

Testimony before the
Senate Committee on the Judiciary
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“The Need for Transparency in the Asbestos Trusts”

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Mr. Chairman and Members of the Committee, thank you very much for the opportunity to testify today. My name is Rob McKenna. I am a partner with Orrick, Herrington & Sutcliffe in our firm’s Seattle office, and I served as Attorney General of Washington State from 2005-2013. During my tenure as Washington’s Attorney General, my peers elected me President of the National Association of Attorneys General; selected me for the Kelley-Wyman Award for Outstanding Attorney General in America; and looked to me as an expert among state AGs on consumer protection issues involving technology, electronic privacy, data security, and intellectual property protection.

I earned a reputation among my peers for being tech savvy by constantly innovating in the area of protecting consumers from online fraud and predators. For example, my team and I built the first computer forensics lab in the consumer protection unit of a state AG office in order to go after malware purveyors who prey on unsuspecting seniors, other adults, and their children. We drafted and secured the passage of our state’s anti-spyware act and data breach notification statute, and also persuaded our legislature to update our state’s laws to make it easier for consumers to obtain credit freezes to protect their bank and credit accounts when they believe they may be at risk.

We conducted dozens of consumer trainings and workshops on identity theft prevention around our state, working with and helping fund AARP’s Fraud Fighters Program. We investigated data breaches and pursued companies that ripped off consumers with spyware and other malicious programs.

At national meetings of the state attorneys general over several years, we organized a series of trainings and presentations for the other AGs and their staff on all these topics, working from the premise that every state AG office should have the capability to pursue online fraud, identity theft, and cyberattacks.

All of this is to say that I’ve worked hard to protect our citizens from these problems and to teach them how to protect themselves. Since leaving office and entering private practice, however, I’ve learned of another threat to some of the most vulnerable among us – those who are ill from asbestos-related diseases and their families. This threat arises from the inadequate disclosure and transparency in the asbestos trust system which the FACT Act of 2015 is intended to address.

I think that all state attorneys general recognize the controversy surrounding asbestos litigation and the asbestos trusts that have been established to speed relief to victims of asbestos exposure. Asbestos is a dangerous product that has harmed many people. Companies with actual liability should be held accountable. Courts in both in the tort system and bankruptcy system have worked hard to strike the appropriate balance between expeditiously compensating injured individuals who have filed claims and protecting future claimants' interests by safeguarding the asbestos trusts from inappropriate claims.

As the states' top legal officers, attorneys general have been entrusted with responsibility for protecting the public interest, including the interests of trust beneficiaries. Many of our state's people have been, and will for many more years continue to be, harmed by asbestos exposure. The attorneys general have a strong interest in maintaining the public's confidence in the judicial process concerning asbestos and in the protection of both current and future asbestos trust beneficiaries. Given the disturbing findings to date by several federal bankruptcy courts concerning misrepresentations in claims made on asbestos trusts, the public has a right to know how far and how deep these problems may or may not extend, and the courts need to know more about claims filed in other forums by the claimants who come before them.

To the extent the records from an asbestos trust contain claimants' health and other sensitive personal information, it is possible to redact or anonymize such information in documents that are collected and made available to other trusts and courts to appropriately protect those claimants' legitimate privacy interests.

The Furthering Asbestos Claim Transparency (FACT) Act of 2015 is common sense transparency legislation that will discourage fraud and abuse in the asbestos compensation system while protecting asbestos trust claimants' sensitive personal information and confidential medical records from disclosure and misuse.

The FACT Act explicitly protects asbestos trust claimants' medical records and full Social Security Numbers, ensuring that such information will never be included in public reports. Trusts' disclosures will also be subject to all of the privacy protections afforded by bankruptcy law and rules. As a result, the bill and existing bankruptcy rules and statutes ensure that personally identifiable information will not become publicly available, even while ensuring that asbestos trusts will report enough information to deter fraud as they protect individuals' privacy.

The asbestos trusts' reports will be subject to the bankruptcy code's existing privacy protections. Section 107 of the code, for example, allows courts to protect any information that would present an undue risk of identity theft or injury to a claimant if disclosed. Similarly, Rule 9037 of the Federal Rules of Bankruptcy Procedure, "Privacy Protections for Filings Made with the Court," would also apply to the trusts' public reports. The rule will allow courts to require redactions of personal and private information. Finally, Rule 9037 will allow courts to limit or prohibit electronic access to trusts' reports.

Courts throughout the country already use these rules to protect the personal information of individuals who file claims during asbestos bankruptcies. For example, the court overseeing the Garlock bankruptcy redacted trust claims information that was introduced into a hearing record and later released to the public. Other courts have required anyone reviewing bankruptcy claims to agree to strict protective orders.

In addition, witnesses at the House Judiciary Committee's hearings on the FACT Act explained that the bill does not threaten asbestos victims' privacy and that asbestos claimants already routinely disclose more information than trusts would be required to report in the course of tort litigation and bankruptcy proceedings. While the FACT Act's opponents falsely claim that the bill would require the release of an unusual amount of information about asbestos bankruptcy trust claimants, this is simply not true. As Professor S. Todd Brown testified before the last Congress, "the very idea that a bill intended to advance transparency would be in any way controversial is striking. If history teaches us anything about bankruptcy law and practice, it is that transparency and safeguarding the interests of absent parties go hand-in-hand."

Bankruptcy is an equitable process designed to protect the interests of all of a bankrupt's creditors. Openness gives creditors and the public confidence that assets are being distributed fairly. The FACT Act simply restores this usual openness to asbestos bankruptcy trusts. And this openness is crucial if the well-documented and widespread problems of misrepresentations to and outright fraud committed upon America's asbestos trusts are to be successfully curtailed, thereby protecting the ability of future claimants to be fairly compensated by the trusts.

I would like to close by specifically addressing concerns raised regarding the privacy and data security of our nation's military veterans. As attorney general for a state with one of our nation's largest per capita populations of veterans and active duty personnel, and as the son of a 34-year veteran of the U.S. Army who fought in World War II, Korea, and Vietnam, I am especially attuned to the special needs of our veterans. The unfortunate truth is that many veterans were exposed to asbestos during their service to our country, often to asbestos insulation products.

Virtually all of the primary manufacturers of asbestos and asbestos insulation have entered bankruptcy and established trust funds to address their asbestos liabilities. As a result, veterans are disproportionately and negatively impacted by waste, fraud, and abuse within the asbestos trust system. As asbestos trusts' limited resources are diverted to claimants who misrepresent their exposure history and even the basic facts of their employment history, the trusts' ability to compensate veterans' legitimate claims is impaired.

While the FACT Act's opponents falsely suggest the bill will hurt veterans by making it harder for them to recover from the trusts, the reality is that nothing could be further from the truth. The FACT Act will help ensure that veterans' legitimate claims can be resolved in the future by discouraging waste, fraud, and abuse in the asbestos trust system. Nearly half of the currently active asbestos trusts have decreased their payouts over the last few years, according to the Wall Street Journal, and those decreases are borne in no small part by veterans.

Opponents also argue that veterans' claims with asbestos trust funds should be excluded from the reports required by the FACT Act. The unfortunate truth, however, is that carving veterans out of the trusts' reports would allow unscrupulous plaintiffs' attorneys to continue filing the same sort of questionable claims that are making their way to the trusts today. Transparent reporting of all trust claims is the best way to ensure that veterans' legitimate claims are fully paid in the future.

Finally, those same opponents of this common-sense legislation falsely claim that veterans oppose the FACT Act, while in truth veterans from around the country strongly support this bill. Dozens of national groups, state-based organizations, and prominent individual veterans registered their support for the FACT Act when it was considered in the Judiciary Committee last year.

Mr. Chairman and Members of the Committee, thank you again for this opportunity to testify during this hearing. I urge you to help stop fraud on the asbestos trusts by passing the FACT Act to create greater transparency and accountability in the trust system, and protect veterans and other future claimants in the process.