

Questions from Senator Tillis for David Skeel

Many thanks for your questions and for inviting me to share my thoughts on them. I should preface my responses by saying that I have not carefully studied the operation of the trusts often used for compensating the victims in mass tort cases. But I answer each of your questions below based on my understanding of the process.

- 1. Tell me about how the system works for people who might discover their injury a few years down the road. Does the current Chapter 11 process allow for injured people to access compensation right away as well as in the future if it takes them a while to discover their injury? Or are they out of luck if they don't get in to file a claim right away?*

Chapter 11 generally does not contemplate paying injured people or other creditors until a reorganization plan has been confirmed (or the case has been resolved in some other fashion). My understanding is that, once a reorganization plan has been confirmed and a trust has been set up, injured people can sometimes obtain compensation relatively promptly, but this may vary based on the terms of the trust and the nature of the injury.

- 2. Do you have a sense of how the turnaround time for compensation under one of these funds compares with the turnaround time in a personal injury lawsuit through the courts? I mean, it seems like a compensation fund might be quicker? And isn't a lawsuit kind of a gamble compared to a fund that is already set aside?*

I do think the turnaround time may often be considerably quicker for payment from the trust set up as part of a Chapter 11 reorganization plan as compared to the ordinary litigation process, and that the ordinary litigation process is more of a gamble. There may be exceptions to this, depending factors such on the nature of the injury, when the injury occurs, and how the litigation is handled outside of bankruptcy. But in general, an important benefit of the trust approach is that, once the trust is set up, it can provide a payout relatively promptly and treat similar claims similarly.

- a. The plaintiffs' bar claims delay, but isn't that entity the sole source of delay in all of the divisional merger cases, to the point, in most cases, of even refusing to start a negotiation?*

I'm not familiar with the particular allegation of delay. As mentioned above, a benefit of handling mass tort cases in bankruptcy is that, when a trust is set up, the process can be more expeditious and provide payouts than are more consistent from one claim to the next than traditional litigation.

b. *In one current divisional merger case, the debtors and the future claimants representative representing 80+% of asbestos claims have negotiated a deal for over half a billion dollars for claimants. Yet even in that case, the plaintiffs' bar refuses even to engage and continues to delay payment to claimants. Don't examples like these refute the various statements that the debtor is causing delay or trying to avoid providing compensation?*

I'm not familiar with the details of the negotiations in this particular case, so I can't speak to the extent of any delay or to its cause.

3. *Can you explain how the compensation funds come together? What's the process and what kind of oversight do the funds have? And who has a seat at the table in the negotiation when these funds are put together? Is it just the current creditors or do people who might make a future claim have any representation to protect their rights in these discussions?*

In asbestos cases that are governed by section 542(g) of the Bankruptcy Code, a legal representative is appointed to represent the interest of future claimants. In other mass tort cases, legal representatives are not always appointed. Given that the future claimants' interests are not the same as current claimants' interests, I believe it is very important that the future claimants have their own representative or representatives. Otherwise, the trust is created through negotiations among the debtor, the current victims, and other creditors, without the perspective of future claimants.

a. *Given that the lion share of the money spent in tort cases goes to lawyers and not asbestos claimants, and that a large percentage of those claims are ultimately dismissed after proving to be frivolous or fraudulent, wouldn't that money better be redirected to a trust system for all legitimate current and future claimants?*

Although I haven't carefully studied the details of how the asbestos cases have been handled, there have long been complaints that too little of the payouts get to the victims who are most harmed. I would favor the implementation of a trust system that sought to regularize the treatment of asbestos victims, and in the past I have been involved in discussions about legislation that was intended to have this effect.

4. *A court recently found rampant fraud perpetrated by plaintiff lawyers in the tort system on corporate defendants that necessitated a RICO lawsuit against those lawyers. Is that a concern given the calls to favor that system in these divisional merger cases?*

I'm not familiar with this particular ruling. As discussed in my written and oral testimony, I believe it is important to use traditional bankruptcy doctrines such as fraudulent conveyance law and the requirement that a bankruptcy be filed in good faith to police divisional mergers, and to make sure that they are not used abusively. But for a divisional merger that is not abusive, I believe resolution in bankruptcy provides important benefits as compared to the traditional litigation process outside of bankruptcy.

5. *I have introduced, alongside Senators Grassley and Cornyn, legislation designed to promote transparency and accountability in asbestos bankruptcies and trusts funds created to compensate asbestos victims. The PROTECT Asbestos Victims Act would require the appointment of independent, non-conflicted fiduciaries and allow the Department of Justice to audit bankruptcy trust funds. Do you believe that Congress, if it considers any modification to bankruptcy courts' consideration of divisive mergers and non-debtor releases, should also consider reforms that would promote equitable distribution of funds and deter waste, fraud, and abuse that may limit victims' access to compensation?*

I have not studied your proposed legislation carefully, so I won't speak to the details. But I do favor measures that would ensure that representatives of future victims and other court-appointed representatives be truly independent, and that would promote transparency and accountability in the operation of the funds.