by our firm, submit the following in support of their request that the bill be defeated: the Owens Corning/Fibreboard Asbestos Personal Injury Trust; the United States Gypsum Asbestos Personal Injury Settlement Trust; the Babcock & Wilcox Company Asbestos PI Trust; and the Federal-Mogul Asbestos Personal Injury Trust.

I. Function of the Trusts

The single most positive development in the management of corporate asbestos liability and the payment of asbestos disease victims in the United States has been the utilization of settlement trusts in conjunction with the reorganization and discharge provisions of the Bankruptcy Code, specifically Section 524(g). This development has allowed any number of major American employers – including Owens Corning, United States Gypsum, Babcock & Wilcox, and Federal-Mogul – to establish and fund trusts for the benefit of asbestos disease victims, in exchange for a court-ordered discharge from any further liability for both present and future asbestos-related claims. The result has been not only the continuing employment of the tens of thousands of Americans employed by these companies as well as the continuing operation of them as solvent businesses, but also the free-market establishment of a privately funded, cost-efficient, expedited process for compensating American workers and their families, victimized by the disabling diseases – often fatal – that are caused by exposure to asbestos.

Contrary to a common misconception, asbestos settlement trusts are not created or established under the Bankruptcy Code. Asbestos settlement trusts, just like the reorganized companies that emerge from bankruptcy, are legal entities organized and regulated under state law,[1] and are governed by a well-established body of state law and procedure. The trusts are funded entirely by contributions from the reorganized business. No government funding is provided to them.

Moreover, the trusts can find themselves named as defendants in personal injury actions filed in the tort system. Notwithstanding the fact that the trusts' purpose is to pay qualified asbestos claims and treat the victims of exposure fairly, equitably and reasonably, the trusts' governing documents provide that a victim who is not satisfied with the outcome of non-binding arbitration with a trust retains the right to institute a lawsuit in the tort system against the trust in the victim's jurisdiction.

II. Historical Background

It is important to understand Section 524(g) in its historical context. The first asbestos trust was established through the Johns Manville Corporation reorganization in the 1980s. Manville filed for chapter 11 bankruptcy protection because of its overwhelming obligations for asbestos claims in the tort system. It needed to find a way to liquidate present and future claims, and to determine how much of the company's assets needed to be reserved to pay the asbestos-claimant constituency. A channeling injunction ultimately directed all asbestos-related claims to the Manville Trust, which assumed the liabilities of the debtor and was funded, in part, by stock of the reorganized company. Manville's stock turned out to be unmarketable, however, because of concerns in the market that, should the trust run out of funds, the channeling injunction could be successfully challenged by future claimants for a lack of "due process," and Manville therefore would again be subject to asbestos claims, and would again be insolvent.

Congress responded to that concern by enacting Section 524(g) of the Bankruptcy Code, which allows for a channeling injunction to issue and be enforceable against the holders of future claims, so long as certain requirements are met, including (i) the appointment of a representative to protect the interests of holders of future claims, and (ii) the channeling of all asbestos claims to a trust, which must operate in a manner that provides reasonable assurance that similarly situated present and future claims will be treated in substantially the same manner. There is no requirement that the trust operate either for the benefit of solvent third-party defendants in the tort system or for the benefit of other trusts. The trusts operate solely for the benefit of their beneficiaries, the holders of asbestos claims against the trusts.

III. The Bill Does Not Benefit the Trusts' Beneficiaries

The bill does not, as its proponents claim, protect either the trusts or their beneficiaries. Rather, the bill merely changes the rules in the tort system so as to impose increased costs on the trusts' claimants. The litigation advantage that this bill provides to solvent asbestos defendants is its only practical purpose. While the trusts recognize the legislative attempt to address the direct costs to the trusts incurred by the bill, the trusts believe that the bill will unduly and unnecessarily increase the trusts' administrative burdens and will inevitably lead to higher non-reimbursable costs and delays in the

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1 *See, e.g.*, United States Gypsum Asbestos Personal Injury Settlement Trust Agreement §1.1 (noting that the trust is created as a statutory trust under Chapter 38 of title 12 of the Delaware Code and referencing the filing of a Certificate of Trust with the Delaware Secretary of State). First Amended Chapter 11 Plan of Reorganization of USG Corporation and Its Debtor Subsidiaries, *In Re: USG Corporation*, Case No. 01-2094 (Bankr. D.Del. May 5, 2006), Dkt. No. 10810 (Exhibit I.A.18).

processing of claims and payment to holders of asbestos claims. Such a bill does not protect the trusts or their beneficiaries; it burdens them.

Moreover, Section 8(A)'s requirement that the Trusts make available on the court's public docket the names of each claimant, together with the other required information will inevitably lead to the disclosure of confidential medical and health information for thousands of victims who are not plaintiffs in any litigation.

IV. The Bill is Not Necessary; Information is Available Already

The plan documents in asbestos-related bankruptcy cases require that the trustees of the asbestos settlement trusts submit annual reports and account to the Bankruptcy Court that confirmed the plan. These reporting requirements are not mandated by Section 524(g) or any other provision of the Bankruptcy Code, but are included in the plan documents to ensure that the trusts remain subject to the continuing jurisdiction and supervision of the Bankruptcy Court, and thus are qualified settlement funds for tax purposes.[2]

Accordingly, substantial information regarding the trusts is already published. The annual reports which the trusts file with their respective Bankruptcy Courts are available to the public through the docket in the underlying bankruptcy case. The GAO found that each of the 47 asbestos trust annual financial reports for 2009 and 2010 that it reviewed included not only the total amount of payments made by the trusts, but also, in most cases, the total number of claims received and paid. The annual reports typically include audited financial statements and summaries of claim disposition. The summaries include: (i) the number of claims and dollar amounts paid; (ii) a breakout between malignant claims and non-malignant claims; and (iii) the trust's current payment percentage. Moreover, the trusts' websites not only contain their court-approved Trust Distribution Procedures, which disclose the scheduled values paid by disease category, but also contain in most cases an identification of the products and sites that they recognize as giving rise to bona-fide exposure evidence in support of claims against that trust. Thus, solvent defendants who obtain a work history from a plaintiff can easily use this information to determine whether that plaintiff would have a trust claim and, if so, its approximate value.

The trust documents approved by the District and Bankruptcy Courts for use by the asbestos trusts expressly provide that information about claims must be treated as confidential and not be released unless either: (i) the claimant consents or (ii) the trust is served with a valid subpoena. Such a confidentiality provision is not unusual; it mirrors the practice that is followed by solvent defendants in the tort system with regard to their own settlements and settlement negotiations. In any case, the GAO found in its most recent report that litigants in the tort system can readily obtain information from the trusts regarding claimants, such as their exposure to a particular company's asbestos-containing products, pursuant to a court-issued subpoena. Moreover, defendants can routinely obtain such information directly from the claimants themselves in discovery.

The trustees of the asbestos settlement trusts, each of whose appointments have been approved by a Bankruptcy Court, are fiduciaries who must at all times manage the trusts and their assets consistent with the purposes of the trust they serve, solely in the best interest of its beneficiaries. It is their responsibility to ensure that funds are paid only to legitimate beneficiaries. Each trust pays only for its several share of liability to its claimants. The amount that each trust pays reflects the fact that most claimants will have claims against a number of other tortfeasors – both other trusts and solvent

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[2] *See* Treas. Reg. §1.468B-1 (1993).

defendants. And because the vast bulk of asbestos claims are settled, rather than tried to verdict, the total amount to which a claimant is entitled is never fixed.[3] Thus, even if each trust or solvent defendant in the tort system knew the settlements paid by other trusts or solvent defendants, without a trial and verdict it simply is not possible to establish that a claimant has obtained a full recovery of his damages.

V. Trusts and its Beneficiaries Would Bear the Ultimate Economic Burden Associated with Quarterly Reports and Responses to Requests

Under Section 2 of the Act, a new Section 8(A) would be added to Section 524(g) of the Bankruptcy Code, which would require asbestos settlement trusts established under Section 524(g) of the Bankruptcy Code to publicly report certain information at the trusts' expense.

Section 8(A) would require that each trust file with the bankruptcy court, not later than 60 days after the end of each quarter, a public report that "...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...." A trust could not provide such a report by providing only information taken from the claim form or pre-set data fields as informed judgment (as opposed to simple electronic copying) would be required. Neither "exposure history" nor the "basis for payment" appears in pre-set data fields.

With respect to exposure, different trusts require different exposure details to be provided on the face of the claim form, and we are aware of no trust that requires a complete asbestos exposure history in order to qualify a claim for payment, since they are paying just a "several share" of the claimant's damages. In many cases, the relevant exposure information can only be gleaned from a review of the supporting documents submitted with the claim form. In some cases, the relevant exposure field may simply contain the words "See Attached." In order to comply with Section 8(A), the trusts would need to report exposure history based on both the face of the claim form and the supporting and supplemental documentation submitted with the claim form, and the burden on the trusts would be quite significant. An experienced claims reviewer would need to prepare a special analysis of the exposure history for submission with the report for each specific claim, and we estimate it would take, on average, no less than 15 minutes to prepare such an analysis.[4]

On the payment of claims issue, an experienced claims manager would need to prepare a statement as to the basis for payments on a claim-by-claim basis, because preparing a narrative for the basis for payment is not part of the normal claims processing system. We estimate it would take approximately 30 minutes for experienced management to prepare such a statement for each claimant assuming both the exposure and the medical basis for the payment is to be described, which is what the Act appears to contemplate. Assuming a trust received 10,000 claims per quarter on average and paid 5,000 claims per quarter on average, the preparation of this type of narrative and the preparation of the exposure reports described in the prior paragraph would necessitate experienced managers and claims reviewers spending an aggregate of 20,000 hours per year on these aspects of a trust's compliance with

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[3] As Judge Fitzgerald noted in the *Bondex* case, the value of a claim is not "fixed," other than by a verdict at trial that has become final and non-appealable. *See* Hearing Transcript at 26, *In re Specialty Prods. Holding Corp.*, No. 10-11780 (Bankr. D. Del. Dec. 13, 2010) ("[H]ow has the amount of the claim ever been fixed so that you could possibly know that the plaintiff has recovered a full share if it's pursuant to a settlement?").

[4] The time estimates contained in this letter are based on discussions with the managers of a facility that processes trust claims.

the Act. Under the provisions of the Act, the trusts would bear the ultimate economic burden associated with preparing these quarterly reports.

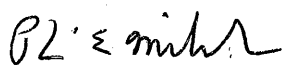
The Act would also add a new Section 8(B) to Section 524(g) of the Bankruptcy Code. The language of proposed Section 8(B) is so broad that we are unable to provide any estimate as to the cost and time associated with responding to requests under the provision. Clearly, each response would be formulated on a request-by-request basis and on a claimant-by-claimant basis. Section 8(B) provides that if any party to any action in law or equity concerning liability for asbestos exposure makes a written request to a trust, the trust must "... provide in a timely manner any information related to payment from, and demands for payment from, such trust...." This broadly drafted provision could arguably require a trust to provide information regarding every claim that it has ever received to multiple parties, with each request being unique in some manner, an unimaginable burden. This is especially likely where the requesting party is confronted with the issue of its own insolvency and requests the information in an effort to eliminate or minimize the amount of its own alleged liability. The preparation of such reports would necessitate substantial due diligence, and the issue of "reasonable cost" would surely become the subject of time-consuming material disputes, over and over again.[5]

VI. Conclusion

Rather than protecting the trusts and the victims of asbestos exposure, the bill burdens the victims with a loss of confidentiality and burdens the trusts with additional and unnecessary administrative obligations.

Accordingly, our trust clients respectfully request that the House of Representatives defeat the bill.

Sincerely,



Philip E. Milch

PEM/mk

cc: The Honorable Robert Goodlatte, Chair, House Judiciary Committee
The Honorable John Conyers, Ranking Member, House Judiciary Committee

[5] Section 8(B) provides that a trust may request payment for any "reasonable costs" incurred by the trust in complying with a Section 8(B) information request.