

# KTLA

Kansas Trial Lawyers Association

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**To:** Senator Rick Wilborn, Chairperson  
Members of the Senate Judiciary Committee.

**From:** Callie Jill Denton JD, Executive Director

**Date:** February 2, 2017

**RE:** **SB 73 Enacting the asbestos bankruptcy trust claims transparency act; providing for disclosures regarding asbestos bankruptcy trust claims in civil asbestos actions. (OPPOSE)**

The Kansas Trial Lawyers Association (KTLA) is a professional association of trial lawyers with members across the state. KTLA opposes SB 73 and requests that the Senate Judiciary Committee not pass it.

Asbestos-related lung disease was well-documented in the early 1900s; linked to lung cancer by the 1940s; and found to cause mesothelioma in the 1950s. Asbestos companies have a long and well-documented history of concealing the harms of asbestos exposure from employees and the public. It is also documented that they did so with full knowledge of the deadliness of asbestos exposure, and that the risk of injury and death was avoidable.

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Despite the industry's history, Kansas has enacted laws that allows asbestos companies to evade liability and avoid accountability to Kansas veterans, teachers, and workers. The Silica and Asbestos Claims Act, KSA 60-4901 *et. seq.*, makes it more difficult for plaintiffs to file a civil action against an asbestos company. The Successor Corporation Asbestos-Related Liability Fairness Act, KSA 50-11301 *et. seq.*, is a sweeping exclusion from liability for all pending and future asbestos claims which immunizes the Crown Corporation and its successors.

**SB 73 further reduces the accountability of asbestos companies to Kansans. SB 73 creates unique procedural exceptions that protect asbestos companies and delay the claims of Kansans with asbestos-related injuries. SB 73 is unnecessary because there is no flood of asbestos litigation in Kansas and there is no need to protect the asbestos industry.**

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- **Kansas rules of civil procedure are carefully balanced to be fair to both sides. SB 73 creates a new procedure that favors asbestos defendants for the purpose of delaying and denying the plaintiff's claims.**

Kansas' procedural rules are fair. Discovery rules allow both sides to obtain information that is relevant to their case. Judges have the power to grant authorize depositions, issue subpoenas, and determine whether evidence is relevant and should be admitted. There is no need—and it is unfair—to create a separate procedure for asbestos cases

SB 73 grants asbestos corporations new procedural advantages, including the right to endlessly submit motions to repeatedly stay or delay a case. The impact of SB 73 is to prevent an asbestos plaintiff's case from proceeding while the asbestos defendant denies accountability. Ultimately the plaintiff may die before they get their day in court.

- **There is no asbestos crisis or litigation crisis in Kansas, nor crisis of asbestos trust fraud.**

There has never been an asbestos-related litigation crisis in Kansas. There is little reason to believe that there is a flood of tort litigation of any sort in Kansas. Personal injury cases are only 1% of all civil and criminal cases in Kansas—2,396 tort cases out of 192,230 total civil and criminal cases filed in Kansas courts in fiscal year 2016, per the Annual Report of the Courts of Kansas.

Out of the millions nationally who have filed claims with asbestos trusts, defendants have only been able to claim an error rate of 0.35%, an amount far less than other large trust systems.

- **Kansas laws already limit and deter asbestos-related claims.**

Kansas has already enacted laws that makes it extremely difficult for a plaintiff with an asbestos-related injury to obtain justice. The Silica and Asbestos Claims Act establishes gatekeeper-like standards for plaintiffs that apply before a court case can even be filed, and it deters litigation. In all but the most serious cases, a plaintiff must receive a diagnosis from a specialist and documented proof of 10 years since exposure and diagnosis. The Act also requires that the plaintiff have specific clinical signs of disease before they can file their case. In addition, Kansas has non-economic damage caps and wrongful death damage caps that limit plaintiffs' recoveries.

Finally, as noted previously, the rules of civil procedure are more than adequate to fairly handle civil litigation involving asbestos claims, including procedures to address any of the defendant's concerns that a claim may be fraudulent or frivolous.

- **Kansans are still at risk of illness of death due to asbestos exposure; they need the protection of law, and access to justice.**
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Veterans, workers in the building and automotive trades, and teachers are at greater risk for exposure to asbestos. There is no “safe” level of exposure to asbestos; even secondary exposure is dangerous. Between 1999-2013, 1,654 Kansans died from asbestos-related illnesses.<sup>1</sup>

SB 73 is unnecessary and unfair legislation that limits access to justice for Kansans who have been injured by asbestos exposure. On behalf of the Kansas Trial Lawyers Association, I respectfully request that the Judiciary Committee not pass SB 73.

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<sup>1</sup> <http://www.asbestosnation.org/facts/asbestos-deaths/ks/>



## Background on Mesothelioma

Asbestos is a fibrous mineral that was once used in many industries due to its resistance to fire, heat and corrosion. It was a widely used component of products that included insulation, roofing, flooring, brake and boiler linings, gaskets and ship building materials. Military barracks and naval ships were often insulated with asbestos products. But use of the material peaked in 1973 when litigation revealed a conspiracy dating back to 1934 by asbestos manufacturers to suppress information regarding the hazards of asbestos inhalation.<sup>1</sup> In 1973, the United States Court of Appeals for the Fifth Circuit issued a ruling, for the first time, that allowed workers injured by exposure to asbestos to hold manufacturers of those products and other strictly liable for failure to warn that the products were unreasonably dangerous.<sup>2</sup>

There is an international consensus that asbestos causes mesothelioma (a cancer of the lining of the lung), lung cancer, and asbestosis (a chronic, progressive inflammation of the lungs which makes it difficult to breathe and is associated with an increased risk of other cancers, including stomach, colon, and esophageal cancer.<sup>3</sup>) Occupational Safety and Health Administration (“OSHA”) first regulated asbestos exposures in 1972.<sup>4</sup> EPA adopted a regulation, later overturned in Court, banning asbestos use. Almost two decades ago, OSHA observed that “it was aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure.” 51 Fed. Reg. 22,615 (1986).

Many asbestos victims were employed in industries and occupations that resulted in their being exposed to numerous asbestos-containing products during their careers. The majority of asbestos victims are middle-income workers. According to the National Institute for Occupational Safety and Health, the leading occupations for deaths due to asbestos exposures are plumbers, pipefitters and steamfitters.<sup>5</sup> Many were exposed while serving in the U.S. military. Others were exposed as a result of working in such industries are construction, shipbuilding, asbestos mining and processing, chemical manufacturing and metalworking.

Because the latency period between the first exposure to asbestos and clinical disease is typically 20 to 40 years, many are not yet identified. Victims of mesothelioma typically only live for 4 to 18 months after their diagnosis.<sup>6</sup>

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<sup>1</sup> Barry Castleman, *Asbestos Medical and Legal Aspects* (5<sup>th</sup> Edition) Aspen Publishers (2005).

<sup>2</sup> *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1092 (5<sup>th</sup> Cir. 1973)

<sup>3</sup> National Institute of Occupational Safety and Health, Division of Standards Development and Technology Transfer, *Occupational Health and Safety Guideline for Asbestos: Potential Human Carcinogen* (1988); available at <http://www.cdc.gov/niosh/docs/81-123/pdfs/0041.pdf>

<sup>4</sup> *Building and Construction Trades Dept. v. Brock*, 838 F.2d 1258, 1262 (D.C. Cir. 1988)

<sup>5</sup> National Institute for Occupational Safety and Health, Division of Respiratory Disease Studies, *Work-Related Lung Disease Surveillance Report 2002*, page 9 (May 2003); Available at: <http://www.cdc.gov/niosh/docs/2003-111/pdfs/2003-111.pdf>.

<sup>6</sup> Mesothelioma Applied Research Foundation, *Mesothelioma Information: Disease Development and Progression*, available at:

[http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.4023387/k.643A/Mesothelioma Information.htm#whatismesothelioma](http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.4023387/k.643A/Mesothelioma%20Information.htm#whatismesothelioma)



## **Background on Asbestos Litigation & the Trust System**

### **History of Asbestos Litigation and Trust Formation**

Asbestos is a fibrous mineral that was once used in many industries due to its resistance to fire, heat and corrosion. It was a component of products that included insulation, roofing, flooring, brake and boiler linings, gaskets and ship building materials. Use of the material peaked in 1973, the year in which the United States Court of Appeals for the Fifth Circuit issued a ruling that allowed workers injured by exposure to asbestos to hold manufacturers of those products and other strictly liable for failure to warn that the products were unreasonably dangerous.<sup>1</sup> This ruling followed revelations of a conspiracy to suppress information regarding hazards of asbestos inhalation.<sup>2</sup> The volume of asbestos litigation increased following the 1973 ruling, and in 1982, Johns-Manville Corporation (“Manville”), the principal asbestos defendant at the time, filed for bankruptcy as a result of insufficiency of its assets to pay the asbestos claims being filed against it. After a lengthy bankruptcy proceeding, a trust was established in 1988 to pay qualifying asbestos claims against Manville. This was the first asbestos trust.<sup>3</sup> Asbestos claims continued to increase through the 1990s,<sup>4</sup> and other asbestos defendants also filed for bankruptcy.

In 1994, Congress amended the bankruptcy Code to create Section 524(g) to specifically address asbestos-related bankruptcies. Among other things, the provision allows a bankruptcy court to bind future asbestos injury claimants to a plan of reorganization through the appointment of a future representative to represent their interest in the negotiation of the plan. Because of the long latency period between exposure to asbestos and manifestation of a disease, Congress recognized that provisions must be made for the compensation of future asbestos victims and determined that a trust would be the best vehicle for handling claims against a bankrupt defendant. Section 524(g) basically codified the approach to dealing with asbestos claims that the court had approved in the Manville bankruptcy. A trust that is created under Section 524(g) assumes the asbestos-related liabilities of the debtor company and must use all of its assets and income to pay qualifying asbestos claims. The trust must treat future claimants substantially the same as present claimants, and at least 75 percent of present asbestos claimants must vote to accept the plan. If all of the requirements of Section 524(g) are met, the bankruptcy courts will issue a channeling injunction directing that asbestos claims may be brought only against the trust. In addition to creating Section 524(g), Congress also amended the Bankruptcy Code to add section 524(h), a provision that allows certain injunctions that existed on the date of the enactment of Section 524(g) to be treated as Section 524(g) injunctions.

### **Description of Individuals Injured by Asbestos**

The majority of asbestos victims are middle-income workers. According to the National Institute for Occupational Safety and Health, the leading occupations for deaths due to asbestos exposures are plumbers, pipefitters and steamfitters.<sup>5</sup> Many were exposed while serving in the U.S. military. Others were exposed as a result of working in an industry in which asbestos was utilized. Examples of such industries are construction, shipbuilding, asbestos mining and processing, chemical manufacturing and metalworking. To date, bankruptcy trusts have paid over 2 million claims.<sup>6</sup> Because the latency



period between the first exposure to asbestos and clinical disease is typically 20 to 40 years, many are not yet identified.

There is an international consensus that asbestos causes mesothelioma (a cancer of the lining of the lung), lung cancer, and asbestosis (a chronic, progressive inflammation of the lungs which makes it difficult to breathe and is associated with an increased risk of other cancers, including stomach, colon, and esophageal cancer.<sup>7</sup>) Victims of mesothelioma typically only live for 4 to 18 months after their diagnosis.<sup>8</sup> Occupational Safety and Health Administration (“OSHA”) first regulated asbestos exposures in 1972.<sup>9</sup> EPA adopted a regulation, later overturned in Court, banning asbestos use. Almost two decades ago, OSHA observed that “it was aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure.” 51 Fed. Reg. 22,615 (1986).

The states with the highest number of mesothelioma cancer victims (> 500) between 1999-2005 are: California, Pennsylvania, Florida, New Jersey, New York, Texas, Illinois, Virginia, Ohio, Massachusetts, Washington, and Michigan.<sup>10</sup> During 1999-2005 the national rate of mesothelioma deaths was about 11.5 per million population per year, but more than half the states had higher rates. The states with the highest rate of mesothelioma deaths are: Maine, New Hampshire, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, West Virginia, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Louisiana, Wisconsin, Minnesota, Utah, Wyoming, Montana, Idaho, Alaska, Washington, and Oregon.<sup>11</sup> In addition, asbestosis was a contributing cause in over 1400 deaths between 2000-2005, a sharp rise from the rate of death in 1998.<sup>12</sup>

Many asbestos victims were employed in industries and occupations that resulted in their being exposed to numerous asbestos-containing products during their careers. As a result, many victims have claims against several defendants, but the amount a claimant recovers from each defendant is limited to that defendant’s several share of the liability.

### **Insufficiency of Assets Available to Compensate Asbestos Victims**

There are insufficient assets in the trusts that are established to pay asbestos victims to fully compensate the victims for the bankrupt defendants’ liabilities. When a trust is established, the Bankruptcy Court and District Court approve a schedule of values for the payment of asbestos claims based upon the historical several share of the bankrupt defendant’s liability to asbestos victims in different disease categories. These values exclude punitive damages. A trust must invest and manage its assets in a manner that will allow it to pay qualifying claimants equitably over a 40-year period. The trust pays claimants, who submit qualifying claims to the trust, values based upon the court-approved schedule. The trust, however, will in almost every case only be able to pay a qualifying claimant a small percentage of the scheduled value for his or her claim as a result of the underfunding of the trust.

Even though existing asbestos trusts hold in the aggregate approximately \$20 billion,<sup>13</sup> this amount is far less than the amount that asbestos victims should be receiving in compensation for their injuries. RAND finds that “[m]ost trusts do not have sufficient funds to pay every claim in full and, thus, set a payment percentage that is used to determine the actual payment a claimant will be offered.” The

median payment percentage is 25 percent, but some trusts pay as low as 1.1 percent of the value of a claim.<sup>[i]</sup>

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<sup>1</sup> *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1092 (5<sup>th</sup> Cir. 1973)

<sup>2</sup> Barry Castleman, *Asbestos Medical and Legal Aspects* (5<sup>th</sup> Edition) Aspen Publishers (2005).

<sup>3</sup> Stephen J. Carroll et al., *Asbestos Litigation*, RAND INSTITUTE FOR CIVIL JUSTICE, page xxiii (2005); available at: [http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf)

<sup>4</sup> *Id.* at page xxiv (2005) (“[a]nnual claims against major defendants have increased sharply over [the] 1990s”)

<sup>5</sup> National Institute for Occupational Safety and Health, Division of Respiratory Disease Studies, *Work-Related Lung Disease Surveillance Report 2002*, page 9 (May 2003); Available at: <http://www.cdc.gov/niosh/docs/2003-111/pdfs/2003-111.pdf>.

<sup>6</sup> Lloyd Dixon, et al, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND INSTITUTE FOR CIVIL JUSTICE (2010) at page xii (See Figure S.2. “Cumulative Number of Claims Paid and Value of Claim Payments at the Selected Trust” [claims from 26 selected active trusts]) available at: [http://www.rand.org/pubs/technical\\_reports/2010/RAND\\_TR872.pdf](http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf)

<sup>7</sup> National Institute of Occupational Safety and Health, Division of Standards Development and Technology Transfer, *Occupational Health and Safety Guideline for Asbestos: Potential Human Carcinogen* (1988); available at <http://www.cdc.gov/niosh/docs/81-123/pdfs/0041.pdf>

<sup>8</sup> Mesothelioma Applied Research Foundation, *Mesothelioma Information: Disease Development and Progression*, available at:

[http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.4023387/k.643A/Mesothelioma\\_Information.htm#whatismesothelioma](http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.4023387/k.643A/Mesothelioma_Information.htm#whatismesothelioma)

<sup>9</sup> *Building and Construction Trades Dept. v. Brock*, 838 F.2d 1258, 1262 (D.C. Cir. 1988)

<sup>10</sup> National Institute of Occupational Safety and Health, Work-Related Lung Disease (WoRLD) Surveillance System Table 7-4. *Malignant mesothelioma: Number of deaths by state, U.S. residents age 15 and over, 1999-2005*, (March 2009); available at

<http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=894&GroupRefNumber=T07-04>.

<sup>11</sup> National Institute of Occupational Safety and Health, Work-Related Lung Disease (WoRLD) Surveillance System Table 7-5. *Malignant mesothelioma: Number of deaths, death rates (per million population), and years of potential life lost (YPLL) by state, U.S. residents age 15 and over, 1999-2005* (March 2009); charts available at:

<http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=895&GroupRefNumber=T07-05>.

<sup>12</sup> National Institute of Occupational Safety and Health, Work-Related Lung Disease (WoRLD) Surveillance System Table 1-4. *Asbestosis: Number of deaths by state, U.S. residents age 15 and over, 1996-2005* (March 2009) available at:

<http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=493&GroupRefNumber=T01-04>.

<sup>13</sup> *Supra*, Dixon, RAND INSTITUTE FOR CIVIL JUSTICE at page xii (2010) (“As of year-end 2008, the assets of the selected active trusts totaled \$18.2 billion, and this total does not include the assets of four recently formed trusts that had not filed financial statements as of 2009. The total also does not include the estimated assets of currently proposed trusts. Estimates of the initial assets at eight of the nine proposed trusts for which information is available total \$14.5 billion.”); David Austern & Raji Bhagavatula, *Not over yet: despite positive developments affecting asbestos claims, insurers should still expect significant liabilities*, 107 BEST’S REV. (April 1, 2007)(estimating current trusts, assets at \$30 billion).

<sup>[i]</sup> *Supra*, Dixon, RAND INSTITUTE FOR CIVIL JUSTICE at page xv (2010).