United States Senate Committee on the Judiciary, "The Need for Transparency in Asbestos Trusts" Hearing Held on February 3, 2016

Answers to Questions for the Record, Mark A. Behrens, Esq.

Questions from Chairman Grassley:

1. **In *In re Garlock Sealing Technologies, LLC*, Judge Hodges concluded that the lawyers representing the plaintiffs manipulated, withheld, and suppressed evidence in multiple cases against Garlock. Although there are a host of questions raised by Judge Hodge's opinion, given the nature of the trusts, it is difficult to ascertain how extensive the degree of misrepresentation may be within the trust system. I'm also concerned by what appears to be the lack of any meaningful independent oversight, and potential conflicts of interest.**

   a. **To your knowledge, do any of the firms or lawyers discussed in Judge Hodges' opinion play any governance role in any of the asbestos trust funds? If so, what role do they play, and in which trusts.**

Answer: It appears that at least one of the asbestos plaintiffs' firms described in the *Garlock* opinion serves on the Trust Advisory Committee of several asbestos trusts. *See* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 43 (Rand Corp. 2010). Further, there is substantial evidence that suppression of evidence of trust-related exposures by plaintiffs and their lawyers is pervasive, extending far beyond the particular firms that were described in Judge Hodges' opinion. The practice almost certainly includes law firms that have a governance role in many asbestos trust funds.

   b. **In your opinion, is there an actual or apparent conflict of interest for these lawyers or firms who sit on a trust "Advisory Committee" while also filing claims with those trusts, or other asbestos trusts?**

Answer: Yes, in my opinion there does appear to be a conflict of interest for a law firm to have a governance role in an asbestos trust while also representing large numbers of people who file claims with that trust. Those involved in trust governance should be acting to exclude specious claims and engage in robust audits, but claim filers have a different incentive. As Buffalo Law School Professor Todd Brown has stated, "Imagine a Medicare system in which the medical providers that submit the most reimbursement claims determine the criteria for reimbursement, have the power to veto any plan for auditing the claims they submit, and

effectively control the appointment of those responsible for overseeing reimbursements and audits. Would claim criteria be designed to strike an optimal balance between excluding specious claims and managing administrative costs, or would the criteria focus on making the process most efficient for medical providers? Would we see more robust audits, or would they largely abandon claim audits?" S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 Buff. L. Rev. 537, 537 (2013). In the asbestos context, it is clear that putting the power to control trust governance in the hands of some of the largest asbestos personal injury firms has led to trust claim qualification criteria that are highly permissive. *See* Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 The Advoc. (Tex.) 80, 80, 82 (2007) ("Because the procedures are voted on by the claimants through their attorneys, and the trusts often do not contest liability, it is much easier to collect against a bankruptcy trust than a solvent defendant…. [B]ankruptcy trusts have emerged to gives asbestos firms an almost automatic guarantee of settlements for their clients."). As further explained by a commentator:

> Institutionalized fraud is an inherent part of the current asbestos bankruptcy trust system. [T]he trusts, designed by the same individuals who are now submitting claims, contain "loopholes" allowing for ease of payment, often without the need for any real proof. By using the loopholes which have been integrated into the system itself, asbestos claimants can legitimately obtain compensation which they are otherwise precluded from obtaining in the tort system.

Thomas M. Wilson, *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, 29 Mealey's Litig. Rep.: Asbestos 6(May 7, 2014).

c. In your opinion, is there an actual or apparent conflict of interest for a lawyer who sits on an asbestos trust "Advisory Committee" to represent a plaintiff with a tort claim in the state civil justice system who may later file a claim with an asbestos trust?

Answer: Yes, for the same types of reasons discussed above. Apparent conflicts also exist with respect to the interests of current and future claimants and the differing interests of subclasses of current claimants. *See* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833, 858-60 (2005).

d. To your knowledge, is there any evidence of coordination between members of different trust "Advisory Committees"?

Answer: Members of Trust Advisory Committees (TAC) are certainly repeat players across bankruptcy trusts. *See* S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 Buff. L. Rev. 537, 552 (2013) ("One or more lawyers from just five law firms sit on TACs for substantially all of the trusts established since 2000, with representatives of Kazan McClain, Baron & Budd, Motley Rice, Cooney & Conway, and Weitz & Luxenburg on the TACs of ten or more trusts each. The influence of these firms is likely more substantial given the presence of one or more of their affiliate or spin-off firms on the

TACs for these trusts."). Additionally, most of the trust distribution procedures for trusts "established since the late 1990s are based on similar templates and include many of the same basic terms." *Id*. at 552.

2. In 2011, the Government Accountability Office (GAO) asked nearly a dozen asbestos trusts whether they conduct any self-generated audits and whether those audits have uncovered fraud. Only three trusts reported conducting self-generated audits. Not surprisingly, those who conducted audits of themselves didn't self-report any fraud.

a. With respect to the relatively few audits that have been conducted within the trusts, are these audits performed by fully independent actors, with unfettered access to the requisite data?

Answer: In my opinion, no. The actors are not fully independent and they do not have access to unfettered access to the requisite data. For instance, some trusts "do not track the claim-level data necessary to conduct stratified, targeted audits when questionable practices or patterns may warrant such an approach." S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 351 (2013).

b. To what extent, if any, did those audits have access to the claims filing information from *other* trusts for the purpose of verifying the absence of fraud and misrepresentation?

Answer: Comparisons across trusts are not done to identify potentially fraudulent claiming activity. As explained by the U.S. Chamber Institute for Legal Reform in a new report, "trusts do not compare claims to determine if plaintiffs are making inconsistent assertions to different trusts." U.S. Chamber Institute for Legal Reform, *Insights and Inconsistencies: Lessons from the Garlock Trust Claims* 5 (Feb. 2016).

a. Can you comment generally on the adequacy of these audits? Is it plausible to suggest that the results of these audits suggests the absence of fraud and abuse?

Answer: No, not in my opinion. The self-reported findings by the trusts are most likely a function of the inability of the trusts to identify inconsistent claiming patterns in a cost-effective way than reliable proof of the absence of problems in trust filings.

Questions from Senator Cornyn:

1. **As you know, Section 524(g) of the Bankruptcy Code authorizes courts to approve asbestos bankruptcy trusts. It also forbids a judge from approving a plan of reorganization unless 75% of the asbestos creditors in the bankruptcy support it. This gives trial lawyers incredible leverage, which they use to ensure that asbestos trusts adopt lax payment rules. A former plaintiffs' attorney named Thomas Wilson discussed this in an article he wrote entitled "Institutionalized Fraud in Asbestos Bankruptcy Trusts," which I'd like to include in the record.**

   Wilson's article explains that the trusts' lax rules allow "compensation for claims which are not otherwise payable within the tort system" and that "attorneys are able to obtain millions of dollars in compensation without fear of repercussion." Do you think that Wilson's characterization is accurate?

Answer: Yes, the trust system certainly pays on claims that would not otherwise be entitled to payment in the tort system. This occurs because of the permissive nature of trust distribution criteria. *See, e.g.*, Marc C. Scarcella & Peter R. Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, 14:7 Mealey's Asbestos Bankr. Rep. 1, 10-11 (Feb. 2015) ("For nearly a decade most tort jurisdictions have adopted inactive dockets for non-malignant claims that do not meet minimum medical impairment thresholds: thresholds that far exceed the qualification criteria accepted by most trusts for the lesser impaired non-malignant injury categories."); *see also id.* at 15 (quoting Texas asbestos plaintiffs' lawyer Steven Baron, Baron & Budd, Texas Legislative Hearing on RTPs, Oct. 16, 2008: "You asked some questions about the claim form. Interestingly, the claim form and what you must prove, you do not even have to prove exposure…. [W]ith respect to mesothelioma, all one needs to prove their compensation, at least for an expedited claim … is a pathology report for an accredited hospital that says mesothelioma. No causation. Nothing like that. One fiber – no fiber.").

2. **I proposed an amendment to fix the "trial lawyer veto" when Congress last considered comprehensive bankruptcy reform legislation. I withdrew it out of respect for colleagues who were working on a bipartisan basis to move the bill through this committee. But with $30 billion committed to asbestos trusts and more asbestos bankruptcies sure to occur in the future, I might be interested in revisiting the issue. Would fixing this problem with 524(g) and reducing trial lawyers' influence over the management of future asbestos trust funds help future victims?**

   Answer: Yes, I believe it would.

Questions from Senator Flake:

1. **During your oral testimony you mentioned that asbestos plaintiffs do not typically intend to engage in fraud but rather their attorneys "refresh their recollection" as to where they were exposed.**

a. Is the problem you were identifying one of *selective* refreshing of recollection?

Answer: Yes, that is the issue. I understand from plaintiffs' lawyers that their clients often do not remember the asbestos-containing products they worked around many decades ago. The lawyers, however, often know what products have been identified at certain worksites because of information obtained in prior cases of others at those sites and from records. Before a plaintiff is deposed in a tort case, the plaintiff's lawyers often will not discuss the client's trust-related exposures. That discussion will occur after the tort case is resolved so that admissions by the plaintiff about those exposures will not be available to be considered by the jury when it is apportioning fault in the tort case.

b. How is the selective refreshing of recollection in asbestos cases different from the standard refreshing of recollection that takes place in any given litigation?

Answer: The asbestos case situation is very different from other situations because the tactic is not being used to assist in the search for the truth but to frustrate and undermine the integrity of the judicial process. Judge Hodges addressed this point in *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014). He wrote: "[M]ost important, while it is not suppression of evidence for a plaintiff to be unable to identify exposures, it *is* suppression of evidence for a plaintiff to be unable to identify exposure in the tort case, but then later (and in some cases previously) to be able to identify it in Trust claims." *Id*. at 86.

c. Specifically, how does the selective refreshing of recollection in asbestos cases result in misrepresentation or fraud, and, in your experience, how does such refreshing typically lead to a more favorable outcome for the plaintiff than would otherwise result?

Answer: As Judge Hodges found in *Garlock*, the practice of asbestos plaintiffs delaying the filing of their asbestos trust claims – and suppressing evidence of trust-related exposures in the underlying tort cases – "prejudiced Garlock in the tort system." *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 86 (W.D.N.C. Bankr. 2014). Because the jury may not be fully informed about the totality of the plaintiff's asbestos exposures, the jury may be misled into imposing liability on a tort defendant instead of finding the injury to be caused partly, or even entirely, by others.

d. Is this selective refreshing of recollection less of a problem in other types of litigation?

Answer: The selective refreshing of information to suppress evidence is not a problem in other litigations. Asbestos litigation is unique because of the special nature of section 524(g) trusts and because of the widespread scope of the problem, as found by Judge Hodges in the *Garlock* case.

2. Have there been any instances of fraud *within* the trusts themselves?

Answer: Yes. I identified one in my written testimony. A new report by the U.S. Chamber Institute for Legal Reform also reveals a pattern of inconsistent claiming from one trust to another, and provides many examples of troubling inconsistencies across trust claim filings by various individuals. *See* U.S. Chamber Institute for Legal Reform, *Insights and Inconsistencies: Lessons from the Garlock Trust Claims* (Feb. 2016).

a. If so how widespread is this problem?

Answer: The lack of transparency in the trust system makes it hard to state with certainty but the potential for abuse without accountability is high.

3. In 2011, the Government Accountability Office (GAO) asked nearly a dozen asbestos trusts whether they conduct audits and whether their audits have uncovered fraud. Only three of the trusts queried by GAO reported conducting audits, and their audits didn't find any fraud. Do you think the asbestos trusts' audits and internal controls are adequate? If not, what do you believe to be the best method of ensuring the necessary audits are conducted.

Answer: I believe that there needs to be greater transparency in the trust system. If exposure histories provided to trusts were publicly available there would be a mechanism to identify inconsistent claiming activity by claimants in trust and tort systems and across various trusts.

4. Would the aggregation of the claims information required under the FACT Act be a burden on the trusts? Why or why not?

Answer: The reporting requirements in the FACT Act would not impose an unreasonable burden on the asbestos trusts. Marc Scarcella, a principal in Bates White Economic Consulting and a former data analyst and statistician for Claims Resolution Management Corporation (a wholly owned subsidiary of the Manville Personal Injury Settlement Trust), has testified that "any out-of-pocket expense the trusts incur in complying with the quarterly reporting and disclosure requirements of the FACT Act will be minimal." *See* Furthering Asbestos Claim Transparency Act, Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 114th Cong. (Feb. 4, 2015) (statement of Marc Scarcella), *available at* 2015 WLNR 3578593 He testified in the House in 2015:

> Asbestos bankruptcy trusts receive and collect claim level data electronically, store and process claim level data electronically, and track claim status and payment information electronically. As a result, extracting quarterly summary tables at the claim level or responding to third party data requests is an efficient and cost-effective process for the trusts. Based on my extensive experience working for and with claim processing facilities on issues of data management and reporting, I can say with confidence that the trusts and facilities are well equipped to produce these quarterly reports at minimal cost.

Id.; *see also* Asbestos Claim Transparency, Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 113th Cong. (Mar. 13, 2013) (statement of Marc Scarcella), *available at* 2013 WLNR 6234066.

Furthermore, the FACT Act would allow trusts to require any third party that requests trust claim information to pay for the reasonable costs incurred by the trust to comply with the request.

It also should be remembered that because many TDPs require trusts to challenge defendant subpoenas, the current system is inefficient and costly to the trusts as well as to defendants. In fact, a 2011 U.S. Government Accountability Office report on asbestos trusts cited an instance in which a trust incurred $1 million in attorneys' fees responding to a discovery request. *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 30 (Sept. 2011).According to Mr. Scarcella, "This example is exactly the type of costly and burdensome discovery request the FACT Act will limit in the future through standardized reporting requirements and cost-shifting provisions that will ultimately result in significant cost-savings for the trusts." February 2015 Testimony of Marc Scarcella, *supra*.