

**Kansas Senate
Judiciary Committee**

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Hearing on House Bill No. 2457, the “Asbestos Bankruptcy Trust Claims Transparency Act”

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Chairman Sen. Wilborn, Vice Chair Sen. Lynn, and members of the Senate Judiciary Committee, thank you for allowing me to appear before you today in order to voice my opposition to House Bill No. 2457, 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.

Asbestos is a deadly mineral and is responsible for countless deaths around the world, including up to 15,000 each year in the U.S. alone. At its peak from the 1940s to the 1970s, asbestos was the basis of thousands of consumer products – from cigarette filters to handheld hair dryers – and millions of Americans were exposed to the deadly fibers. Internal industry documents have definitively shown time and again that the makers and industrial users of asbestos had known for decades that their products were killing workers, yet they covered up this fact and failed to warn workers handling asbestos of its deadly nature. Many Americans might think it's been banned, but it has not. It's lethal, legal and continues to pose serious risks to millions of American families. There are workers in Kansas who are unknowingly exposed to asbestos every day who will only learn about it decades from now when they are diagnosed with an asbestos disease.¹

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

¹ NPR, *America's 'Third Wave' Of Asbestos Disease Upends Lives*, <https://www.npr.org/sections/health-shots/2015/12/17/459866871/americas-third-wave-of-asbestos-disease-upends-lives>

of the bankruptcy code. These companies settled all potential future claims and shifted all liability arising from their culpable conduct to a trust. 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. The proponents of this bill will say that the trust filing process is simple, and make it seem like claimants get a check in the mail a week or two after filing their claim. This is not true. Claims take years to resolve and may ultimately be resolved against the claimant or require more information to substantiate the claim. 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. The proponents of this bill will say there is plenty of money in the trusts—\$25 billion dollars—but they don't tell you that these trusts are paying only pennies on the dollar of what they were expected to pay when first funded. 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.

The proponents' argument that there is double-dipping or systematic fraud in connection with asbestos trusts is simply wrong. Asbestos-related disease has touched nearly half a million Americans and is one of the largest public health crises in the history of the world. Asbestos victims are sick and doing their best to recall where they worked and what products they may have been exposed to decades before their diagnosis. Trust claims, meanwhile, take years to resolve and pay pennies on the dollar. The *Garlock* opinion, which is so heavily relied upon by the proponents of this legislation, reveals only that among the thousands of attorneys dedicated to the pursuit of justice on behalf of an elderly and ailing population of veterans and venerable laborers, one has been shown to possibly have concealed exposures. But *Garlock* does not describe the state of

asbestos tort litigation in Kansas. In Kansas, the rules of procedure and the threat of sanctions protect against the kind of abuse that *Garlock* is meant to represent. In any event, *Garlock* is a one-off opinion that cited to cherry picked data that even Garlock knew was bogus. Garlock flagrantly abused its workers, exposing thousands of Navy sailors to asbestos for decades and failing to warn them about it. And, even Garlock couldn't defend the decision on appeal. Instead, Garlock agreed to pay almost four times *more* than the judge's estimate of their liability to settle its bankruptcy claim.²

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 2013.³ 103 more Kansans died from asbestosis during the same period, and more than 1,000 died from asbestos-related cancer.⁴ 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. House Bill No. 2457 is simply the latest, but not the first attempt, by asbestos defendants to minimize or extinguish altogether their liability in Kansas.

² <https://www.asbestos.com/news/2016/03/18/garlock-enpro-480-million-settlement-asbestos-claims/>

³ <http://www.asbestosnation.org/facts/asbestos-deaths/ks/>.

⁴ *Id.*

House Bill No. 2457

In effect, House Bill No. 2457 requires that victims of asbestos disease 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 is unnecessary and punitive. In essence, it requires that victims of asbestos diseases do the defendants’ work for them by spending the precious time they have left building the case of the asbestos defendants who caused their disease. It is a grotesque command, especially since asbestos trust claims take years to resolve, and many are ultimately resolved *against* the claimant. For those that do pay, awards are always reduced to a mere fraction of their stated value. Thus, House Bill No. 2457 requires that persons suffering from the debilitating effects of mesothelioma, for example, create an illusion of liability where none may exist. This is clearly a perversion of justice.

In addition, this legislation sews the seeds for undermining the confidentiality of settlement agreements in other cases as well. Trusts are the result of a global settlement agreement. Under Kansas Code 60-452, settlement agreements cannot be admitted as evidence of a party’s fault in a civil case, yet Section 5 does just that. If Kansas is willing to admit settlements as an admission of fault in this case, especially where there hasn’t been any evidence of a problem in the state of Kansas, then why couldn’t this apply in another case? This is the sort of slippery slope the proponents of this bill are leading the committee down.

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 (with competent attorneys). Transparency is already the rule.

Instead, House Bill No. 2457 simply advances the goal of Fortune 500 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 House Bill No. 2457, the bills have died in committee. This bill should face a similar fate.