

**Responses of Rob McKenna (Partner, Orrick, Herrington & Sutcliffe LLP)
to Written Questions of Chairman Chuck Grassley
“The Need for Transparency in the Asbestos Trusts”
U.S. Senate Judiciary Committee
February 3, 2016**

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

At the outset, it is important to note the significant differences between the trust system and the tort system. The tort system is adversarial and dynamic. The trust system, by contrast, is administrative and static. Its aim is to process (rather than defend) claims and distribute finite resources as quickly and efficiently as possible, minimizing transaction costs.

The procedures for payments to asbestos trust claimants are established through the trust agreement and the trust distribution procedures (“TDP”). These procedures are drafted by plaintiff asbestos lawyers serving on behalf of their clients on asbestos claimant committees (“ACC”), together with the future claimants’ representative (“FCR”), the debtor and their respective counsel. These documents, which creditors vote to accept and a federal court ultimately approves, are part of the bankruptcy reorganization plan. After reorganization, trusts are overseen by one or more trustees, a trust advisory committee (“TAC”) and an FCR. The members of the TAC are plaintiffs’ attorneys whose firms submit millions of dollars of claims.

The process for filing, evaluating and paying asbestos claims is outlined in the trust’s TDP, which sets out the minimum requirements, including the specific exposure and medical criteria that an asbestos claimant must meet to receive a settlement payment from the trust. TDPs typically require the claimant to establish (1) an asbestos related medical condition; and (2) a history of exposure to the debtor’s product(s) that contain asbestos. As explained below, the exposure requirement can be satisfied by demonstrating as little as one day of work at one of the trust’s approved sites. The TDP also includes scheduled values for each type of compensable disease, the review procedures to be employed by the claim reviewers, and appeal procedures for claimants in the event of any adverse claims determination.

To initiate the claim review process, a claimant’s representative fills out a trust claim form and provides supporting documentation, such as a pathologist’s report confirming the asbestos-related disease. Asbestos trusts process submitted claims either by expedited review (“ER”) or individual review (“IR”). Under the expedited review process, claims will qualify for payment if they meet the TDP requirements for exposure and injury. The ER “is a method of review intended for claims that can be easily verified by the Trust as meeting the presumptive Medical/Exposure criteria for the relevant disease level.”¹ When the trust concludes that a claim qualifies for payment under expedited review, the compensation grid outlined in the TDP defines the value of the claim. This grid identifies a “scheduled value” for each category of

¹ See, e.g., United States Gypsum Asbestos Personal Injury Settlement Trust, Instructions for Filing, p. 2.

disease.² The actual payment made by the trust to a claimant is substantially less than the scheduled value, which is reduced by a payment percentage. Approximately 98% of all claims submitted to asbestos trusts are processed by expedited review.³

The IR process may be utilized “if the claim does not meet the presumptive Medical/Exposure criteria...or to determine whether the liquidated claim’s value exceeds the Scheduled Value” established by the trust.⁴ In contrast to the formulaic valuation of the expedited review process, individual review provides a valuation of the claim according to the claimant’s unique circumstances.

To meet the exposure requirement, an asbestos trust claimant must show product exposure as well as occupational exposure. Occupational exposure is typically satisfied by showing 5 years of cumulative work history in an approved occupation or industry, lists of which are available on the trust’s web sites. Product exposure can be satisfied by as little as a single day of presence at one of the trust’s approved sites for mesothelioma claimants. A claimant who meets these two minimal criteria is presumed to have been exposed to asbestos. This means that when an asbestos claim form states that the claimant worked in a listed occupation within a listed industry at an approved job site, product exposure is presumed and no evidentiary proof of exposure is needed to obtain payment from the trust. If a claimant does not attest to presence at an approved job site or in an approved occupation, he or she may submit an affidavit, deposition testimony of someone present at the claimant’s work site (even if the deponent did not know the claimant), or “other credible evidence”⁵ that demonstrates exposure to the asbestos product(s) during the requisite time period and duration of time.

Claims are then processed by a claims reviewer employed by one of the handful of trust claims processors, such as the Delaware Claims Processing Facility, the Claims Resolution Management Corporation, and the Claims Processing Facility. Claims are processed in a first-in-first-out order, with reviewers confirming that the requirements set forth in the trust’s TDP. Claimants receive deficiency letters if any requirement is not met, and are given a chance to cure the identified defects. Some trusts state that they generally complete processing in less than 60 days,⁶ while others take three months.⁷ Claimants may appeal denials of their claims.

² These values are established in the negotiations prior to confirmation of the reorganization plan and vary according to severity of injury. Thus, for example, scheduled values for mesothelioma claims are higher than those for other cancer and non-cancer claims.

³ September 2011 Government Accountability Office, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, p. 20.

⁴ *See, e.g.*, United States Gypsum Asbestos Personal Injury Settlement Trust, *Instructions for Filing*, p. 2.

⁵ *See, e.g.*, USG TDP, Sec. 5.7(b)(3).

⁶ *See* UNR Trust – Frequently Asked Questions, <https://www.cpf-inc.com/trusts/unr-trust/unr-trust-faqs/>.

⁷ *See* EPI Trust – Frequently Asked Questions, <https://www.cpf-inc.com/trusts/epi-trust/epi-trust-faqs/>.

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?

The amount of preparation and casework involved in filing a claim with an asbestos bankruptcy trust is unquestionably substantially less than that involved in filing a tort case in the court system. To file a trust claim, all a plaintiff's attorney need do is obtain minimal exposure information from a claimant, usually through a brief intake interview conducted by a non-attorney. At this time, the claimant also signs release forms permitting the attorney to access the medical records necessary to prove the diagnosis per the trust's requirements, and sometimes also executes an affidavit regarding exposure. The interview, releases, and affidavits are frequently also used for initiation of a tort case. Then another employee of the law firm, usually a paralegal, fills out and submits the trust forms and related documents. In fact, most trust claims processors offer an option for a bulk upload of claims, further simplifying the process for the filer.

By contrast, tort cases involve substantial attorney work. At a minimum, an attorney must file a complaint and participate in discovery (including interrogatories, requests to admit, document productions, and depositions in nearly all cases). In cases that progress, additional effort must be expended for hearings, expert discovery, jury selection, and trial. This process can take many months or years to complete.

The risk level associated with filing a trust claim is also dramatically less than the risk of pursuing a tort case. If a trust claim is denied, the claimant has the opportunity to cure the defects. Thus the initial expenditure of effort and money on filing trust claims is low, and there is only a minimal risk that those efforts will be in vain. In a tort case, plaintiff's counsel may incur costs to develop sufficient proof to reach a settlement or take a case to trial. And there is always a risk that one or more defendants will refuse to settle and win a defense verdict. The difference in risk levels is most stark with weak cases, which can easily obtain payment in the trust system if they meet the minimal requirements. Weak cases in the tort system, however, can require the most work if the plaintiff refuses to settle for reduced amounts and present the greatest risk of a defense verdict.

Responses of Rob McKenna (Partner, Orrick, Herrington & Sutcliffe LLP)
to Written Questions of Senator Jeff Flake

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1. The provisions of the FACT Act are “subject to section 107” of the Bankruptcy Code.

a. What does section 107 require?

Section 107 of title 11 of the Bankruptcy Code requires that documents filed in bankruptcy actions be made publicly available for examination without charge, with the exception of three categories of information that the Court may protect from disclosure.

b. What type of information is protected under section 107?

Section 107 provides that, if the court believes that an undue risk of identity theft exists, it may protect from disclosure identifying information (including the party’s name; social security number; date of birth; official State or government issued driver’s license or identification number; alien registration number; government passport number; employer or taxpayer identification number; unique biometric data; unique electronic identification number, address, or routing code; or telecommunication identifying information or access device); or other information. The court may also protect from disclosure trade secrets; confidential research, development, or commercial information; or scandalous or defamatory information.

c. Who would ensure that section 107’s requirements are met?

The bankruptcy court will ultimately ensure that these requirements are met. However, as discussed below, the FACT Act requires the disclosure of almost no information that would pose an undue risk of identity theft, as it only requires the claimant’s name, a description of the claimant’s exposure history, and the basis for the claimant’s payment demand. Thus, violations of Section 107’s requirements are unlikely. Additionally, the trusts are required to redact personally identifiable information (PII) from any submission made pursuant to the FACT Act. See Fed. R. Bankr. P. 9037. Any individual who wishes to have additional information of the types specified in Section 107 protected need only show cause to the bankruptcy court why such protection is needed.

d. What is the bankruptcy court’s role in protecting information identified in section 107?

The bankruptcy court may act *sua sponte* or upon a party’s request to protect trade secrets, confidential R&D information, or scandalous or defamatory matters from disclosure. The court may protect identifying information upon a showing of cause. The court may also sanction an attorney for failure to redact identifying information as required under Bankruptcy Rule 9037.

e. What does this mean for the protection of personal information?

Given the safeguards described above, PII is amply protected from disclosure under the FACT Act. Indeed, as described below, individuals are at far greater risk of disclosure of PII in tort cases.

f. Would Rule 9037 of the Bankruptcy Rules also apply to FACT Act disclosures? What power would that give judges to protect privacy?

Federal Rule of Bankruptcy Procedure 9037 applies to all documents filed in any bankruptcy action, and requires redaction the first 5 digits of an individual's social security number, the month and day of an individual's date of birth, the name of any minor children except the initials, and all but the last four digits of any financial account number, unless the court orders otherwise. This provision would apply to filings made pursuant to the FACT Act. The bankruptcy court may sanction an attorney who violates Rule 9037. In re Lunden, 524 B.R. 410, 418-19 (Bankr. D. Mass. 2015) (awarding compensatory and punitive damages as sanction for attorney's failure to redact social security number as required by Rule 9037).

2. In the context of privacy protection, a key issue is the protection of personally identifiable information (PII).

a. What PII is revealed by the disclosures under the FACT Act?

The FACT Act requires the disclosure of an asbestos bankruptcy trust claimant's name, exposure history, and the basis for the claimant's payment demand. It specifically prohibits disclosure of the claimant's social security number and confidential medical records.

b. What PII is typically revealed during the course of tort litigation?

At a minimum, a plaintiff in the tort system will have to disclose his or her name, date of birth, address, social security number, and medical records. Other PII typically is revealed during discovery, such as physical descriptors (height, weight), employment records, spouse's name, minor children's names, and financial records. Indeed, discovery in tort cases is so extensive that the answers to some of the most common password hint questions (mother's maiden name, place of birth, family members' birth dates, school names) are typically revealed. Most of this information is not required to be redacted before filing, and even that which is redacted is often accidentally disclosed.

3. To the best of your knowledge has there ever been an instance of identity theft off PACER or any other public litigation docket?

I am aware of a handful of instances of identity theft perpetrated using information obtained from PACER or other public litigation dockets. The first occurred in 2002-2003 when criminals used information obtained on PACER to obtain information about inmates in federal correctional facilities and open fraudulent financial accounts. See Soroka v. Household Auto. Fin. Corp., No. CV044000300, 2007 Conn. Super. LEXIS 1197, at *18 n.5 (Super. Ct. Apr. 30, 2007) (discussing instances of identity theft using court documents). These criminals were indicted on federal fraud and identity theft charges. Id. The second instance of identity theft, also in 2002, occurred when

a thief used a local Ohio online docket system to view a speeding ticket with a driver's social security number, birth date, height, weight, and signature on it, and used this information to obtain credit cards in the driver's name. *Id.* In another Ohio case, a group of criminals used the Franklin County Municipal Court Web site to obtain PII subsequently used to open credit cards and bank accounts. Bruce Cadwallader, *Six Suspected in ID Theft Via Court Web Site*, THE COLUMBUS DISPATCH (Dec. 21, 2007), available at http://www.dispatch.com/content/stories/local/2007/12/21/clerkit.ART_ART_12-21-07_B1_OO8RDCG.html.

Recent steps appear to have increased the security of PII in court documents. In 2007, various Federal Rules were amended to provide that certain PII—including social security numbers, taxpayer identification numbers, birth dates, names of minors, and financial account numbers—must be partially or entirely redacted prior to filing on PACER or filed under seal. *See* Fed. R. Bankr. P. 9037, Fed. R. Civ. P. 5.2, Fed. R. Crim. P. 49.1, Fed. R. App. P. 25. Subsequent training for lawyers and clerks and explicit statements on the PACER site that such redactions are required appears to have increased compliance with the redaction requirements. At the state level, many states have adopted best practices to secure PII contained in court filings. *See* Hon. Paul H. Anderson, *Future Trends in Public Access: Court Information, Privacy, and Technology*, at 11 (Nat'l Cntr. for State Courts 2011); José Dimas, *A Focus on Identity Theft, Social Security Number, and the Courts* (Nat'l Cntr. for State Courts 2006).