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AMERICAN LEGISLATIVE EXCHANGE COUNCIL

ISSUE ALERT

To: ALEC Members on the House Judiciary Committee
From: ALEC's Civil Justice Task Force
Re: Texas HB 2034 - Asbestos Bankruptcy Trusts
Date: March 25, 2011

We understand that the Texas House Judiciary Committee will hear H.B. 2034 on Monday morning. This legislation is based on ALEC's *Asbestos Claims Transparency Act* and would reduce the potential for fraud and gamesmanship with respect to asbestos and silica claims. ALEC strongly supports H.B. 2034 which, like the ALEC model, promotes honesty in asbestos litigation.

By way of background, asbestos litigation has forced over 85 employers into Chapter 11 bankruptcy. As part of the reorganization process, many of these companies have established trusts to pay present and future asbestos-related claims. These trusts represent a major source of funding for asbestos claimants and have an estimated value of \$30-60 billion, an amount some experts believe may be sufficient to fully compensate victims. Asbestos claimants often seek compensation from trusts or claims facilities formed in asbestos bankruptcy proceedings and from civil defendants that remain solvent.

In many states, including Texas, the lack of transparency between these two paths to recovery—the asbestos trusts and the civil tort system—raises a strong potential for fraud and abuse. Unscrupulous claimants or attorneys may allege facts intended to maximize recoveries against various trusts and differing or even conflicting facts to maximize recoveries against tort system defendants.

National attention first began to focus on this type of abuse after startling facts were uncovered in 2007 by Ohio Judge Harry Hanna in *Kanianian v. Lorillard Tobacco Co.* There, a plaintiff's estate filed an asbestos lawsuit after the estate reportedly recovered more than \$700,000 from various asbestos trusts. Judge Hanna ordered the claim forms filed with the trusts to be disclosed. His decision "effectively opened a Pandora's box of deceit," according to the *Cleveland Plain Dealer*. Judge Hanna found that the claim form submissions were inconsistent and contradictory to the claims made against Lorillard. Judge Hanna barred the plaintiff's law firm and the attorney from practicing in his court. Judge Hanna stated, "It was lies upon lies upon lies." The *Wall Street Journal* editorialized that Judge Hanna's opinion should be "required reading" to assist in providing "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts."

These revelations came on the heels of the 2005 watershed decision by the manager of the federal court silica litigation, U.S. District Judge Janis Graham Jack, who recommended that all but one of the 10,000 claims in the federal multi-state silica litigation should be dismissed on remand because the diagnoses were fraudulently prepared. Thousands of the silica claimants had previously filed claims with asbestos trusts, although Judge Jack

appreciated that “a golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis.”

Together, these examples illustrate the need for legislators to take steps to address fraud and abuse in asbestos and silica cases. This is what H.B. 2034 would do.

H.B. 2034 would require an asbestos or silica plaintiff to disclose any claims that have been or will be made against a trust or fund set up to pay claims. Copies of executed claim forms and supporting materials must be produced so that defendants can explore whether the plaintiff is attempting to tell one story to bankruptcy trusts and another story in civil litigation. The claim forms and related materials would be admissible in court so that the jury can make a fully informed decision before assigning fault.

If you have any questions about this issue, please feel free to contact Amy Kjose, ALEC’s Civil Justice Task Force Director at (202) 742-8510. Thank you for your prompt attention to this matter.

American Legislative Exchange Council | 1101 Vermont Ave., NW 11th Floor, Washington, DC 20005
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