

Responses to Written Questions of Senator Charles Grassley
“The Need for Transparency in the Asbestos Trust”
U.S. Senate Committee on the Judiciary
By: Judge Peggy L. Ableman

Question 1: Please describe the process for filing and obtaining compensation from a trust, versus a traditional tort in state court. What must be provide in the trust system, etc.? How quickly do trusts process these claims?

Response to Question 1:

The process for obtaining compensation from a bankruptcy trust is straightforward and effortless. In order to qualify for a settlement payment from a bankruptcy trust most Trust Distribution Procedures (“TDP’s”) require a claimant to establish evidence of (1) an asbestos related medical condition; and (2) history of exposure to the debtors’ asbestos-containing products.

Exposure requirements can be met simply by submitting an affidavit, deposition testimony, or “other credible evidence” demonstrating exposure to the asbestos product during the required time period and for the minimum duration of time. These requirements are similar to what is required for a tort case to proceed but they can be legitimately and easily circumvented if the claimant’s history coincides with an approved site or occupation list.

When a claim is based on an asbestos claimant having worked in a listed occupation within a listed industry, or at an approved job site during the proper time period, no proof of actual exposure is necessary. The claimant does not need to verify his occupation nor even identify how he was exposed. Unlike what is required in the tort case, exposure to the product is presumed. Similarly, no exposure affidavit is needed if a claimant was employed at the job site listed on the trust’s approved site list. And, while the claim form must be signed by the claimant, or his lawyer, or a fiduciary of the estate if the claimant is deceased, the forms are not affidavits and do not meet federal or state evidentiary oath requirements. Some even allow an individual to sign off “upon information and belief.”

Furthermore, asbestos trusts do not take into consideration exposures to any other asbestos-containing products when paying a claimant, nor is the information submitted in a claim form to one trust shared across other trusts. Exposure to products of solvent companies are also not considered.

Trusts process these claims immediately with payment made within days. For example, when the Manville Trust was just first established in November of 1988, there existed a hefty backlog of claims. As a result, the trust contained a provision for “Exigent Health and Extreme Hardship Claims” that enabled a dying claimant to move up in the payment order. The General Counsel to the Claims Resolute Management Corporation, a 100% subsidiary of the Manville Trust, recently testified: “...now that claims are resolved so quickly, there’s really not a purpose to this anymore. And I don’t think anybody files exigent health or hardship applications

anymore.”¹ Simply stated, if a claimant meets a trusts’ rather lax criteria for payment, the claimant will promptly receive an offer of settlement and payment upon acceptance within a few days.

In a tort case, the rules of procedure, the process of discovery, and the rules of evidence place a premium on fairness and quality over efficiency. Exposure is never presumed and identification of specific products of a defendant is required in contrast to many bankruptcy trusts that do not even require proof of exposure to a particular product. And, most importantly, none of the trusts require the standard of proof that is used by a court in a civil trial.

Question 2: In your opinion, is the level of preparation and casework involved in filing a trust claim tantamount to the work (and risk) involved in traditional tort litigation?

Response to Question 2: Asbestos trusts are designed to settle claims quickly and without any effort expended to verify the legitimacy or validity of a claim. The *Wall Street Journal* reported, “[u]nlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require “victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.”² If a claimant meets a trust’s criteria for payment – criteria which are less rigorous than the tort system- the claimant will receive payment³. SUNY Buffalo Law Professor Todd Brown has noted that “it is possible that some claims may be approved even if the evidence supporting exposure may not survive early dispositive motions in the relevant state court.”⁴

Indeed, the trial lawyers’ own advertisements for seeking additional clients tout just how simple the trust claiming process can be. One such ad contains the following assurance:

A traditional mesothelioma lawsuit takes much longer than an asbestos bankruptcy trust claim to settle. Unlike filing a lawsuit, a bankruptcy claim filed by an experienced asbestos attorney is a simpler process that takes much less time and is less stressful. You do not have to give testimony, give a deposition or go on trial.”⁵

¹ Cummings v. General Electric Co., No. 13-CI-006374 (Jeff. Cir. Court, Kentucky) Deposition of Jared Garlick, Dec. 14, 2015, Transcript at pp. 35-36

² Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall Street Journal, March 11, 2013 at A1 available at http://www.wsj.com/articles/SB100014241278873238643045783_8611662911912

³ U.S. Gov’t. Accountability Office, GAO-11-819, Asbestos

⁴ S. Todd Brown, Bankruptcy Trusts, Transparency, and the Future of Asbestos Compensation, 23 Widener L.J. 299, 317 (2013)

⁵ Law Offices, Clapper, Patti, Schweizer & Mason, Internet Advertisement

Attached as **Exhibit A** to this response are samples of ads that solicit clients by luring them with similar promises of fast and easy compensation.⁶

In essence, the trusts provide an almost automatic guarantee of settlements for asbestos claimants in contrast to the rigorous and exacting proof required in litigation. The payout is also promptly tendered by the trusts whereas litigation is generally a far more protracted process. Then too, the risk associated with a jury trial does not exist in the trust claiming system. Along with the potential for significant recovery as a result of a trial, there is always the possibility of a defense verdict.

⁶ *Injury Compensation: The Role and Administration of Asbestos Trust 21 (September 2011)*; Adrienna Barmlett Kvello, *The Best of Times and the Worst of Times: How Borg, Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 *The Advoc. (Tex)* 80, 80 (2007) (“it is much easier to collect against a bankruptcy trust than a solvent defendant.”)

EXHIBIT A

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Access Trust Funds

\$30 Billion Set Aside for Victims of Mesothelioma

Companies who had or anticipated claims brought against them by victims of mesothelioma put aside funds to protect their financial stability. As a result, significant pools of money were established for victims, allowing them access to a portion of those funds as compensation. Accessing trusts is done by filing a claim.

Claim vs. Lawsuit

Filing an asbestos claim is similar to filing an insurance claim and less like a lawsuit. Typically, a trial and court appearances are not part of the claims process. Because the trusts do not require you to provide live testimony, there is no reason for you to travel to a court or even to our offices. All paperwork can be completed in your own home, through us traveling to you and then continuing research on our own to help build your case. We still make house calls.

Focused On Your Needs

We'll help you understand your claim and guide you through the filing process. By filing your claim through the Mesothelioma Claims Center, you can quickly and easily get the money you deserve.

We've Been There

For 30 Years, we've helped victims of mesothelioma gain equal representation and maximum claim settlements. We've helped over 2,000 people get the money they deserve.

Easier Than It May Seem

Your individual situation may merit an actual lawsuit. However, it doesn't have to be that complicated. Trusts have been set up to benefit victims of mesothelioma in such a way that lawsuits and court appearances aren't needed. Contact us today and you'll see how easy it can be to get the compensation you deserve.

Why Mesothelioma Claims Center?

We understand the process for evaluating your claim and making sure you get the appropriate share of \$30 billion in asbestos trusts.

That's money set aside for victims of mesothelioma like you, regardless of whether your employer was the government, is now bankrupt, or even still in business.

Put us to work on your claim now.

Why not get started now? When you fill out the form above, or call, you'll receive a FREE case evaluation from an experienced paralegal who will start processing your form within 24 hours. If we think that we can move forward with your claim we will begin immediately - at no cost to you.

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How It Works

Put Our Experience to Work for You.

For 30 years, we've helped victims of mesothelioma get compensation for medical costs, lost wages and suffering.

Filing a Claim

Starting the claims process with Mesothelioma Claim Center is easy.

- Fill out the form to the right or call to speak with someone directly
- Upon receiving your request, we will contact you promptly to gather more information on your potential claim

How Mesothelioma Claims Center Can Help

- Minimize your paperwork, expense, stress, long waits and travel time
- Simplify complicated legal procedures
- Give you equal access to the justice system, regardless of income or ethnicity
- Maximize your mesothelioma or asbestos-related claim

Why Mesothelioma Claims Center?

We understand the process for evaluating your claim and making sure you get the appropriate share of **\$30 billion in asbestos trusts**.

That's money set aside for victims of mesothelioma like you, regardless of whether your employer was the government, is now bankrupt, or even still in business.

Put us to work on your claim now.

Why not get started now? When you fill out the form above, or call, you'll receive a **FREE** case evaluation from an experienced paralegal who will start processing your form within 24 hours. If we think that we can move forward with your claim we will begin immediately -- at no cost to you.

Easier Than It May Seem

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Mesothelioma Trust Funds

The enormous number of asbestos-related lawsuits that have been brought since the mid-1990s has driven many of the companies responsible for exposing workers to toxic levels of asbestos to seek bankruptcy protection.

As a condition of reorganization and reemergence from bankruptcy, the courts have required many of these companies to set up trust funds charged with providing compensation to workers and other individuals who were injured through asbestos exposure.

Asbestos and Mesothelioma

For many centuries, the fibrous mineral asbestos has been prized for its unique set of properties. Asbestos is flame proof and heat resistant; it is a poor conductor of electrical current and withstands most forms of chemical corrosion. Moreover, asbestos is lightweight but extremely strong, and very inexpensive to produce.

Until the 17th century, asbestos was more or less a novelty item, used to weave flameproof cloth. With the advent of the Industrial Revolution, however, there came a need to find insulating materials for the immense, heat-generating engines, boilers, turbines and other types of heavy machinery that drove the factories and the mills. Asbestos seemed to be the perfect solution.

Since the 1930s, medical scientists have linked occupational asbestos exposure to the development of a number of diseases including mesothelioma, a cancer that targets the membranes lining the pleural, peritoneal and pericardial cavities. When asbestos degrades, it reverts back to its original, fibrous composition. As asbestos breaks down, it creates clouds of dust laden with thousands of needle-sharp asbestos microfiliaments. When individuals inhale this dust, the microfiliaments inflame their parenchymal tissues leading to chronic changes that are precursors to mesothelioma and other asbestos-related diseases.

Asbestos Bankruptcy Trusts

There is ample evidence that the companies that used asbestos in commercial and industrial applications were well aware of its dangers as early as the 1940s. Nevertheless, they continued to put employees and consumers in harm's way. As more and more evidence emerged both of the toxic effects of asbestos and the massive information cover-up these companies engaged in, individuals who were injured by asbestos exposure began filing litigation against these companies.

Asbestos litigation created such huge financial pressures on these companies that in 1994, the United States Congress passed an amendment to the U.S. Bankruptcy Code providing special protection to asbestos companies. The companies were allowed to file for Chapter 11 bankruptcy which is not a liquidation of assets but a reorganization of debts. As part of the reorganization process, the bankruptcy court mandated that these companies set up trust funds to compensate past and future asbestos victims. Each company must allocate at least 50 percent of its post-bankruptcy equity to the claimant fund.

By June 2010, over 71 companies had created asbestos bankruptcy trusts, responsible for paying out billions of dollars.

Mesothelioma Lawsuit Versus Mesothelioma Bankruptcy Trust Claim

An asbestos bankruptcy trust claim is not a lawsuit, although the product identification process for trusts claims and lawsuits may be the same. Claimants are required to document exposure to the products manufactured, distributed or deployed by the company represented by the trust. Such documentation can include employment records, invoices and affidavits from coworkers.

The bankruptcy trust filing process is simpler and shorter, and does not involve depositions or any form of testimony or trial. The time interval for filing a bankruptcy trust claim may also differ from the statute of limitations



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- What Is A Bankruptcy Trust
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- Libby Medical Plan Trust
- Bankruptcy Trusts List
- Covering Medical Bills

Home> Mesothelioma Law> Bankruptcy Trusts> Filing for a Claim

Filing for an Asbestos Bankruptcy Trust Claim

HOW MAKING AN ASBESTOS BANKRUPTCY CLAIM IS DIFFERENT THAN PROSECUTING A LAWSUIT

A traditional mesothelioma lawsuit takes much longer than an asbestos bankruptcy trust claim to settle. Unlike filing a lawsuit, a bankruptcy claim filed by an experienced asbestos attorney is a simpler process that takes less time and is much less stressful. You do not have to give testimony, give a deposition or go to trial.

Instead, you talk with one of our attorneys, who can then determine which asbestos products you were exposed to. Seems simple, but this is one of the most important reasons to have one of our attorneys represent and guide you. **Determining the products you were exposed to and which companies are responsible takes an expert.** We have been exclusively helping clients with this process for over three decades and are very experienced in identifying which bankrupt companies to file claims against.

Our mesothelioma attorneys are uniquely experienced in proving your claim, negotiating with asbestos trusts, and ensuring final settlements and fair payments.

While some trusts claims are settled quickly, others can take a year or longer to resolve. Depending on the degree of your illness and proof of exposure, the amounts from bankruptcy trust claims can be quite significant.

QUALIFICATIONS FOR FILING AN ASBESTOS BANKRUPTCY TRUST CLAIM

There are three main qualifications for filing a valid bankruptcy trust claim which our attorneys will determine if you are eligible:

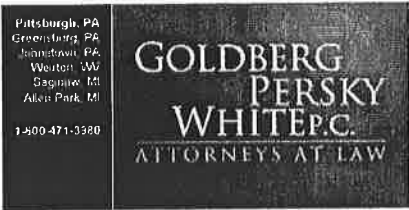
1. Statute of Limitations – even if the time has passed for bringing a mesothelioma lawsuit, you may still be eligible to file a bankruptcy trust claim. The statute of limitations varies, so contact our attorneys who can quickly determine if you qualify to file.
2. Legitimacy and degree of your illness (proved through medical records showing your diagnosis). Generally speaking, the more severe your illness is, with mesothelioma being the most severe, the higher the settlement amount of your claim.
3. Proof of exposure to the asbestos products produced, manufactured or used by the company represented by the trust.

Our asbestos attorneys will gather the evidence needed to meet these requirements. If you worked with or around the bankrupt company's asbestos containing products during the period of time when asbestos was in use, we can get documents such as employment records, affidavits, co-workers testimony, invoices and other related documents that meet the criteria required by the trusts.

If you have been diagnosed with mesothelioma or an asbestos related disease, call us today and we can help determine which trusts you may be eligible to file a claim against and collect money from.

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[site map]



Asbestos Bankruptcy Trusts

Some of the companies responsible for exposing workers to asbestos have filed for bankruptcy under Chapter 11 of the US Bankruptcy Code. This is a different kind of bankruptcy than is commonly thought of in the rest of the world; it is not a liquidation of assets where the company goes out of business, but is a reorganization of debts so that the company continues on in a modified form.

This is sometimes referred to as a reorganization bankruptcy. As required under Chapter 11, companies must submit plans outlining their reorganization to creditors and the courts; as part of this plan, most companies set up trusts to benefit asbestos victims harmed by their processes or products.

Asbestos Bankruptcy Claims

These trusts are designed to provide payments for all present and future asbestos injury claims. Payments usually equal only a small portion of their true value. Because of our knowledge and experience, GPW's asbestos attorneys are able to efficiently and effectively establish the rights of our clients to the money that has been put into asbestos trusts for victims of mesothelioma and other asbestos related diseases. We fight for every dollar owed our clients by the asbestos trusts.

We are able to so effectively process asbestos bankruptcy claims because of our specialized knowledge and dedicated staff. Many of our asbestos lawyers volunteer on the committees that help manage these trusts, so we know exactly what needs to be done to maximize the payments to our clients. Assisting our attorneys is our large, dedicated asbestos bankruptcy department of more than 10 experienced staff members. As a result of our size, we can quickly and efficiently complete and file claims against the many companies that have filed for bankruptcy.

When will my asbestos bankruptcy claims be paid?

The time it takes companies to plan, establish, and begin asbestos payouts from their trusts can be anywhere from several months to several years. While no firm can avoid these delays to payments, the hard work and experience of our dedicated asbestos attorneys and bankruptcy staff means that our clients receive their settlements as fast as possible.

Having filed over 75,000 individual bankruptcy claims with twelve different bankruptcy trusts means our staff is intimately familiar with the differing processes, requirements, and formats required by each trust. Our experience allows us to cut out delays caused by missing or incomplete information, delays not uncommon among others with less familiarity with asbestos bankruptcy trust procedures or lacking a dedicated asbestos bankruptcy department.

Questions?

If you have questions regarding asbestos bankruptcy, asbestos injuries, or bankruptcy trust payments, please contact us today.

Companies & Trusts Paying Claims

These asbestos companies and/or Bankruptcy Trusts are currently receiving and paying claims:

- Celotex, Eagle Picher, HK Porter, Babcock & Wilcox, Fibritco, Keene, Combustion Engineering, Kaiser, Harbison Walker, Hellburton, United States Gypsum, Armstrong World Industries, Fibreboard, Manville, Owens Corning Fiberglas, and National Gypsum

Trust Established

The following asbestos companies are presently "bankrupt" and Bankruptcy Trusts to pay claims have not yet been created:

- AC&S, W.R. Grace, Pittsburgh Corning Corporation, Federal Mogul, NARCO, AP Green Industries, Pfizer, Quigley, GAF, Hercules, and a few others.

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Asbestos Bankruptcy Trust Claims

The massive number of asbestos-related claims in recent decades left dozens of asbestos manufacturers and suppliers filing for bankruptcy protection. So what does that mean for the people who were injured by their toxic products? While bankruptcy filings and settlement trusts have further complicated the asbestos issue, our mesothelioma attorneys are here to guide you through the process and help you get the compensation that is rightfully yours.

Bankruptcy and settlement trusts

Most asbestos companies that file bankruptcy do so under Chapter 11. This process is different from a traditional bankruptcy, in which a company may be forced to liquidate its assets and close its doors.

Call us at (866) 606-6159 to speak with a mesothelioma paralegal

In seeking Chapter 11 bankruptcy protection, an asbestos company simply asks the court to suspend any pending or future lawsuits against the company. Meanwhile, the company reorganizes and develops a plan, which includes a bankruptcy trust, to pay asbestos claims. Contrary to popular belief, filing for bankruptcy does not allow asbestos companies to avoid compensating people who have been hurt by their products.

How bankruptcy claims are different from traditional asbestos claims

A traditional claim against a solvent asbestos manufacturer involves filing a mesothelioma lawsuit within the statute of limitations, conducting litigation, and setting a court date—a process that can take years.

A claim against a bankruptcy settlement trust, on the other hand, typically moves more quickly through the system. It does not require you to give a deposition or go through a stressful trial. A bankruptcy claim is handled through a claim process that may involve a private arbitration rather than in a public courtroom, and the standard statute of limitations does not apply. Even if it's too late to file a traditional asbestos settlement trust.


In a traditional mesothelioma lawsuit, claims are made against defendants and are litigated in the courtroom. In a bankruptcy claim, on the other hand, you file a claim with a trust that has been set up by an asbestos manufacturer for the sole purpose of compensating asbestos victims. If you were exposed to multiple asbestos products manufactured by several bankrupt companies, you may qualify for multiple trusts.

Finally, while large settlements in a traditional mesothelioma lawsuit can threaten a company's ability to stay in business, settlement trusts are set up to ensure that funds are available for future claims. In other words, the compensation you

receive from a mesothelioma settlement trust will not diminish the amount available to pay an asbestos claimant who files later.

Do you qualify for compensation from an asbestos bankruptcy trust?

If you have mesothelioma or another asbestos-related condition, you may be eligible for compensation from an existing or future bankruptcy trust. Additionally, if you were exposed to multiple asbestos products that were made by different bankrupt companies, you may be eligible to file claims against multiple, separate trusts.

 Please keep in mind that even if the statute of limitations has passed for a mesothelioma lawsuit, you still may be eligible to file a bankruptcy claim. To find out if you may be entitled to compensation from an asbestos settlement trust, contact us for a free, no-obligation consultation.



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Asbestos Bankruptcy Trusts

Asbestos litigation began in the United States during the 1970s, and by 2002 defendants paid \$49 billion in compensation to claimants. As lawsuits and expectations for future claims increased, many asbestos defendants filed for reorganization under section 524(g) of the U.S. Bankruptcy Code.

Reorganization does not mean that an asbestos defendant has run out of money, but rather that it has a large amount of asbestos liabilities. Reorganization allows the defendants to pay claims while protecting their assets. Courts have ordered many of the primary asbestos defendants who have filed for bankruptcy to set up personal injury trust funds specifically to compensate asbestos victims. These types of funds are also called mesothelioma compensation funds, or asbestos bankruptcy trusts.

To learn more about bankruptcy trusts and asbestos related lawsuits, get a copy of the Mesothelioma Center's [free informational packet](#). The packet is loaded with information about mesothelioma and other asbestos-caused diseases. [Fill out this form](#) to get your free packet.

Asbestos Lawsuits



During the past 30 years, nearly 100 companies subject to asbestos lawsuits have filed for bankruptcy. By 2011, 60 asbestos trusts had reportedly been established on behalf of companies that have filed for reorganization. Courts are expected to order the creation of additional asbestos trusts as more defendants file for reorganization.

Since creation of the first asbestos bankruptcy trust in 1988, trusts have paid out about \$17.5 billion for more than 3.3 million claims.

How to File an Asbestos Bankruptcy Trust Claim

As with lawsuits, filing an asbestos bankruptcy trust claim requires showing evidence of an asbestos related injury. Most trusts identify categories and levels of diseases that are eligible for various amounts of compensation. Similar to some state laws and courts, trusts also may require claimants to satisfy certain medical criteria to file

claims.

In addition to filing a claim form or some other written statement concerning the asbestos-related injury, claimants also may be required to provide other evidence.

Such evidence usually includes:

1. Medical documentation (e.g., pathology reports) showing that the claimant has been diagnosed with an asbestos-related disease.
2. Medical documentation describing to what extent asbestos contributed to the claimant's disease.
3. A statement from a qualified physician regarding the diagnosis.
4. And evidence that the claimant was exposed to asbestos at the company's facilities or from the company's product(s) (e.g., witness affidavits, employment records, invoices).

How Trust Claims Are Decided

Bankruptcy trusts are set up on behalf of companies with asbestos liabilities, but the companies do not operate the trusts. In fact, these companies do not review claims or make any determinations based on the evidence submitted by claimants. The decision to pay a claim is made by the trust, which is a separate organization from the company.

Trustees manage asbestos trusts for the benefit of present and future claimants. The claims are processed and decided under preset trust distribution procedures. Representatives of current and future claimants must consent to any significant changes to these procedures.

Trusts often publish additional information about their rules, guidelines and qualifications. Among the information they can publish is a list of confirmed exposure sites.

Filing A Trust Claim and A Lawsuit?

Claimants sometimes file asbestos trust claims and asbestos lawsuits. It is important to remember, however, that filing a trust claim can affect the amount of compensation received from a lawsuit. State laws vary greatly on when trust claims must be made and how trust compensation affects the determination of lawsuit awards. For instance, states treat information sharing, setoffs, indirect trust claims and limitations on trust payments differently. The Mesothelioma Center offers general information, but it is best to consult a qualified mesothelioma attorney about your claim.

It is best to consult a mesothelioma attorney about whether you can file an asbestos trust claim, an asbestos lawsuit or both. They are knowledgeable about the litigation and trust claim processes. They can also let you know how filing one type of claim may affect the amount of compensation you may be eligible to receive through the other type of claim.

It is also important to remember that statutes of limitation only allow a certain amount of time to file a lawsuit. If your time to file a lawsuit has expired, you may be able to file an asbestos trust claim. Again, it is best to speak with a mesothelioma lawyer to determine the options for your individual case.

[click to view the process](#)

Information Sharing

State courts have different rules about sharing trust claim information with lawsuit defendants. Some courts require plaintiffs to disclose any claim forms they have submitted to trusts during the discovery phase of litigation. This requirement does not necessarily mean that the plaintiffs must file their trust claims before trial. It just applies to any claims that have already been filed. A few courts, such as New York City and Montgomery County, Pennsylvania courts may require filing certain trust claims before trial.

Setoffs

Some states – Illinois, New York, Texas and West Virginia among them – may permit "setoffs" for trust payments. In other words, if a claimant has already received a trust payment, any defendant he or she sues may be able to deduct the amount of that payment from a court award.

Responses to Written Questions of Senator Jeff Flake
“The Need for Transparency in the Asbestos Trust”
U.S. Senate Committee on the Judiciary
By: Judge Peggy L. Ableman

Question 1: It has been claimed that the exposure evidence that would be disclosed under the FACT Act is already available under the traditional rule of civil discovery.

- (a) Can tort defendants use the rule of civil discovery to obtain the exposure evidence that would be disclosed under the FACT Act? If not, why not?
- (b) Would the exposure that would be disclosed under the FACT Act be more or less than the evidence required to be disclosed under the traditional rules of civil discovery?

Response to 1(a):

Although federal law does not restrict discovery of trust information, efforts to obtain this information in state court are rarely successful because the discovery rules available in litigation are insufficient to ensure disclosure from the federal bankruptcy court.

Plaintiffs’ counsel, who have had, and continue to exert, control over the creation and administration of asbestos bankruptcy trusts have included provisions in the Trust Disposition Procedures (“TDPs”) that are designed to limit, if not preclude, defendants’ ability to use discovery to access evidence of a tort-plaintiffs’ filings of trust claims. As the United States Government Accountability Office reported in a 2011 Report of the role and administration of asbestos trust:

As of 2011, 65 percent of asbestos trusts have modified their TDP’s after confirmation to include provisions designed to allow claimants who are also suing defendants in the tort system to prevent tort defendants from accessing exposure evidence and other vital information submitted by claimants as part of their trust claims.¹

This type of confidentiality provision generally treats all information that a claimant has submitted to a trust as aspects of settlement negotiations. As such, they are intended to be confidential and protected by privilege. Generally such a confidentiality provision requires a subpoena for the production of claims information and it must issue from the Bankruptcy Court rather than the trial court. Even in states where the Case Management Orders require production of all trust claims and factual information in support of them, plaintiffs’ counsel often impose obstacles to their access. Subpoenas served on trusts are vigorously opposed by the trustee. Written discovery is met with objection or even ignored. Notwithstanding the judicial trend toward requiring disclosure of trust submissions, plaintiffs have devised methods to avoid providing these materials in discovery.

¹ U.S. Government Accountability Office, GAO-11-819 asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 3 (2011)

One such tactic utilized often is for a different law firm, not associated with plaintiff's litigation counsel and not involved in the state court case, to submit the claim forms to trusts, without advising the lawyers in the litigation. Trial counsel, in turn, either deliberately or negligently, do not verify whether they have been submitted.

Another method of avoiding disclosure is for a plaintiff's counsel to strategically delay the filing of trust claims until after the litigation is concluded. In those cases, plaintiffs can legitimately contend that no trust claims have been filed and there is thus nothing to disclose. In fact, some lawyers have freely admitted that they make it a regular practice of deferring the filing of trust claims until after the tort case is over.² They justify this approach by asserting their ethical obligation to maximize recovery for their clients.

Response to 1(b):

The exposure evidence that would be disclosed under the Fact Act is far less extensive than the information generally sought in discovery in civil tort cases. While asbestos creditors' committees ("ACC") of the trusts consist of tort creditors, in practice their attorneys are given control through power of attorney. In essence, then, it is the leading plaintiffs' asbestos attorneys who draft the Trust Distribution Procedures ("TDP") and who are responsible for establishing the criteria for claim payments. These criteria are specifically drafted in such a way as to allow asbestos claimants to obtain compensation on the basis of far more lax exposure standards than those required in the tort system. "None of the trusts require the standard of proof that is used by a court in a civil trial."³ With trust claims, the exposure requirements can be satisfied simply by an affidavit submitted by the claimant, a family member, or a co-worker, or just by asserting that the individual was employed at any one or more of the various work sites that are listed in the TDP's.

With only these minimal requirements, claimants seeking compensation can easily and quickly submit their claim forms to any of the section 524(g) trusts that have been established, promptly receive payment from many, if not all, of them, without any of the information shared with other trusts. So long as a claimant has satisfied the minimal specific exposure time periods and medical requirements, he or she will automatically qualify for payment from the trust. Even if a claimant has certified to multiple trusts exposures from various asbestos products, the trusts are set up in such a way that contribution or indemnity awards are not considered. Frequently claimants do not ever identify these filings in testimony at depositions or in requests for production during discovery in the civil case.

The FACT Act will require simply that the trusts file publicly available quarterly reports with the Bankruptcy Courts. These reports will identify claims received by the trusts, including the name and exposure history of each claimant and the basis for any payments made. It would also require that the reports be made available to any party to any action if the subject

² See, Ableman, Peggy, Kelso, Peter, and Scarcella, More A Look Behind the Curtain: *Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, Mealy's Litigation Report, Asbestos volume 30, #10 (Nov. 4, 2015), p.7

³ See Pls' Mot. For a Protective Order Regarding Settlement and Bankr. Claims at 1, *In Re Asbestos Litigation* No. 96 9999 at 2 (R.I. Sup. Ct. Dec. 28, 2011).

concerns liability for asbestos exposures. Significantly, the reports would not include any claimants confidential medical records or full social security numbers.

Question 2: In traditional multi-defense tort litigation, one defendant can present arguments based on the conduct of other potentially liable parties.

(a) In order to do so, does a defendant need to know who the other parties are?

(b) Does the operation of the asbestos trust prevent asbestos tort defendants from knowing who the other parties are?

In your three decades on the bench, have you seen this dynamic anywhere other than in asbestos litigation?

Response to 2 (a), (b), & (c):

Given the fact that bankruptcy trusts are unique creations under both bankruptcy law and in the tort system, there exists no other area of the law of which I am aware where an injured party can pursue compensation for his losses from two separate systems, with distinctly different sets of requirements to be entitled to payment. To my knowledge, there is no other privately funded compensation system with over \$30 billion in assets under management that is administered by trustees whose interests are closely aligned with claimants, and where oversight is not publicly known and transparency is only minimally existent. It is a dynamic that I have never encountered in any other area of the law.

Defendants who are sued in state or federal courts for injuries from a plaintiff's asbestos exposure are only aware of the identity and products of their named co-defendants, and in many circumstances, have no way of knowing how, where, or when a plaintiff was exposed to the products of companies not sued in the lawsuit. Many of the top-tier defendants, who produced thermal insulation and refractory products, originally accounted for a substantial share of compensation being paid to plaintiffs in tort litigation. Many of those companies were forced into bankruptcy in the early part of this century. As a result, the plaintiffs turned to a new group of defendants, who are involved in the manufacturing and distribution of asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products. At the same time, they systematically abandoned any mention or pursuit of relief from reorganized bankruptcy companies and instead began to target those defendants who were solvent and still able to be sued in tort. In the process, witness testimony concerning the products to which plaintiffs were exposed changed markedly, whereby plaintiffs and their co-workers or family members began to deny or minimize plaintiff's exposure to asbestos-containing products that were manufactured by defendants in bankruptcy. This phenomenon, facilitated by plaintiffs' counsel's control over exposure evidence, had the effect of inflating the value of tort claims while suppressing evidence of exposure to the products of reorganized companies.

The vast amount of information concerning asbestos victims' claims for compensation collected by the Section 524(g) trusts is not available, either through trust governance rules or through civil discovery. This circumstance precludes those defendants who are sued in civil

cases from full and complete information regarding a plaintiffs' sources of exposure to products of reorganized companies. Since there are now many examples of cases in which the product exposures set forth in multiple trust claims differ markedly from, or are inconsistent with, the exposures that plaintiffs are asserting in their tort cases, there is every reason to believe that the trust confidentiality provisions are denying tort defendants highly relevant information about other potentially culpable entities. This suppression of evidence of alternate exposures has a profound impact upon the defendants' potential share of liability, the settlements of claims, and the outcomes at trial. In essence, a large portion of critical evidence is not available to allow a fair and balanced assessment of fault among all responsible parties.

As a result, a plaintiff's exposure history in the tort case may be incomplete at best, and fabricated at worst. Our civil justice system depends upon timely disclosure and full and complete information for the truth-seeking process to work effectively. This dual compensation system will continue to be viewed with suspicion, and the integrity and legitimacy of the process will continue to be questioned, so long as the ability to cross-check these exposure assertions does not exist.

Question 3: In your experience as a judge supervising asbestos cases, do you believe promoting transparency in the bankruptcy trusts will help state courts more efficiently process asbestos claims? If so, why?

Response to Question 3:

Promoting transparency in the bankruptcy trusts may not have as much effect on efficiency in the civil litigation process but eliminating information asymmetries concerning trust claim payments should have the effect of promoting respect for and confidence in our legal process. As it stands now, defendants have no way of knowing what other payments have already been received or will be claimed by a plaintiff in the future. They are therefore left either to guess, overestimate, or underestimate the risks of trial. The growing number of cases where plaintiffs have been found to have advanced one set of facts under penalty of perjury in one forum, and a contradictory set of facts under penalty of perjury in another, erodes public respect for and confidence in our judicial system.

Question 4: Are the privacy protections in the FACT Act stronger than the privacy protections normally afforded in state courts?

Response to Question 4:

A frequent criticism of the FACT Act is that it would require the trusts to disclose extensive personal claim information. This characterization of how the Act would operate is inaccurate and overblown, especially when compared to the information that must be disclosed in state and federal court litigation, all of which is available on public dockets. The personal information to be revealed under the Act – the name and nature of the injury asserted – is not extensive and is already on court dockets that are required to be open to the public. The information has been disclosed in bankruptcy cases in the past without any evidence of abuse. Moreover, courts have the power to limit access to files that contain personal information by the

issuance of protective orders.

In my opinion, the potential privacy implications of the FACT Act have been seriously overstated by plaintiffs. The argument that the Act will further victimize unsuspecting asbestos victims by allowing information about their illness to be made publicly available makes little sense in this context. In any corresponding tort lawsuit, the information required to be disclosed is already available on public dockets and even on the internet. When a trust claimant files a lawsuit, the plaintiff waives any reasonable expectations of privacy. The information that will be required to be disclosed under the FACT Act is far less comprehensive than that which is included in public court filings.

Question 5: You testified that judges should be doing more to discourage misconduct in their court. Should judges also consider referring cases in which counsel appear to be withholding, manipulating, or suppressing evidence to the local U.S. Attorney or another prosecutor?

Response to Question 5:

Those who seek to shed more light on the trust-claiming process frequently describe the bankruptcy trust system as “rife with fraud and abuse.” Yet, the ability to identify and characterize these practices as fraudulent in the criminal sense is far from clear cut. Besides the reluctance of federal or state prosecutors to agree to prosecute this conduct, most of the plaintiffs’ practices of manipulating or suppressing evidence can be rationalized by them as allowable by the structure of the trusts. In some cases they argue that they are simply following rules established by the TDP’s, which are typically lax, have no oversight, and require the mere listing of job a site or proximity to it as sufficient to justify compensation.

When a judge uncovers conduct that is misleading to the tribunal, or where he or she observes practices that are abusive, the usual procedure for sanctioning an attorney is by referral to state disciplinary boards or counsel. These bodies are charged with investigating instances of lawyer violations of the state’s ethical rules or its code of professional conduct. Prosecutors do not generally usurp the responsibilities of these disciplinary boards.

Moreover, the asbestos bankruptcy trust system is structured in such a way that trusts do not compare claims with other trusts to identify inconsistencies, evidence of alternative exposures is not required, and contradictory information in various filings is acceptable. As a result, it is often difficult to distinguish fraud, in a purely legal sense that is the result of deliberate and knowing assertions of false or fabricated exposure histories, from zealous advocacy that takes advantage of the loopholes built into the trusts. Often the cases in which plaintiffs’ attorneys have failed or neglected to disclose trust claims can be defended by assertions of sloppiness, innocent mistake, or inadvertence, rather than fraud.