



U.S. DEPARTMENT OF JUSTICE TAKES ON ASBESTOS TRUST FRAUD, ABUSE

by Mark A. Behrens and William F. Northrip

In recent weeks, the U.S. Department of Justice has taken unprecedented steps to combat the “problematic lack of transparency in the operation and oversight of asbestos trusts.”¹ 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.”² The Department found “alarming evidence” of “fraud and mismanagement inside trusts.”³ It seeks to protect the interests of legitimate claimants and the United States, which may be entitled to reimbursement for medical treatments paid by Medicare if claimants collect from asbestos trusts.

Statement of Interest Filed in New Asbestos Trust Proposal

On September 13, 2018, the Department filed perhaps its first-ever Statement of Interest in an asbestos-related bankruptcy proceeding (*In re Kaiser Gypsum Co.*), asserting its concern that plans for the creation of an asbestos trust are lacking adequate safeguards against “fraud, mismanagement, or abuse.”⁴ DOJ’s notice gives the parties time to address its concerns to avoid “the need for the filing of objections.”⁵

Transparency: Asbestos-trust claim fraud and abuse received national attention in 2014 after a North Carolina federal bankruptcy judge found that gasket and packing manufacturer Garlock Sealing Technologies, LLC had paid inflated amounts in asbestos lawsuits because 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).”⁶ Many of the trust claims filed by Garlock plaintiffs included work and exposure histories that were factually inconsistent with the representations those plaintiffs made in civil asbestos actions.⁷

¹ See, e.g., Letter from Acting Associate Attorney General Jesse Panuccio to Hon. Steve Marshall, Attorney General of Alabama (Sept. 13, 2018) [hereinafter “DOJ Letter to State AGs”].

² See 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., at 8, *In re Kaiser Gypsum Co., Inc.*, No 16-31602 (JCW), (Bankr. W.D.N.C. Sept 13, 2018) [hereinafter “DOJ Statement of Interest”].

³ U.S. Dept. of Justice, Office of Public Affairs, Press Release 18-1187, *Justice Department Files Statement of Interest in New Asbestos Trust Proposal*, at 1 (Sept. 13, 2018) [hereinafter “DOJ Press Release”].

⁴ DOJ Statement of Interest, *supra*, at 3.

⁵ *Id.* at 2.

⁶ *In re Garlock Sealing Tech., LLC.*, 504 B.R. 71, 84 (Bankr. W.D.N.C. 2014).

⁷ James L. Stengel & C. Anne Malik, *Insights & Inconsistencies: Lessons from the Garlock Trust Claims* (U.S. Chamber Inst. for Legal Reform Feb. 2016).

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The Department asserts that the Kaiser trust should permit the United States to monitor when individuals file claims or receive payments. A claimant who denies trust-related exposures during a tort action should not be able to take a different position in the trust system. The trust should not be unreasonably restricted from cooperating in civil discovery or permit claimants to strategically file and refile trust claims. Also, the trust should not pay claimants whose claims would be barred in the tort system.

Medicare: Claimants should be advised if they may be subject to a reimbursement obligation.

Administrative Costs and Attorneys' Fees: The Department may object to any trust provisions that "impose excessive administrative costs or that permit attorneys to collect excessive contingency fees."⁸

Objection Filed to Appointment of Proposed Future Claimants' Representative

On September 26, 2018, the Justice Department's U.S. Trustee Program (USTP) filed a first-ever objection to the appointment of a future claimants' representative (FCR) in a different asbestos bankruptcy (*In re Duro Dyne National Corp.*)⁹ The USTP seeks discovery to determine if the proposed FCR is "free of disqualifying conflicts of interest" and "capable of serving as an independent fiduciary."¹⁰ Without an effective FCR, a debtor and present claimants may reach a settlement that pays inflated compensation to present claimants in return for a lower overall contribution by the debtor into a trust. As trust assets are depleted, future claimants would receive smaller payments, potentially affecting Medicare reimbursements.

Support from Many Partners

The Justice Department expressed its gratitude for the "many partners" that are working to increase asbestos trust transparency,¹¹ including almost 20 state attorneys general who wrote the Department in 2017 detailing the rampant abuse, lack of oversight, and the need for federal intervention in the asbestos trust system.¹² The Washington Legal Foundation, among others, had also called on the Department to act.¹³ At the state level, 15 states have adopted laws that require plaintiffs to file and produce asbestos trust claims before trial.¹⁴

What's Next?

The Department plans to look for other opportunities to "increase the transparency of asbestos trusts and protect the interests of legitimate claimants and the United States."¹⁵ For example, the Department "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."¹⁶ Also, the Department has reportedly sent demands to a number of trusts seeking information about settlements with claimants to determine if there have been False Claims Act violations for failure to reimburse Medicare for claimants' medical treatments.¹⁷ 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."¹⁸

⁸ DOJ Statement of Interest, *supra*, at 14.

⁹ See Objection of the United States Trustee to Debtors' Motion for an Order Appointing Larry Fitzpatrick as Representative for Future Asbestos Claimants, *In re Duro Dyne Nat'l Corp.*, No 18-27963 (Bankr. D.N.J. Sept. 26, 2018).

¹⁰ *Id.* at 2.

¹¹ DOJ Press Release, *supra*, at 2.

¹² See *id.*

¹³ See Glenn G. Lammi, *Cleaning Up the Asbestos Litigation Mess: A Role for the Department of Justice?*, FORBES.COM, Apr. 2, 2018.

¹⁴ See Mark A. Behrens, *Asbestos Trust Transparency*, 87 FORDHAM L. REV. 108, 117 n.81 (2018).

¹⁵ DOJ Press Release, *supra*, at 2.

¹⁶ See DOJ Letter to State AGs, *supra*.

¹⁷ See Alex Wolf, *Asbestos Trusts Come Under DOJ Civil Investigation*, LAW360, Oct. 5, 2018.

¹⁸ DOJ Press Release, *supra*, at 2.