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FACTS ABOUT THE “FACT ACT”– AN ANTI-VICTIM ASBESTOS BILL

Asbestos is a lethal toxin and it has not been banned in the United States. Companies still use it, workers are still exposed to it, and at least 3,000 Americans still die from asbestos-related cancers every year¹ (although some experts put the death toll as high as 10,000).²

Beginning in the 1930's, the asbestos industry engaged in a cover-up of the lethal effects of asbestos that went on for decades.³ Companies still refuse to make public where asbestos is present, where it was used and where it is imported. They still insist on complete confidentiality when settling lawsuits.

In 1994, Congress passed special legislation that allowed asbestos companies to set up trusts to compensate asbestos victims and, at the same time, reorganize under the bankruptcy laws. This protection has allowed most companies seeking bankruptcy protection to remain operating and economically healthy.

Trusts are settlement vehicles. They are devices used to settle claims for which companies have already conceded liability.⁴ Congress is now considering the Furthering Asbestos Claim Transparency (FACT) Act, an industry-backed bill that would make it more difficult for victims of asbestos-related cancers and diseases to receive needed compensation from these trusts.⁵ This legislation is strongly opposed by asbestos victims, victims' groups, and consumer rights organizations. Here is why.

The FACT Act would force asbestos trusts to disclose victims' personal information online, leaving victims vulnerable to identity thieves, con artists and criminals, who will scour these sites for information. Yet the bill has no disclosure requirements for asbestos companies, which continue to conceal information about their products.

- The FACT Act would require asbestos trusts to disclose on their public docket private information about asbestos victims' illnesses and compensation with only two limitations: full social security numbers and “confidential” medical records would not be listed. However, other “sensitive personal information would be irretrievably released to the public domain,”⁶ including full names, addresses, dates of birth, the last four digits of their social security number, information about their children, and finances (including compensation provided to families of dying victims).“

- The information to be disclosed by the FACT Act is the very type of information the Federal Trade Commission advises people to “never” publicly disclose in order to keep their identities safe.⁷
- While the legislation protects “confidential medical records,” the term is undefined and is left entirely to the discretion of each individual trust. Therefore, it is expected that some personal medical information would be disclosed including information that health care providers are prohibited from releasing under HIPAA privacy laws.⁸
- As explained in a *New York Times* editorial, in contrast to its treatment of victim funds, the FACT Act would put “virtually no burdens on asbestos companies, like disclosing the settlements they have reached with plaintiffs or requiring them to reveal where their products were used and when, so that workers know which companies or trusts might be liable for their injuries.”⁹

The FACT Act would obstruct state rules and significantly delay or deny justice to asbestos victims.

- The FACT Act will allow any defendant in any asbestos lawsuit the right to demand any information about any asbestos victim from any asbestos trust at any time for any reason whether or not this information is relevant in a lawsuit, allowing companies to engage in endless fishing expeditions for irrelevant information.
- To comply with this Act, trust staff would have to be diverted “from processing claims while they respond to limitless demands for information and prepare required reports.”¹⁰ This will greatly slow down or stop the process by which the trusts are able to review and pay legitimate claims. Indeed, since relevant information is already available to defendants through the discovery process, this provision has no real purpose other than to delay the payment of claims.
- Terminally ill victims cannot tolerate this kind of delay. Mesothelioma, a lethal cancer only caused by asbestos exposure, causes death between 4 to 18 months after diagnosis.¹¹ As a result, this bill ensures that gravely ill victims will die before receiving compensation.¹²
- By allowing defendants to do an end-run around state discovery rules that place limits on information-gathering by parties, this bill represents “a heavy-handed piece of federal interference with the states’ legal systems.”¹³

The FACT Act diverts the limited trust funds from asbestos victims to unnecessary administration and reporting.

- Four major trusts have told Congress that in order to comply with this Act’s substantial reporting requirements, “experienced managers and claim reviewers” would have to spend “an aggregate of 20,000 hours per year... [or] the equivalent of ten new full-time employees.” Yet even that is a conservative estimate since, “the language requiring trusts

to provide information on historical claims is so broad as to make the impact potentially vast and yet unquantifiable.¹⁴

- Asbestos trusts are already severely underfunded. The RAND Institute for Civil Justice found, “Most trusts do not have sufficient funds to pay every claim in full and ... the median of the payment percentage is 25 percent.”¹⁵ Clearly, “[i]t is wasteful to use the already limited monies available in trusts to pay claims, to provide information already available through the state court discovery system.”¹⁶
- The Act provides that defendants will reimburse trusts for costs dealing with some specific requests. However, there is no funding for the more “significant overhead and other administrative costs to meet the requirements of the FACT Act.”¹⁷

The FACT Act would unduly harm veterans by delaying their claims and exposing them to privacy risks.

- Veterans disproportionately suffer from asbestos related illnesses and cancers. While veterans make up only 8 percent of our population, they represent 30 percent of all mesothelioma victims.¹⁸
- According to the Veterans Administration, “veterans who served in any of the following occupations may have been exposed to asbestos: mining, milling, shipyard work, insulation work, demolition of old buildings, carpentry and construction, manufacturing and installation of products such as flooring and roofing.”¹⁹

FACT Act proponents say the law is needed to prevent two problems - widespread fraud and abuse in the trust system, and “double-dipping” by victims. Both arguments are baseless.

- Trusts have strict criteria for paying claims and are regularly audited. In fact, they routinely reject deficient claims.²⁰ When the U.S. Government Accountability Office studied trusts in 2011, it did not identify one fraudulent claim.²¹
- As explained by Elihu Inselbuch of Caplin & Drysdale, a tax law firm with expertise in asbestos bankruptcy trusts, “Because the injured victim was typically exposed to multiple asbestos products at multiple job sites over a period of many years, he or she must file different claims, with different trusts, with different forms that request different information. The fact that the exposure information submitted to one trust differs from the exposure information submitted to another does not mean it is ‘inconsistent’ – and certainly not specious or fraudulent.”²²
- Far from engaging in “fraud” or “double dipping,” a victim who files a claim with each entity responsible for making him or her sick is exercising the same legal right as any injured victim, i.e. trying to recover from any company that caused harmed. In fact, each trust is responsible for and pays for only its own share of the harm.²³ And as noted above, each trust usually can pay only pennies on the dollar.

NOTES

¹ Center for Diseases Control, “Table 37: Deaths from selected occupational diseases among persons aged 15 and over: United States, selected years 1980–2010”; <http://www.cdc.gov/nchs/data/hus/2013/037.pdf>

² *Asbestos: Think Again: America’s Asbestos Epidemic*, ENVIRONMENTAL WORKING GROUP, <http://bit.ly/1Dd9NEG>

³ See, Paul Brodeur, *Outrageous Misconduct; The Asbestos Industry on Trial*, Pantheon Books, New York NY, 1985.

⁴ See, 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) (Mr. Inselbuch’s Responses to Questions for the Record) [hereinafter Inselbuch Responses];

http://www.americanbar.org/content/dam/aba/administrative/tips/asbestos_tf/InselbuchResponsestoQuestionsfortheRecordFACTAct.authcheckdam.pdf

⁵ The Furthering Asbestos Claims Transparency Act (FACT Act). In the 114th Congress (2015-2016), the FACT Act is: H.R. 526, introduced on January 26, 2015 by Rep. Blake Farenthold (R-TX), and S. 357, introduced on February 4, 2015 by Senator Jeff Flake (R-AZ).

⁶ Victims’ personal information would be made part of the public bankruptcy docket and easily accessible online. U.S. House. Committee on Judiciary, Report Accompanying H.R. 982, Furthering Asbestos Claim Transparency (FACT) Act of 2013, H.R. REP. NO. 113-254 (2014) (Dissenting Views)

<http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/HR982Dissent.pdf>. See also, Susan Vento, “Asbestos Bill Invades the Privacy of Victims and Veterans.” *Roll Call*, June 3, 2013.

http://www.rollcall.com/news/asbestos_bill_invades_the_privacy_of_victims_and_veterans_commentary-225262-1.html

⁷ See, e.g., Federal Trade Commission, Consumer Information, “How to Keep Your Personal Information Secure,”

<http://www.consumer.ftc.gov/articles/0272-how-keep-your-personal-information-secure#offline>; Data Privacy:

Taking It Personally <http://www.consumer.ftc.gov/blog/data-privacy-taking-it-personally>

⁸ See, “Understanding Health Information Privacy,” Department of Health and Human Services.

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/> In the last Congress, the House Judiciary Committee refused to amend the bill to “simply ensure[] that trusts comply with the HIPAA Privacy Rule.” U.S. House. Committee on Judiciary, Report Accompanying H.R. 982, Furthering Asbestos Claim Transparency (FACT) Act of 2013, H.R. REP. NO. 113-254 (2014) (Dissenting Views)

<http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/HR982Dissent.pdf>

⁹ “One-Sided Bill on Asbestos Injuries,” *New York Times* (June 19, 2013).

http://www.nytimes.com/2013/06/20/opinion/one-sided-bill-on-asbestos-injuries.html?_r=1

¹⁰ See, Inselbuch Responses, *supra* note 4.

¹¹ *Stages of Mesothelioma and Outcomes*, Mesothelioma Applied Research Foundation, 2015.

http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.8055915/k.8443/Stages_of_Mesothelioma_Mesothelioma.html

¹² Inselbuch Responses, *supra* note 4.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Lloyd Dixon, Geoffrey McGovern, Amy Coombe, “Asbestos Bankruptcy Trusts, An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts,” Rand Institute for Civil Justice (2010)

http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.sum.pdf

¹⁶ Inselbuch Responses, *supra* note 4.

¹⁷ *Ibid.*

¹⁸ “Asbestos and the Military, History, Exposure & Assistance,” Military.com.,

<http://www.military.com/benefits/veteran-benefits/asbestos-and-the-military-history-exposure-assistance.html>

¹⁹ “Asbestos,” United States Veterans Administration. <http://www.publichealth.va.gov/exposures/asbestos/>

²⁰ Inselbuch Responses, *supra* note 4.

²¹ *Asbestos Injury Compensation: The Role And Administration Of Asbestos Trusts*, United States Government Accountability Office, Report To The Chairman, Committee On The Judiciary, House Of Representatives (2011).

²² Inselbuch Responses, *supra* note 4.

²³ *Ibid.*