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# New Fight Erupts Over Pursuit of Asbestos Claims

Critics Cite *Lax Oversight of Trusts to Compensate Victims, but Plaintiffs' Lawyers Say System Helps Injured Workers, Lowers Costs*

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By NATHAN KOPPEL

Giant trust funds were designed to alleviate some of the problems of protracted asbestos-related litigation.

But these billion-dollar trusts have come under fire from insurance companies and legal scholars contending that they lack transparency, pay questionable claims and unfairly enrich plaintiffs' lawyers.

Trusts aren't required to disclose personal information about claims. That lack of transparency, some experts say, creates the potential for abuse. Some fear trust money won't go to people who most need it.

"The real concern," says Steven Todd Brown, a professor at University at Buffalo Law School, who has studied asbestos trusts, is that people who "get sick in the future may not get paid what they are entitled to, because trusts are expending their assets paying more marginal claims." According to data from court filings and interviews with plaintiffs' and defense lawyers, trusts are more likely than the court system to pay damage awards to claimants with conditions other than cancer, considered the gravest of asbestos-related diseases.



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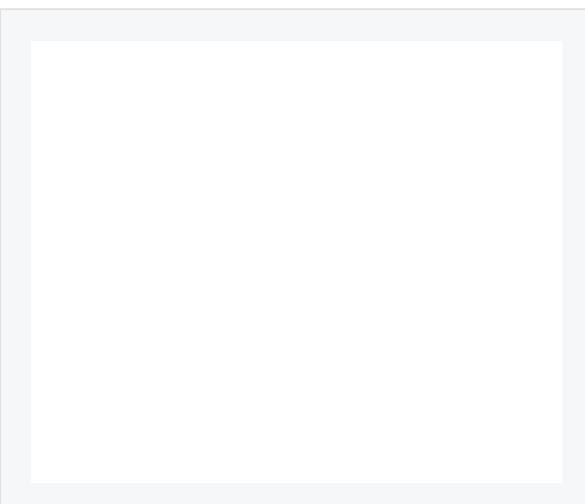
Associated Press

W.R. Grace, which ran this asbestos-contaminated mine in Libby, Mont., is creating a trust to compensate injured residents.

Plaintiffs' lawyers say that trusts resolve claims more efficiently than the courts and help companies survive. All interested parties, including insurance companies, they add, are invited to lodge objections to trusts at the time they are created by bankruptcy courts.

The nation's roughly 40 asbestos trusts were set up with court approval by Johns Manville Corp., Owens Corning and other former makers and sellers of asbestos, once commonly used as a fire retardant. The trusts oversee about \$20 billion in assets, a

sum that has nearly tripled since 2005, according to Bates White LLC, a consulting firm that advises companies and insurers facing asbestos liability. Last year, the firm says, trusts paid out about \$3 billion in claims, more than double the previous year's total.



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The trust system might grow, as other large companies are in the process of creating trusts. W.R. Grace & Co. has proposed a trust of more than \$1 billion to resolve asbestos claims, including those filed by citizens of Libby, Mont., who say they were exposed to the company's nearby mine that processed asbestos-contaminated vermiculite. A Delaware bankruptcy court is due to rule on the proposal early next year.

The asbestos-trust system sprang up more than a decade ago after it became clear that the nation's onetime asbestos makers faced potentially crippling legal claims for illnesses from their own workers and others who were exposed to asbestos, often years before the health hazard was recognized.

The Environmental Protection Agency has banned most asbestos-containing products. But some products still contain trace amounts, and the fiber is still present in some buildings.

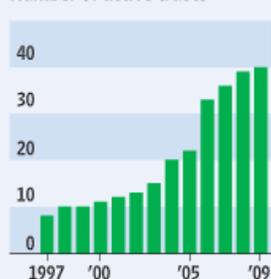
In 1994, Congress, looking for a way to keep these companies afloat and provide a continuing source of funding to pay asbestos-injury claims, amended U.S. bankruptcy laws to allow companies forced into bankruptcy because of asbestos liability to restructure by setting up trusts. They also were a way to spare companies and asbestos claimants the high cost of litigation.

Financed largely by insurance money and company stock, the trusts were designed to last as long as there were victims with valid asbestos-related illness, which often appear 30 to 40 years after exposure. The law protected companies that had created such trusts from being sued over asbestos.

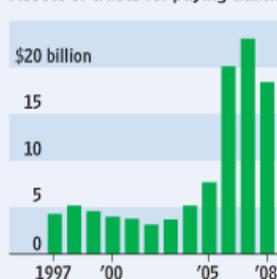
### Out of Court

Asbestos trusts have grown in number and value in recent years, as more manufacturers turn to them when facing large asbestos liabilities.

Number of active trusts



Assets of trusts for paying claims



Source: Bates White, LLC

Trusts have been created to resolve other types of large-scale litigation, primarily claims alleging injuries from defective drugs, says Richard Nagareda, a professor at Vanderbilt University Law School. But many pharmaceutical trusts are financially open-ended, meaning companies are obligated to pay any valid claim. The continuing commitment

gives drug makers incentive to closely monitor the trusts. Asbestos companies, in contrast, he says, pay a fixed amount when the trusts are set up, and then have less interest in ensuring that trusts are spending their assets wisely.

"Trusts are as fair as they can be," counters Joseph Rice, one of the nation's leading asbestos plaintiffs' lawyers, who serves on the advisory committee of several trusts. "My clients received much greater compensation in the court system than they will ever recover through the distribution process."

The asbestos trusts are required to report how much they award annually in total asbestos compensation and what percentage goes to cancer victims.

But asbestos trusts aren't required to disclose the names of people who file injury claims or identify those who are awarded payouts for their conditions. Moreover, because asbestos claimants are often the largest class of creditors in asbestos-related bankruptcy proceedings, their lawyers play a major role in deciding who receives payouts from the trusts and how much they get.

Those lawyers typically stand to reap a 25% to 40% share of any awards to their clients. As a result, critics say, plaintiffs' lawyers have an incentive to be generous, and to approve compensation for claimants who aren't injured seriously or already might have been fully compensated by courts or other trusts for their illnesses.

Lawyers who run asbestos trusts say they require claimants to file medical evidence and a

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detailed work history which, along with periodic audits of the trusts, guards against frivolous claims. They also point out that trusts are overseen by trustees and bankruptcy judges, who can help ward off potential conflicts. Stricter disclosure requirements, many of them say, would undermine the privacy of asbestos victims.

Last year, the Owens Corning's asbestos trust paid about \$500 million -- nearly half of its total payouts for the year -- to workers alleging asbestos-related ailments other than cancer, such as impaired functioning of the lungs. Similarly, Armstrong World Industries, has directed about 40% of its payouts to "nonmalignant" claims, according to a 2009 court filing.

Nonmalignant claims often represent injuries far less serious than mesothelioma or other cancers caused by asbestos exposure.

The trustees of the Owens Corning and Armstrong trusts declined to comment. Lawyers who help run the trusts say going forward they will devote a greater percentage of payouts to cancer claims.

Paying people with less serious injuries contrasts sharply with the outcome of court cases over asbestos exposure, in which more than 85% of asbestos damages are paid to those with cancer, according to both plaintiffs' and defense lawyers. They say that is partly because legislation in various states has tightened evidence standards for asbestos claims in court, discouraging marginal cases. Such laws, however, don't apply to trusts, though lawyers and court documents show some trusts devote a similarly high percentage of payments for cancer.

Hartford Financial Services Group, a major asbestos insurer, said in a statement that it has filed requests recently with various trusts "to discern whether claims made against its policyholders are legitimate."

Others have found what they believe are illegitimate claims. Garlock Sealing Technologies LLC, a New York-based gasket maker, paid almost \$10 million in court damages in 2008 to three plaintiffs whose family members died as a result of asbestos injuries. The plaintiffs later tried to recover additional damages from various trusts, according to court filings, which isn't illegal but which Garlock felt was double-dipping. "We found the plaintiffs were pursuing claims we had already paid," says Garlock's attorney Garland Cassada, who alerted the trusts and thus averted any double payments for the same claim.

Some insurance companies and defense attorneys propose a national database of asbestos claims, which would include the names of claimants, the nature of their grievances and what they have recovered in damages.

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