

SUBJECT: Requiring bankruptcy trust claims before lawsuit for asbestos injuries

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Smithee, Clardy, Laubenberg, Schofield, Sheets
4 nays — Farrar, Hernandez, Raymond, S. Thompson

WITNESSES: For — Lee Parsley, Texans for Lawsuit Reform; Kathleen Hunker, Texas Public Policy Foundation; Morgan Little, Texas Coalition of Veterans Organizations; Marc Scarcella, U.S. Chamber Institute of Legal Reform; Nathan Horne, United States Chamber of Commerce-Institute for Legal Reform; (*Registered, but did not testify:* John Marlow, ACE Group; Jay Thompson, Afact; Michael Chatron, AGC Texas Building Branch; Jon Fisher, Associated Builders and Contractors of Texas; Kelly Curbow, AT&T; Steve Perry, Chevron USA; Tom Sellers, ConocoPhillips; Diane Davis, East Texans Against Lawsuit Abuse; Samantha Omev, ExxonMobil; Ron Lewis, General Electric; Mike Meroney, Huntsman Corp., and Sherwin Alumina, Co.; Lee Loftis, Independent Insurance Agents of Texas; Bill Oswald, Koch Companies; Lee Ann Alexander, Liberty Mutual Insurance; Jonna Kay Hamilton, Nationwide; Joe Woods, Property Casualty Insurers Association of America; John Sepehri, Texas Apartment Association; Amanda Martin, Texas Association of Business; Hector Rivero, Texas Chemical Council; Lisa Kaufman, Texas Civil Justice League; Jim Brennan, Texas Coalition of Veterans Organizations; Jeffrey Brooks, Texas Conservative Coalition; Lindsey Miller, Texas Independent Producers and Royalty Owners Association; Shannon Rusing, Texas Oil and Gas Association; William West, The American Legion; John W. Fainter Jr, The Association of Electric Companies of Texas, Inc.; Stephanie Simpson, Texas Association of Manufacturers; Cary Roberts, U.S. Chamber Institute for Legal Reform; Julie Klumpyan, Valero; Tara Snowden, Zachry Corporation; Dawn Buckingham; Dennis Kearns; John LaBoon)

Against — Bryan Blevins, Texas Trial Lawyers Association; Denise Phillips; Collene Whipple; Jason Whipple

On — Mark Davidson

BACKGROUND: Asbestos or silica trusts are established under Federal Bankruptcy Code, ch. 11, sec. 524(g) if the company in bankruptcy currently is named as a defendant in a personal injury case alleging asbestos or silica-related injuries and it is likely there would be similar claims against the company in the future. Individuals claiming damages for asbestos or silica-related injuries can make a claim with the bankruptcy trust of the company they believe is responsible for the injury and receive compensation if certain criteria are met.

DIGEST: CSHB 1492 would add required disclosures for claimants in asbestos or silica personal injury lawsuits and allow defendants in these cases to stay proceedings and modify judgments under certain circumstances.

Required disclosure. The bill would require a claimant in an asbestos or silica personal injury lawsuit to provide notice of a trust claim, which would mean a filing with or claim against an asbestos or silica trust. The notice would be required for any trust claims made by the claimant. The bill also would require the claimant to disclose trust claim material, which would mean documentation that was filed with or required by an asbestos or silica trust.

The notice would include a statement by the claimant that identified each pending trust claim and a sworn statement by the claimant's attorney that the notice was complete and based on the attorney's good faith investigation of all potential trust claims. If the claimant filed a trust claim after this disclosure, the claimant would have to provide additional notice and trust claim material related to that claim.

The bill would create a presumption that trust claim material was authentic, relevant, discoverable, and not privileged in these cases. It would specify that a party could use the trust claim material to prove an alternate source for the cause of the exposed person's injury, a basis to allocate responsibility for the exposed person's injury, or any other issue

relevant to resolution of a claim in the lawsuit.

The bill would allow a defendant to file a motion for sanctions if a claimant failed to provide notice and trust claim material related to a trust claim that, after a judgment was awarded for the injury, the claimant received compensation from the trust for the same injury. The trial court could impose an appropriate sanction, including vacating the judgment and ordering a new trial.

Motion to stay proceedings. The bill would allow a defendant to file a motion to stay the proceedings in an asbestos or silica personal injury lawsuit. The motion would include a list of asbestos or silica trusts not disclosed by the claimant that the defendant in good faith believed the claimant could make a successful trust claim against and information supporting those potential claims.

The bill would require the claimant to file a response that could include either:

- a statement and supporting proof that the claimant had made a trust claim described by the defendant and had served the required notice and trust claim materials; or
- a request for the court to determine that the fees and expenses, including attorney's fees, for filing a trust claim identified in the defendant's motion would exceed the claimant's reasonably anticipated recovery from that trust.

In the event that the court made a determination described above, or the claimant proved that the claimant had already served notice and trust claim material related to the defendant's proposed trust claim, the court could not stay the proceedings. If the court determined there was a good faith basis for the claimant to make the proposed trust claim, the court would be required to stay the proceedings until the claimant provided the court with proof showing the claimant had served notice and trust claim material on the defendant related to that trust claim.

Modification of judgment. CSHB 1492 would allow a trial court, after receiving a motion from a defendant, to modify a judgment received by a claimant in an asbestos or silica personal injury lawsuit if the claimant had failed to provide notice and trust claim material, or the claimant made a trust claim after the judgment that existed at the time of the judgment. The court could modify the judgment by the amount of a subsequent payment made by an asbestos or silica trust or order other relief.

The bill would require the defendant to file a motion to modify the judgment within a reasonable time after the claimant received a payment from the asbestos or silica trust, but could not file after three years from the date the judgment was signed.

The bill would take effect September 1, 2015, and would apply to lawsuits that were pending on, or lawsuits commenced on or after, that date.

**SUPPORTERS
SAY:**

CSHB 1492 would improve fairness and transparency in asbestos or silica personal injury lawsuits and would encourage claimants to access the potentially more beneficial bankruptcy trust system before filing a lawsuit.

Currently, there is dual compensation available to claimants with asbestos or silica-related injuries. Depending on what products the claimant was exposed to, the claimant can make a trust claim or file a lawsuit against a company. There is a problem with claimants who receive a settlement or judgment through litigation and afterward make a trust claim, otherwise known as “double-dipping.” Asbestos or silica trusts are being depleted by claims and can no longer pay each claimant as much as they would have years ago. When claimants double-dip, they are taking away valuable resources from potential future claimants who will need to be compensated.

The bill would require a claimant with a potential valid claim against an asbestos or silica trust to make that claim before the claimant’s lawsuit could continue, ensuring no more double-dipping. Even if the bill increased the number of trust claims made, it would ensure that the reason was because a claimant had a legitimate claim against a particular trust

and not because the claimant was working both systems.

The bill would improve transparency and prevent fraud that is committed when claimants make conflicting representations to a trial court and an asbestos or silica trust. A claimant does this by claiming that the asbestos or silica produced by a particular defendant caused their injuries, and then after the claimant receives compensation, claim to an asbestos or silica trust that a different company's asbestos or silica caused their injuries. This fraudulent behavior is prevalent. The bankruptcy trust system is supposed to audit its claims and the court is supposed to sanction attorneys for lying or withholding information, but that is not enough. When claimants delay making claims against asbestos or silica trusts until after a trial, defendants do not get a complete picture of the claimant's exposure and the company that is likely culpable. The bill would provide defendants with those missing pieces and would protect the court and bankruptcy trust systems from fraud.

The bill would encourage claimants to investigate potential asbestos or silica trust claims before pursuing lawsuits. The bankruptcy trust system is not adversarial in nature, unlike a lawsuit, and takes much less time. Once a claim is filed and documentation is provided to show where a claimant worked or other relevant exposure information, the claimant can receive compensation. Many trusts share processing facilities, meaning a claimant can file one claim form that can be processed for multiple trusts, which decreases the amount of paperwork a claimant must file. There is no reason for claimants to not make trust claims before filing a lawsuit, unless they do not believe they have a claim against any of the asbestos or silica trusts. The bill would encourage making these claims so that claimants could receive much-needed compensation quickly.

**OPPONENTS
SAY:**

CSHB 1492 would place an undue burden on claimants with asbestos or silica-related injuries and prevent many from having their day in court. Currently, asbestos or silica personal injury lawsuits involving claimants who have been diagnosed with malignant mesothelioma or certain other fatal diseases are required to be expedited by the court to go to trial or else be finally disposed of within six months of being referred to the court.

This is to give claimants a chance to go to trial before they pass away. This bill would be contrary to the policy that put the six-month expedition requirement in place and would not increase fairness. It only would allow defendants to game the system and delay trial.

The bill also would not prevent claimants from depleting asbestos or silica trusts because the bill actually would require claimants to first seek compensation from those trusts. The bill would not decrease the amount of claims made against asbestos or silica trusts, but in fact could increase the number of those claims.

The bill would require claimants to create evidence for defendants, which is an unprecedented concept. Claimants currently are required to produce trust claim material to the defendants, but the bill would give that information the power of proving another source caused the injury, allowing a defendant to use that information to lessen the defendant's culpability at trial without having to gather any evidence itself. The bill would create a system where defendants, not claimants, could "double-dip." Defendants could receive credit for any settlements a claimant received from asbestos or silica trusts, then the defendant could use the trust claim material to prove an alternate source caused the asbestos or silica-related injury. Both would result in the defendant owing less money to the claimant.

The bill would be unnecessary in protecting against fraud in the court or bankruptcy trust systems. If an attorney lies to the court about a trust claim, which does not happen often, the court can and should sanction the attorney. The bankruptcy trust system also does not need protection because it already uses an audit process to ensure that claimants previously did not make conflicting claims to a court. If it was found that a claimant made conflicting representations, the claim would be denied. The attorney representing the claimant, and possibly the entire law firm, could be suspended from filing claims with that trust.