COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

QUESTIONS FOR THE RECORD TO
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U.S. DEPARTMENT OF JUSTICE

Questions submitted for the Record from Subcommittee Chairman Marino

Asbestos Trusts

1. Can you further elaborate on the statement you made at the hearing regarding the need for greater accountability for asbestos trusts?

RESPONSE: There is a general lack of transparency in the operation and oversight of post-confirmation trusts, especially asbestos trusts. Among others things, there is a lack of reporting on the operations of such trusts and no clear recourse for stakeholders to challenge the claims review process or the administration of trust operations. The ABI Commission to Study the Reform of Chapter 11, on which I served as a non-voting *ex officio* member, recommended legislative changes to improve the corporate governance and transparency of post-confirmation trusts (although it did not address asbestos trusts specifically).

Bankruptcy courts and the United States Trustees have limited statutory oversight authority following plan confirmation, so the standards and mechanisms of accountability that pertain to chapter 11 debtors do not apply to post-confirmation trusts. For example, the claims process is conducted without court review and generally is not subject to independent investigation. As a general principle, this lack of oversight and accountability may create opportunities for improper, unfair, or unwise conduct that are not easily remedied.

In the case of asbestos trusts, the debtor usually has little incentive to ensure that the claims process is conducted properly because the debtor pays an agreed upon amount of money into the trust that is then used to pay current and future tort victims. The integrity of the claims process does not impact the reorganized debtor, which can carry on its business after discharge of its asbestos liability. By contrast, claimants suffering from asbestos disease, as well as those not yet diagnosed, may be adversely affected because the payment of illegitimate claims may dilute the amount of recoveries available to them.

The potential magnitude of the problem with asbestos trusts was identified in the case of *In re Garlock Sealing Technologies*, 504 B.R. 71 (Bankr. W.D.N.C. 2014). The debtor

corporation challenged the aggregate amount of its asbestos liability for the purpose of formulating a plan of reorganization and establishing a trust in a claims estimation proceeding. *Garlock* is unusual because the debtor challenged its liability and obtained discovery about claims filed in other companies' cases. The debtor compared the claimants' assertions in other bankruptcy cases to their assertions against Garlock in non-bankruptcy state tort actions about which companies exposed them to asbestos. The bankruptcy court ultimately concluded that the asbestos claimants had filed inconsistent claims in a "startling pattern of misrepresentation" of exposure and determined that the debtor was liable for less than one-tenth of the $1.3 billion that the plaintiffs claimed was owed. The parties ultimately settled for an amount greater than the court's estimation, but still 63 percent less than the claimants' initial valuation.

2. Certain state attorneys general are investigating whether false claims submitted to asbestos trusts violate state laws, including state false claims acts. In fact, the Utah Attorney General has filed a legal action under the Utah False Claims Act based on the theory that Utah's Medicaid program may have been defrauded as a result of false claims submitted to asbestos trusts. The Federal government could also examine whether Medicare has been defrauded as a result of similar false claims under the federal False Claims Act. Would you consider a parallel federal investigation?

   RESPONSE: As noted in response to the previous question, we recognize that significant concerns have been raised about the administration of post-confirmation asbestos trusts. Generally, the existence of other federal and state investigations and legal actions is not a bar to USTP civil enforcement of bankruptcy violations in bankruptcy court. In many instances, misconduct that violates bankruptcy law also violates other federal or state laws. We conduct parallel investigations and where appropriate make criminal referrals to the United States Attorney as provided in 28 U.S.C. § 586(a)(3)(F). The USTP also may refer civil enforcement matters to other Department of Justice components and other federal or state agencies if we obtain information that non-bankruptcy laws appear to have been violated.

   The USTP lacks statutory authority to conduct an investigation into asbestos trusts because those trusts operate post-confirmation. Our post-confirmation authorities generally pertain only to pre-confirmation matters, like the review of estate professionals' fees, that continue under the jurisdiction of the court after confirmation of a reorganization plan. Notably, by statute, the USTP has even less pre-confirmation authority in asbestos cases than in other chapter 11 cases. For example, under 11 U.S.C. § 524(g)(4)(B)(i), a future claims representative (FCR) is appointed before confirmation in asbestos bankruptcy cases to serve as a fiduciary for those who have not yet been diagnosed, but who later may suffer from asbestos disease. The USTP plays no role in the selection of a FCR, which is in contrast to its authority to appoint other independent persons to serve as fiduciaries in chapter 11 cases.

Credit Counseling

3. The Chairman of the Senate Judiciary Committee wrote to you recently about the need to strengthen pre-bankruptcy credit counseling for financially distressed consumers under the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. The pre-bankruptcy counseling statute 11 U.S.C. 502(k) explicitly provides that banks and other lenders can be punished if consumers seek to settle debts prior to filing a bankruptcy and the lender does not engage in a debt reduction negotiation. What steps will you take to ensure that this required pre-bankruptcy counseling provides an opportunity for consumer to obtain reduced balance settlements?

   RESPONSE: We agree that the debt settlement provisions of 11 U.S.C. § 502(k) provide an important consumer protection. Under USTP regulations governing nonprofit budget and credit counseling agencies, 28 C.F.R § 58.20(l)(9), any counseling agency that does not provide the service of seeking to settle the client's debts with creditors shall provide the client with contact information for an approved agency that does perform such service. It is important that the USTP review agency compliance on an ongoing basis and ensure that credit counselors provide a meaningful review of non-bankruptcy options, including developing viable repayment plans.

Questions submitted by Judiciary Ranking Member John Conyers, Jr.

1. In your prepared statement, you mention that the number of motions filed by the U.S. Trustee Program to dismiss consumer cases deemed to be abusive "significantly increased" in fiscal year 2016. Please be specific what the numbers were for fiscal years 2015 and 2016, respectively. Does the U.S. Trustee Program encourage Chapter 13 trustees to object to stale proofs of claim?

   RESPONSE: The USTP takes a balanced approach to its civil enforcement efforts to redress fraud and abuse in the bankruptcy system. Although a majority of the actions are taken to address debtor violations, the USTP also focuses significant efforts on remedying wrongdoing by creditors and others who seek to exploit debtors.

   While motions to dismiss against consumer debtors relating to the means test under 11 U.S.C. § 707(b)(2) were down in FY 2016, actions focusing on more serious conduct, such as the concealment of assets and false oaths, increased. Further, in my prepared statement, I specifically referenced an upturn in the number of actions taken under 11 U.S.C. § 707(b)(3) to dismiss cases that are deemed abusive under a bad faith or totality of the circumstances standard. Between FY 2015 and FY 2016, the USTP saw an increase of 5 percent in such actions (from 673 to 707), with an overall success rate of nearly 98 percent for those motions that were decided during FY 2016.

   As to your question about objections to stale debt claims (*i.e.*, claims that are beyond the state statute of limitations and must be withdrawn or denied upon objection), the USTP has actively encouraged trustees to object to such claims. For example, the

Handbook for Chapter 13 Standing Trustees addresses the obligation to object to claims, and trustee training materials issued in 2014 specifically addressed stale debt claims. This topic also has been addressed in communications with the National Association of Chapter Thirteen Trustees (NACTT), including as recently as in a speech delivered by me on July 13, 2017, at the NACTT's annual convention. According to an informal survey conducted by the NACTT, more than one-half of the trustees who responded said they file objections to stale debt claims.

In addition to the efforts of the chapter 13 trustees in individual cases, the USTP has conducted major investigations into stale debt claims practices and taken enforcement action in which we assert that a creditor's knowing filing of a large volume of stale debt claims constitutes an abuse of the bankruptcy process that may be remedied by injunctive and monetary relief. We have sought court adjudication and these matters remain pending.

2. In your prepared statement, you mention that the United States Trustee Program has an initiative directed at attorneys for consumer debtors who engage in professional misconduct. What initiative, if any, does the Program have to deal with the misconduct of attorneys who represent creditors?

RESPONSE: Identifying and remedying improper conduct by debtors' counsel is an important part of the USTP's consumer protection efforts. Failure of counsel to satisfy their obligations under the Bankruptcy Code and Rules is detrimental not only to debtors, but also to trustees, creditors, the courts, and the entire bankruptcy system. The USTP fully utilizes the tools given to us by Congress to address misconduct by consumer debtors' attorneys.

As noted in my testimony, between FY 2015 and FY 2016, the USTP increased the number of actions taken under 11 U.S.C. §§ 329 and 526 pertaining to the conduct of debtors' lawyers and debt relief agencies by more than 30 percent combined. The primary beneficiaries of these actions are the debtors themselves. In fact, the remedy usually provided under section 329 is the disgorgement of fees that were paid by the debtor. The USTP also is active in seeking other legal remedies for misconduct by debtors' attorneys.

Though the USTP has not defined a specific initiative to address improper conduct by creditors' counsel, we do act to address such conduct when identified. For example, the USTP previously entered into a settlement with a multi-state law firm representing mortgage creditors for misconduct related to the filing of proofs of claim and motions for relief from the automatic stay that contained inaccurate arrearage figures. As part of the settlement, the law firm agreed to implement policies and procedures to ensure accurate filings in compliance with the Bankruptcy Code and Rules, including designating a firm partner to execute a verified statement regarding the review performed in each case.

Importantly, for more than a decade, the USTP has given enforcement priority to addressing abuse of the system by creditors. Among other things, we have reached six nationwide settlements against national mortgage servicers for violating the Bankruptcy Code and Rules, and taken other actions against unsecured claimants, including those holding credit card debt. Our actions in bankruptcy court alone have provided more than 100,000 homeowners with well over $100 million in monetary relief. Other USTP settlements with our federal and state partners have provided billions of dollars in relief to hundreds of thousands of consumers, including homeowners in chapter 13.

a. If an attorney for a creditor knowingly files a false proof of claim, what does the Program do about that?

RESPONSE: Often, creditor claims are filed by the creditor or their agents, not by their lawyers. If we have evidence that an attorney for a creditor knowingly filed a false claim, we would take appropriate civil action. In addition to enforcement actions in the bankruptcy court, the USTP may refer the attorney to state licensing and disciplinary authorities for violations of state ethical rules, as well as make a criminal referral to the United States Attorney as provided in 28 U.S.C. § 586(a)(3)(F).

b. What does the Program do about a creditor's attorney who routinely files statutorily time-barred proofs of claim in bankruptcy cases?

RESPONSE: In cases we have investigated, stale debt claims are filed by creditors or their agents, not their lawyers. The focus of our discovery and enforcement actions have been on the creditors in whose name the claims were filed and the debt collectors who filed the claims on behalf of those creditors. As noted in our response to your question 1 above, we are engaged in intensive, ongoing litigation concerning the knowing filing of stale debt claims, so it would not be appropriate to discuss all possible parties who might be subject to sanctions if we prevail on the merits.