

**Testimony of Marc Scarcella in support of
The Fairness in Claims and Transparency Act**

Bates White, LLC
1300 Eye Street, NW
Suite 600
Washington, D.C. 2005

Introduction

My name is Marc Scarcella, and I want to thank the committee for holding today's hearing on the Fairness in Claims and Transparency Act, and allowing me the opportunity to provide testimony in support of the proposed legislation. As an economist who has been studying trends in asbestos claim filings and compensation for over ten years, I believe that transparency between the asbestos civil tort and bankruptcy trust systems is critical for the proper allocation of fault across all culpable parties.

I currently work in the Environmental and Product Liability practice of Bates White, LLC where I consult on a variety of issues relating to mass tort litigation, including the estimation of litigation risk and economic damages associated with asbestos claims. My current clients include defendants and insurers actively litigating cases in the asbestos civil tort, but prior to joining Bates White in 2009 I spent nearly a decade as a consultant to asbestos claimant representatives in 524(g) bankruptcy proceedings, trustee boards of some of the largest asbestos bankruptcy trusts, and as an in-house statistician for the Johns-Manville Personal Injury Settlement Trust. It is from this balanced experience of seeing the world from both the tort and trust systems, and working for both defendants and claimants, that I've gained a great deal of knowledge and unique perspective about how these two compensation systems interact with one another, or in many instances, fail to interact with one another.

The issue of asbestos bankruptcy trust transparency that sits at the heart of the proposed legislation has been the focus of academic, judicial, and legislative debates across the country in recent years. Even though asbestos bankruptcies and resulting bankruptcy trusts have been around for decades, it's only been in the past few years that the trust system as a whole has become a substantial, alternative source of compensation to what plaintiffs are already receiving in the tort system. As a result, tort defendants, state courts and legislators have been faced with the challenge of finding effective and efficient methods of integrating these dual compensation systems into one.

As written, the Fairness in Claims and Transparency Act will further promote the filing of asbestos trust claims and related disclosures in the tort system without posing an undue burden on plaintiff counsel, which in turn will result in expedited trust payments to asbestos victims well in advance of tort case resolution. In support of this conclusion my testimony will focus on the process in which plaintiff counsel can actively pursue asbestos trust claims in an efficient manner without detracting significant resources from the related lawsuit in the tort system.

Pursuing Trust Claims

The primary purpose of asbestos bankruptcy trusts confirmed under 524(g) is to efficiently process and pay qualifying claims for individuals who suffer from asbestos related diseases. Trusts are designed to pay claims expeditiously and with minimal administrative and transactional costs. To accomplish this, most trusts have established presumptive medical and exposure criteria to quickly determine if a claim

qualifies for payment. The resolution procedures developed to govern this process are often standardized across trusts allowing plaintiff attorneys to utilize the same claims material for multiple trust submissions, thus minimizing their filing costs per claim. To further expedite the process of filing claims, many trusts and claim facilities have utilized electronic filing and processing systems that provide plaintiff law firms the ability to file thousands of claims *en masse*.¹

The efficient manner in which trusts are able to receive, process, and pay claims has produced over \$14 billion in payments to hundreds of thousands of claimants between 2006 and 2011.² Not surprisingly, this level of compensation has incentivized some plaintiff law firms to hire attorneys and non-attorney professionals whose primary job duties are to file and pursue trust claims.³ As a result, the resources plaintiff law firms may use to file trust claims are independent of the attorneys and professionals that are actively pursuing tort claims. In effect, requiring plaintiff counsel to proactively pursue trust claims in conjunction with the tort case should in no way detract from the quality of representation that the plaintiff receives.

It is also worth noting that for living mesothelioma plaintiffs, this administrative process of filing and resolving a trust claim can occur even faster. Many trusts offer an “Exigent Claim” status for living mesothelioma cases that find themselves in immediate need of financial assistance for expenses or loss of income as a result of their asbestos-related disease. This Exigent Claim status can accelerate the trust review and payment process. Given that many mesothelioma plaintiffs are living at the time their attorney files a lawsuit in the tort system, any trust claims that are actively pursued would likely yield payment well before trial, even in jurisdictions that have *extremis* mesothelioma dockets.

This point illustrates that the trust filing and resolution process can provide compensation more quickly and efficiently than lawsuits in the civil tort system, and because the process is largely administrative these trust claims can be pursued without detracting significant resources from the plaintiff counsel’s pursuit of a related lawsuit in the tort system. In short, asbestos bankruptcy trust claims can easily be made concurrently with a pending tort case, and often provide plaintiffs with needed compensation while the related lawsuit is still being resolved. These payments can be critical for paying a plaintiff’s medical bills and other potential financial strains stemming from any loss of income.

Part of the reason why trust and tort claims can be made concurrently with a great deal of efficiency is because there is overlap between the supporting evidence required in both processes. Much like the tort system, a mesothelioma trust claim can be supported by a physical exam or pathology report. The payment criteria for a mesothelioma trust claim typically require meaningful and credible exposure to asbestos-containing products and operations of the reorganized debtor.⁴ This can be demonstrated by specific product identification or alleged exposure to operations supported by plaintiff testimony in the

¹ See for example: Sample Excel file for Electronic Filing offered by Verus
<http://www.kaiserasbestostrust.com/Files/KACC%20Sample%20Excel%20Files.zip>

² *Supra* 1.

³ See for example: web site of Goldberg Persky White, P.C.

⁴ See for example: The Babcock & Wilcox Company Asbestos PI Settlement Trust Distribution Procedures, Section 5.7(b)(3), revised January 4, 2008

form of an affidavit or deposition. In the event that the plaintiff is no longer living, the supporting exposure testimony can be provided by family member or co-worker.

To further limit the discovery burden for plaintiff counsel, many trusts maintain Approved Site Lists compiled through corporate records and plaintiff testimony that include locations where the reorganized defendant's products or operations were present for a specified period of time.⁵ The purpose of these Approved Site Lists is to expedite the review process by allowing plaintiff attorneys to easily leverage the institutional knowledge and testimony compiled over decades of litigation. Plaintiffs can establish product exposure by being at one of these locations at a time when the bankrupt entity's asbestos-containing products or operations were also believed to be present. In fact, many experienced plaintiff law firms maintain and leverage similar site, product, and testimony lists and resources when developing cases against defendants in the tort system.⁶

The final step in trust claim resolution is the determination of the payment amount. Unlike settlements made with defendants in the tort system, this is not a negotiated or compromising process. Trusts typically provide a schedule of payment amounts for each asbestos-related injury, as well as an individual review and valuation procedure that values claims based on specific claimant characteristics. These valuation models are designed to yield payment amounts that mimic the reorganized company's settlement history prior to bankruptcy. Trusts that are unable to pay claimants 100% of the specified amount will establish a "Payment Percentage" that uniformly reduces the amounts by a fixed percentage. Thus, the actual payment received by each claimant is equal to the determined amount, multiplied by the Payment Percentage.

Trust Payment Percentages are subject to change over time based on projections of future claim obligations. If future liability expectations increase, then trusts will likely decrease individual claim payments in an attempt to maintain assets far enough into the future to be in a position to pay all claims in an equitable manner. Conversely, if future liability expectations decrease, then trusts will likely increase individual claim payments. Again, this is done in an attempt to maximize claim payments while ensuring that trust assets will be sufficient to pay all future claimants. For many trusts, when payments increase, prior claimants are given retroactive, or "True-Up" payments equal to the difference between what they previously received from the trust and what the trust is currently paying similarly situated claimants. As a result, there is no downside risk to pursuing payment from a trust as quickly as possible. Rather, there is only downside risk of waiting to pursue a trust claim as values may decrease over time. As written, I believe that the proposed legislative will further promote the expeditious filing of trust claims, which in my view, is in the best interests of the plaintiffs.

Conclusion

⁵ See for example: The United States Mineral Products Company Asbestos Personal Injury Settlement Trust, Protocol for Adding a Site to the Trust's List of Qualified USM Worksites <http://www.claimsres.com/documents/USM/USM%20Protocol%20for%20Adding%20a%20Site%20to%20the%20Trust%27s%20List%20of%20Qualified%20USM%20Worksites%20022510.pdf>

⁶ See for example: web site of Cascino Vaughn Law Offices, LTD

As an economist who has been studying trends in asbestos claim filings and compensation for over ten years, I believe that transparency between the asbestos civil tort and bankruptcy trust systems is critical for the proper allocation of claimant compensation. As written, the proposed legislation will help provide this necessary transparency by allowing defendants to assume the burden of proving cases against asbestos trusts, and based on such evidence, courts can choose to compel plaintiff counsel to file and disclose related trust claims in a timely manner. As a result, the Fairness in Claims and Transparency Act will further promote the filing of trust claims without posing an undue burden on plaintiff counsel, resulting in expedited payments to asbestos victims well in advance of tort case resolution.