

NEWS & DEVELOPMENTS

Get Your "FACTS" Straight

The U.S. House of Representatives Subcommittee on Regulatory Reform, Commercial and Antitrust Law is considering legislation that for the first time would require asbestos bankruptcy trusts to submit to bankruptcy courts quarterly reports containing information about claimants to the trust. [Testimony](#) in support of and in opposition to the bill was heard on March 13, 2013.

The Furthering Asbestos Claim Transparency Act of 2013 (FACT), H.R. 982, will obligate each of the current approximately 60 bankruptcy trusts to file quarterly reports that “describe[] 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.” *See* Furthering Asbestos Claim Transparency Act of 2013, H.R. 982, 113th Cong. (2013). If passed, these quarterly reports will be made available to the public on the court’s docket. *Id.*

Of interest to asbestos state court litigants, this proposed legislation will also obligate trusts to timely disclose to parties in cases involving asbestos exposure “any information related to payment from, and demands for payment from, such trust.” *Id.*

While the purpose of this legislation is aimed at curbing fraud and preventing claimants from recovering from multiple bankrupt trusts for the same exposure and injury, its effects are certain to be more widespread. Peggy L. Abelman, a retired state court jurist who handled an asbestos docket in Delaware, which has already implemented a similar state law that requires plaintiffs to disclose claim materials as part of the discovery process, testified about the need for reform in this area:

Absent full disclosure, the defendants cannot be informed of the full extent of an individual’s exposure. They are therefore often led to believe – erroneously – that their products were far more responsible for the plaintiff’s disease than what may have been the case, because they have no way of knowing the substance of an individual plaintiff’s claims.

Proponents also contend that this bill is needed now more than ever, particularly as asbestos plaintiffs shift their focus from bankrupt product manufacturers to solvent product and premises owner defendants, such as chemical manufacturers. As Marc Scarcella, an economic consultant of Bates White, LLC, testified:

The number of confirmed asbestos bankruptcy trusts and level of trust claim payments has increased significantly over the last five years, creating an alternative compensation system to the civil tort system where solvent defendants continue to indemnify claimants in full. Asbestos

bankruptcy trust transparency is not about determining how much money a victim of an asbestos-related injury should receive, but rather determining the appropriate amount that each culpable party should pay, including the bankruptcy trusts.

Opponents of the bill are concerned that these new reporting requirements will delay the processing of bankruptcy claims and delay the compensation of claimants. Elihu Inselbuch, a member of Caplin & Drysdale, expressed the additional concern that “the bill is intended to help defendants skirt state laws regarding rules of discovery and joint and several liability.” Inselbuch further argued that because claimants typically only receive from the bankruptcy trusts a small percentage of the value of their injuries, the current system leaves little concern for fraudulent, multiple recoveries for the same injury.

Attorneys that litigate products and premises liability suits involving asbestos exposure should keep abreast of this proposed legislation. Should this legislation pass through Congress, those defending cases in states that do not currently mandate bankruptcy trust disclosures as part of the discovery process will have access to this new and valuable litigation tool. Less certain is whether the implementation of this law will lead to the discovery of any fraud in the bankruptcy claim process. Todd Brown, a Professor at the State University of New York, Buffalo Law School opined that until such disclosure is made, neither party “has access to sufficient information across trusts to reach the extreme conclusions that are commonly advanced—that fraud is nonexistent, on the one hand, or rampant, on the other.”

Keywords: litigation, products liability, asbestos, transparency, bankruptcy trust, FACT 2013, federal legislation

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