United States House of Representatives

Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Testimony of Nicholas P. Vari
K&L Gates LLP
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222-2613

Hearing on H.R 526, the "Furthering Asbestos Claim Transparency (FACT) Act of 2015"

February 4, 2015

Chairman Marino, Vice-Chairman Farenthold, Ranking Member Johnson, and members of the Subcommittee, thank you for allowing me to appear before you today in support of the Furthering Asbestos Claims Transparency (FACT) Act of 2015; H.R. 526.

INTRODUCTION

My name is Nicholas Vari. I am a partner with the law firm of K&L Gates, LLP, resident in Pittsburgh, Pennsylvania. For nearly twenty-five years, I have represented defendants such as Crane Co. in asbestos cases throughout the United States. Those experiences shape my comments today. Nevertheless, the views I offer herein are mine alone, and do not reflect the views of my law firm or its clients.

At the outset, the modern-day asbestos defendant can hardly be characterized as an "asbestos company". Many of these companies never manufactured a single item that contained asbestos. Rather, those companies manufactured equipment, vehicles, or similar devices that may have, at some point in time, contained small, consumable parts—manufactured by others—that contained asbestos. And those parts were replaced soon after the sale. Other of the current tort system defendants may have sold—decades ago—limited amounts of materials that contained some asbestos. Nevertheless, those companies—and not the now-bankrupt companies that were the primary asbestos defendants in years past[1]—are left to respond in the tort system for injuries caused by *all* of the asbestos-containing materials that were made and sold by anyone, including those entities that can no longer be reached in the tort system.

[1] Shelly, Cohn, Arnold, *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 Law Journal 675,676 (No. 3, 2014) (noting that "the 'main players' have exited the tort system" which has led to plaintiffs "targeting an ever-growing number of 'peripheral' defendants that have comparatively lower degrees of culpability for the claimant's injuries").

Since I began defending asbestos claims, over eighty-five companies have filed for bankruptcy protection due to asbestos claims.[2] In many instances, those tort system defendants were replaced by asbestos bankruptcy trusts, which hold billions of dollars in assets to compensate asbestos claimants.[3] Due to the lack of any meaningful interface between the trust and tort systems, however, the trust recoveries often occur in *addition* to the *complete* recoveries that are available in the tort system. I have observed personally the impact that the lack of access to information regarding trust submissions has had on tort system litigants.

THE DUAL COMPENSATION SYSTEMS

The processes of submitting a claim in the tort system and submitting a claim to a bankruptcy trust are similar. In the tort system, the plaintiff files a complaint, often naming 40 or more defendants, and then provides one or more sworn statements evidencing his or her alleged exposure to asbestos-containing materials made or sold by the defendants from whom the plaintiff seeks to recover. The tort system plaintiff further provides evidence of a compensable injury that he or she attributes to asbestos exposure. Each defendant against whom a claim is made, then, evaluates the claim. The vast majority of the claims are settled or dismissed before trial, although some are tried, and the plaintiff is compensated accordingly.

Similarly, a trust claim is instituted with a submission that includes proof of an asbestos-related injury and a statement that the plaintiff is entitled to compensation from

[2] *See*, *e.g.* Dixon, McGovern, Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (RAND Corp. 2010) at Table A.1.
[3] Scarcella and Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, Mealey's Asbestos Bankruptcy Report Vol. 12, #1 (June 2013) at pp. 2-3.

the trust for his or her injury. That claim is then processed, evaluated, and, if appropriate, paid. Most claims are accepted, and some are contested.[4] The primary difference between the two situations is that the product exposure information in the tort system claim is largely a matter of public record, while the product exposure information for the bankruptcy trust claim is concealed from public view.

Before assessing the importance of product exposure evidence to a tort system defendant, it is important to note how responsibility for an asbestos-related injury is allocated in the tort system. Asbestos-related diseases are traced to the cumulative dose of asbestos that one has received during his or her lifetime. The sources of these exposures include product-related, occupational, and environmental exposures. Nevertheless, one cannot assess the actual cause or causes of a cumulative-dose disease without first knowing and evaluating all of the exposures that may have contributed to the disease. When substantial pieces of a particular individual's asbestos exposure history are not included in the analysis, the entire responsibility for those cumulative-dose conditions may be spread disproportionately upon a small group of solvent defendants that may have collectively played a minor role, if any, in actually causing that injury. Therefore, when the tort system defendants are deprived of information regarding a claimant's overall asbestos product exposure history, those defendants are unable to accurately apportion the plaintiffs' claims among the various asbestos exposures that caused the plaintiffs' injuries. In turn, courts and jurors are

[4] *See*, Scarcella, Kelso, *supra*, at p. 11 (Noting that the trust review process is not a negotiated or compromised process. The claim either qualifies, or it does not. The trusts spend approximately two cents on claims review for every dollar paid).

also deprived of a complete picture, and, therefore, unable to assess accurately the potential contribution of each exposure to a particular injury.

When information pertaining to a claimant's asbestos exposure are not disclosed, the financial burdens relating to asbestos personal injury lawsuits claimants fall increasingly upon the remaining tort system defendants. The amount of compensation available for a particular injury does not diminish simply because fewer defendants are available to pay. Instead, only the number of payers among whom that compensation can be spread diminishes. In these instances, it is important for those who are left in the tort system to be able to assess the entirety of a claimants' exposure history, and not just a subset of those exposures.

THE LESSONS OF *GARLOCK*

When information regarding exposures to products made and sold by now-bankrupt entities is not disclosed, the burden of compensating tort system claimants falls disproportionately upon those who remain in the tort system. And the same claimants who pursue full remuneration in the tort system can, for the most part, recover more money from the asbestos bankruptcy trusts without any impact on their tort system recoveries. The undue burdens created by this "double-dipping" are exacerbated in situations where now-bankrupt companies contributed significantly to the asbestos exposures that caused a particular claimant's disease. The fact that new defendants with increasingly tangential relationships to asbestos-containing materials are being added to the tort system does not solve this problem.

This is precisely the teaching of the United States Bankruptcy Court for the Western District of North Carolina's *Garlock* opinion.[5] In that case, the Court compared the amount of money that Garlock Sealing Technologies, LLC, a now-bankrupt manufacturer and supplier of industrial seals, *actually* paid to resolve claims in the tort system compared to what it *should* have paid if one had considered Garlock's *actual* potential legal responsibility for the asbestos-related injuries for which it was sued. After conducting its analysis, the Bankruptcy Court found the value of Garlock's *actual* potential legal responsibility for asbestos claims was roughly *one-tenth* of the amount than *Garlock* likely would have paid had it resolved those claims in the tort-system.[6]

The *Garlock* opinion details a claim in which I was involved personally that illustrates how the absence of product exposure information available to the bankruptcy trusts can prejudice tort system defendants. The *Garlock* court described "a California case involving a former Navy machinist mate aboard a nuclear submarine", in which, after the verdict, *Garlock* discovered that the plaintiffs' lawyers had failed to disclose exposure to 22 different asbestos products, many of which involved bankrupt entities.[7] The *Garlock* opinion does not disclose, however, that many tort system defendants settled the claim in question for significant sums, based on the mistaken impression that the plaintiffs had disclosed all of the injured plaintiffs' potential asbestos exposure.[8] But for the *Garlock* opinion, those defendants would have never known about the twenty-two other allegedly injurious products to which that plaintiff claimed to have been

[5] *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (Bankr. W. D. N.C. 2014).
[6] *Id*. at 94.
[7] *Id*. at 74, 97.
[8] At numerous points in the tort system discovery process, plaintiffs were asked to identify all sources of the injured plaintiff's asbestos exposure. None of the exposures that the *Garlock* court referenced were disclosed in the discovery process.

exposed. And since the *Garlock* opinion was issued years after the claim was settled, defendants are substantially handicapped – if not entirely precluded – from recovering the amounts they overpaid to settle that claim.

Juries in California are permitted to assign a share of plaintiffs' often extensive non-economic damages awards (here $9 million, in the claim described in the *Garlock* opinion) among all entities (including bankrupt entities) whose products may have contributed to a plaintiffs' injuries. Defendants, therefore, evaluate their own potential liability exposure by comparing the injured plaintiff's overall historical asbestos exposure to the alleged exposure to the defendant's product. By failing to disclose evidence of additional exposures, this particular plaintiff avoided entirely the allocation of fault to other potentially culpable entities who may have contributed to the plaintiffs' injuries—from whose trusts plaintiffs collected—while at the same time inducing the tort system defendants to over-value plaintiffs' claims against them. In so doing, each of the tort system defendants was induced to over-estimate its potential liability *before* entering into settlement negotiations. Had all the plaintiff's asbestos exposures been disclosed to the tort system defendants these excessive settlements probably would not have occurred.

THE ABSENCE OF A MEANINGFUL CASE AGAINST TRANSPARENCY

In light of the foregoing, and in light of the prospect for confusion and misinformation that may occur if only one side has access to the asbestos product exposure information within the trusts' possession, there is good reason to permit asbestos defendants and other asbestos bankruptcy trusts access to product exposure

information that is known to individual asbestos bankruptcy trusts. At the same time one may ask "what is the downside to having trusts provide exposure information?" Several arguments against disclosure have been offered, but none merits precluding transparency.

1. The Proposed Act Does Not Reduce Any Recovery of Any Asbestos Claimant.

The financial impact of exposures to non-parties' asbestos-containing products is a function of state law. The proposed FACT Act does not even address this issue. Rather, the FACT Act provides only for the disclosure of information possessed by the trusts, so that the tort system defendants and asbestos bankruptcy trusts can have a complete picture of a tort claimant's asbestos-exposure history. The *impact* of that information is left to state law. Put another way, those who advocate that bankruptcy trust recoveries should not impact an injured claimant's tort system recovery may continue to do so, and their efforts in that regard are not hindered by this proposed legislation. The present legislation deals only with access to the information. The question of the ultimate impact of this information remains an issue that the parties can address going forward. Without disclosure, however, that debate cannot ever occur.

2. The Defendants Do Not Already Have the Product Exposure Information to Which the Trusts Are Privy.

If the information that is within the possession of the bankruptcy trusts was already available, there would be no need for the FACT Act. The reality—as illustrated by the *Garlock* opinion—is that vital product exposure information that is submitted to the trusts is often not disclosed. The reality is also that the bankruptcy trusts often are not readily willing to provide claims information.

The information regarding the asbestos-containing materials to which an asbestos claimant was exposed is largely, if not exclusively, within the control of that claimant and his or her counsel. There is no question that a tort system plaintiff must disclose all of the product disclosures of which the plaintiff or his or her counsel is aware. And, many courts have ruled that a plaintiff must disclose all of his or her trust filings in the tort system. Accordingly, there is no real basis for precluding asbestos defendants from obtaining claims information from the bankruptcy trusts.

3. Discovery of Trust Submissions Will Not Violate Anyone's Privacy.

In the context of an asbestos lawsuit, the injured person provides releases to the defendants that give those defendants access to a lifetime's worth of the plaintiff's medical records, and all of the plaintiff's work and earnings history. There are no medical records or other identifying information provided to the trusts that are not otherwise discoverable in the tort system. Accordingly, unless there is something missing from the tort system disclosures, the information held by the trusts should not generate additional information, confidential or otherwise. Nevertheless, the prospect of

omissions in the tort system discovery process merits this additional check on the tort system discovery process.

4. Plaintiffs Are Required, Already, to Provide All Product Exposure Information in Discovery.

In every asbestos lawsuit, plaintiffs are asked at length about their exposures to asbestos. These questions are asked, among other ways, in the form of written interrogatories, the answers to which are provided by counsel. This is not work product; it is information that is extremely relevant to addressing each defendant's contribution, or lack thereof, to the totality of the asbestos exposures at issue. And this information is fully discoverable in an asbestos personal-injury lawsuit.

In over two decades of defending asbestos claims, I am not aware of a plaintiff ever objecting—on any grounds—to a question asking him or her to identify the asbestos-containing materials to which he or she was exposed. At the same time, there are those who object strenuously to asbestos defendants getting the same information from the bankruptcy trusts. This distinction makes little practical sense. The information is relevant, and admissible, and it should be available from the trusts, as well as from the plaintiffs.

CONCLUSION

In closing, recent history teaches us that information contained in bankruptcy trust submissions does not flow freely to tort system defendants and other bankruptcy trusts. Complete asbestos exposure history information is necessary to enable the tort system defendants (and courts and juries where appropriate), as well as asbestos bankruptcy trusts, to evaluate a defendant's potential contribution to an asbestos related

disease. The product exposure information is readily available to plaintiffs and to the trusts. To deprive tort system defendants and the general asbestos bankruptcy trust system of the same information creates an inequality that is solved by a simple legislative cure that creates no undue hardship for anyone.

There is good reason to provide open access to bankruptcy trust claim submission information. There is no good reason for precluding such access. Accordingly, H.R. 526 is not only sound in theory, it will be sound in practice.

Thank you for your consideration of these issues.