

On Wednesday, February 4, 2015, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Judiciary Committee held hearings on [H.R. 526, known as the Furthering Asbestos Claim Transparency \(FACT\) Act of 2015](#). Introduced in the House by Representative Blake Farenthold (R - Texas), Vice-Chairman of the Subcommittee, H.R. 526 would amend §524(g) of the Bankruptcy Code to require asbestos trusts created in chapter 11 reorganization cases to file quarterly reports with the bankruptcy court. The bill requires that the reports, which would be made available on the court's public docket, include not only the names and exposure histories of trust claimants, but also the amounts paid and the basis for making payments to claimants. In addition, H.R. 526 requires asbestos trusts to provide any information related to payments or demands for payment from the trust to any party to an asbestos liability lawsuit, provided the party makes the request in writing and pays the reasonable costs incurred by the trust for providing the information. The bill excludes confidential medical records and full social security numbers from disclosure, and provides that disclosure to parties to asbestos litigation may be subject to appropriate protective orders.

The hearing on H.R. 526 opened with preliminary remarks by Tom Marino (R – Pennsylvania), the new Subcommittee Chairman. Representative Marino spoke in favor of the bill, of which he is a co-sponsor. Then Representative Henry Johnson (D – Georgia) yielded to John Conyers (D – Michigan), who asked the families of asbestos victims present in the hearing room to stand. Representative Conyers spoke against the bill, noting that even though proponents claim that the bill will help asbestos victims, victims vigorously oppose the proposed legislation. Representative Farenthold, the bill's sponsor, spoke next, stating that his bill is designed to protect future asbestos victims, by preserving the limited resources in the asbestos trusts from being depleted by double dipping and fraud. He noted that the bill was simple and its goal is to get at the facts. Finally, Representative Johnson spoke in opposition to the bill. Calling it a "Trojan horse" piece of legislation, he criticized Republicans for not inviting any victims or their family members to testify before the Subcommittee. Chairman Marino briefly responded to Representative Johnson's comments, noting that while the Democrats, as the minority party in the House, could invite one witness to testify before the Subcommittee, they chose a plaintiff's attorney, not a victim or a victim's family member, to testify.

After a brief recess, four witnesses testified before the Subcommittee. Elihu Inselbuch, a member of the firm of Caplin & Drysdale, testified first and in opposition to H.R. 526. Mr. Inselbuch, who has served as counsel to a number of asbestos Trust Advisory Committees, noted that while the Subcommittee had been led to believe that fraud impairs the management of the asbestos trusts no evidence of fraud or double dipping exists. Nicholas Vari, a partner with the law firm of K&L Gates LLP, testified in favor of the FACT Act. Mr. Vari, who has represented defendants, such as Crane Co., in asbestos litigation, said that the asbestos trusts work in a vacuum. He said that the proposed legislation is not about "good guys and bad guys" but about making information available. Marc Scarcella, an economist and principal in Bates White Economic Consulting, expressed his concern about

what the rapid depletion of trust assets meant for future victims. Noting that 23 asbestos trusts pay less today than they did in 2008, Mr. Scarcella noted that transparency uncovers inconsistent, specious, and fraudulent claims, which redound to the benefit of future claimants. Finally, Lester Brickman, the Benjamin N. Cardozo Distinguished Professor of Law at Yeshiva University, testified in favor of the FACT Act. Professor Brickman testified that fraud was rampant in a system manipulated by plaintiffs' attorneys.

The nature of questions asked by Subcommittee members broke down along party lines. Republicans focused on the need for transparency to avoid double dipping and fraud so as to preserve asbestos trust assets for future claimants. Subcommittee Chairman Marino commented, when questioning Mr. Inselbuch, why there was a problem with transparency if there is indeed no fraud in the system. Citing to the tactics of asbestos claimants' lawyers decried in an order by Judge George Hodges in the chapter 11 case of *In re Garlock Sealing Technologies, LLC*, Republicans on the Subcommittee expressed concern that the lack of transparency in the asbestos trust system creates an environment ripe for fraud. Democrats, on the other hand, asked whom the proposed legislation benefits, noting that neither asbestos victims nor the asbestos trusts support the FACT Act. Pointing to the GAO's study of the administration of asbestos trusts, which reported that trust officials that had conducted audits of asbestos trusts had found no evidence of fraud, Democrats asked whether H.R. 526 was a solution in search of a problem. Democratic Subcommittee members also raised concerns about victim privacy, and asked whether witnesses advocating for greater transparency, such as Mr. Vari, supported transparency with regard to settlements entered between asbestos victims and asbestos firms.

The language of H.R. 526 is identical to that of H.R. 982, which Representative Farenthold introduced in the House in March of 2013. Democrats on the Judiciary Committee at that time also opposed passage of H.R. 982, contending it not only was an assault on the privacy interests of asbestos victims but also was "based on the false assertion that there is endemic fraud in the asbestos trust system." While the House of Representatives passed H.R. 982 by a vote of 221 to 199, the bill stalled in the Senate, never making it out of the Senate Judiciary Committee. With Republicans now in control of the Senate, is this the year that Congress will pass the FACT Act?

Copies of the witnesses' written statements may be found at the following link: <http://judiciary.house.gov/index.cfm/hearings?ID=DCC41737-0D2C-487A-913C-5580F5686BB4>

For the GAO Report ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS, click on the following link: <http://gao.gov/products/GAO-11-819>