

EXHIBIT 5

December 18, 2018, Transcript

In re The Fairbanks Co., No. 18-41768,

(Bankr. N.D. Ga.)

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

IN RE:) Chapter 11
)
THE FAIRBANKS COMPANY,) Case No. 18-41768-pwb
)
)
Debtor.)

**TRANSCRIPT OF HEARING ON DEBTOR'S MOTION FOR AN ORDER
APPOINTING JAMES L. PATTON**

**BEFORE: Judge Paul W. Bonapfel
DATE: December 18, 2018
PLACE: Courtroom 1401
United States Bankruptcy Court
Atlanta, Georgia**

IN ATTENDANCE:

Counsel for Debtor: William L. Rothschild
Ogier, Rothschild &
Rosenfeld, PC
P. O. Box 1547
Decatur, GA 30031

Luke A. Sizemore
Paul M. Singer
Reed Smith LLP
Suite 1200
225 Fifth Avenue
Pittsburgh, PA 15222

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1 Appearances Cont'd

2 Counsel for the United States Trustee
3
4
5 Martin P. Ochs
David S. Weidenbaum
Office of the U.S. Trustee
362 Richard Russell Federal
Building
75 Ted Turner Drive SW
Atlanta, GA 30303

6
7 Counsel for Asbestos Claims Committee
8 Leslie M. Pineyro
Jones and Walden, LLC
21 Eighth Street, NE
Atlanta, GA 30309

9
10 Kevin Maclay
Caplin & Drysdale
One Thomas Circle NW, Suite
11 1100
Washington, DC 20005-5802

12 Counsel for Liberty Mutual Insurance
13 Robert B. Millner
Dentons US, LLP
233 South Wacker Drive
Suite 5900
14 Chicago, IL 60606-6361

15 Counsel for James L. Patton
16 Sharon M. Zieg
Young, Conaway, Starrgat &
Taylor
Rodney Square
17 1000 North King Street
18 Wilmington, Delaware 19801

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P R O C E E D I N G S

10:00 a.m.

THE COURTROOM DEPUTY: Your Honor, the first matter to be heard today is the Fairbanks Company. Debtor's Motion for an Order Appointing James L. Patton, Jr. as legal representative for future asbestos claimant. We will now take appearances for the bench.

MR. ROTHSCHILD: Bill Rothschild for the Debtor in Possession.

MR. OCHS: Good morning, Your Honor. Martin Ochs, United States Trustee. I'm joined today by my colleague, David Weidenbaum.

MR. WEIDENBAUM: Good morning, Your Honor.

THE COURT: Good morning.

MS. PINEYRO: Your Honor, Leslie Pineyro, the Asbestos Claims Committee.

THE COURTROOM DEPUTY: And on Courtcall.

MR. SIZEMORE: Good morning, Your Honor. My name is Luke Sizemore on behalf of the Debtor and Debtor in Possession. And with me in the room is Paul Singer.

MR. MILLNER: Good morning, Your Honor. My name is Robert Millner. I'm with Dentons US, LLP in Chicago and I'm appearing for the Liberty Mutual Insurance Company.

MR. MACLAY: And Your Honor, good morning. This is Kevin Maclay calling. I'm with the law firm of Caplin and

1 Drysdale in Washington, D.C. And I'm calling on behalf of
2 the Official Committee of Asbestos Claimants.

3 MS. ZIEG: Good morning, Your Honor. Sharon Zieg
4 from Young, Conaway, Starrgat and Taylor on behalf of the
5 proposed future representative James L. Patton. And with me
6 in the room is Mr. Patton.

7 THE COURT: Okay. Anyone else? No, that's the
8 other case. All right, go ahead.

9 MR. ROTHSCHILD: All right. Short history of
10 procedural. Bill Rothschild. The Debtor in Possession filed
11 a motion. The United States Trustee has an objection to the
12 motion. We recognized it - we recognize that it has
13 evidentiary issues and so we ask for a resetting so that we
14 can put live evidence on. We expect a half day and we're
15 asking for sometime in January. The Debtor in Possession
16 does have a strong perceived need to move as fast as we can
17 from this point on.

18 THE COURT: Okay. What's the evidentiary hearing?
19 What do you propose - maybe I should ask Mr. Ochs since he's
20 objecting, but what's the nature of the evidentiary hearing?

21 MR. ROTHSCHILD: I can answer that --

22 MR. SIZEMORE: Your Honor --

23 MR. ROTHSCHILD: -- but I think Luke Sizemore and
24 Paul Singer can answer it better.

25 THE COURT: Okay. Mr. Sizemore?

1 MR. SIZEMORE: Yes. Yeah, thank you, Your Honor.
2 Thank you for letting us participate by phone today. That's
3 extremely helpful for us and efficient for the case so we do
4 appreciate that. And I am prepared to use - to take a couple
5 minutes today to frame what the Debtor believes are the
6 disputes and facts raised by the United States Trustee's
7 objection without going into our full argument.

8 As a threshold matter, Your Honor, I think it's
9 important to recognize the obvious. That is, the only
10 request for relief that's properly before the Court at this
11 time is the Debtor's motion pursuant to section 524(g) and
12 105(a) of the Bankruptcy Code to appoint Mr. Patton as a
13 future claimants representative. Other parties in interest,
14 including the United States Trustee had nearly five months
15 to move for the appointment of an alternative future
16 claimants representative or to establish new procedures by
17 which a representative should be appointed. But no party in
18 interest has done so.

19 Focusing then on the Debtor's request to appoint
20 Mr. Patton as future claimants representative, we believe
21 there are two questions of law that have been joined by the
22 United States Trustee's objection and the Debtor's reply.
23 First, whether the motion filed by the Debtor seeking the
24 appointment of Mr. Patton was proper from a procedural
25 perspective. And second what is the proper standard for the

1 appointment of a future claimants representative. As to the
2 first question, the Debtor's position, is that it followed a
3 procedure that is consistent with Section 524(g) and that
4 has been the predominant practice for the appointment of
5 future claimants representatives in asbestos cases across
6 the country for many years.

7 The United States Trustee's position, as we
8 understand it, is that the Court should impose what the U.S.
9 Trustee views as a better procedure. Setting aside the
10 merits of that proposed procedure we believe the objection
11 is non-responsive to the question of whether the motion that
12 is currently before the Court to appoint a specific
13 individual is procedurally proper. The Debtor respectfully
14 submits that the answer to that question is that there is
15 nothing improper about the Debtor's motion. And so the Court
16 should consider whether to grant or deny that motion on its
17 merits.

18 As to the second question as to the appropriate
19 standard. The Debtor's position is that the proper standard
20 for the appointment of a future claimants representative is
21 whether the individual is disinterested, as that term is
22 defined in Section 101-14 of the Code. And if so, whether
23 that individual is qualified to serve. To the Debtor's
24 knowledge this is the only standard that has ever been used
25 to appoint a future claimants representative in 524(g) of

1 the Code. And when court's have examined the respective
2 future claimants representative's qualification, it
3 consistently look to the individual's experience in other
4 asbestos and mass tort cases.

5 As we understand it, the United States Trustee's
6 position is that the Court should ignore this precedent and
7 impose a new ill-defined standard for the appointment of a
8 future claimants representative. That is, the United States
9 Trustee wants the Court to determine [audio skip -10:38:43]
10 FCR will provide representation that is effective,
11 disinterested and independent. We think it's notable that
12 Judge Kaplan in *In Re Duro Dyne National Corp* rejected this
13 proposed standard as recently as October of this year, which
14 ruling is currently on appeal.

15 If the Court rules in the Debtor's favor on those
16 two legal issues that the motion was procedurally proper and
17 that the standard for appointing an FCR as whether the
18 individual disinterested and qualified, there might not be
19 any need for material factual disputes for the Court to
20 determine. Mr. Ochs may tell me that I'm wrong, but as I
21 read it the United States Trustee's objection does not
22 appear to question Mr. Patton's experience or his
23 qualifications for a position or whether he is disinterested
24 as that standard is defined in 101-14 of the Code. Rather it
25 seems to us that the United States Trustee's objections

1 appear to focus on whether Mr. Patton will be [audio skip-
2 10:39:48]. And demand additional disclosures to assess those
3 factors.

4 If the Court agrees with the United States
5 Trustee's position, that the Bankruptcy Code requires more
6 than being disinterested and qualified or that further
7 disclosures are appropriate, the Debtor recognizes that
8 there may be factual issues to be explored in an evidentiary
9 hearing. And for that reason we were and are prepared to
10 adjourn this to an evidentiary hearing to deal with those
11 issues. That, Your Honor, is how the Debtor views the issues
12 raised by the objection and I'd be pleased to answer any
13 questions that the Court may have.

14 THE COURT: Okay. Thank you. Mr. Ochs?

15 MR. OCHS: Thank you, Your Honor. Martin Ochs, the
16 United States Trustee. Good morning. Mr. Sizemore points out
17 that, you know, his argument is that in some way Mr. Patton
18 is disinterested. The United States Trustee believes it's
19 not just disinterested, it's independent. Mr. Sizemore and
20 the Debtor seem to think that there's no requirement of
21 independence, but in fact, the complicating factor in this
22 case is that Mr. Patton is inextricably intertwined with
23 other cases. And what's important to note here is that a
24 claimant, a future claimant, who is yet unrepresented - has
25 no representation in this case is being asked or being told

1 that they will be represented by Mr. Patton who is selected
2 by the adversaries, the existing claimants now and the
3 Debtor. And so they, they, the Debtor and the existing
4 claimants want Mr. Patton to represent the interest of the
5 future claimants. These are people who don't even - who may
6 not exist or don't exist as yet, but may exist somewhere
7 down in the future.

8 THE COURT: Well, they exists. We just don't know
9 - they don't know that they're a claimant yet.

10 MR. OCHS: Right. And to that end it's important
11 to note that, for instance, when the United States Trustee
12 was selecting a committee, the United States Trustee spoke
13 to one potential committee member, the asbestos committee
14 here. The United Trustee spoke to one and he said my
15 daughter may be a future claimant. And so he raised issues.
16 That claimant knows that there may be future claimants that
17 don't even know that they have a claim yet. And that's the
18 whole point of independent party appointed and the United
19 States Trustee has strong concerns about whether Mr. Patton
20 is in fact independent.

21 The United States Trustee does believe that there
22 is a need for discovery to determine Mr. Patton's
23 independence in this case.

24 THE COURT: Does the U.S. Trustee have an
25 alternative to suggest?

1 MR. OCHS: The United States Trustee does not
2 propose an individual person for this, but the United States
3 Trustee does suggest that the Court - it's the Court's role
4 to select the person, not the Debtor. This is not the
5 appointment of a trustee.

6 THE COURT: I agree with that Mr. Ochs. The Court
7 will make the appointment.

8 MR. OCHS: Right, but --

9 THE COURT: How do I find - what do I do run an ad
10 in the Wall Street Journal --

11 MR. OCHS: Either --

12 THE COURT: -- future claims representative --

13 MR. OCHS: There, there are a number of ways --

14 [CROSSTALK]

15 THE COURT: -- requested, apply here.

16 MR. OCHS: -- that this could happen. This case
17 has gotten press and the press may generate interest from
18 other parties who may be interested in serving in the role
19 in which it's proposed that Mr. Patton serve. The Court
20 could post on its website the availability of the position
21 for the future claims representative.

22 THE COURT: Has any court every done any of that?

23 MR. OCHS: What's that?

24 THE COURT: Has any court ever done any of that?

25 MR. OCHS: The - it has not happened, but that

1 does not mean that it should not happen.

2 THE COURT: No, I understand.

3 MR. OCHS: It does not mean that it should not
4 happen. You know as Mr. Sizemore [audio skip-10:43:43].
5 They're citing with confidence *Duro Dyne*. *Duro Dyne* is on
6 appeal at this point in time and it is certainly not binding
7 on this Court. The United States Trustee suggests that this
8 is time for a new paradigm in the appointment of asbestos
9 future claims representatives.

10 THE COURT: Okay. So what's the evidentiary
11 hearing going to be on?

12 MR. OCHS: About whether --

13 THE COURT: It's gonna be on whether, whether Mr.
14 Patton is independent and will be effective?

15 MR. OCHS: -- whether Mr. Patton is independent --

16 THE COURT: He had three words, effective,
17 independent and what was the other one?

18 MR. OCHS: Whether --

19 THE COURT: Or maybe that was - maybe it was Mr.
20 Sizemore who came up with --

21 UNIDENTIFIED SPEAKER: Disinterested.

22 MR. OCHS: Disinterested.

23 THE COURT: We understand he's gotta be
24 disinterested and he's qualified. He's gotta be qualified.
25 You're proposing additional standards which are --

1 MR. OCHS: Whether he's in fact --

2 THE COURT: -- whether he'll b effective and
3 independent.

4 MR. OCHS: Correct.

5 THE COURT: Was that all of it or was there
6 something else?

7 MR. OCHS: That's correct, Your Honor.

8 THE COURT: Okay.

9 MR. OCHS: And the issue here is because Mr.
10 Patton is a future claims representative in, for instance,
11 another case.

12 THE COURT: Well, does that disqualify anybody
13 who's ever - who's a future claims representative?

14 MR. OCHS: Not necessarily, but we need to look at
15 what the overlap here is between future or potential future
16 claimants in this case and potential future claimants in
17 another case in which Mr. Patton or whoever may be selected
18 may be. Because if you have a claim in this case it may
19 impact your claim in another case and who's to determine
20 whether you get a dollar in this case or a dollar in --

21 THE COURT: Well, there's other issues that need
22 to be - I mean there's an inherent conflict between the
23 current claimant and the future claimant.

24 MR. OCHS: Precisely.

25 THE COURT: And which includes the nature and

1 extent of the claims of the current claimant potentially.

2 MR. OCHS: Right. And that alone --

3 THE COURT: Which deserve careful scrutiny.

4 MR. OCHS: Absolutely. And the United States
5 Trustee does not believe that the parties or the Court
6 currently has in front of it enough information to make an
7 assessment as to whether Mr. Patton can discharge his duties
8 as the future claims representative.

9 THE COURT: Okay. I'm not gonna run an ad and I'm
10 not gonna try to find a future claimants representative. So
11 if the U.S. Trustee thinks that there should be somebody
12 other than Mr. Patton you need to find somebody and suggest
13 them. I'm just saying I'm not gonna do it Mr. Ochs. The
14 established precedent does not include that --

15 MR. OCHS: Right.

16 THE COURT: -- as far as I can tell. As far as I
17 can tell from the papers that I've looked at and some CLE
18 materials that somebody wrote. The standard practice in the
19 country is that the Debtor proposes a claims - a future
20 claims representative. That is always what happened. And I'm
21 gonna follow at least the - from what I can gather, there
22 has been at least twelve years concern about the inherent
23 conflicts and the inherent problems in this procedure.

24 MR. OCHS: And the United States Trustee --

25 THE COURT: I get it. I get it. I understand it,

1 but I don't know what I can do to change it because I don't
2 think I can become, you know, an employment agency running
3 around soliciting somebody to be the future claims
4 representative in this case.

5 MR. OCHS: You know --

6 THE COURT: I just don't see how that would work.
7 I never got involved in the state court analog in a sense a
8 guardian ad litem. I don't know how guardian ad litem are
9 chosen. That's what this effectively is. It seems to me at
10 least somebody has suggested that that's the analog for what
11 a future claims representative is. So short of somebody and
12 I guess it falls on the United States Trustee's office.
13 Because the United States Trustee is the watchdog for the
14 sytem.

15 MR. OCHS: Absolutely, Your Honor.

16 THE COURT: And if you're the watchdog, you know,
17 find somebody that can do this job --

18 MR. OCHS: If --

19 THE COURT: -- and suggest them. It's not your job
20 to appoint them either. Congress didn't say you were to
21 appoint them with the approval of the court. I get it. You
22 don't have statutory authority to make this appointment. I
23 get it. Neither does the Debtor, but somebody's gotta make a
24 recommendation.

25 MR. OCHS: In the past - and you know the United

1 States Trustee is mindful of Your Honor's comments and the
2 past and other cases have not, you know citing you to you,
3 but in the past Your Honor has said in situations like this
4 where we've sought a chapter 11 trustee or an examiner, Your
5 Honor says it would be good if there was a Charlie Cromwell
6 in this sort of situation.

7 THE COURT: Well, actually it was Charlie Crumley.

8 MR. OCHS: Crumley. He was before my time. I'm
9 allowed to mispronounce his name and I apologize, Your
10 Honor. But, you know, it's a similar situation here. It's a
11 very, very similar situation here. So the United States
12 Trustee has asked that the process be held open for 30 days,
13 let's see what happens, let's see who might come in, let's
14 see what other parties might be able to be presented to the
15 Court for this independent role and let's see what happens.

16 THE COURT: I am - what I'm telling you is I'm
17 happy for you to do that. I'm happy for the United States
18 Trustee to do that, but I don't expect people - maybe your
19 idea is people will just file applications to be future
20 claims representatives --

21 MR. OCHS: You know --

22 THE COURT: -- and file it with the Court. If you
23 think that's appropriate, I guess they can do that.

24 MR. OCHS: You know, Your Honor, its interesting
25 when you sit at my desk and a case files and then all of a

1 sudden there is a need for a creditors committee. The United
2 States Trustee doesn't pick that creditors committee and yet
3 the United States Trustee gets a plethora of calls - I want
4 to represent. And the United States Trustee believes that in
5 this case the same sort of process will happen. That parties
6 will see the notoriety of the case, the publicity of the
7 case and that they may well seek to have their hat tossed
8 into the ring as being in the role that the Debtor proposes
9 to put Mr. Patton in and that may be more appropriate.

10 But to go back to the discovery issue, the United
11 States Trustee needs to at least be able to probe Mr.
12 Patton's ability to act in a disinterested way and an
13 independent way. And so therefore, there is absolutely a
14 need for discovery and as they're laid out in the United
15 States Trustee's papers there are points that the United
16 States Trustee believes that Mr. Patton and the Debtor
17 should answer. And those would be appropriate points for
18 discovery in this case.

19 The Debtor argues now and a very odd argument.
20 Last night I got the Debtor's reply papers to the United
21 States Trustee's response and all through the night the word
22 disingenuous rolled through my head. Because its odd that
23 the Debtor today or last evening says for the first time the
24 United States Trustee in some way delayed the process. The
25 United States Trustee has not delayed this process in any

1 event. The Debtor [audio skip-10:51:54] withdrew its
2 representation of Mr. Fitzpatrick. Mr. Fitzpatrick should be
3 the FCR, the future claims representative.

4 THE COURT: He's apparently busy litigating with
5 your clients counterpart in [audio skip-10:52:10].

6 MR. OCHS: I don't know that, Your Honor. We're
7 not, we're not sure why that happened. We don't know why he
8 withdrew. He's not here to say that today and we have no
9 representation or affidavit from that. The Debtor's
10 pleadings, in fact, only said that he had other things to
11 do. It didn't say what else he had to do and where else he
12 might be working or making money. So we don't know why he
13 was --

14 THE COURT: I thought the brief had said he had
15 withdrawn because he was tied up in that case, but maybe I
16 misread it.

17 MR. OCHS: As I understood the pleadings and we
18 can go - we can go back --

19 THE COURT: It doesn't matter. It doesn't matter.

20 MR. OCHS: Right, but, but the point being is the
21 United States Trustee has not in any way delayed this case.
22 As soon as this pleading came in the United States Trustee
23 studied it, analyzed it, discussed with the Debtor, needing
24 just a few additional days to respond to it and in fact,
25 timely filed his response to this pleading. The other

1 pleading was never brought - it was filed, but it was never
2 scheduled for a hearing before the Court. The United States
3 Trustee is in no way delayed or slowed down the process of
4 this case. In fact, I have made this case readily available
5 to the Debtor's counsel and the Committee counsel. They all
6 have my cell phone. They all speak to me any hour of the day
7 or night. They all know how to reach me. I've never slowed
8 anything down.

9 There was a - what's known as a QSF motion on
10 today and I agreed that, that should be heard today. They or
11 the Debtor made a conscious decision to schedule this
12 hearing a the very last day, I believe, of Your Honor's
13 calendar for 2018. That wasn't a choice made by the United
14 States Trustee. The United States Trustee didn't tell the
15 Debtor in November wait until December to make this motion.
16 So the suggestion that the United States Trustee has slowed
17 this process down is not accurate. So to leave the case or
18 leave the process open for 30 days at this point in time to
19 allow let's see what percolates up to the top, let's see who
20 else might be interested to serve. Let's see who the other
21 candidates may be and then we can proceed after that period
22 of time.

23 THE COURT: Okay.

24 MR. OCHS: Thank you.

25 MR. ROTHSCHILD: Thank you.

1 THE COURT: Anyone else which to be heard on this
2 motion?

3 MR. MACLAY: Yes, Your Honor. This is Kevin Maclay
4 on behalf of the Official Committee of Asbestos Claimants.

5 THE COURT: Go ahead.

6 MR. MACLAY: Your Honor, just to note a couple
7 points. Obviously the brief filed by the Trustee's office
8 came in on Friday. The Debtors have put a reply brief on the
9 record. If this matter continues past today, we would intend
10 - we will also file a brief addressing some of the issues
11 that were raised in the Friday filing by the Trustee's
12 office. A couple of points that I would make in response to
13 what I've heard today though, Your Honor.

14 We heard the Trustee's comment that there is a
15 conflict between the interests of futures and present. And
16 that is a very limited conflict which primarily occurs post
17 effective date of a Section 524(g) plan. As, in fact, the
18 Trustee itself has acknowledged in briefs filed in the New
19 Jersey action in *Duro Dyne*. The circuit court in the Third
20 Circuit has expressly recognized, Your Honor, that in fact
21 the interest of futures and presents are so closely aligned
22 that when Congress wrote 524(g) the super majority voting
23 requirement was intended to make the statute constitutional
24 because the interests of presents and the interests futures
25 were so closely aligned. And that's with the *Combustion*

1 *Engineering* case, Your Honor, 391 F.3d at pinpoints at 237
2 and 234, and note 45.

3 So to make a long story short, Your Honor, this
4 idea that there's this conflict between the futures and
5 presents is extremely overblown. In fact, presents are a
6 constitutional surrogate for futures in many respects. And
7 the fact that the appointment of Mr. Patton is supported by
8 the Official Committee of Asbestos Claimants is a huge
9 factor demonstrating the appropriateness of that
10 appointment. That is the substantive point I wanted to make,
11 Your Honor. Obviously, I'm also available to answer any
12 questions you might have and to note that the process that
13 the U.S. Trustee is suggesting has never been done before.
14 It seems unworkable. We also just want to put on the record
15 our objection to that process as taking a case which would
16 hopefully have been run fairly smoothly, given the very
17 limited budget available, and turning it into what could be
18 very damaging for the Debtor and therefore for the
19 Committee's constituents if (indiscernible) they'll ever get
20 paid for their injuries. That's what I would like to say,
21 Your Honor, unless you have any questions.

22 THE COURT: Thank you.

23 MR. OCHS: Your Honor, Martin Ochs, the United
24 States Trustee. May I address two points --

25 THE COURT: Sure.

1 MR. OCHS: -- that were raised by the Committee's
2 counsel? First of all the suggestion that futures and
3 current claimant's interest are completely aligned is really
4 nonsense.

5 THE COURT: That's not what he said.

6 MR. OCHS: That they're closely aligned I believe
7 was the words that he used.

8 THE COURT: He said that the real conflict comes
9 after the effective date.

10 MR. OCHS: Right. But if we have - if we have the
11 current claimants watching over the pot, we're making the
12 determination of the person who's watching over the pot
13 making - if we have them selecting that person, the existing
14 claimants today right now have a goal, quick and as much as
15 possible. The future claimants don't want quick, 'cause they
16 don't exist yet and they don't want the existing claimants
17 to get as much as possible 'cause then it leaves as little
18 as possible for the future claimants. So from that regard --

19 THE COURT: But isn't the current objective to get
20 as much as possible?

21 MR. OCHS: To get as much as possible, but not as
22 much as possible into the hands of the existing claimant.
23 There is a difference.

24 THE COURT: Of course I guess the plan - maybe Mr.
25 Rothschild or Mr. Sizemore should answer this question, but

1 is it the plan or the trust? How - what will establish how
2 the funds get disbursed?

3 MR. ROTHSCCHILD: Mr. Sizemore is the person to
4 answer.

5 THE COURT: Okay. Mr. Sizemore?

6 MR. SIZEMORE: Yes, Your Honor. This is being
7 filed with the plan an asbestos trust agreement and asbestos
8 trust distribution procedures. And those are documents that
9 are related to the plan. They will be presented to the Court
10 in conjunction with consideration of confirmation of the
11 plan. And it's the latter that really establishes the
12 procedures by which the trust will analyze claims that are
13 submitted to it and determine how those claims should be
14 compensated if at all.

15 THE COURT: How does it decide what - how does it
16 decide what kind of reserve there should be for future
17 claimants?

18 MR. MACLAY: Your Honor, Kevin Maclay for the
19 Committee?

20 THE COURT: Sure, go ahead.

21 MR. MACLAY: Your Honor, that is in fact why there
22 is FCR in bankruptcy. The negotiations between the FCR and
23 the Committee and the Debtor with respect to what the [audio
24 skip-10:59:27] is, that's the term of art that typically
25 used. That is (indiscernible) and that is why the position,

1 in fact, exists and is required under 524(g).

2 THE COURT: Well, that's --

3 MR. MACLAY: However, Your Honor's earlier point
4 is very well taken because you don't have a pot until a plan
5 is confirmed. Up until that point the interest of the
6 Committee and the FCR are extremely closely aligned, if not
7 identical in terms of maximizing the size of the pot. And
8 that is the point that the Third Circuit has recognized and
9 that we would ask Your Honor to recognize as well. So to
10 make a long story short, Your Honor - and there's also a
11 legal requirement under the statute that a trust that's set
12 up be in a position to pay present plans and future demands
13 that involve similar claims in substantially the same
14 manner. That's what the statute provides. That's what the
15 process that's been ruled upon by dozens of courts in
16 asbestos bankruptcies before, Your Honor, have followed. And
17 that's the procedure that the Debtors have proposed that the
18 Committee supports, and it will maximize the pot available
19 to pay both presents and futures.

20 THE COURT: But nevertheless, the allocation
21 effectively - the reserve effectively - y'all may refer to
22 it some different way, but the reserve for future claimants
23 will be established and negotiated through the plan and the
24 trust agreement?

25 MR. MACLAY: That's right, Your Honor. And an

1 important thing to add to that is there is an independent
2 trustee who is essentially the mediator, or in fact in some
3 senses the decision maker with respect to the payment
4 percentage. So yes, Your Honor will have his own expert
5 [audio skip-11:01:08] that provides competing projections of
6 the anticipated future outlays and the Trustee's current
7 expert will help the Trustee decide, you know, where to go
8 on that and that's how the trust proceeds. So there's all
9 sorts of protections built into the process which we'll be
10 happy to layout more fully in a brief if you ever needed us
11 to so do. Which [audio skip-11:01:31] the interest of the
12 futures are protected.

13 But one of the most important is that an extremely
14 experienced FCR be appointed so that they are in a
15 reasonable negotiating position with knowledge of how this
16 process works. That's why Mr. Patton is such an excellent
17 choice as many other courts have recognized. To put it in
18 someone as an FCR who doesn't have that kind of experience
19 would obviously disadvantage the futures because they
20 wouldn't have the same knowledge as to how that process
21 works and how to maximize the future (indiscernible). If
22 that's responsive to Your Honor's question.

23 THE COURT: Yes.

24 MR. OCHS: Your Honor, what the Committee is
25 saying is let us pick the guy that we have to battle with

1 about how much we're gonna give up for the future claimants.

2 THE COURT: I understand that.

3 MR. OCHS: And that's troublesome to say --

4 THE COURT: I understand that.

5 MR. OCHS: -- that's troublesome to say the least.

6 THE COURT: I, I - you don't have to say that
7 anymore.

8 MR. OCHS: And --

9 THE COURT: I get it. I understand it.

10 MR. OCHS: -- and the argument that not just the -
11 moving beyond the delay argument that's suggested which
12 really has not merit, but the argument that this is gonna be
13 some costly process and that there's not yet a fixed fund or
14 pond or pool rather, is simply is wrong. Liberty Mutual has
15 already committed its policy limits.

16 THE COURT: I understand that. We have, we have a
17 pot, right?

18 MR. OCHS: Right. So --

19 THE COURT: It's not like the pot may get bigger
20 from other insurance --

21 MR. OCHS: Right.

22 THE COURT: -- as I understand it, unlikely or we
23 don't know right now, but - so that's not the problem. The
24 problem is the allocation seems to me. The problem is the
25 distribution and the allocation and the reserve for future

1 claimants. That's the issue and that's where the conflict
2 is.

3 MR. OCHS: Absolutely. Absolutely.

4 THE COURT: Okay. And so I, I get it. I understand
5 it. I see the problems with the current way that its done.
6 I'm prepared to have a different way to do it, but I'm not
7 gonna run ads and I'm not gonna solicit. And so the bottom
8 line is if you think, the U.S. Trustee thinks that it should
9 be somebody other than Mr. Patton, who appears to be
10 disinterested and qualified, you need to bring him forth --

11 MR. OCHS: Right.

12 THE COURT: -- or her forth.

13 MR. OCHS: Understood, Your Honor.

14 MR. MACLAY: And Your Honor --

15 THE COURTS: And that could be --

16 MR. MACLAY: Your Honor?

17 THE COURT: -- that's just the way it is 'cause I
18 just don't see as a practical matter how a court can - what
19 am I supposed to do interview people? Have a hearing? Have
20 five, ten people come up here and sit in the stand and I,
21 you know sit back and maybe we can make an exception and
22 have coffee in the courtroom, have a little discussion
23 about, you know, a job interview. It doesn't work that way I
24 don't think.

25 MR. OCHS: Your Honor makes light of the process.

1 THE COURT: I'm not making - I am making light of
2 it Mr. Ochs, but I'm serious about it. I don't think I can
3 do that and I'm not going to so there's really nothing more
4 to discuss about that.

5 MR. MACLAY: And Your Honor?

6 MR. OCHS: Very well.

7 MR. MACLAY: And, Your Honor, could I make one
8 further point on behalf of the Committee --

9 THE COURT: Sure.

10 MR. MACLAY: -- from Kevin Maclay. With respect to
11 the allocation, Your Honor, that's not something that Mr.
12 Patton, as the FCR, would do during the bankruptcy case.
13 It's actually irrelevant Your Honor is being asked to decide
14 today because the allocation is done by the post effective
15 date FCR.

16 THE COURT: If that's --

17 MR. MACLAY: That is a position that is typically
18 the same person, but that's done pursuant to the plan. So
19 it's conceptually a distinct issue from today's motion,
20 which is to appoint Mr. Patton as the FCR during the
21 bankruptcy case. There will be a separate opportunity if one
22 were appropriate, to object to Mr. Patton as the post
23 effective date FCR, the one who actually would deal with
24 allocation issues anyway.

25 THE COURT: Okay. That's not what I heard earlier.

1 If that's the way - if the plan is going to say there's
2 going to be \$40 million or whatever it is in the trust and
3 it will be distributed according to ways that will be
4 figured out at a later point, great. No conflict. We don't
5 even need a future claims representative almost. My
6 understanding is that, that's not the way it works. So if
7 I'm wrong about that, I remain to be - I am ready to be
8 shown that the plan - maybe somebody could have a draft of
9 the plan or the plan agreement so we would know what it is
10 we're likely to be talking about and we could look at. And
11 we won't have to engage in theoretical discussions. And I
12 don't mean to --

13 MR. MACLAY: Your Honor --

14 THE COURT: Hold on. Hold on. One of the problems
15 with this court procedure is when you start talking I can't
16 shut you up without screaming. So you have to pause after
17 every sentence to wait until I wanna ask you to be quiet
18 because as I ask Mr. Ochs to be quiet. There's some things
19 that are just not for today and this is one of them. I don't
20 wanna engage in this anymore today. It's an issue. I await
21 to be - I'll wait an explanation about it, but I see a
22 conflict there and I see, I see a problem. So now where does
23 that leave us? That leaves us with needing an evidentiary
24 hearing. Yes, Mr. Rothschild, I can shut you up.

25 MR. ROTHSCHILD: There's great precedent for that

1 on this floor, Your Honor.

2 THE COURT: There's a lot of precedent for that.

3 MR. ROTHSCHILD: All right. Two points. Number
4 one, it appears that Mr. Ochs took personally the line in
5 our briefs about the U.S. Trustee not being timely or
6 whatever [audio skip-11:07:37] well, he's exactly correct.
7 That as a representative of the United States Trustee in
8 this district, he has been available from the Sunday before
9 the filing all the way through whenever needed and is
10 exceedingly diligent to any extent that we imply the
11 opposite we were wrong in what we wrote. That's item number
12 one.

13 Item number two, for future briefing, I'm not sure
14 if you ever got the spot of thinking that you could be
15 handed a list and would pick one off the list, but that
16 contravenes the clear statement rule on statutory
17 interpretation, which is to say Congress in '78 went out of
18 its way to get the court out of the business of choosing
19 among candidates because of the problem that you are then -
20 you may then be judging in a contested matter in an
21 adversary proceeding when on one side of it is the person
22 that you chose. It shows up in the center (indiscernible) to
23 Section 706 for example - the widely criticized practice.

24 I think in addition to that, that there is because
25 of the Congress presumed to know - they were presumed to

1 know the precedent out there. That there is a problem. A
2 more minor one with anybody other than the plan proponent
3 bringing to you for approval the person that the plan is
4 going to have 'cause that would put the plan proponent in
5 the position of having a confirmed plan when there's a
6 portion of the plan that the plan proponent cannot consent
7 to. Those are issues for a later day. It all may get
8 resolved before that around Mr. Patton. But before people
9 get too far I want to caution a concern that I have even if
10 there's no coffee in the courtroom and the Court just looks
11 at resumes of a beauty contest that the Court picks the
12 person.

13 THE COURT: Well, you can brief all of that, but I
14 disagree with your analysis. I understand it. I understand
15 it. I get it. You brief it. You point it out. If there's any
16 case law on it, give it to me. But if Congress - you're
17 right about it. The 1978 code, a beautiful piece of
18 legislation that probably never should have been tampered
19 with. But the 1978 code got the judge out of the
20 administrative business. Got the judge out of the
21 appointment of a trustee business. It used to be when I
22 started practice you would know who had the case by who was
23 the trustee.

24 MR. ROTHSCHILD: By who was the judge. What
25 trustee had the case by who --

1 THE COURT: No. You would know which - if you
2 didn't know who the judge was - who the trustee was, you
3 knew who the judge was 'cause that was the trustee that,
4 that judge appointed. And there were a lot of problems with
5 that and there's a lot of problems with bankruptcy
6 (indiscernible), as you know. Anyway so the 1978 legislation
7 did a lot of that. They put it in the U.S. Trustee and
8 they're the person that appoints subject to approval. Okay,
9 great.

10 The channeling injunction provisions come after
11 that. And they specifically do not provide for the United
12 States Trustee to do that and they specifically provide for
13 the Court to make the appointment.

14 MR. ROTHSCHILD: Understand.

15 THE COURT: Typically the way Congress does things
16 they didn't bother to tell us how we're supposed to go about
17 doing that.

18 MR. ROTHSCHILD: Understand that's the clear
19 statement rule that [audio skip-11:11:25] I think our
20 disagreement on the law matters.

21 THE COURT: Okay. Well, you can brief any of these
22 points, but as far as I'm concerned I'm supposed to do the
23 appointment. Okay. How do I go about doing that? I get the
24 established precedent is the Debtor, as the proponent of the
25 plan files a motion for approval of a person that the Debtor

1 has selected presumably with the support and the input of
2 the Asbestos Committee. Great. Wonderful. Wonderful. And
3 that's the way it's done. U.S. Trustee says that's not the
4 way it should be done and that way has been criticized for
5 exactly the reasons that Mr. Ochs and the United States
6 Trustee in its brief talks about, which is the people who -
7 you're choosing the other side to negotiate with. I get it.
8 If nothing else, there's an appearance there that, you know,
9 there's just something that's not quite right about that.
10 Okay. I understand the need. It's sort of - I get the
11 standards. What's the case up in Delaware that's now going
12 on, is on appeal? What's the name of that case?

13 MR. OCHS: *Duro Dyne*, Your Honor.

14 THE COURT: *Duro Dyne*?

15 MR. OCHS: Yes.

16 THE COURT: The *Duro Dyne* case, the judge said it's
17 the same standard for appointment of any other professional,
18 which is disinterested and qualified. Okay. There's
19 precedent. That's apparently what everybody else has said. I
20 will say it seems to me that there ought to be - you'd want
21 somebody who's going to be effective and who's going to be
22 independent. You don't want somebody who's just gonna say,
23 you know, yeah, sure whatever you all want to do; when do I
24 get my fee. And that's the danger that the U.S. Trustee is
25 saying exists - and they wrote this 2006 article in the NYU

1 somewhere or another talks about it. I think that's a valid
2 concern. I don't know it plays out in this case. I don't
3 know - but I think that's a concern that is appropriately
4 addressed. Having said that I come back to the earlier
5 statement, which is Mr. Patton appears to be disinterested
6 and he appears to be qualified. I would hope that he would
7 also be effective and independent. I don't know. I suppose
8 we could ask him. Mr. Patton will you be effective? Oh, yes,
9 I'll be effective. And will you be independent? Oh, yes,
10 I'll be independent. I don't know how you're gonna prove
11 that or the opposite.

12 So anyway the case does need to move along. And so
13 if the U.S. Trustee has a better idea, I'm happy to hear it.
14 But a lot of times in bankruptcy people have - don't like
15 the way things are, but they don't really have a solution.
16 Not just the - I'm not criticizing the U.S. Trustee's
17 office. I'm thinking of creditors who stand up and object to
18 things. And you ask them well, what do you want to do and
19 they said well, we don't know, but we don't wanna do this.
20 So kind of like, I'll make the political reference to the
21 debate in the United Kingdom over what to do about Brexit.
22 Nobody likes what's currently proposed, but they don't know
23 what to do as an alternative.

24 So that leaves us with we'll have an evidentiary
25 hearing. And when do we have - what's available? What date

1 did you have in mind Mr. Rothschild?

2 MR. ROTHSCHILD: Mr. Sizemore in Pittsburgh may
3 know because he's [audio skip-11:15:50] of other folks on
4 the telephone.

5 THE COURT: Okay. What dates are available? Mr.
6 Sizemore?

7 MR. SIZEMORE: Your Honor, I think it - yes, Your
8 Honor. I don't have those dates in front of me. My
9 suggestion might be if the Court can give us its available
10 dates we can then correspond with all of the relevant
11 parties. Let them - give them time to set their schedules
12 and then circle back with the, with the clerk as to which
13 dates works best for the entire group.

14 THE COURT: Okay. The dates currently available
15 are Thursday the 10th, Friday the 18th, Tuesday the 22nd,
16 Thursday the 24th, Friday the 25th, January the 31st and
17 Friday February 1st.

18 MR. SIZEMORE: Thank you. Thank you, Your Honor. I
19 think I can take that, circulate it amongst all the parties
20 after this, after this hearing. We will endeavor to circle
21 back to you today with the date that works best for the
22 entire group.

23 THE COURT: We could probably also do something in
24 the afternoon on Tuesday the 29th, but I'd rather do it in
25 the morning so we have all day. We'll have all day if we

1 need it.

2 MR. SIZEMORE: Thank you, Your Honor.

3 MR. OCHS: Your Honor, one thing that may impact
4 the scheduling. And just for the benefit of the people on
5 the phone, it's Martin Ochs speaking. One thing that may
6 impact the date selected here is if the United States
7 Trustee is going to propound discovery, which I expect that
8 we will that, you know, we have this holiday coming up and
9 that will gobble up some people's time. Not necessarily
10 mine, but other people's time and so that should be factored
11 into the calculus of the date selection.

12 THE COURT: Well, Mr. Sizemore was saying that he
13 was gonna try to work out something that will work for
14 everybody.

15 MR. OCHS: Okay. I just want to make sure. He said
16 the folks on the phone and I don't - I'm outside of that
17 group so.

18 MR. ROTHSCHILD: No. We have not forgotten that
19 the objectant has to be consultant and has to be happy to
20 some extent with the date that we come back and ask the
21 Court to hold.

22 THE COURT: Okay.

23 MR. OCHS: Thank you, Your Honor.

24 THE COURT: Well, you all either, you all let us
25 know either that everybody has reached an agreement on one

1 of these dates or that you haven't and what the positions of
2 the various parties are. You can do that in an email and
3 I'll take a look at it and then I'll just set it.

4 MR. OCHS: Email address to Ms. Mason on that.

5 THE COURT: Sure.

6 MR. OCHS: It probably goes without saying, given
7 the professional level of the parties involved in this case,
8 but one would assume that there will be a level of
9 cooperation on the discovery here.

10 THE COURT: I would hope so. I would not expect
11 otherwise.

12 MR. OCHS: Thank you.

13 THE COURT: I don't understand what the discovery
14 would be other than depositions.

15 MR. ROTHSCHILD: We can make those on the phone
16 familiar with the Court's first rule of discovery in the
17 Northern District - of discovery disputes in the Northern
18 District.

19 THE COURT: Yeah, they don't exist. They're not
20 permitted. If you're a debtor and somebody wants something,
21 the only question is when, how long do I have to get it to
22 you. If there's any problems we'll schedule a telephone
23 conference.

24 MR. OCHS: Thank you, Your Honor.

25 THE COURT: Okay. Anything else we need to do on

1 this case?

2 MR. OCHS: That's it for the United States
3 Trustee, Your Honor. Thank you very much for your time
4 today.

5 THE COURT: Okay. Thank y'all.

6 [END OF AUDIO]

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C E R T I F I C A T E

I, Felicia A. Harris, court approved transcriber,
certify that pages 1 through 37 represent a true and correct
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the proceedings in the above-entitled matter; that this
transcript was done to the best of my ability based on what
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This 19th day of December, 2018.

/s/ Felicia A. Harris
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