

Department of Justice Combats Asbestos Trust Abuse

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The following article is a companion to John J. Hare and Daniel J. Ryan, Jr., The More Things Change: Bankruptcy Trust Reform and the Status Quo in Asbestos Litigation, published in the October 2018 edition of the Defense Counsel Journal. That article addressed inconsistent claiming behavior by asbestos plaintiffs and their attorneys and how various state legislatures are addressing the disconnect that exists between the tort and asbestos trust systems. This article describes recent actions by the United States Department of Justice to promote transparency in the trust system, address fraud, mismanagement or abuse in newly-formed trusts and investigate improper conduct related to asbestos trusts.

THE United States Department of Justice and its United States

Trustee Program (USTP)¹ are taking unprecedented steps to

¹ The USTP is the component of the Department of Justice that protects the integrity of the bankruptcy system by

overseeing case administration and litigating to enforce the bankruptcy laws. See United States Department of Justice,

combat a “problematic lack of transparency in the operation and oversight of asbestos trusts.”² The actions follow a November 2017 letter to the United States Attorney General by twenty state attorneys general describing problems with the asbestos trust system and requesting federal engagement to “ensure that no fraud is being committed.”³

The Department and USTP are opposing the creation of new trusts that lack provisions to prevent “fraud, mismanagement, or abuse”⁴

About the U.S. Trustee Program, available at <https://www.justice.gov/ust>.

² Letters from Hon. Jesse Panuccio, Acting Associate Attorney General of the United States, to Attorneys General of Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin (Sept. 13, 2018), available at <https://www.justice.gov/opa/press-release/file/1094021/download> [hereinafter “DOJ Letters to State AGs”].

³ Letter from Attorneys General of Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin to Hon. Jefferson B. Sessions, III, United States Attorney General (Nov. 6, 2017), at 1 [hereinafter “State AGs’ Letter to DOJ”].

⁴ Statement of Interest on Behalf of the United States of America Regarding Plans of Reorganization for Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc., *In re Kaiser Gypsum Co., Inc.*, No 16-31602 (JCW), at 8 (Bankr. W.D.N.C. Sept 13, 2018), available at <https://www.justice.gov/opa/press->

and appear to “contain many of the same attorney-friendly provisions and weak safeguards that have enabled fraud and abuse in past asbestos bankruptcy cases.”⁵ In addition, the USTP is challenging the appointment of certain future claimants’ representatives in pending bankruptcy proceedings.⁶ The USTP argues that the lawyers are too conflicted to serve as independent fiduciaries. Further, the Department sent civil investigative demands to asbestos trusts to investigate “whether the

[release/file/1093916/download](https://www.justice.gov/opa/press-release/file/1093916/download) [hereinafter “DOJ Kaiser Gypsum Statement of Interest”].

⁵ Objection of the United States Trustee to the Disclosure Statement for the Prenegotiated Plan of Reorganization for Duro Dyne National Corp., *In re Duro Dyne Nat’l Corp.*, No 18-27963 (MBK), at 3 (Bankr. D. N.J. Oct. 15, 2018) [hereinafter “USTP Objection to Duro Dyne Disclosure Statement”].

⁶ See Objection of the United States Trustee to the Debtors’ Motion for an Order Appointing Lawrence Fitzpatrick as Representative for Future Asbestos Claimants, *In re Duro Dyne Nat’l Corp.*, No 18-27963 (MBK) (Bankr. D. N.J. Oct. 1, 2018), available at <https://www.justice.gov/opa/press-release/file/1096501/download> [hereinafter “USTP Objection to Duro Dyne FCR Appointment”]; Notice of Appeal and Statement of Election, *In re Duro Dyne Nat’l Corp.*, No 18-27963 (MBK) (Bankr. D. N.J. Oct. 31, 2018); Amended Objection of the United States Trustee to Debtor’s Motion for an Order Appointing James L. Patton, Jr., as Legal Representative for Future Asbestos Claimants, *In re The Fairbanks Co.*, No. 18-41768-PWB (Bankr. N.D. Ga. Dec. 14, 2018).

Medicare Program has been reimbursed in accordance with the Medicare Secondary Payer Act.”⁷

The Department “welcomes” the reporting of any “information on asbestos trust fraud or mismanagement” so that it can “investigate conduct related to asbestos trusts that is illegal under federal law.”⁸

I. Background

Originally, and for many years, the primary defendants in asbestos cases were companies that mined asbestos or manufactured friable, amphibole-containing thermal

insulation. Mass claims pressured “most of the lead defendants and scores of other companies” into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation, such as Johns-Manville Corp.⁹ In bankruptcy, these companies created scores of trusts that collectively hold billions of dollars to pay asbestos claimants with injuries as a result of exposure to their products.¹⁰ Each trust reflects a company that exited the tort system in bankruptcy.¹¹

Filing a trust claim is much easier and faster than bringing a lawsuit.¹² To recover from an

⁷ See Alex Wolf, *Asbestos Trusts Come Under DOJ Civil Investigation*, LAW360, Oct. 5, 2018.

⁸ *Id.*

⁹ See STEVEN J. CARROLL ET AL., ASBESTOS LITIGATION 67 (RAND Corp. 2005), available at https://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf.

¹⁰ See S. Todd Brown, *How Long Is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 537 (2013) (“Section 524(g) of the Bankruptcy Code authorizes the entry of an injunction that channels all of a debtor’s asbestos-related liabilities to a bankruptcy trust, which is established by the debtor to pay all valid current and future asbestos claims.”); U.S. Gov’t Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, 3 (Sept. 23, 2011) (\$36.8 billion in over 60 asbestos trusts as of 2011), available at <https://www.gao.gov/assets/590/585380.pdf>.

¹¹ See William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts*,

2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008, 23 WIDENER L.J. 675, 675-676 (2014) (asbestos trusts “answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades”).

¹² See John J. Hare and Daniel J. Ryan, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: Refuting the Myths About Transparency*, 15 MEALEY’S ASB. BANKR. REP. 1, 3 (Apr. 2016) (“Plaintiffs’ lawyers routinely advertise their ability to file trust claims ‘quickly and easily,’ and tell potential clients that paralegals evaluate potential trust claims and undertake the filing process. The evidence also demonstrates that trust claims are paid more quickly than tort claims.”); Dionne Searcy and Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J., Mar. 11, 2013, at A1 (“Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical

asbestos trust, a claimant files a short claim form with documentation evidencing asbestos exposure attributable to the trust's predecessor and medical records for the disease being claimed.¹³ If a trust determines that a claim meets the criteria required for payment, the trust will make an offer based on a percentage of the "scheduled value" for the alleged injury, as set forth on a grid. A trust can make an offer to resolve the claim within days after submission.¹⁴ Claimants commonly receive multiple trust payments, since each trust operates independently and many workers were exposed to different products.¹⁵

Plaintiffs typically obtain compensation both "from the trusts

and through a tort case."¹⁶ In a bankruptcy proceeding involving gasket and packing manufacturer Garlock Sealing Technologies, LLC, a typical mesothelioma plaintiff's recovery was estimated to be \$1-1.5 million, "including an average of \$560,000 in tort recoveries and about \$600,000 from 22 trusts."¹⁷ Many of the today's asbestos defendants are formerly peripheral or new defendants associated with chrysotile-containing products "such as gaskets, pumps, automotive friction products, and residential construction products."¹⁸

By delaying the filing of trust claims until after an asbestos-related personal injury case settles or is tried to a verdict, plaintiffs can suppress evidence of trust-related

records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.")

¹³ See S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299, 317-318 (2013).

¹⁴ See Deposition of Jared Garelick, Cummings v. General Elec., No. 13-CI-006374, at 34-36 (Jefferson Ky. Cir. Ct. Dec. 14, 2015). After the offer is accepted, payments tend to be made quickly. The U.S. Government Accountability Office estimates that approximately 97-98% of trust claims are processed on an expedited review basis. See U.S. Gov't Accountability Office, *supra* note 10, at 20. Only a tiny percentage of claimants seek individual review in the hopes of obtaining more compensation from the trusts. See Brown,

supra note 10, 61 BUFF. L. REV. at 554; Deposition of Jared Garelick, at 37-38.

¹⁵ See Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TUL. L. REV. 1071, 1078-1079 (2014).

¹⁶ Lloyd Dixon and Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases*, iii (RAND Corp. 2015), available at https://www.rand.org/pubs/research_reports/RR907.html.

¹⁷ *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (Bankr. W.D.N.C. 2014).

¹⁸ Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations From 1991-2010*, 27 MEALEY'S LITIG. REP.: ASB., Oct. 10, 2012, at 1, available at https://www.bateswhite.com/media/publication/11_media.617.pdf. Chrysotile is "far less toxic than other forms of asbestos." *In re Garlock*, 504 B.R. at 75.

exposures and thwart efforts by solvent defendants to apportion fault to bankrupt entities or obtain set-offs, resulting in “double dipping” by plaintiffs.¹⁹ Further, tort plaintiffs have alleged asbestos exposures that are inconsistent with claims later submitted to asbestos trusts.²⁰

These concerns came to the fore in Garlock’s bankruptcy.²¹ Historically, Garlock was a relatively small player in the asbestos tort system and “very successful in settling (and rarely trying)” lawsuits filed against it.²² After virtually all asbestos-containing thermal insulation defendants exited the tort system by the early 2000s, Garlock and other formerly peripheral defendants became a “focus of plaintiffs’ attention” because the companies were still solvent.²³ In this new environment, Garlock faced challenges defending itself

because “evidence of plaintiffs’ exposure to other asbestos products often disappeared.”²⁴ The judge in *Garlock* said that this was the result of “the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants’ asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants).”²⁵ The judge concluded that the missing evidence “had the effect of unfairly inflating the recoveries against Garlock.”²⁶ The judge described several specific examples of plaintiffs and their attorneys withholding exposure evidence from Garlock.²⁷

Numerous reports have confirmed that “[w]e are now past the time when [the abuses described in *Garlock*] can be referred to as mere anomalies.”²⁸

¹⁹ See Editorial, *The Double-Dipping Legal Scam*, WALL ST. J., Dec. 25, 2014, at A12.

²⁰ See Brickman, *supra* note 15, 88 TUL. L. REV. at 1088; Daniel J. Ryan and John J. Hare, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock’s Bankruptcy*, 15 MEALEY’S ASB. BANKR. REP. 1, 2 (Aug. 2015).

²¹ See *Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, 2015 WL 4773425, at *5 (W.D. Pa. Aug. 12, 2015) (“The evidence uncovered in the *Garlock* case arguably demonstrates that asbestos plaintiffs’ law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system.”).

²² *In re Garlock*, 504 B.R. at 73.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 84.

²⁶ *Id.* at 86; *see also id.* at 94 (stating that the withholding of exposure evidence by asbestos plaintiffs’ lawyers was “widespread and significant”).

²⁷ *See id.* at 84-85.

²⁸ Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 AM. J. TRIAL. ADVOC. 479, 488 (2014); *see also* Peter Kelso and Marc Scarcella, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* (U.S. Chamber Inst. for Legal Reform Dec. 2015), available at <https://www.instituteforlegalreform.com/uploads/>

For instance, a 2015 study of almost 1,850 mesothelioma lawsuits resolved by industrial product manufacturer Crane Co. from 2007 through 2011 found a “similar pattern of systematic suppression of trust disclosures [as] was documented in the Garlock bankruptcy.”²⁹ In cases where Crane Co. was a codefendant with Garlock, 80% of trust claim forms or related exposures “were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings.”³⁰

A November 2017 bankruptcy filing by Bestwall LLC, an affiliate of Georgia-Pacific, LLC, described additional instances where “asbestos plaintiffs, at a minimum, inconsistently and selectively disclosed exposure evidence to support or strengthen their cases against non-bankrupt companies.”³¹

Most recently, the United States Department of Justice has said that secrecy regarding trust filings has made it “nearly impossible to detect when plaintiffs are seeking recovery based on factual representations that may be incompatible with other representations previously made in other litigation or before other trusts.”³²

At the state level, legislatures are providing asbestos defendants with greater access to asbestos trust claim information.³³ Trust claims materials contain important exposure history information, providing defendants with a tool to identify fraudulent or exaggerated exposure claims and establish that trust-related exposures were partly or entirely responsible for a plaintiff’s harm. Fifteen states now have statutes requiring plaintiffs to file and

sites/1/TheWaitingGame_Pages.pdf; Mark A. Behrens, *Disconnects and Double-Dipping: The Case for Asbestos Bankruptcy Trust Transparency in Virginia* (U.S. Chamber Inst. for Legal Reform 2016), available at https://www.instituteforlegalreform.com/uploads/sites/1/DisconnectsDoubleDipPaper_WebReady.pdf; Mark A. Behrens et al., *Illinois Asbestos Trust Transparency: The Need to Integrate Asbestos Trust Disclosures with the Illinois Tort System* (Ill. Civil Justice League 2017), available at <https://lrany.org/wp-content/uploads/2017/06/Illinois-Asbestos-Trust-Transparency-Report.pdf>.

²⁹ Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock*

Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co., 30 MEALEY’S LITIG. REP.: ASB. 1, 1 (Nov. 4, 2015), available at <https://www.mccarter.com/files/Uploads/Documents/Ableman%20Commentary%20Asbestos%20Litigation%2011.4.15.pdf>.

³⁰ *Id.*

³¹ Informational Brief of Bestwall LLC, *In re Bestwall LLC*, 2017 WL 4988527, at 20 (Bankr. W.D.N.C. Nov. 2, 2017).

³² DOJ Kaiser Gypsum Statement of Interest, *supra* note 4 at 8.

³³ See Mark A. Behrens, *Asbestos Trust Transparency*, 87 FORDHAM L. REV. 107 (2018).

disclose asbestos trust claims before trial.³⁴

II. State AGs Urge DOJ to Act

In November 2017, twenty state Attorneys General wrote the United States Attorney General to express their concern with “the potential abuse and mismanagement of asbestos bankruptcy trusts.”³⁵ They noted that the Director of the USTP testified before Congress that the lack of an “independent policeman” for asbestos trusts creates a “risk of abuse.”³⁶ They also mentioned the *Garlock* bankruptcy court judge’s finding of a “startling pattern of misrepresentation” in asbestos claims.³⁷ The state Attorneys General said that they had “repeatedly attempted to obtain documents from the trusts” to investigate the “potential for fraud and abuse,” but were stonewalled.³⁸ The Attorneys General asked the Department of Justice to commit

federal resources to “ensure that no fraud is being committed.”³⁹

The Washington Legal Foundation, among others, also called on the Department to act.⁴⁰

III. The Department Responds

On September 13, 2018, the Department wrote the state Attorneys General and told them that it “agrees that the United States would be well served by a commitment of Department resources” to address “potential fraud, abuse, and mismanagement in asbestos trusts.”⁴¹

The Department said, “henceforth the United States will object to plans for asbestos trusts that fail to include critical information on how asbestos claims will be evaluated, paid, and reported or that lack sufficient safeguards to prevent fraud and abuse and to ensure that the interests of the United States will be protected.”⁴²

³⁴ See ARIZ. REV. STAT. § 12-782; IOWA CODE §§ 686A.1–9; KAN. STAT. ANN. §§ 60-4912–4918; MICH. CODE ANN. § 600.3010–3016; MISS. CODE §§ 11-67-1 TO -15; N.C. GEN. STAT. §§ 1A-1, RULE 26; 8C-1, RULE 415; AND 1-75.12; N.D. CENT. CODE §§ 32-46.1-01 TO -05; OHIO REV. CODE ANN. §§ 2307.951–954; OKLA. STAT. TIT. 76, §§ 81–89; S.D. CODIFIED LAWS §§ 21-66-1 TO -11; TENN. CODE §§ 29-34-601 TO -609; TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.051–.058; UTAH CODE §§ 78B-6-2001 TO -2010; W. VA. CODE §§ 55-7F-1 TO -11; WIS. STAT. § 802.025; see also *In re* Mass. State Court Asbestos Litig., Amended Pre-Trial Order No. 9,

¶ XIII(C)(7)(o) (Mass. Super. Ct. Middlesex Cnty. June 27, 2012).

³⁵ State AGs’ Letter to DOJ, *supra* note 3, at 1.

³⁶ *Id.*

³⁷ *Id.* (quoting *In re Garlock*, 504 B.R. at 86).

³⁸ *Id.* at 2.

³⁹ *Id.* at 1.

⁴⁰ See Glenn G. Lammi, *Cleaning Up the Asbestos Litigation Mess: A Role for the Department of Justice?*, FORBES.COM, Apr. 2, 2018.

⁴¹ DOJ Letters to State AGs, *supra* note 2, at 1.

⁴² *Id.* at 2.

In addition, the Department will “investigate conduct related to asbestos trusts that is illegal under federal law.”⁴³

IV. Statement of Interest Filed

The same day the Department wrote the state attorneys general, it filed perhaps its first ever Statement of Interest in an asbestos-related bankruptcy proceeding.⁴⁴ The Department told a North Carolina federal bankruptcy court that plans for creation of a trust to resolve the asbestos-related liabilities of Kaiser Gypsum Company and Hanson Permanente Cement, Inc. are “lack[ing] sufficient safeguards to prevent fraud, abuse, or mismanagement and to ensure that the interests of the United States will be protected.”⁴⁵ The Department said that it was filing the Statement to allow the parties to work to avoid “the need for the filing of objections.”⁴⁶

A. Medicare-Related Provisions and Disclosure

The Department said that trust procedures “should clearly identify who will be responsible for [Medicare Secondary Payer Statute

(MSP)] reporting as well as ensure that those parties have access to information sufficient to accurately report payments to [the Centers for Medicare and Medicaid Services (CMS)].”⁴⁷ The Department noted the “strong interest” of the United States in “ensuring that the provisions of the Trust are consistent with the parties’ reporting and reimbursement obligations under the MSP statute.”⁴⁸ To ensure this, the trust should have procedures to educate claimants of their potential reimbursement obligations.⁴⁹

B. Addressing Fraud and Abuse

The Department added that, “because Medicare will only be reimbursed if trust funds remain available to pay legitimate asbestos claimants, the United States has a strong interest” in ensuring that any trust that emerges from the bankruptcy should include “adequate safeguards so that it does not become depleted through fraud and mismanagement.”⁵⁰ The Department detailed several concerns, which are discussed below.

⁴³ *Id.*

⁴⁴ DOJ Kaiser Gypsum Statement of Interest, *supra* note 4.

⁴⁵ *Id.* at 2.

⁴⁶ *Id.*

⁴⁷ *Id.* at 12.

⁴⁸ *Id.* at 5.

⁴⁹ *Id.* at 13.

⁵⁰ *Id.* at 5.

1. Claim Transparency

The Department said it may object to “any proposed Trust procedures that would permit claimants to file claims and receive payments in complete anonymity and in a manner that may prevent any meaningful audit of the trust claims and payments.”⁵¹ The Department said that trust claim filings should be public, “as would be the case if those claims were pursued in a state court or litigated through the bankruptcy claims process.”⁵²

2. Administrative Costs and Attorneys’ Fees

The interests of the United States may be impaired if excessive administrative costs or excessive contingency fees reduce the amount paid to claimants, thus diluting the value of potential Medicare reimbursements. The Department may object if claimants’ attorneys are able to charge the same contingency fee to file uncontested trust claims that they receive in tort cases.⁵³

3. Trust Governance

The Department is seeking disclosure of any fiduciaries who will administer the trust post-confirmation. The Department believes that fiduciaries should be subject to “vigorous conflicts review and disinterestedness standards,” because trust operations “tainted by conflicts of interest can result in dilution of funds flowing to claimants and under-reimbursement to the Medicare Trust Fund.”⁵⁴

RAND has reported that individuals and law firms that play a lead role in multiple trust advisory committees (TAC) also represent claimants against the trusts.⁵⁵ RAND explains the importance of these TACs:

Trusts are governed by trustees, who operate the trust for the benefit of claimants. Because trusts often have hundreds of thousands of beneficiaries who cannot directly control the trustees, committees are set up to represent the interests of current and future claimants. Trustees are

⁵¹ *Id.* at 12.

⁵² *Id.* at 13.

⁵³ *See id.* at 14.

⁵⁴ *Id.* at 14-15.

⁵⁵ Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and*

Activity with Detailed Reports on the Largest Trusts xvi (Rand Corp. 2010), available at https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf.

required to obtain the consent of the trust advisory committee (TAC) (representing current claimants) and the future claimants' representative (FCR) (representing future claimants) before major actions by the trust can be taken (such as revising trust distribution procedures, or TDPs).⁵⁶

4. Payment of Non-Meritorious Claims

The Department seeks to ensure that trust assets are not dissipated through payments to persons making fraudulent claims or who otherwise would not have had viable claims if the debtor had remained in the tort system.⁵⁷

The Department may object to any trust provision that “proposes to make distributions to claimants who cannot credibly demonstrate significant exposure to the Debtors’ products.”⁵⁸

The Department also may object to trust provisions that “appear to shelter claimants from the consequences of misconduct in other proceedings.”⁵⁹

Many trust distribution procedures include language that “expressly authorizes claimants to assert exposure histories that are inconsistent with representations made in the tort system.”⁶⁰ For example, Owens Corning/Fibreboard TDP ¶ 5.7(b)(3) states that evidence submitted in support of trust claims “is for the sole benefit of the PI Trust, not third parties or defendants in the tort system.”⁶¹ Owens Corning/Fibreboard TDP ¶ 5.7(b)(3) further states:

The PI Trust has no need for, and therefore claimants are not required to furnish the PI Trust with evidence of, exposure to specific asbestos products other than those for which OC or Fibreboard has legal

⁵⁶ *Id.*; see also Marc C. Scarcella and Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12 MEALEY'S ASB. BANKR. REP. 33, 43 (December 11, 2013) (“Subsequent to the establishment of the trust following plan confirmation, it is often the representatives of asbestos claimants who assume the leadership roles in advising the management of trust assets and distribution of claim payments over time.”).

⁵⁷ See DOJ Kaiser Gypsum Statement of Interest, *supra* note 4, at 15.

⁵⁸ *Id.*

⁵⁹ *Id.* at 16.

⁶⁰ Brown, *supra* note 10, 61 BUFF. L. REV. at 562.

⁶¹ Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures, Revised Dec. 2, 2015, available at <http://www.ocfbasbestostrust.com/wp-content/uploads/2015/12/OC-FB-Amended-TDP.12.2.2015-C0463534x9DB18.pdf>.

responsibility.... Similarly, *failure to identify OC or Fibreboard products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of this TDP.*⁶²

Cardozo Law School Professor Lester Brickman has explained that this language “vitiates any consequences of failing to identify product exposures in responses to interrogatories, depositions, and trial testimony in tort cases.”⁶³

The Department’s position is that a claimant should not be permitted to deny exposure to a debtor’s products in tort litigation then take a different position in a trust claim.⁶⁴ Further, claimants should be “advised of the effect of prior inconsistent statements made

in other asbestos proceedings and any previous denial of any exposure to products for which the Debtors are legally liable.”⁶⁵

In addition, the Department may object to trust provisions “which unreasonably restrict the Trust from cooperating in discovery or which permit claimants to strategically withdraw and refile Trust claims.”⁶⁶

Many TDPs have been modified post-confirmation to include a “confidentiality” provision.⁶⁷ For example, the Owens Corning/Fibreboard Asbestos TDP requires a “valid subpoena . . . issued by the Bankruptcy Court” for the trust to produce claims information.⁶⁸ Further, the trustee is ordered to “take all necessary and appropriate steps” to fight the subpoena.⁶⁹ TDP “confidentiality” provisions are contrary to the majority rule in the civil courts, where trust claim submissions are routinely held to be discoverable.

⁶² *Id.* (emphasis added).

⁶³ Brickman, *supra* note 15, 88 TUL. L. REV. at 1106; *see also* Marc C. Scarcella and Peter R. Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, 14 MEALEY’S ASB. BANKR. REP. 1, 14 (Feb. 2015) (“the trusts do not seem to be concerned with inconsistent allegations that may be made in the underlying tort case as evident by inclusion of ‘Sole Benefit’ clauses in many TDPs”).

⁶⁴ *See* DOJ Kaiser Gypsum Statement of Interest, *supra* note 4, at 16.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See* Asbestos Claims Legislation, Hearing Before the Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, 112th Cong. (May 10, 2012) (statement of Leigh Ann Schell), *available at* 2012 WLNR 9840045.

⁶⁸ Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures, *supra* note 61.

⁶⁹ *Id.*

TDP provisions that allow the withdrawal and refiling of trust claims appear “intended to suppress evidence of plaintiffs’ exposures to the products of reorganized companies so as to inflate the value of tort claims....”⁷⁰

As Professor Brickman has explained:

Most TDPs have a three-year statute of limitations requiring that trust claims be filed within three years of diagnosis of an asbestos-related disease or, if later, within three years after the ‘initial claims filing date’ or the date of the asbestos-related death. This allows plaintiffs to file and resolve many tort actions before filing trust claims. In the event that plaintiffs are unable to resolve their tort claims within the allowed time period, most TDPs . . . allow a claimant to file a trust claim to meet the applicable statute of limitations first and then to withdraw the claim ‘at any time . . . and file another claim subsequently without affecting the

status of the claim for statute of limitations purposes.”⁷¹

Further, trust TDPS often permit a claimant to ask the trust to defer processing a claim for up to three years without affecting the status of the claim for statute of limitations purposes.⁷²

The impact of these provisions is that “a plaintiff suing in the tort system can have filed trust claims, then withdrawn or deferred them, completed the tort suits during which they testified that they had not filed any trust claims, and then immediately refile or revive the trust claims asserting product exposures that controvert the plaintiff’s testimony in the tort action.”⁷³

Lastly, the Department asserts that the trusts “should not be permitted to make payment to claimants whose claims would be time barred in the tort system.”⁷⁴

V. Objections to FCR Appointments

On September 26, 2018, the USTP filed its first-ever objection to the usually routine appointment of a future claimants’ representative

⁷⁰ 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 Prof.

Lester Brickman), *available at* 2015 WLNR 3578295.

⁷¹ *Id.*

⁷² *See id.*

⁷³ *Id.*

⁷⁴ DOJ Kaiser Gypsum Statement of Interest, *supra* n. 4, at 16-17.

(FCR) in an asbestos-related bankruptcy proceeding.⁷⁵ The USTP noted that the proposed FCR (Lawrence Fitzpatrick, a longtime FCR in asbestos bankruptcy proceedings) in Duro Dyne National Corp.'s bankruptcy had been selected by the debtors and an ad hoc committee of certain current asbestos plaintiffs: "the very parties that he will be required to negotiate with or litigate against and who retained and compensated him prior to bankruptcy."⁷⁶

The USTP described the appointment of an FCR as "one of the most consequential orders"⁷⁷ that is entered by a court in an asbestos-related bankruptcy. The FCR's role is "to protect the rights of absent parties."⁷⁸

For that reason, the USTP told a New Jersey federal bankruptcy court that "the FCR's appointment and selection should be transparent, he should be free from conflict, and he should be held to the highest possible standard of independence."⁷⁹

The USTP said, "it is unclear whether [Mr. Fitzpatrick] actually acted as an independent fiduciary" in the "pre-negotiated" Duro Dyne chapter 11 cases or "is capable of acting as an independent fiduciary during these cases."⁸⁰

Without an effective FCR, the USTP explained, a debtor and present claimants may reach a settlement that pays inflated compensation to selected present claimants in return for a lower overall contribution by the debtor into a trust. As trust assets are depleted, future claimants receive smaller payments. The USTP said that this "appears to have happened in various asbestos plans negotiated without the full participation of an effective FCR."⁸¹

Over the USTP's objection, the bankruptcy court approved the appointment of Mr. Fitzpatrick as FCR in a minute order issued in October 2018.⁸² The USTP is appealing.⁸³

On December 14, 2018, the USTP filed a similar objection in a

⁷⁵ See U.S. Dept. of Justice, Press Release 18-1256, 2018 WL 4613912, *U.S. Trustee Program Files Objection to the Appointment of the Debtor's Proposed Future Claimants' Representative for Future Asbestos Claimants in Duro Dyne National Corp.*, No. 18-27963 (Bankr. D.N.J.) (Sept. 26, 2018); Alison Frankel, *DOJ Intensifies Attack on Asbestos Trusts, Files Opposition in Prepackaged Duro Dyne Bankruptcy*, 40 No. 26 WESTLAW J. ASBESTOS 5 (Oct. 12, 2018).

⁷⁶ USTP Objection to Duro Dyne FCR Appointment, *supra* note 6, at 2.

⁷⁷ *Id.*

⁷⁸ *Id.* at 5.

⁷⁹ *Id.*

⁸⁰ See USTP Objection to Duro Dyne Disclosure Statement, *supra* note 5, at 2 n.3.

⁸¹ USTP Objection to Duro Dyne FCR Appointment, *supra* note 6, at 9.

⁸² *Judge Rejects U.S. Trustee's Objections, Names Future Claimants' Representative*, 18 MEALEY'S ASB. BANKR. REP. 10 (Oct. 17, 2018); Alex Wolf, *Asbestos Trust Rep Beats DOJ Objection in Duro Dyne Ch. 11*, LAW360, Oct. 16, 2018.

⁸³ See *U.S. Trustee Appeals Appointment of FCR for Duro Dyne Chapter 11*, 2018-4762

Georgia federal bankruptcy court, challenging another veteran claimants' representative and asbestos trust trustee, James L. Patton, Jr.⁸⁴ The USTP argues that Mr. Patton's "role as an asbestos trust fiduciary, coupled with the law firm's frequent representation of fiduciaries in asbestos cases, illustrates the closed network of professionals who administer asbestos cases and recycle many of the same trust terms that omit important anti-fraud provisions and cost controls that the [USTP] deems essential...."⁸⁵ The USPT asked the court to deny Mr. Patton's appointment as FCR, defer naming an FCR for at least thirty days, and authorize additional candidates to apply to the court for the position or be nominated by interested parties for the court's consideration. Alternatively, if the court considers the request to appoint Mr. Patton, the USTP argues, further disclosures should be required with respect to the circumstances of Mr. Patton's selection.

VI. Objection to Disclosure Statement

In October 2018, the USTP challenged another aspect of the Duro Dyne chapter 11 cases, filing an objection to the disclosure statement for the "pre-negotiated" plan of reorganization.⁸⁶ The USTP argued that the disclosure statement could not be approved because it "does not disclose or explain the Plan's lack of safeguards against fraud or abuse, nor does it explain or justify the fact that, under the Plan, numerous claims may be paid that would not have been viable and that have not historically been paid in the tort system—thereby subjecting all other claimants to a risk that their claims will be diluted."⁸⁷ The USTP also argued that the Plan described in the disclosure statement is not confirmable because "it fails to include adequate safeguards against fraud and abuse."⁸⁸

The USTP raised many of the same objections to the proposed plan that the Department raised in its Statement of Interest in the Kaiser Gypsum bankruptcy proceeding.

MEALEY'S DAILY NEWS UPDATE 8 (Nov. 5, 2018); Notice of Appeal and Statement of Election, *In re Duro Dyne Nat'l Corp.*, No 18-27963 (MBK) (Bankr. D.N.J. Oct. 31, 2018).

⁸⁴ See Amended Objection of the United States Trustee to Debtor's Motion for an Order Appointing James L. Patton, Jr., as Legal Representative for Future Asbestos

Claimants, *In re The Fairbanks Co.*, No. 18-41768-PWB (Bankr. N.D. Ga. Dec. 14, 2018).

⁸⁵ *Id.* at 3 n. 3.

⁸⁶ See USTP Objection to Duro Dyne Disclosure Statement, *supra* note 5.

⁸⁷ *Id.* at 3-4.

⁸⁸ *Id.* at 4.

A. Claim Secrecy

The plan in the Duro Dyne chapter 11 cases contains “sole benefit” and “confidentiality” provisions that “appear to prohibit the Trust from disclosing whether any particular individual has filed a claim, the factual allegations on which the claim was based, and whether the claim was paid.”⁸⁹ The USTP said these “far-reaching secrecy provisions” allow claimants to continue the “very gamesmanship and discovery abuse criticized by the court in *Garlock*.”⁹⁰

B. Illusory Evidentiary Requirements

The USTP also said that the plan contains illusory evidentiary requirements that will facilitate payments to claimants without actual asbestos illness.⁹¹ Furthermore claimants will be paid even if their injuries appear to be mostly the fault of others.⁹²

As a consequence of the plan’s “extremely relaxed criteria,”⁹³ the USTP argued, the trust “will be flooded with claims far out of proportion to the Debtors’ historic asbestos liability, which the [t]rust may be obligated to pay notwithstanding the fact that

many of those claims would not have been compensable on the tort system.”⁹⁴

C. Facilitation of Litigation Misconduct

The USTP said the plan “reward[s] dishonesty” to the detriment of deserving claimants.⁹⁵ The USTP highlighted a TDP provision that allows payment to claimants who fail to identify exposure to the debtors’ products in underlying tort litigation.

The USTP also mentioned a provision in the plan that allows claimants to withdraw and refile claims without giving rise to any statute of limitations defense. The USTP said the provision can “easily be exploited by a dishonest attorney, who could strategically withdraw and refile a [t]rust claim in order to avoid disclosing the existence of that claim in discovery in non-[t]rust proceedings.”⁹⁶

D. Excessive Attorney Fees and Administrative Costs

The USTP objected to the TDP’s lack of any cap on attorneys’ fees for

⁸⁹ *Id.* at 9.

⁹⁰ *Id.*

⁹¹ *Id.* at 11-12.

⁹² *See id.* at 11.

⁹³ *Id.* at 11.

⁹⁴ *Id.* at 12.

⁹⁵ *Id.* at 13.

⁹⁶ *Id.* at 13-14.

trust claims processed under an expedited review process.⁹⁷

Without a cap, the USTP said, many claimants' attorneys "will presumably receive the same contingency fee in these uncontested matters that they would have received from a contested verdict in a civil trial, which may unfairly dilute the actual compensation being paid to asbestos victims."⁹⁸

E. Failure to Identify TAC Members

The USTP objected to plan's failure to identify TAC members and the apparent lack of any requirement that any of these fiduciaries will be subject to the "vigorous conflicts review and disclosure that govern the selection of estate fiduciaries during a bankruptcy case."⁹⁹

F. Absence of Independent Audit Requirement

Finally, the USTP said it is "concerning" that the Trust Agreement and TDPs do not provide for a "mandatory, independent audit of the Trust and the Trust fiduciaries."¹⁰⁰

G. Future Objections

In November 2018, the bankruptcy court judge approved an amended disclosure statement and set a February 8, 2019, deadline for any objections to confirmation of the plan of reorganization or proposed modifications to the plan.¹⁰¹

VII. CIDs Sent to Trusts

In the fall of 2018, the Department of Justice also sent civil investigative demands to asbestos trusts to investigate "whether the Medicare Program has been

⁹⁷ See *id.* at 14.

⁹⁸ *Id.*

⁹⁹ *Id.* at 15.

¹⁰⁰ *Id.* at 16.

¹⁰¹ See Amended Order (I) Approving Second Amended Disclosure Statement as Providing Adequate Information Within the Meaning of Section 1125(A) of the Bankruptcy Code; (II) Establishing Procedures for Solicitation and Tabulation of Votes on Amended Plan of Reorganization; (III) Approving the Form of

Ballots; (IV) Scheduling a Hearing on Confirmation of the Plan; (V) Approving the Form, Manner and Scope of Mailed and Published Notices of the Time Fixed to (A) Vote on the Amended Plan, and (B) File Objections to Confirmation of the Amended Plan; and (VI) Granting Related Relief, *In re Duro Dyne Nat'l Corp.*, No 18-27963 (MBK) (Bankr. D.N.J. Nov. 20, 2018); see also *Duro Dyne's Disclosure Statement Approved by Bankruptcy Judge*, 2018-4785 MEALEY'S DAILY NEWS UPDATE 8 (Nov. 21, 2018).

reimbursed in accordance with the Medicare Secondary Payer Act.”¹⁰²

VIII. Conclusion

The Department of Justice and its USTP are taking unprecedented steps to “increase the transparency of asbestos trusts and protect the interests of legitimate claimants and the United States.”¹⁰³ The Department and USTP have challenged the creation of trusts that lack provisions to safeguard against fraud and abuse. The USTP is challenging the appointments of certain future claimants’ representatives as too conflicted to exercise independence. In addition, the Department sent civil investigative demand letters to asbestos trusts to investigate potential False Claims Act violations regarding Medicare reimbursement issues. These actions are a welcome development and signal that, at least under the present Administration, the Department will likely take a larger and more active role in the asbestos trust system.

¹⁰² See Alex Wolf, *Asbestos Trusts Come Under DOJ Civil Investigation*, LAW360, Oct. 5, 2018.

¹⁰³ U.S. Dept. of Justice, Press Release 18-1187, *Justice Department Files Statement of*

Interest in New Asbestos Trust Proposal, at 2 (Sept. 13, 2018) available at <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-new-asbestos-trust-proposal>.