

**Kansas Senate  
Judiciary Committee**

**Testimony of Andrew Schermerhorn  
Partner, The Klamann Law Firm  
4435 Main Street, Ste. 150  
Kansas City, Missouri 64111**

Hearing on Senate Bill No. 73, the “Asbestos Bankruptcy Trust Claims Transparency Act”

February 2, 2017

Chairman Wilborn, Vice Chari Lynn, and members of the Committee, thank you for allowing me to appear before you today in order to voice my opposition to Senate Bill No. 73, the Asbestos Bankruptcy Trust Claims Transparency Act.

### **Introduction**

My name is Andrew Schermerhorn. I am a partner at the Klamann Law Firm and a resident of Leawood, Kansas. My firm currently represents victims of asbestos exposure and has done so for more than thirty years. Our asbestos clients are always the hard-working laborers from decades past who worked in the construction and industrial trades literally building our great state – our homes, our offices, our utilities – and they are disproportionately veterans, the brave men and woman who protected our nation who now, in their time of need, we cannot let down.

In 1994, Congress amended the Federal Bankruptcy Code so that corporations historically involved in the manufacture of asbestos-containing products could reorganize under the protection bankruptcy code and shift to a trust all liability arising from their culpable conduct. The asbestos trusts, however, pay only a fraction of the damage and suffering that they have caused. For victims, this is a travesty and a tragedy. Moreover, resolution of claims made in these specially created bankruptcy proceedings can take years. By that time, the victim has often died. Finally, once a bankruptcy claim is resolved, awards are reduced to a fraction of their stated value. Thus, victims of mesothelioma, for example, oftentimes receive very little or nothing from an asbestos bankruptcy trust. The “system” in this regard is extremely unfair.

Non-bankrupt defendants should answer for their wrongdoing in civil court, just as any other culpable person or entity must. However, in Kansas, asbestos defendants almost never answer for their wrongdoing. Though licensed to practice in Kansas, I have never brought an

asbestos-related lawsuit against any defendant in the State of Kansas. And while I cannot cite statistics, my search of the term “mesothelioma” in Westlaw revealed that the disease has only been cited in six reported Kansas cases and that the last of those was from 1995.

The reason for this dearth of claims has nothing to do with the exposure or lack thereof to asbestos in this state. In fact, 300 Kansas died from mesothelioma during the period from 1999 to 2013.<sup>1</sup> 103 more Kansans died from asbestosis during the same period, and more than 1,000 died from asbestos-related cancer.<sup>2</sup> The small number of cases is instead the result of damage caps adopted by this Legislature and other defense-oriented laws.

Now, we face yet another assault on innocent victims of the deadly diseases caused by asbestos. Senate Bill No. 73 is simply the latest, but not the first attempt, by asbestos defendants to minimize or extinguish altogether their liability in Kansas.

### **Senate Bill No. 73**

Briefly, here is how Senate Bill No. 73 works. *First*, it requires that victims of asbestos disease, within thirty days of filing suit – a period that is generally critical in the case of a dying mesothelioma patient – investigate and file bankruptcy claims that are very likely to result in little, if any, recompense. Since, in Kansas, civil defendants can “try an empty chair,” Section 3 of the Bill, in essence, requires that victims of asbestos diseases spend the precious time they have left working on behalf of the civil defendants who caused their disease. It is a grotesque command. To the extent a dying mesothelioma patient fails to comply, Section 3 of the Bill authorizes the dismissal of their suit altogether.

Thus, the trap is set. It can be expected that the victims of asbestos diseases, who when made aware of their condition are generally elderly and years removed from their exposure,

---

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

<sup>2</sup> *Id.*

might forget a potential source of asbestos. Under Section 3, forgetfulness, a malady that I am afraid affects us all, is enough to toss an asbestos victim out of court.

*Second*, Section 4 grants asbestos defendants the means to delay, repeatedly, having to answer for their culpable conduct. Mesothelioma is a devastating form of asbestos cancer for which there is no cure. Once diagnosed, a victim has only months left to live (the average life expectancy of a mesothelioma victim is twelve to twenty-one months post-diagnosis).<sup>3</sup> Judges who are sympathetic to the right of a victim to have their day in court, however, are often amenable to scheduling trials so that they are likely to occur while the victim is still alive and able to participate. Section 4 of this Bill, however, would make it all but impossible for a victim to have their day in court as it grants to any defendant who desires to delay justice a statutory mechanism for doing just that.

Through Senate Bill No. 73, a defendant need merely file a motion requesting a stay to obtain a delay. For those on the cusp of death, Section 4 denies their right to confront his or her tortfeasor in court and makes impossible her or right to participate in the trial of his or her own case. And for what? Already, Kansas judges have the tools necessary to address discovery abuses, should a defendant suspect one. This Bill simply invites an endless and circular volley of motions and responses.

*Third*, Section 5 of the Bill operates to create an illusion of liability where none may exist. Because of the extremely slow pace at which bankruptcy claims are handled, it can take many months to many years for an asbestos trust claim to be processed. Yet, the Bill makes asbestos trust documents *per se* relevant, authentic, and admissible at trial, and relieves an asbestos defendant from even having to “try the empty chair.” Under Section 5, the same trust claims that a victim must file for fear of having their case dismissed is sufficient to support a jury

---

<sup>3</sup> <https://www.cancer.org/cancer/malignant-mesothelioma/detection-diagnosis-staging/survival-statistics.html>.

finding that the victim was exposed to the products for which the trust was established *and* that such exposure was a substantial contributing factor in causing the asbestos disease. This is in spite of the fact that the asbestos trust claim may ultimately be resolved *against* the victim. This is clearly a perversion of justice.

Finally, although titled the Asbestos Bankruptcy Trust Claims *Transparency* Act, the Bill makes nothing “transparent” that is not already clear. Through ordinary means and methods of discovery, asbestos defendants can obtain a victim’s complete history of asbestos exposure. The identities of all products thought to have caused an asbestos-related disease are obtainable through interrogatory and/or deposition. Thus, all information that could support a bankruptcy claim is already obtainable by an asbestos defendant. Transparency is already the rule.

Instead, Senate Bill No. 73 simply advances the goal of asbestos defendants to minimize further or extinguish altogether their liability in Kansas. It should not come as surprise, then, that in most states that have considered bills similar to Senate Bill No. 73, the bills have died in committee. This bill should face a similar fate.