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HEARING ON THE FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2013

HOUSE JUDICIARY COMMITTEE:
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

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Chairman Bachus, Ranking Member Cohen, and members of the Subcommittee, thank you for this opportunity to testify concerning H.R. 982, the Furthering Asbestos Claim Transparency (FACT) Act of 2013 [hereinafter, the FACT Act or the Act].

I am Todd Brown, Associate Professor of Law and Director of the Center for the Study of Business Transactions at SUNY Buffalo Law School, where I teach Bankruptcy, Torts, Mass Torts and related courses. My research focuses on the intersection of mass torts and bankruptcy law, with an emphasis on identifying and preventing practices that undermine the integrity of the judicial process and the operations of global settlement funds. Prior to becoming a law professor, I worked with the Business Restructuring and Reorganization practice at Jones Day from 1999 to 2003, where I served primarily as debtor's counsel in several large corporate chapter 11 cases. I subsequently worked at Wilmer Cutler Pickering Hale & Dorr from 2003 to 2007, where, among other things, I represented individuals, corporations, banks and insurers in bankruptcy and class action matters.

The views offered here are mine alone and are not those of my current or former employers or clients. I am not being compensated for my testimony today, and I do not accept any personal or professional compensation or funding from any party that is involved in asbestos personal injury or asbestos bankruptcy litigation or legislation.

Introduction

The FACT Act would amend title 11 of the United States Code to require asbestos bankruptcy trusts to file quarterly claim-level reports on the applicable

bankruptcy court's docket. Under the Act, trusts must report (a) the name and exposure history of each party submitting a proof of claim and (b) the basis for any payment made to each claimant during the quarter. The Act expressly excludes "any confidential medical record" and "the claimant's full social security number" from the mandatory quarterly reporting requirement. The Act further requires trusts to comply with certain requests for information concerning claim submissions and payments, subject to appropriate protective orders, and authorizes the trusts to charge fees to cover the reasonable costs of complying with such requests.

In my written statement and testimony concerning the Furthering Asbestos Claim Transparency Act of 2012,[1] I surveyed the history of asbestos personal injury litigation, the evolution of the asbestos bankruptcy trust system, and the relationship between state tort litigation and bankruptcy trusts. In the time since, I have completed one phase of my study of the bankruptcy trust system's operations and summarize some of the findings below. In addition, this written statement outlines some basic features that are common at bankruptcy trusts and discusses some potential concerns with the FACT Act.

Asbestos Personal Injury and Bankruptcy

Less than a decade after *Borel v. Fibreboard Paper Products Corp.*[2] ushered in modern asbestos personal injury litigation, the largest asbestos producer in the United States, Johns-Manville, petitioned for relief under Chapter 11 of the

[1] *See* FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2012, HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, H.R. 4369, No. 112-120, at 24-50 & 175-182 (May 10, 2012) [hereinafter, the 2012 Hearing Report].

[2] 493 F.2d 1076, 1083-85 (5th Cir. 1973).

Bankruptcy Code. Just as *Borel* provided an early roadmap for asbestos personal injury victims to pursue recovery against asbestos manufacturers, the Manville Chapter 11 plan provided a roadmap for defendants seeking to resolve that liability. Under this model, which was codified at Section 524(g) of the Bankruptcy Code in 1994, the defendant establishes and funds a bankruptcy trust, and the district court enters an injunction channeling all of the defendant's current and future asbestos liability to this trust upon the satisfaction of certain conditions. Once established, the trusts process and pay claims according to their respective trust distribution procedures, which establish both the criteria that must be satisfied to qualify for payment and the default value of different types of claims that satisfy these criteria.

Although bankruptcy has become a viable option for companies seeking relief from asbestos liability, it also tends to increase the liability share of defendants who remain in the tort system. Manville's departure from the tort system "shifted liability to the remaining solvent defendants in such a way as to increase the chances that those firms, too, eventually would seek protection in bankruptcy."[3] These subsequent bankruptcies, in turn, increased the liability shares of still other defendants.[4] This cycle continues to this day.[5] To date, approximately

[3] RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 167 (2007).
[4] *See* S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 852 (2008).
[5] *Id.*

60 asbestos bankruptcy trust funds have been established or are in the process of being established.[6]

As the number of active trusts grew (and number of key defendants in the tort system declined) during the last decade, the trust system's collective payments also grew. From 2006 through 2011, bankruptcy trusts paid more than $13.5 billion to asbestos personal injury claimants,[7] leaving approximately $18 billion in assets[8] to satisfy claims that may continue to be filed through 2050.[9] And though new trusts are expected to control more than $12 billion in assets, they appear likely to follow similar payment patterns.

Trust Performance and Future Claims

Given the substantial surge in claim payments during the last decade, several trusts have reduced payment percentages[10] to preserve assets. In its 2010 report

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[6] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3 (2011)[hereinafter GAO REPORT]. Roughly forty of these trusts are active and routinely process and pay claims.

[7] Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, MEALEY'S ASBESTOS BANKR. REP. 1, 2 (June 2012). The payments made during 2012 have not been reported by several trusts to date and, accordingly, have not been included in these figures.

[8] *Id.*

[9] *See* AM. ACAD. ACTUARIES, CURRENT ISSUES IN ASBESTOS LITIGATION, at 2 (Feb. 2006)("Although occupational exposure to asbestos was significantly reduced following the establishment of Occupational Safety and Health Administration (OSHA) requirements in the early 1970s, asbestos diseases are expected to manifest at least through 2050 in the United States, and longer in several other countries where high exposure levels continued longer."); ERIC STALLARD ET AL., FORECASTING PRODUCT LIABILITY CLAIMS (2005)(projecting asbestos personal injury claims will continue through 2050).

[10] The "payment percentage" is the percentage of the value assigned to a claim that will actually be paid to a claimant. Thus, a claim that is assigned a value of $100,000 by a trust applying a 30% payment percentage will be paid $30,000. Trusts

on asbestos bankruptcy trusts, RAND Corporation found that only one of the 29 trust-claim-class combinations it analyzed, the T.H. Agriculture & Nutrition Trust (THAN Trust), applied a 100% payment percentage, and that trust had not yet finished processing its initial claims.[11] The median payment percentage was 25 percent, with no trust other than THAN paying more than 60 percent of the settled claim value.[12]

As reflected in Figure 1, twenty trusts have reduced their payment percentages since the 2010 RAND Report. Two others – Combustion Engineering and DII – appear to be in the process of reducing their payment percentages.[13] During this time, per-claim compensation at these trusts declined between 9% and 93.33%.[14] In fact, the THAN Trust reduced its percentage from 100% to 30% shortly after the RAND report; thus, a mesothelioma claimant who stood to receive $150,000 from the trust in 2010 would receive $45,000 today. Similarly, a mesothelioma claim submitted and settled at the scheduled value under the Lummus TDP today will receive $2,500; a mere 10% of the $25,000 the same claim

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frequently reduce payment percentages once they conclude that continuing payments at existing levels is unsustainable.

[11] Lloyd Dixon, Geoffrey McGovern & Amy Coombe, ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 36-38 (2010) (range from 1.1% to 100%, with a median payment percentage of approximately 25%). The THAN Trust subsequently reduced its payment percentage to 30% in 2011. http://www.thanasbestostrust.com/Files/20110321_THAN_Payment_Percentage_Notice.PDF.

[12] *Id.* at xv.

[13] *See* discussion infra at note 17.

[14] *See* Figure 1.

would have received in early 2011.[15] In light of these reductions, payment percentages range from .5% to 70%.

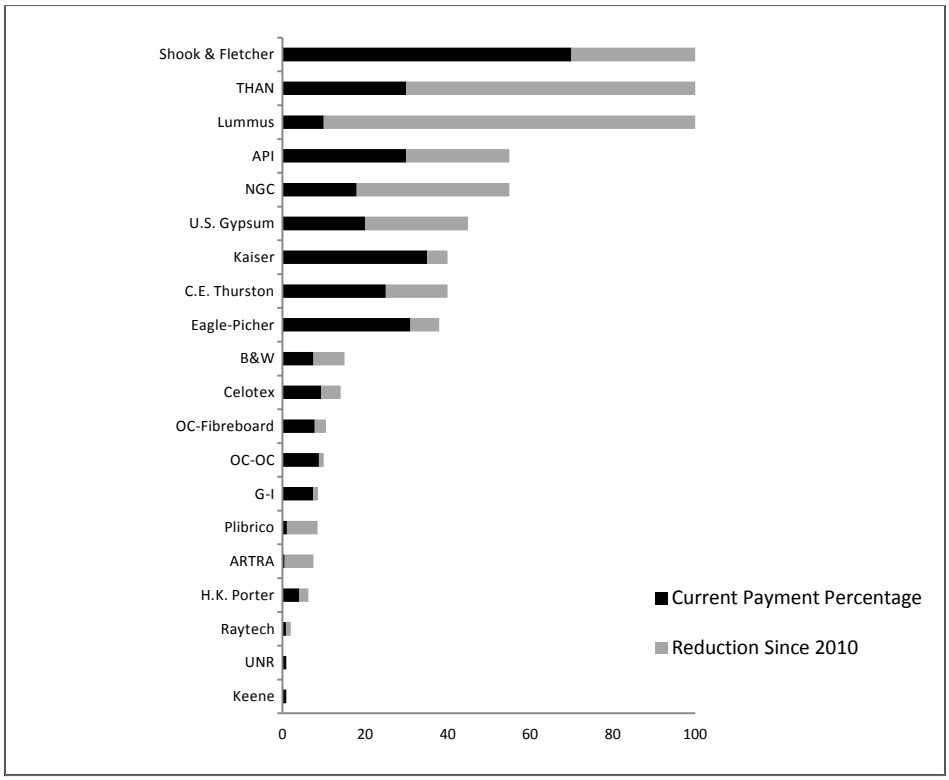

Figure 1: Payment Percentage Reductions Since 2010[16]

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[15] This reduction was attributed to the fact that "more cancer claims have been filed with the Trust in its first three years of operations than were forecast during the bankruptcy case to be filed over the 40 year life of the Trust." *See* Letter to Holders of TDP Determined Lummus Asbestos PI Trust Claims, dated June 13, 2011, at 1 http://www.abblummustrust.org/Files/20110616_Lummus_Letter_To_TDP_Claim_Holders.pdf.

[16] This figure does not include trusts that are actively reconsidering their payment percentages, notwithstanding any likelihood that such reconsiderations will result in payment percentage reductions. *See* DII Industries, LLC Asbestos PI Trust Notice of Payment Percentage Reconsideration (Feb. 22, 2013), *available online at:* http://www.diiasbestostrust.org/files/20130222%20Notice%20of%20Payment%20Percentage%20Reconsideration.pdf ("This re-evaluation will likely result in a reduction of the percentage.").

Similarly, this figure does not include the trustees' proposed reduction of the Combustion Engineering 524(g) Asbestos PI Trust payment percentage to 44% in May of last year, which was to be effective June 18, 2012. *See* Notice to Holders of Combustion Engineering TDP Claims (May 17, 2012), *available online at:* http://www.cetrust.org/docs/20120517_CE_Payment_Percentage_Notice.pdf. The

Bankruptcy trusts have taken other steps to limit claim payments. For example, in January 2012, the Manville Trust adopted a "Maximum Annual Payment," or MAP, which places an aggregate cap on the trust's payments to claimants according to its projected assets and liabilities for the year. Once the MAP is reached, the trust will make no further claim payments during the year, and all unpaid pending claims will carry over into the following year. The MAP for 2012 was $132 million, and the trust reported that it deferred approximately $17.7 million in claims until January 2013.[17] Thus, although the Manville Trust payment percentage remains at 7.5%, its approved claims in 2012 appear to have exceeded projections by a wide margin.[18]

This recent history suggests that after a quarter century of experience in processing and paying asbestos claims, many bankruptcy trusts continue to underestimate future liabilities and, accordingly, pay claims at unsustainable rates

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plaintiff-controlled Trust Advisory Committee for this trust informed the trustees that it was withholding its consent to the reduction, as is allowed under the TDP for the trust, and this dispute does not appear to have been resolved as of the preparation of this written statement. *Id.* Accordingly, this reduction does not appear to have gone into effect, and all claims paid in the interim have been paid under the old payment percentage (48.33%).

[17] *See* Manville Personal Injury Settlement Trust, Special-Purpose Consolidated Financial Statements for Dec. 31, 2012 and 2011, at 10.

[18] Similarly, the Combustion Engineering 524(g) Asbestos PI Trust employs a MAP (currently set at $75 million) and a Claims Payment Ratio, which allocates 87% ($65,250,000) of the MAP to malignancy claims and 13% ($9,750,000) to non-malignant claims. *See* Combustion Engineering 524(g) Asbestos PI Trust 2013 Maximum Annual Payment, Claims Payment Ratio notice, *available online at:* http://www.cetrust.org/docs/CE_2013_MAP_Notice.pdf. The trust's non-malignancy MAP for 2013 was exhausted in January of this year. *Id.* The trust paid all approved malignancy claims in 2012 – $89,282,678, an amount that exceeds the malignancy portion of the MAP by more than $34 million (or 36.8%) – due to a "carryover" from years earlier. Combustion Engineering 524(g) Asbestos PI Trust Annual Report for the Fiscal Year Ended December 31, 2011, at 4.

before ultimately reducing payments as old estimates prove woefully inadequate. Some trusts repeat this process several times.[19] New trusts go online – employing largely identical claim criteria and quality control measures – and, for many, the pattern continues. Regardless of whether they become inactive or simply continue reducing payments, few of the trusts operating today appear likely to "value, and be in a financial position to pay" initial claims and future demands that involve similar claims "in substantially the same manner."[20]

Understanding the Pattern

Even as their payments became a far larger component of overall asbestos personal injury compensation, many trusts became less transparent and more aggressive in challenging efforts to investigate their operations.[21] During this time, the TDPs of newly established trusts included confidentiality and "sole benefit" language that preclude public disclosure of any claim-level information and may delay or effectively prevent[22] private discovery of claim-level information, and the

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[19] For example, the USG Trust has reduced its payment percentage three times since 2010, for a net reduction from 45% to 20%. *See* Letter to Counsel for Claimants Regarding the USG Payment Percentage dated April 20, 2010 (reducing the percentage from 45% to 35%); Notice From Trustees Regarding USG Payment Percentage dated Jan. 6, 2011 (reducing the percentage to 30%); Notice of Payment Percentage Change dated Sept. 28, 2012 (reducing the percentage to 20%). All notices are available online at: http://www.usgasbestostrust.com/.

[20] 11 U.S.C. § 524(g)(2)(B)(ii)(V).

[21] Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, MEALEY'S ASBESTOS BANKR. REP. 1, 9 (June 2012).

[22] Even in jurisdictions that require disclosure of trust forms to other parties in state tort litigation, plaintiffs may avoid this disclosure by simply waiting to file trust claims until after the litigation is over. Lloyd Dixon & Geoffrey McGovern, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION (2011) (noting that some lawyers file all trust claims early in a case, while others elect to wait until after the litigation

TDPs of some trusts that were confirmed years earlier were amended to include virtually identical provisions. Although most trusts file annual reports, many of these reports are no longer accessible through PACER because the judge overseeing the cases ordered them closed. Some trusts have never provided substantial public information concerning their operations, and others have placed annual reports, notices and other information concerning their activities behind password-protected walls.

Given the pattern of trust depletion, growing secrecy concerning trust operations, and anecdotal accounts of specious claiming practices in the trust system, it is perhaps inevitable that much of the discussion to date has centered on the fraud question.[23] As I noted in my prior testimony, however, "In the absence of transparency, nobody with an interest in this debate – litigants, legal representatives, trust officials or judges – has access to sufficient information across trusts to reach the extreme conclusions that are commonly advanced – that fraud is nonexistent, on the one hand, or rampant, on the other – as an empirical matter."[24]

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concludes). Some jurisdictions require plaintiffs to file all trust claims before trial, and others are considering similar requirements. As I noted in my prior testimony, however, these provisions are under attack and may be difficult to enforce. *See* 2012 Hearing Report, *supra* note 1, at 182.

[23] *See*, *e.g.*, Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J., March 11, 2013, at A1; Editorial, *Busting the Trust Fraud*, WALL ST. J., Dec. 12, 2012, at A18; Daniel Fisher, *Double-Dippers*, FORBES, Sept. 4, 2006, at 136 ("Even as states crack down on frivolous lawsuits by people with no symptoms at all, trusts established by bankrupt asbestos manufacturers are paying tens of thousands of claims each year based on inflated or downright false stories of how people were exposed to their products.").

[24] 2012 Hearing Report, *supra* note 1, at 179.

Unless and until the fraud question can be addressed empirically, this cloud is likely to continue to hang over the bankruptcy trust system.

Likewise, the different layers of "double-dipping" [25] asserted by state tort defendants are also difficult to evaluate empirically. Limited transparency may create opportunities for plaintiffs to obtain more from tort defendants and trusts in the aggregate than the damages they are found to have suffered at trial. Beyond these circumstances, defendants also appear to use the term to refer to the possibility that plaintiffs are exploiting the information asymmetries created by the lack of transparency to obtain higher settlement values in tort than they would receive otherwise. Allowing the former, narrower scenario is difficult to justify as a normative matter given that such plaintiffs would, in fact, receive more than appropriate to make them whole due solely to the lack of transparency.

Even without widespread fraud, the design of Section 524(g), the manner in which asbestos bankruptcies are administered, and the management structure and criteria at established trusts continue to work against the goal of ensuring equitable compensation for future victims. These factors are discussed below.

[25] The term "double-dipping" generally refers to the concept of receiving more than one recovery for the same injury. This broad understanding of the term as applied to asbestos personal injury recoveries, however, may be misleading because any one plaintiff may not be made whole by the total recoveries he or she receives from bankruptcy trusts and tort defendants. To the extent that I refer to the term in my work, I use it only to refer to those cases in which a plaintiff has received full recovery on a judgment in the tort system and receives additional recovery from one or more bankruptcy trusts.

A. Tort Claims, Section 524(g) and Asbestos Bankruptcies

Some basic features of asbestos bankruptcies contribute to the pattern. First, although the claims allowance and estimation procedures typically employed in Chapter 11 ordinarily provide bankruptcy courts with considerable discretion in limiting the influence of weak claims in the case, tort claims receive special treatment pursuant to Title 28. Under 28 U.S.C. § 157(b)(2)(B), bankruptcy judges are not authorized to allow or disallow personal injury tort and wrongful death claims against the estate.[26] This section further provides that individual claims cannot be estimated for allowance purposes.[27] In the absence of provisions authorizing consideration of claim-level information necessary to distinguish strong and weak claims, bankruptcy courts lack a basic mechanism for ensuring that those who vote on the plan are, in fact, legitimate stakeholders in the debtor's case.

Moreover, those who control these untested claims may exercise considerable influence in shaping the ultimate design of the trusts and TDPs. Although it is frequently necessary to employ the cram-down (or the threat of a cram-down) to confirm a Chapter 11 plan in non-asbestos cases, it is not possible to cram down a channeling injunction; the 75% vote requirement of Section 524(g) is mandatory.[28] Thus, to get sufficient votes to issue the channeling injunction, the

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[26] Under 28 U.S.C. § 157(b)(2)(B), bankruptcy courts may not oversee the "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11." Rather, these matters may be heard in the district court in which the bankruptcy case is pending or in which the claim arose. 28 U.S.C. § 157(b)(5).

[27] *Id.*

[28] Century Indem. Co. v. Congoleum Corp. (*In re* Congoleum Corp.), 426 F.3d 675, 680 n.4 (3d Cir. 2005) ("Pre-packaged bankruptcies employing a channeling

TDP must pay enough to appeal to those advancing high value claims and have sufficiently generous qualification criteria to appeal to those advancing claims that may be poorly documented or otherwise stand little chance of success in state court. These demands for both expansive qualification criteria and high default settlement values are consistent with the lawyers' duties to their respective clients and grounded in a clear recognition of the leverage they enjoy due to the design of Section 524(g). At the same time, lawyers and their clients likewise have strong interests in minimizing quality control and audit procedures that may require them to incur additional costs and delay payment of their claims.

Although Section 524(g) requires the appointment of a legal representative for future victims prior to the issuance of a channeling injunction, the current framework for doing so has drawn considerable criticism.[29] By definition, unknown and unknowable future victims are unable to participate in the case and ensure loyal representation by their court-appointed representative.[30] These legal representatives are frequently repeat players and are often selected by the debtor in

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injunction are not eligible for the "cram down" provision contained in 11 U.S.C. § 1129(b)(1) which allows the bankruptcy court to confirm a plan of reorganization over creditors' objections in certain circumstances.").

[29] *See*, *e.g.*, Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NORTHWESTERN L. REV. 1435, 1438 & 1439 (2004) (concluding that "future claimants are not adequately represented in bankruptcy negotiations" and the risk that the trusts will be inadequate to pay claimants fairly "is borne primarily by future claimants"); Frances McGovern, *Asbestos Legislation II: Section 524(g) without Bankruptcy*, 31 PEPP. L. REV. 233, 248 (2004) ("The selection of the futures representative is problematic because having a weak futures representative is in the interests of both the debtor and the current claimants."); Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 60 (2000).

[30] Listokin & Ayotte, *supra* note 28, at 1438; Tung, *supra* note 28, at 60.

consultation with lead plaintiffs' firms, which appears to have a punch-pulling effect during bankruptcy negotiations.[31] Moreover, the appointed legal representative does not vote on the plan and may not have sufficient leverage to demand changes to TDP's where current and future claimants' interests differ. And given these factors and the secrecy that surrounds asbestos bankruptcy negotiations, it seems unlikely that dissatisfied future victims will ultimately be in position to hold even apathetic legal representatives accountable when the resulting trusts ultimately fail to protect their interests. As Professor Tung observed, the use of legal representatives in this context may suggest "not so much a concern for otherwise unrepresented claimants, but instead a need to provide due process cover in order to bind future claimants to a reorganization plan."[32]

B. Bankruptcy Trust Management, TDP Criteria and Expansion of the Compensable Claim Pool

The resulting bankruptcy trusts employ claim qualification criteria that are easier to satisfy than comparable standards in the tort system. Among other things, bankruptcy trusts:[33]

- Apply exposure criteria that are lower, and may be substantially lower, than applicable causation standards in the tort system;[34]

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[31] Brown, *supra* note 4, at 900 (noting that future claimants' representatives are often repeat players and "have strong global incentives against taking positions in any one case that may alienate" lead plaintiffs' lawyers); RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 177 (2007).

[32] Tung, *supra* note 28, at 64.

[33] Many of these points are outlined in greater detail in the appendices and text of my working paper, *Bankruptcy Trusts and Future Claims*, which is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225519.

[34] *See* Panel Discussion, *Asbestos Bankruptcy Trusts and Their Impact on the Tort System*, 7 J. L., ECON. & POL'Y 281 (2010) ("A lot of bankruptcy trusts, particularly the newer ones for mesothelioma claims, all they say that there has to be meaningful

- Do not expressly provide for consideration of some other likely causes of lung cancers and other non-signature diseases or have avenues for testing representations concerning other likely causes (i.e., the claimant's smoking history);
- Do not typically employ medical professionals to test the veracity of medical evidence submitted with claims that are not audited;[35]
- Depending on the specific audit plan in place, may not consult independent medical experts with respect to audited claims;
- Pay certain non-malignant claims that are unlikely to be compensated due to substantive and procedural modifications in the applicable state tort system;[36] and
- Do not typically employ the sort of targeted and random audit procedures that are more likely to uncover unreliable claim submission patterns and practices, including practices similar to those uncovered by Judge Jack in the Silica MDL.

Collectively, these factors suggest that so many trusts' projections fall short of actual claim payments because (a) the default qualification criteria may treat many claims that are not likely to be compensable in the tort system as compensable and (b) certain trusts are not employing quality control measures that would identify and deter the submission of claims based on erroneous or misleading representations.

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and credible evidence of exposure; but that can be just a site list. That can be working at a site where somebody is; it could be the equivalent of the guy who was at the place where the auto parts were three buildings over. I would argue that doesn't prove causation, and while that may be admissible to prove something, it's not the same thing as the type of proof that would get you to a jury, or get you past a directed verdict motion on the defense's cross claim against another defendant.") (Comments of Nathan Finch).

[35] Indeed, different medical professionals may review the same tests and data and reach different conclusions concerning a claimant's diagnosis (i.e., with one opining that the patient has mesothelioma and the other opining that he or she has some other form of cancer).

[36] Several states, for example, have enacted medical criteria laws that require evidence of actual physical impairment rather than mere physiological markers of exposure to qualify for compensation. Moreover, several jurisdictions place non-malignancy claims on deferred dockets that effectively preclude recovery to those who cannot demonstrate a physical impairment.

Any administrative settlement fund must balance the cost of paying dubious claims against the cost of identifying and challenging fraudulent or otherwise specious claims. The presumption at most trusts today appears to be "that thorough fraud prevention systems would be too costly and would leave less money to pay claims."[37] Yet this presumption remains untested given the limits of publicly available information and the trusts' apparently limited audit plans.[38] More pointedly, focusing on fraud rather than the broader question for limited fund settlements – whether the fund strikes an appropriate balance between distinguishing claims that have intrinsic merit from those that do not in a cost-effective manner – unduly confuses the issue.

Even at a trust that is experiencing more claim submissions than projections suggest are possible, altering claim criteria and quality controls may prove difficult. TDPs provide the plaintiffs' lawyers who sit on trust advisory committees with veto power over key decisions – including any proposed amendments to TDP standards and criteria and proposed audit plans – that may effectively undermine the efforts of even the most diligent trustee or future claimants' representative. Indeed, the Manville Trust's experience with its efforts to audit claims in the late 1990's and the

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[37] Searcey & Barry, *supra* note 23 (citing comments from Joe Rice, who serves on the trust advisory committees for several trusts).

[38] Moreover, even if claim audits reveal inconsistencies or other questionable factual representations, they may be dismissed as mere errors. *See id.* As I noted in an analysis of specious claims in global settlements last year, it can be extremely difficult to distinguish intentionally fraudulent submissions from those that are the product of mistakes in the claim development and submission processes. *See* S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEMPH. L. REV. 559 (2012).

stern rebuke it received as a result of this effort,[39] suggests that fiduciaries that take their duties too seriously may find more resistance than support for their efforts.

Asbestos Bankruptcy Trusts and Transparency

Transparency has been a critical component of reforms aimed at unwinding and preventing abuse; allowing creditors, the United States Trustee, courts, other parties in interest and, ultimately, Congress to identify and address these shortcomings and preserve the integrity of the bankruptcy process. The absence of comparable transparency in asbestos bankruptcy proceedings and trust administration necessarily raises concerns about whether these funds are, in practice, administered in a manner consistent with the objectives of Section 524(g).[40]

In this context, greater disclosure of claim-level data holds considerable promise. If trusts are unwilling or unable to incur the costs of more comprehensive claim review, such disclosures will provide those who are willing to incur those costs access to sufficient information to do so independently. As such transparency increases the prospects that suspicious patterns and practices will be discovered,

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[39] Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 128-37 (2003) (discussing the Manville Trust audit, mobilization of the plaintiffs' bar against the audit, the resulting litigation and rebuke from the district court). Professor Brickman also suggests that this failure emboldened lawyers and screening companies, and thus contributed to the surge in specious claim filings against bankruptcy trusts in the early part of the last decade. *Id.*, at 135.

[40] As the Third Circuit recently observed, "the trusts place the authority to adjudicate claims in private rather than public hands, a difference that has at times given us and others pause, since it endows potentially interested parties with considerable authority." *In re* Federal-Mogul Global, 684 F.3d 355, 362 (3d Cir. 2012).

those who intentionally submit specious claims and others who simply employ poor claim development and submission quality controls will have greater incentives to modify their practices. And just as the Silica MDL provided certain trust fiduciaries with the information and leverage necessary to address dubious nonmalignant claims within their trusts, any such discoveries with respect to the current generation of asbestos claims may likewise increase the prospects for addressing similarly undesirable patterns and practices going forward.

Notwithstanding the potential benefits of enhanced trust transparency, critics are understandably concerned that the FACT Act unduly impinges on: (i) state interests in controlling discovery in state tort litigation; and (ii) the legitimate privacy interests of asbestos personal injury victims. I will discuss these concerns in turn.

A. Is the FACT Act an Appropriate Exercise of Congressional Authority?

The vision of asbestos bankruptcy trusts as beyond bankruptcy oversight conflates and thereby confuses the means of organizing asbestos trusts with their function in the asbestos bankruptcy process. Any trust established to fulfill the objectives of Section 524(g), just like a reorganized debtor incorporated as a new entity under the terms of a plan, will be organized under state law. But this necessity is merely a product of the fact that the specific steps of corporate or trust formation are left to state law; it does not obviate the need for these entities to

comply with their obligations under the plan, the Bankruptcy Code or other applicable federal law.[41]

The Bankruptcy Code's recognition of the distinction between state law organization and the obligations that arise under federal bankruptcy law is consistent with even the most restrictive conception of the Bankruptcy Power. Although the precise reach of this power remains poorly defined, it is well settled that it applies to questions concerning the restructuring of a debtor's relations with its creditors.[42] When trusts are established under Section 524(g), they assign critical aspects of this power to private entities going forward, but this assignment does not strip Congress of its power to regulate these entities to ensure that they are acting in a manner consistent with the objectives they are established to advance.

B. Balancing Transparency against Claimants' Privacy Interests

Accountability may require transparency, but the public disclosure of previously confidential information may unduly embarrass private citizens or be misused by confidence artists or others attempting to exploit victims. Of course, these risks must be balanced against the objectives of the transparency proposal at issue and potential restrictions on the proposed disclosures.

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[41] Indeed, section 1142(a) of the Code recognizes that "the debtor and *any entity organized or to be organized for the purpose of carrying out the plan* shall carry out the plan and shall comply with any orders of the court."

[42] *See*, *e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (characterizing "the restructuring of debtor-creditor relations" as being "at the core of the federal bankruptcy power").

1. Claimants' Reasonable Expectations of Privacy

Although personal injury victims may have an interest in keeping their injuries private, the decision to pursue compensation for those injuries typically involves waiving that interest. As the federal district court in Delaware recently suggested, individuals who hire a lawyer to pursue potential asbestos-related claims should expect that some level of information about their claims must be disclosed in asbestos-related litigation.[43] Indeed, some courts place more consolidated information concerning asbestos claimants and their injuries than required by the FACT Act on the Internet with little or no fanfare.[44]

Filing a claim form with a trust – just like the filing of a complaint in civil litigation[45] or a proof of claim in bankruptcy – is the assertion of a legal right and requires representations under penalty of perjury. Debtors provide information about their creditors' claims and payments made to their creditors in the year preceding the bankruptcy filing under Section 521. Official Form B10 (the proof of claim) requires creditors to disclose their names, addresses, email addresses, telephone numbers, the legal and factual foundations for their claims, and "copies of any documents that support the claim[s]" – including previously non-public documents – and other personal information. Although debtors and asbestos

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[43] Opinion, *In re* Motions for Access of Garlock Sealing Technologies LLC, Civ. No. 11-1130-LPS, Dkt. No. 64, at 28 (D. Del. March 1, 2013).

[44] For example, the New York City Asbestos Litigation website frequently posts lists of pending asbestos personal injury cases – including plaintiffs' full names, counsel, injuries asserted and other information – apparently without objection by plaintiffs or their counsel.

[45] *See, e.g.,* Ferguson v. Lorillard Tobacco Co., 2011 U.S. Dist. LEXIS 135183 (E.D. Pa. Nov. 22, 2011) ("a claim submitted to a bankruptcy trust is more akin to a complaint than to an offer of compromise") (citing cases).

plaintiffs have structured asbestos bankruptcy cases to avoid proof of claim filings – apparently to avoid potential objections to individual asbestos claims under Section 502 of the Bankruptcy Code[46] – this information is readily produced by most creditors in bankruptcy.[47]

Likewise, settlement amounts may also be subject to disclosure notwithstanding any confidentiality provision in the settlement agreement. Settlement offers and counter-offers are generally entitled to confidential treatment in bankruptcy claim disputes, but final settlement terms must be disclosed and approved by the court. Likewise, in many asbestos tort cases that go to judgment, prior settlement amounts are frequently disclosed for the purpose of molding the judgment.

2. Striking the Appropriate Balance

Courts routinely balance the public and private interests in transparency against its potential risks to innocent parties. This question is rarely limited to the extremes: full public disclosure, on the one hand, and no disclosure, on the other. The question here is whether disclosure of some information is warranted and whether that disclosure can be tailored – or access to the disclosed information controlled – to limit potential misuse of the information. This balancing of interests

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[46] See S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841 (2008).

[47] That said, the bankruptcy schedule identifying all known asbestos claimants (and their respective counsel) in at least one bankruptcy case is readily available to anyone with access to Google. In addition, the API Trust already discloses the information required under the FACT Act available in its annual reports. Annual Report of the Trustee, 2011, API, Inc. Asbestos Settlement Trust, No. 05-30073, Dkt. No. 611 (Bankr. D. Minn. Apr. 23, 2012).

is necessary to ensure that objections that are ostensibly grounded in individual privacy interests are not used to block legitimate but unwanted inquiry.

The Bankruptcy Code and Federal Rules of Bankruptcy Procedure contain numerous provisions requiring disclosure of private and, at times, personal information, but they also empower courts to fashion appropriate orders for protecting those who comply with these provisions. Under Section 107(b)(2) of the Bankruptcy Code, bankruptcy courts have the power to "protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title." Likewise, Section 107(c) authorizes the court to limit access to information that "would create undue risk of identity theft or other unlawful injury to the individual or the individual's property." Moreover, courts have not been hesitant to employ these tools where requested and necessary, especially in the asbestos bankruptcy context.[48]

Conclusion

Thank you again for the invitation to appear today. I hope this summary has been useful, and I am happy to address any questions.

[48] *See* Opinion, *In re* Motions for Access of Garlock Sealing Technologies LLC, Civ. No. 11-1130-LPS, Dkt. No. 64 (D. Del. March 1, 2013) (discussing the numerous steps taken by Bankruptcy Judge Fitzgerald to limit public access to information in asbestos bankruptcy cases).