

How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts

S. TODD BROWN[†]

INTRODUCTION

Imagine a Medicare system in which the medical providers that submit the most reimbursement claims determine the criteria for reimbursement, have the power to veto any plan for auditing the claims they submit, and effectively control the appointment of those responsible for overseeing reimbursements and audits. Would claim criteria be designed to strike an optimal balance between excluding specious claims and managing administrative costs, or would the criteria focus on making the process most efficient for medical providers? Would we see more robust audits, or would they largely abandon claim audits?

The preceding hypothetical mirrors the manner in which bankruptcy trusts are established. 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. Due to an oversight in the design of section 524(g), however, current claimants enjoy the power to veto any plan.¹ Given this power, the lawyers who speak for the largest blocks of current claimants have the power to dictate trust claim

[†] Associate Professor, SUNY Buffalo Law School. The Author wishes to thank Christine Bartholomew, Mark Behrens, Kirk Hartley, Peter Kelso, Stuart Lazar, Chris Pashler, Marc Scarcella, Jack Schlegel, and Jim Wooten for their insight and input concerning this project. Special thanks to my research assistant, Logan Geen, for his assistance in this project. Any errors or omissions, of course, are the author's own.

1. As is more fully outlined in Parts I.B.3 and II, this veto power stems from the requirement that at least 75% of current claimants vote in favor of the plan in order for the channeling injunction to be issued. S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 855-64, 902-04 (2008) (explaining how the design of section 524(g) provides lead plaintiffs' counsel with an unassailable veto power over asbestos bankruptcy cases).

qualification criteria and settlement values, control key appointments, and structure trust governance provisions to preserve their influence over the trusts post-confirmation.²

The danger in this design is that current claimants will insist upon relaxed standards and inflated payments for their own claims and leave little for unknown future victims.³ Ensuring equality of distribution to all claimants who are bound by the plan of reorganization—current and future—is both a “central policy of the Bankruptcy Code” generally⁴ and the “central purpose”⁵ of section 524(g) specifically. To that end, section 524(g) requires the appointment of an independent legal representative for future victims.⁶ Moreover, in order to issue the channeling injunction, the district court must first determine that the injunction is “fair and equitable” to future victims⁷ and that the trust will “value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.”⁸

Notwithstanding the statutory protections for future victims, the available public data shows that few trusts that have processed their initial claims remain in position to ensure equitable payments to future victims. Payments from the most recently established trusts declined as much

2. See *infra* notes 99-100 and accompanying text.

3. As the Third Circuit recently observed, “the trusts place the authority to adjudicate claims in private rather than public hands, a difference that has at times given us and others pause, since it endows potentially interested parties with considerable authority.” *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 362 (3d Cir. 2012).

4. *In re W.R. Grace & Co.*, 475 B.R. 34, 120-21 (Bankr. D. Del. 2012) (quoting *In re Combustion Eng'g Inc.*, 391 F.3d 190, 239 (3d Cir. 2004)) (“This emphasis on the equality of distribution among creditors is highlighted within the requirements of 11 U.S.C. §§ 524(g) and 1123(a)(4) of the Code.”).

5. *In re Plant Insulation Co.*, 469 B.R. 843, 860 (Bankr. N.D. Cal. 2012) (“The central purpose of section 524(g) is the equal treatment of present and future asbestos claims. This policy is enunciated clearly in both the language and legislative history of the statute.”).

6. 11 U.S.C. § 524(g)(4)(B)(i) (2006).

7. 11 U.S.C. § 524(g)(4)(B)(ii).

8. 11 U.S.C. § 524(g)(2)(B)(ii)(V).

as 90% following the initial claim processing period,⁹ and the median payment percentage¹⁰ across the trusts surveyed for this paper has reached an all-time low of 14%.¹¹ Roughly two-thirds of the trusts have reduced payments to claimants at least once since 2010, resulting in per-claim payment reductions of up to 93.33% in that time.¹² In sum, although trusts are established on the promise to pay all current and future victims equitably, this promise has already been broken at all but a few trusts.

The threat to future victims has become pressing given the dramatic growth of the bankruptcy trust system. To date, nearly sixty bankruptcy trusts have been established or are in the process of being established.¹³ These trusts distributed more than \$14 billion to claimants from 2006 through 2011, leaving only \$18 billion in assets¹⁴ to satisfy the claims submitted to them over the next four decades.¹⁵

9. See Notice to Holders of TDP Determined Lummus Asbestos PI Trust Claims (June 13, 2011), available at http://www.abblummustrust.org/Files/20110616_Lummus_Letter_To_TDP_Claim_Holders.pdf (reducing payment percentage from 100% for claims processed through August 2, 2010, to 10% for newly filed claims).

10. The payment percentage is the amount of a claim's assigned value that is actually paid by the trust. See discussion *infra* Part I.C.2.

11. See *infra* Appendix A (Payment Percentages).

12. *Id.* (twenty-two of the thirty-two trusts included in the study paying at historic lows). One trust that has not reduced its initial payment percentage, Combustion Engineering, was the product of a pre-packaged bankruptcy settlement that overtly front-loaded payments pursuant to a two-tier trust. See *infra* notes 196-97 and accompanying text. If these payments are taken into account, twenty-three of the thirty-two trusts studied are currently paying claims at historically low levels.

13. U.S. GOV'T ACCOUNTABILITY OFFICE, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3 (2011) [hereinafter GAO REPORT].

14. Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, MEALEY'S ASBESTOS BANKR. REP., June 2012, at 1, 2. This amount excludes the roughly \$12 billion set aside for trusts that have not yet become active. *Id.*

15. See AM. ACAD. ACTUARIES, CURRENT ISSUES IN ASBESTOS LITIGATION 2 (2006) ("Although occupational exposure to asbestos was significantly reduced following the establishment of Occupational Safety and Health Administration (OSHA) requirements in the early 1970s, asbestos diseases are expected to manifest at least through 2050 in the United States, and longer in several other countries where high exposure levels continued longer.").

As more defendants leave the tort system and establish bankruptcy trusts, future victims will increasingly look to the trust system for payment. If current trends and practices hold, however, bankruptcy trusts will pay future victims a fraction of the amount paid to initial trust claimants.

This Article addresses some of the reasons for this failure and outlines measures for improving trust governance and performance. Part I provides a basic summary of process for establishing a bankruptcy trust under section 524(g) and an overview of features common across the trusts. Part II outlines the misalignment of private incentives and the policy objectives of section 524(g) and identifies specific resulting weaknesses in trust criteria and quality controls. Part III analyzes the extent to which the prevailing trust model undermines future victims' interests, some common defenses of the bankruptcy trust system, and whether future trusts that follow the same model can be confirmed as consistent with the dictates of due process and the express terms of section 524(g). Part IV advances a model for streamlining and improving oversight of bankruptcy trust submissions and payments, which, in turn, should better protect future victims' interests in existing and future trusts.

I. THE ORIGIN, PURPOSE, AND STRUCTURE OF BANKRUPTCY TRUSTS

A. *The Objectives of the Bankruptcy Trust System*

The twin objectives of bankruptcy law—maximizing the pool of assets available for distribution to creditors and ensuring that this distribution is equitable—are reflected in every Anglo-American bankruptcy law dating back to the Statute of Elizabeth.¹⁶ Even the decision to place the exclusive power to adopt a uniform national bankruptcy law with the federal government through the Bankruptcy Clause had its origins in the fear that individual states would pass laws allowing inequitable discharges and distributions that favored their citizens ahead of the

16. 1571, 13 Eliz., c. 5, § 1 (Eng.) (prohibiting transfers made with the “[i]ntent to delaye hynder or defraude Creditors and others of theyr juste and lawfull Actions”).

citizens of other states.¹⁷ The substantive provisions of the modern Bankruptcy Code—including the automatic stay, the power to avoid preferences and fraudulent conveyances, and the absolute priority rule—work collectively to maximize assets and ensure equitable distributions to creditors.

Procedurally, federal bankruptcy law advances these objectives by empowering creditors to protect their interests, both individually and collectively, no matter how large or small their individual stakes in the case. All creditors have the right to object to proposals that affect their interests¹⁸ and vote on any proposed reorganization plan.¹⁹ The Bankruptcy Code also contemplates independent appointments of trustees, examiners and official creditor committees to protect the interests of all creditors against encroachment by repeat players and more influential creditors.²⁰

This procedural design works relatively well in the typical Chapter 11 corporate restructuring of the debtor's current assets and liabilities. What if the ability to reorganize hinges upon the debtor's ability to address the claims of not only current creditors but also currently unknowable future creditors? These creditors cannot receive sufficient notice to satisfy due process,²¹ and it is unlikely that their interests will be fairly represented by other

17. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1102 (1833), available at <http://www.lonang.com/exlibris/story/sto-316.htm>.

18. 11 U.S.C. § 1109(b) (2006).

19. 11 U.S.C. § 1126(a).

20. See 11 U.S.C. §§ 1102-1106.

21. With the Third Circuit's recent rejection of *Avellino & Bienes v. M. Frenville Co.* (*In re M. Frenville Co.*), 744 F.2d 332 (3d Cir. 1984), it appears well settled that asbestos personal injury claims qualify as "claims" subject to discharge under the Bankruptcy Code. *Jeld-Wen, Inc. v. Van Brunt* (*In re Grossman's Inc.*), 607 F.3d 114, 120-21 (3d Cir. 2010) (en banc). Nonetheless, claims may be discharged in bankruptcy only to the extent consistent with due process, and victims that have no reason to be aware of their potential asbestos personal injury claims against a debtor are unlikely to have a sufficiently colorable claim at the time of discharge or knowledge of the need to protect their interests to satisfy due process. *Id.* at 127-28.

parties to the case.²² Yet forcing the debtor into liquidation—as may be required if these future creditors' claims cannot be discharged in the reorganization plan—may ensure that they will receive nothing from the bankruptcy estate.²³

The bankruptcy trust model was adopted in the first asbestos bankruptcies to resolve this problem. This model included features that provided courts with a basis for binding future victims notwithstanding their absence and to protect them from overreaching by other parties in interest.²⁴ Consistent with other proceedings in which interested parties are unable to speak on their own behalf, courts appointed legal representatives to speak for future victims.²⁵ These representatives assisted current parties in interest in the negotiation of the debtors' reorganization plans, which included the establishment of bankruptcy trusts funded by the debtors' securities, insurance recoveries, and other assets.²⁶ To ensure that the debtors

22. *In re Amatex Corp.*, 755 F.2d 1034, 1042-43 (3d Cir. 1985) (discussing future claimants' conflicting interests with the debtor and current asbestos creditors). Similar concerns about the inherent conflicts of interests between current and future victims animated the Supreme Court's rejection of asbestos class action settlements. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

23. *See In re Plant Insulation Co.*, 469 B.R. 843, 852-53 (Bankr. N.D. Cal. 2012). This concern is reflected in Judge Lifland's analysis of the due process question in the Johns-Manville bankruptcy:

Finally, it is worthwhile to remember who due process will serve in this reorganization. The goal of the Plan and the purpose of the Injunction is to preserve the rights and remedies of those parties, who by an accident of their disease cannot even speak in their own interest. The impracticable, if not impossible version of due process envisioned by the Objectors would effectively destroy these rights and remedies. Theories and standards of "due process" are nothing more than the human effort to make the inchoate notions of justice and equity real and tangible to parties who stand before a court of law. The Objectors' "due process", which would deny asbestos victims justice and equity, is not a "due process" at all.

In re Johns-Manville Corp., 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986).

24. *See Brown*, *supra* note 1, at 896-97.

25. *See Frederick Tung*, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 72 (2000).

26. *See id.*

could satisfy the requirements for confirmation,²⁷ the courts issued permanent injunctions channeling all future tort claims against the debtor to the trusts.²⁸ Although this process was controversial, it reflected a pragmatic expansion of the basic principles of Chapter 11 generally—preservation of the going concern value of the debtor and equitable distribution to creditors with similar rights—to include future asbestos personal injury victims.

An immediate problem with this approach was its uncertain foundations in the Bankruptcy Code. Nothing in the code at the time expressly authorized the appointment of a legal representative for future victims, the inclusion of future claims in any distribution scheme, or the issuance of an injunction that limited future plaintiffs' recovery rights to the bankruptcy trust.²⁹ This uncertainty played a significant role in the adoption of section 524(g).³⁰

27. If asbestos defendant-debtors are unable to free themselves of liability to unknown future claimants, they are unlikely to satisfy 11 U.S.C. § 1129(a)(11) (2006). This section requires a finding that the debtor's emergence from bankruptcy "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor" in order for the court to confirm the plan. *Id.* Although this standard is not high in practice, the failure to resolve this unknown future asbestos liability has historically raised sufficient doubt concerning the debtor's risk of insolvency post-confirmation to preclude confirmation. *See, e.g., In re UNR Indus., Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984); *In re Johns-Manville Corp.*, 36 B.R. 743, 757 (Bankr. S.D.N.Y. 1984).

28. *See* Mark D. Plevin et al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. 271, 277 (2006) (summarizing the Johns-Manville approach).

29. Brown, *supra* note 1, at 853 ("The legal foundations for the trust-injunction mechanism in Manville and other early cases—the court's equitable authority and largely unsettled interpretations of key provisions of the Code—were, at best, unstable.").

30. 140 CONG. REC. H. 10,765-66 (daily ed. Oct. 4, 1994) (noting lingering uncertainty over the legal foundations of the bankruptcy trust injunction approach); *Jeld-Wen, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 126 (3d Cir. 2010) (en banc) ("The Manville Trust was the basis for Congress' effort to deal with the problem of asbestos claims on a national basis, which it did by enacting § 524(g) of the Bankruptcy Code as part of the Bankruptcy Reform Act of 1994.") (internal citations omitted).

B. *The Section 524(g) Bankruptcy Process*

Consistent with its origins, the basic purposes of section 524(g) are to preserve the going concern value of asbestos defendant-debtors, provide legitimate victims with prompt compensation, and afford similar current and future victims with substantially similar compensation.³¹ As Judge Fitzgerald, who has presided over several asbestos-related bankruptcies, recently observed:

Ultimately, what Congress was attempting to do with § 524(g) was to ensure that everyone unfortunate enough to contract asbestos-related illnesses as a result of exposure to a bankruptcy debtor's products, thereby becoming entitled to compensation from that debtor, be subject to substantially the same treatment in bankruptcy. Thus, Congress decided that whether one is currently a victim of such an illness or whether one will not fall ill for many more years, for bankruptcy-related purposes, a victim's compensation should not depend on how quickly he or she manifests illness.³²

To that end, section 524(g) seeks to provide future victims an independent voice in the proceedings and requires a finding that the proposed plan and trust are fair and equitable before issuing a channeling injunction. Among other things, section 524(g) requires:

- The appointment of a legal representative to speak on behalf of those who will assert asbestos personal injury demands in the future;³³
- A judicial finding that channeling the liabilities of the parties responsible for the plaintiffs' injuries to the trust is fair and equitable in light of the responsible parties' contributions to the trust;³⁴
- "[R]easonable assurance that the trust will value, and be in a financial position to pay, present claims

31. *In re Plant Insulation Co.*, 469 B.R. 843, 859 (Bankr. N.D. Cal. 2012) ("Congress had three purposes in enacting section 524(g): equal treatment of present and future asbestos claimants; preservation of going-concern value; and prompt payment of meritorious asbestos claims.").

32. *In re Flintkote Co.*, No. 04-11300 (JFK), 2012 Bankr. LEXIS 5888, at *69-70 (Bankr. D. Del. Dec. 21, 2012) (internal citations omitted).

33. 11 U.S.C. § 524(g)(4)(B)(i) (2006).

34. 11 U.S.C. § 524(g)(4)(B)(ii).

and future demands that involve similar claims in substantially the same manner;³⁵ and

- The approval of at least 75% of current asbestos claimants entitled to vote on the plan.³⁶

Collectively, these requirements were intended to protect future claimants' interests by providing them with an independent voice during the proceedings, demanding specific judicial findings concerning questions that affect their interests, and aligning their interests with the current claimants, who must overwhelmingly support the plan.³⁷ Assuming these and the other conditions of section 524(g) are satisfied, the bankruptcy court may confirm the plan, and the federal district court is authorized to issue an injunction channeling all current and future asbestos liability against the debtor to the trust.

1. *Pre-Petition.*

a. The Impact of Co-Defendant Bankruptcies. As in most complex Chapter 11 cases, events that precede the filing of the bankruptcy petition play a critical role in shaping an asbestos bankruptcy. In these cases, debtors today most often argue that their bankruptcies are driven less by their relative culpability for asbestos personal injuries than the departure of substantially all of the first-tier asbestos defendants from the tort system.³⁸ These defendants, who previously defended only a few asbestos cases at any given point in time, were suddenly named in thousands of cases as other defendants filed bankruptcy and established bankruptcy trusts.³⁹ Thus, the bankruptcy of past defendants has contributed to the increase in bankruptcy filings by other defendants today, and today's bankruptcy filings are likely to contribute to future

35. 11 U.S.C. § 524(g)(2)(B)(ii)(V).

36. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

37. See Brown, *supra* note 1, at 896-97.

38. LLOYD DIXON ET AL., RAND INST. CIV. JUST., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 1-3 (2010) [hereinafter 2010 RAND REPORT].

39. *Id.* at 8.

bankruptcy filings by other defendants with modest roles in the asbestos industry.⁴⁰

For example, in the *Specialty Products Holding Corp.* bankruptcy, the debtors argue that they were named as defendants in 107 mesothelioma cases from 1980 to 1999, with plaintiffs receiving settlements from the debtors in just forty-one of these cases.⁴¹ The debtors contend that this reflects their actual role in the broader asbestos industry because they sold asbestos-containing products for a relatively brief period (six years), and these products collectively comprised roughly 0.02% of the asbestos-containing products sold during that time.⁴² As other defendants entered bankruptcy, however, plaintiffs increasingly named the debtors as defendants in these cases. By the time they entered bankruptcy in 2010, the debtors were being named in roughly half of all new mesothelioma cases filed in the United States each year.⁴³ Thus, as with their former co-defendants, these new debtors commenced bankruptcy to obtain peace from ongoing asbestos litigation.

b. Pre-Petition Bankruptcy Planning and Negotiations. Once a company chooses to pursue an asbestos bankruptcy, it will generally take one of two tracks: a consensual filing or a contested filing.⁴⁴ In consensual cases, the debtor/defendant will negotiate with one or more leading asbestos plaintiffs' lawyers and attempt to shape the basic terms of a global bankruptcy settlement.⁴⁵ Upon consultation with lead counsel for plaintiffs, the debtor may also select and hire someone to serve as the legal representative for future

40. Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 556 (2006) ("The sudden collapse of Owens Corning caused a sharp reaction on Wall Street that made capital impossible to come by for what were now seen as 'asbestos-tainted' companies. This reaction, in turn, pushed other companies over the edge. Armstrong World Industries filed for bankruptcy protection in December 2000, followed in 2001 by G-I Holdings (GAF), USG, W.R. Grace, Federal Mogul (Turner & Newall) and a number of less prominent companies.").

41. Transcript of Hearing, In re *Specialty Products Holding Corp.*, No. 10-11780 (JKF), at 31 (Jan. 7, 2013).

42. *Id.* at 26-27.

43. *Id.* at 27.

44. 2010 RAND REPORT, *supra* note 38, at 9-10.

45. Brown, *supra* note 1, at 861-64.

victims.⁴⁶ Collectively, these parties will attempt to iron out a plan of action for the bankruptcy case, the basic terms of any resulting bankruptcy trust, and identify and resolve potential obstacles to establishing the trust prior to the commencement of the bankruptcy case.⁴⁷ By contrast, in a contested filing, the debtors typically file without any such agreement or understanding and focus their energies on reducing their ultimate contributions to the resulting bankruptcy trust during the bankruptcy case.

2. *Post-Petition Estimation and Planning.* Following the commencement of the bankruptcy case, the United States Trustee ordinarily appoints an official committee of asbestos creditors, and the bankruptcy court appoints an official legal representative for future victims.⁴⁸ In consensual filings, the attorneys chosen for the asbestos committee may be the same lawyers who negotiated with the debtor pre-petition. Likewise, debtors typically request the appointment of the legal representative who served in this role pre-petition, and bankruptcy courts usually make this appointment with little fanfare.⁴⁹ Many of the plaintiffs' lawyers who serve on official asbestos claimants' committees, the lawyers who represent the committees, debtors' counsel, the legal representatives and the judge are repeat players across asbestos bankruptcy cases.⁵⁰ Co-defendants do not typically have standing in these cases, and their interests in preserving current or future contribution or other rights are not advanced by the legal representative or otherwise.⁵¹

Once the committee and futures representative appointments are finalized, the focus of an asbestos bankruptcy case is resolving the issues necessary to establish and fund the trust. Among other things, this includes an estimation of the debtor's aggregate liability to current and

46. *Id.* at 862.

47. 2010 RAND REPORT, *supra* note 38, at 9.

48. Tung, *supra* note 25, at 48, 55.

49. *See* Brown, *supra* note 1, at 897-99.

50. For example, more than a dozen of the largest asbestos bankruptcies filed since 2000 have been overseen by Bankruptcy Judge Judith K. Fitzgerald, either in her home court in Pennsylvania or as a visiting judge in Delaware.

51. *In re ACandS, Inc.*, 462 B.R. 88 (Bankr. D. Del. 2011) (explaining that a co-defendant lacks standing to intervene in another asbestos defendant's bankruptcy case).

future asbestos victims, funding the trust through contributions from the debtor and other responsible parties, finalizing the trust distribution procedures and trust governance agreements, and establishing a process for voting on the proposed plan of reorganization.⁵²

Estimation—the process for determining the portion of the estate’s assets that will be devoted to funding the trust—is often among the most hotly contested proceedings in an asbestos bankruptcy. Although courts generally allow discovery concerning a debtor’s *aggregate* liability,⁵³ they rarely allow significant inquiry into the merits of *individual* asbestos claims asserted against the debtor. Under 28 U.S.C. § 157(b)(2)(B), bankruptcy judges are not authorized to allow or disallow personal injury tort and wrongful death claims against the estate.⁵⁴ This section further provides that individual claims cannot be estimated for allowance purposes.⁵⁵ Thus, estimation disputes tend to involve a review of the debtor’s settlement history and various arguments suggesting that this history may over or understate the debtor’s legal liability to asbestos personal injury claimants.⁵⁶ In most cases, estimation proceedings are valuable more as a mechanism for encouraging the parties to reach a consensual estimate of the debtors’ aggregate long-term asbestos liability than in fixing that liability directly.⁵⁷

52. Tung, *supra* note 25, at 55-56.

53. *Id.* at 55.

54. Under 28 U.S.C. § 157(b)(2)(B) (2006), bankruptcy courts may not oversee the “liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11.” Rather, these matters may be heard in the district court in which the bankruptcy case is pending or in which the claim arose. 28 U.S.C. § 157(b)(5).

55. 28 U.S.C. § 157(b)(2)(B).

56. See generally Philip Bentley & David Blabey Jr., *Asbestos Estimation in Today’s Bankruptcies: The Central Importance of the New Trusts*, 26 MEALEY’S LITIG. REPT.: ASBESTOS 1 (Jan. 18, 2012).

57. Ultimately, trust funding should be resolved by settlement regardless of what happens at the estimation hearing. If the debtor obtains a favorable estimation and proposes funding the trust up to—or even in excess of—this estimated amount, the plan will still fail without the support of 75% of the plaintiffs. If the estimated liability is too high, the debtor may not be able to fashion a plan that is acceptable to other creditor constituencies. *Accord* Frances McGovern, *Section 524(g) Without Compromise*, 31 PEPP. L. REV. 233, 244 (2004)

During this time, the plan proponents will also finalize negotiations concerning the contributions necessary to fund the trust. Settlements with insurers, affiliates, and others with potential financial responsibility for satisfying the debtor's liability to asbestos victims must be submitted and approved by the bankruptcy court.⁵⁸ At the same time, coverage litigation with non-settling insurers may proceed on a parallel track in state court and, at times, continues long after plan confirmation.

3. *Plan Confirmation.* As in other aggregative proceedings against a common fund, bankruptcy proceedings must balance individual rights against collective interests. If individual creditors can block a reorganization that promises to increase the assets available for distribution to creditors as a whole, opportunistic creditors may attempt to withhold their support in order to increase their individual recoveries.⁵⁹ This potential, in turn, may ultimately preclude the debtor's restructuring as more and more individual creditors seek holdout premiums for their claims.⁶⁰ Conversely, empowering plan proponents to force individual creditors to accept the majority's preference may undermine the legitimate interests of individual creditors; powerful creditors controlling large debts may skew the vote to favor certain classes of claims and force weaker creditors to accept less than they would receive in any liquidation of the debtor's estate.⁶¹ The task for bankruptcy law and procedure is to not only overcome the collective action problem but also provide for an equitable distribution to creditors according to the value and priority of their claims.

(discussing difficulty in balancing plaintiffs' and other creditors' interests). In either case, litigation over the estimate may linger on appeal and delay confirmation to the detriment of the estate and its creditors. To that end, although estimation may technically provide a liability figure that might be controlling as far as plan confirmation is concerned, most of the parties ultimately have a shared interest in settlement.

58. FED. R. BANKR. P. 2019.

59. See Stephen J. Lubben, *Credit Derivatives and the Future of Chapter 11*, 81 AM. BANKR. L.J. 405, 428 (2007).

60. Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1374 (2000) (noting that the ability to avoid the holdout problem through cramdown is a significant benefit of the bankruptcy process).

61. Lubben, *supra* note 59, at 428.

Bankruptcy achieves this balance through the use of the “cram-down” and incorporating certain claim-level protections for creditors into the plan confirmation process. Under section 1129(b), the court can approve a plan of reorganization notwithstanding the fact that a class of creditors rejects the plan if the plan “does not discriminate unfairly, and is fair and equitable” to that class of creditors. Individual creditors are protected by provisions ensuring that they receive (a) payment in full prior to any payments to lower priority claims⁶² and (b) no less than the amount they would receive in a Chapter 7 liquidation of the estate.⁶³ At the same time, the cram-down power effectively limits a creditor’s potential to obtain more than its fair share by holding out.

Cram-down, however, does not apply to the supermajority vote requirement of section 524(g). If fewer than 75% of asbestos personal injury creditors vote against the plan, the district court is not authorized to issue an injunction channeling current and future asbestos claims to the bankruptcy trust, even if that class is subject to cram-down under section 1129(b).⁶⁴ Moreover, because asbestos personal injury claims are controlled by a small number of influential plaintiffs’ law firms—any one of which may control sufficient votes to prevent the satisfaction of this requirement—section 524(g) provides a small group of lawyers with an effective veto power over any plan.⁶⁵ In short, section 524(g) undermines the Bankruptcy Code’s most effective mechanism for resolving the common action problem.

To reach finality in an asbestos bankruptcy, then, courts and debtor-defendants rely upon this small group of lead plaintiffs’ lawyers to obtain sufficient support amongst their peers to satisfy the supermajority vote requirement.⁶⁶ These lead lawyers must devise trust terms that are finan-

62. 11 U.S.C. § 1129(b)(2)(B)(ii) (2006).

63. 11 U.S.C. § 1129(a)(7)(A)(ii).

64. *Century Indem. Co. v. Congoleum Corp.* (*In re Congoleum Corp.*), 426 F.3d 675, 680 n.4 (3d Cir. 2005) (“Pre-packaged bankruptcies employing a channeling injunction are not eligible for the ‘cram down’ provision contained in 11 U.S.C. § 1129(b)(1) which allows the bankruptcy court to confirm a plan of reorganization over creditors’ objections in certain circumstances.”).

65. *Brown*, *supra* note 1, at 860.

66. *See McGovern*, *supra* note 57, at 247-48.

cially acceptable to those with strong claims, some of whom might have obtained high six- and seven-figure verdicts at trial.⁶⁷ At the same time, they must include generous qualification criteria to obtain the support of claimants with weak or uncertain claims—which are unlikely to be challenged due to the limitations of 28 U.S.C. § 157(b)—against the debtor. In sum, bankruptcy trusts' criteria must be sufficiently inclusive to garner the support of poorly documented claims, and the trusts' initial payments must be sufficient to obtain the support of those with strong claims.⁶⁸

C. *Common Features of Bankruptcy Trusts*

After the plan of reorganization is confirmed and the channeling injunction is entered, bankruptcy trusts are organized under state law and structured as qualified settlement funds under 26 U.S.C. § 468B. The trusts are overseen by one or more trustees, a trust advisory committee (TAC), and a future claimants' representative (FCR).⁶⁹ Trustees operate much like senior corporate executives: hiring and overseeing employees and outside professionals; directing trust investments; and otherwise managing the day-to-day business of the trust (processing and paying claims).⁷⁰ The TAC represents the interests of those with claims that have been approved by the trust but have not been satisfied in full, and the FCR represents the group of unknown victims whose demands for compensation will be advanced in the future.⁷¹ Collectively, trustees, the TAC, and the FCR operate much like a corporate board of directors; periodically evaluating the trust's overall operations—including claim submission and payment patterns—and making the adjustments they believe necessary to protect the interests of trust beneficiaries.

67. *See id.* at 250-51.

68. *See Brown, supra* note 1, at 860.

69. *See* GAO REPORT, *supra* note 13, at 15; 2010 RAND REPORT, *supra* note 38, at 12-14.

70. GAO REPORT, *supra* note 13, at 15; 2010 RAND REPORT, *supra* note 38, at 12.

71. GAO REPORT, *supra* note 13, at 15; 2010 RAND REPORT, *supra* note 38, at 13-14.

Repeat players dominate the management roles within bankruptcy trusts. Trustees tend to be former plaintiffs' lawyers and judges with substantial asbestos litigation or asbestos bankruptcy experience. Likewise, FCRs tend to be academics, lawyers and former judges with similar expertise in these fields. One or more lawyers from just five law firms sit on TACs for substantially all of the trusts established since 2000, with representatives of Kazan McClain, Baron & Budd, Motley Rice, Cooney & Conway, and Weitz & Luxenburg on the TACs of ten or more trusts each.⁷² The influence of these firms is likely more substantial given the presence of one or more of their affiliate or spin-off firms on the TACs for these trusts. This reflects both the consolidation found in asbestos personal injury litigation generally and the fact that these same firms tend to play substantial roles in formal and informal asbestos plaintiffs' committees.

A small number of repeat players perform most of the claim processing across trusts. Although some bankruptcy trusts process claims internally, most trustees employ experienced claims administrators to manage this process for them. Seven claims administrators collectively manage claim processing for the trusts controlling more than 99.7% of the assets held in the bankruptcy trust system.⁷³ The two largest administrators—Verus Claims Services and Delaware Claims Processing Facility—manage the claim processing for trusts responsible for more than 80% of the payments made in 2011.⁷⁴

1. *The Claim Review Process.* With few exceptions, the process for filing, evaluating, and paying asbestos claims at a given trust is outlined in its trust distribution procedures (TDPs).⁷⁵ Although TDPs may vary across trusts at the margins, most of the trusts established since the late 1990s are based on similar templates and include many of the same basic terms.⁷⁶ Among other things, TDPs outline the

72. See 2010 RAND REPORT, *supra* note 38, at 53-186.

73. See Scarcella & Kelso, *supra* note 14, at 7.

74. *Id.*

75. Although most trusts refer to this document as their "trust distribution procedures," other names—for example, "claim distribution procedures"—have been used by different trusts.

76. 2010 RAND REPORT, *supra* note 38, at 11.

specific exposure and medical criteria that must be satisfied to qualify for compensation, scheduled values for each type of compensable disease under the TDP, the review procedures to be employed by the claim reviewers, and the procedures claimants may use to appeal any adverse claim determinations by the reviewers.⁷⁷

To initiate claim review, the claimant's representative will fill out a trust claim form⁷⁸ and provide any required supporting documentation.⁷⁹ Although most trusts ask for the same basic information, they generally require that plaintiffs fill out unique claim forms for each trust. The leading claim administrators, however, allow plaintiffs to file claims against all of the trusts they service through a central electronic claim filing system.⁸⁰

Once submitted, trusts generally process claims on one of two tracks: *expedited review*, in which the claim will be evaluated for satisfaction of the applicable medical and exposure criteria and paid according the scheduled value for the asserted injury under the TDP, and *individual review*, which involves a more detailed examination of the intrinsic merit and/or value of the claim under applicable state tort law.⁸¹ According to the U.S. Government Accountability Office (GAO), approximately 97 to 98% of all claims submitted to trusts today are processed on an expedited review track.⁸²

Claims evaluated under expedited review will qualify for payment if they satisfy the TDP requirements for exposure and injury outlined previously. Once the trust concludes that a claim qualifies for payment under expedited review, the compensation grid outlined in the TDP will define the value of the claim. This grid identifies a

77. GAO REPORT, *supra* note 13, at 15.

78. This form is often referred to as a "proof of claim." The claim filed with bankruptcy trusts, however, is distinct from the proof of claim required under 11 U.S.C. § 501 within a bankruptcy case, and the use of the term "proof of claim" in the bankruptcy trust context has, at times, been an unnecessary source of confusion. To that end, I refer to the claim submissions to trusts as "claim forms."

79. GAO REPORT, *supra* note 13, at 17-18.

80. Scarcella & Kelso, *supra* note 14, at 7.

81. GAO REPORT, *supra* note 13, at 17-18.

82. *See id.* at 20.

“scheduled value” for each category of disease. These values are initially fixed in pre-confirmation negotiations and tend to vary according to severity of injury. Thus, scheduled values for approved mesothelioma claims are consistently higher than scheduled values for other cancer and asbestosis claims, which have lower values in the tort system.⁸³

Individual review may be mandatory or occur at the request of the claimant.⁸⁴ Some claimants may not be eligible for expedited review due to a documented smoking history, failure to establish a sufficiently prolonged history of exposure to the trust defendant’s products, or the inability to procure sufficient medical evidence to establish a qualifying injury.⁸⁵ In these cases, the trust is required to deny the claim for failure to meet the presumptive exposure and medical standards applicable in individual review. However, the claim may be allowed in an amount up to the scheduled value for the asserted injury if the claim reviewer “is satisfied that the claimant has presented a claim that would be cognizable and valid in the tort system.”⁸⁶

In addition, some claimants who qualify for expedited review may nonetheless request individual review in hopes of obtaining more compensation for their injuries than provided by the scheduled value for their respective injuries.⁸⁷ Individual review in this context is designed to provide a valuation of the claim tailored to the plaintiff’s unique circumstances. After consideration of this

83. 2010 RAND REPORT, *supra* note 38, at 7 n.8. Mesothelioma is a rare form of cancer that is considered a signature disease associated with asbestos exposure. Successful mesothelioma victims typically obtain compensation that far exceeds that received by plaintiffs asserting other cancer and asbestosis injuries in the tort system. *Id.* However, even these outcomes are not static, as juries sometimes award large verdicts against asbestos defendants in other cancer cases brought by long-term smokers.

84. See GAO REPORT, *supra* note 13, at 18.

85. 2010 RAND REPORT, *supra* note 38, at 15. Some trusts also require individual review of claims based on exposure to the trust defendant’s products outside of the United States or outside of the workplace.

86. Combustion Engineering 524(g) Asbestos PI Trust TDP, § 2.2. Most other trusts use the same or materially similar language.

87. Claimants who voluntarily pursue individual review are generally allowed to rescind the individual review election at any time prior to the liquidation of their claims.

information, the trust may offer compensation that is less than, equal to, or greater than the scheduled value of the claim up to the maximum amount authorized for that disease category under the TDP.⁸⁸ Claim-level data is not generally disclosed by the trusts, so an empirical analysis of how claimants seeking enhanced recoveries fare under individual review is not currently possible.

2. *Settlement Offers and Payments.* Once the claim administrator approves and assigns a value to a claim, the trust will make an offer to the claimant. If the claimant accepts the offer, payments tend to be made quickly. If the claimant rejects the offer, the claimant and the trust may negotiate or engage in some form of alternative dispute resolution procedure as outlined by the trust.⁸⁹ If this fails, the trust distribution procedures may allow for the claimant to pursue claim valuation in the tort system.⁹⁰

To slow the depletion of trust assets, TDPs authorize (and frequently require) trust officials to periodically revisit future claim submission and payment projections and adopt a “payment percentage” to equalize payments going forward.⁹¹ When a trust adopts a payment percentage that is less than 100%, every claim that is settled by the trust going forward will be paid an amount equal to the settled value times the payment percentage immediately. The claimant will retain a claim for the unpaid portion, which may result in additional payments only if the trust’s payment percentage increases in the future. Given the historical patterns, however, it is unlikely that these future payments will be substantial.

88. 2010 RAND REPORT, *supra* note 38, at 21. For example, under section 5.3(b)(3) of the United States Gypsum Asbestos Personal Injury Settlement Trust TDP, the scheduled value for a mesothelioma claim is \$155,000, and the maximum value a mesothelioma claimant can be awarded after individual review is \$450,000.

89. 2010 RAND REPORT, *supra* note 38, at 21.

90. *Id.*

91. Some trusts adopt and apply a payment percentage from the outset when projected current and future liabilities exceed the trusts projected assets. For example, the recently established Christy Refractories Co. Asbestos Personal Injury Trust applies a payment percentage of 11%. Christy Refractories Asbestos Personal Injury Trust TDP, § 2.3. Trusts may also employ other mechanisms for capping aggregate or categorical payments.

Under the T H Agriculture & Nutrition Personal Injury Trust (THAN Trust) TDP, for example, an approved mesothelioma claim has a scheduled settlement value of \$150,000.⁹² The THAN Trust has a payment percentage of 30%,⁹³ however, so the amount paid for a mesothelioma claim approved today would be \$45,000 (\$150,000 x .3). If the trust increases the payment percentage to 35% in the future, the claimant would be entitled to an additional 5% of the scheduled value at that time, or \$7500 (\$150,000 x .05). If the payment age declines further, the claimant will not have to return any money received, but she will not receive any additional recovery unless and until the payment percentage is subsequently increased to more than 30%.

II. ANALYSIS: TRUST CRITERIA AND QUALITY CONTROLS

With the codification of the bankruptcy trust model in section 524(g), the focus of asbestos bankruptcy shifted from advancing its equitable and constitutional foundations to shaping the accepted interpretations of the statutory language to expedite the process.⁹⁴ Most of the unique issues that arise in an asbestos bankruptcy as a result of section 524(g)—the standards for appointing a legal representative for future victims,⁹⁵ whether an injunction is fair and equitable among injunction beneficiaries and victims,⁹⁶ and whether current and future victims stand to receive substantially similar treatment⁹⁷—are left to the discretion of the judges overseeing the case. And if a current party in interest does not raise these issues, they may be considered only in passing. By contrast, the supermajority vote requirement leaves little room for discretion: either the plan has the support of at least 75% of asbestos claimants or it does not. And to facilitate expeditious case administration,

92. T H Agriculture & Nutrition, LLC Asbestos Personal Injury Trust TDP, § 5.3(a)(3).

93. T H Agriculture & Nutrition, LLC Asbestos Personal Injury Trust Payment Percentage Notice (Mar. 21, 2011) [on file with author].

94. See Brown, *supra* note 1, at 896.

95. See NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 331-32 (1997) (noting lack of guidance in the Bankruptcy Code concerning appointments of legal representatives for future claimants).

96. 11 U.S.C. § 524(g)(4)(B)(ii) (2006).

97. 11 U.S.C. § 524(g)(2)(B)(ii)(V).

much of what occurs in an asbestos bankruptcy centers around ensuring that this condition can be met in a timely fashion.⁹⁸

The irony of section 524(g) is how this mechanism for protecting future victims—requiring the approval of a supermajority of current asbestos creditors—also empowers current claimants to shape bankruptcy trusts in ways that ultimately undermine future victims' prospects for recovery. On the surface, section 524(g)'s protections for future victims should limit front-loading payments to current claimants, but obtaining the support of current claimants frequently entails marginalizing other voices in the bankruptcy case and the resulting trusts. These attorneys who can deliver sufficient votes to satisfy the supermajority vote requirement exercise considerable control over the design of the trust, appointments to leadership roles within the trust, and the distribution procedures that define the process for reviewing and paying claims.⁹⁹ This control over appointments has a clear punch-pulling effect during the bankruptcy case,¹⁰⁰ and trustees and claims administrators are bound to process and value claims according the terms of the TDPs that are largely dictated by the asbestos committee.

Although affording a relatively small group of lawyers the power to exercise considerable control over the process may give courts and others pause, it does not necessarily follow that this authority has been abused. Indeed, some trusts have become more restrictive in their injury standards and payments to unimpaired claims in recent years,¹⁰¹ and other recent developments may suggest that some trusts have become more vigilant in testing the intrinsic merit of the claims submitted.¹⁰² Even with these changes,

98. See Brown, *supra* note 1, at 860-61.

99. See *id.* at 862-63.

100. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 177 (2007).

101. Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163, 164 (2006).

102. In September 2012, for example, trusts managed by the Western Asbestos Settlement Trust sued a law firm that specializes in filing asbestos claims with bankruptcy trusts, alleging that the firm "engaged in a pattern of submitting unreliable evidence in support of claims for substantial amounts of money from

however, critics continue to stress that bankruptcy trusts have become a haven for fraudulent claims.¹⁰³

A. *Study Parameters*

Although the manner in which bankruptcy trusts are established suggests the potential for corrupting their statutory purpose, studies to date have not provided a meaningful picture of the effect on the trusts operations. Other attempts to study bankruptcy trusts suggest that this is due to the growing secrecy surrounding their operations.¹⁰⁴ Some trusts previously sold or licensed their claim information freely,¹⁰⁵ but most bankruptcy trusts currently treat claim submissions and payments as confidential.¹⁰⁶ Beginning in 2006, new trusts included TDP language requiring the trusts to treat claim submissions, discussions and payments as confidential “settlement negotiations,” and several older trusts amended their TDPs to include similar provisions.¹⁰⁷ These provisions obligate trustees to “take all necessary and appropriate steps” to resist disclosure of this information unless authorized by the claimant or required under applicable law.¹⁰⁸ As a result, during the timeframe that the trust system emerged as significant source of plaintiff compensation, substantially all of the trusts became more secretive concerning the claim-level information necessary to study their operations in detail.

the [trusts].” Complaint for Declaratory Judgment at 2, *W. Asbestos Settlement Trust v. Mandelbrot*, No. 12-04190 (N.D. Cal. Sept. 19, 2012).

103. See, e.g., Editorial, *Busting the Trust Fraud*, WALL ST. J., Dec. 12, 2012, at A18; Daniel Fisher, *Double-Dippers*, FORBES, Sept. 4, 2006, at 136 (“Even as states crack down on frivolous lawsuits by people with no symptoms at all, trusts established by bankrupt asbestos manufacturers are paying tens of thousands of claims each year based on inflated or downright false stories of how people were exposed to their products.”).

104. See LLOYD DIXON & GEOFFREY MCGOVERN, RAND INST. CIV. JUST., ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION xi (2011) [hereinafter 2011 RAND REPORT].

105. H.R. REP. NO. 112-687, at 11 (2012) [hereinafter the FACT ACT REPORT].

106. See 2010 RAND REPORT, *supra* note 38, at xvii.

107. Scarcella & Kelso, *supra* note 14, at 9.

108. *Id.* at 10.

Notwithstanding these limitations, most active bankruptcy trusts' TDPs and financial reports remain public information.¹⁰⁹ Using the TDPs, it is possible to identify the extent to which trust criteria expand the pool of compensable claims beyond comparable standards in the tort system. Moreover, by comparing trust standards and practices against complex global settlements in which plaintiffs do not enjoy similar dominance over the process, it is also possible to highlight weaknesses in trust design that may be attributable to the leverage imbalance created by section 524(g).

Specifically, this analysis focuses on the publicly available information from thirty-two trusts. This sample excludes inactive trusts, including trusts that only rarely accept and pay claims, and those whose long-term prospects hinge upon unresolved litigation. This exclusion is necessary to avoid injecting data that might suggest unrepresentative patterns, practices, and financial information. Moreover, many of these excluded trusts do not provide sufficient public disclosures to allow a meaningful study of their operations. Finally, given that the focus of this review is the long-term performance of active trusts, this sample excludes trusts that have not yet become active and any trusts that were only recently approved, except as otherwise noted.

The trusts' exposure and medical criteria are compared to representative standards in the tort system and similarly complex global settlements to the extent outlined below. These comparisons are not intended to suggest that any disconnect from applicable tort law is necessarily undesirable; indeed, any administrative claims resolution process is likely to adopt criteria that are more streamlined than state tort litigation.¹¹⁰ Moreover, given the differences in the standards from one state to the next and changes in state law over time, it may be impractical to establish streamlined compensation criteria that track tort standards to each individual claim. Where noted, this section also contrasts bankruptcy trust TDPs against the terms of the global settlements adopted in the National Settlement Plan in the Fen-Phen litigation, the Vioxx multidistrict litigation (MDL), and the Gulf Oil Spill MDL. These non-bankruptcy

109. GAO REPORT, *supra* note 13, at 16.

110. NAGAREDA, *supra* note 100, at 150.

settlements were selected because they involve similarly complex evidentiary and oversight questions and employ comparable grid/matrix procedures for evaluating and valuing claims for settlement.

B. *A Comparative Analysis of Trust Criteria*

As noted in Part I, claimants must satisfy a trust's exposure and injury criteria to qualify for payment. For the 97 to 98% of claims that are subject to expedited review,¹¹¹ a causal connection between the two may be assumed if these two criteria are satisfied. Likewise, other potential defenses—including submission of a claim after the applicable limitations period has expired and alternate causation (such as far higher exposure to other asbestos products, smoking history, etc.)—may not be available or will be evaluated solely on the basis of the claimants' representations to the trust. The trusts' exposure, medical and quality control provisions are discussed in greater detail below.

1. *Exposure Standards.* Interestingly, some of the strongest criticism of TDP exposure standards comes from prominent plaintiffs' lawyers, including some whose firms have played a critical role in designing several trusts. These challenges typically arise when defendants in the tort system attempt to avoid or reduce their liability to the plaintiff by arguing that his or her disease should be attributed, in whole or in part, to products manufactured by entities whose liabilities have been assumed by bankruptcy trusts. For example, in a recent state court filing, three leading plaintiffs' firms observed:

Many of the asbestos bankruptcy trusts do not require proof of exposure to a company's products. Rather, some trusts base their offer on medical diagnosis alone, while others care about an individual's occupation or job location. None of the trusts require the standard of proof that is used by a court in a civil trial.¹¹²

Another prominent plaintiffs' lawyer recently opined that the use of approved job site lists allows individuals who

111. See GAO REPORT, *supra* note 13, at 20.

112. Plaintiff's Joint Motion for a Protective Order Regarding Settlements and Bankruptcy Claims at 2, *In re Asbestos Litig.*, No. 96-9999 (R.I. Sup. Ct. Dec. 12, 2011) [on file with author].

worked “three buildings over” from any asbestos to qualify for payment.¹¹³

A survey of the active trusts’ TDPs largely confirms these assessments.¹¹⁴ Section 5.7(b)(2) of the Combustion Engineering (CE) Trust, for example, provides that a claimant must have at least five years of occupational exposure to asbestos fibers or regular contact with others who were regularly exposed to asbestos, but may require no more than one fleeting exposure to a product with virtually any relationship to the trust’s predecessor.¹¹⁵ Mesothelioma claimants, for example, need only demonstrate exposure to “an asbestos-containing product sold, distributed, marketed, supplied, specified, produced, selected, maintained, handled, processed, installed, repaired or manufactured by CE or for which CE otherwise has legal responsibility.”¹¹⁶ For all other injury categories, the claimant must establish that this exposure occurred for no less than six months.¹¹⁷

Twenty-four of the trusts surveyed employ identical exposure criteria.¹¹⁸ Only three trusts have express minimum temporal exposure requirements for mesothelioma claims.¹¹⁹ Eighteen have no minimum exposure periods for Level 1 non-malignant claims and require no more than six months

113. See Symposium, *Asbestos Bankruptcy Trusts and Their Impact on the Tort System*, 7 J.L. ECON. & POL’Y 281, 297 (2010) (comments of Nathan Finch) (“A lot of bankruptcy trusts, particularly the newer ones for mesothelioma claims, all they say that there has to be meaningful and credible evidence of exposure; but that can be just a site list. That can be working at a site where somebody is; it could be the equivalent of the guy who was at the place where the auto parts were three buildings over. I would argue that doesn’t prove causation, and while that may be admissible to prove something, it’s not the same thing as the type of proof that would get you to a jury, or get you past a directed verdict motion on the defense’s cross claim against another defendant.”).

114. See *infra* Appendix B (Exposure and Medical Criteria).

115. Combustion Engineering 524(g) Asbestos PI Trust TDP, § 5.7(b)(2).

116. *Id.* at § 5.7(b)(3).

117. *Id.* at § 5.7(b)(1).

118. See *infra* Appendix B (Exposure and Medical Criteria).

119. Two of these trusts require three months exposure to the predecessor’s products for mesothelioma claims and one year of exposure for all other claims. Western Asbestos Settlement Trust Case Valuation Matrix, § VII.c.; J.T. Thorpe Settlement Trust Case Valuation Matrix, § VII.c.

of exposure to the predecessor's products or others who worked with those products for all other claims.¹²⁰ Moreover, twenty-one of the trusts studied have published "approved work site" and similar lists of locations or ships where their predecessor companies' products were located, so claimants can more readily establish qualifying exposure by demonstrating that they worked at one of these approved sites.¹²¹

Collectively, this suggests that it is possible for a claimant who did not work directly with *or even in the same building as* an asbestos-containing product to nonetheless qualify as exposed. For the highest value claims (mesothelioma) and the numerous low-value non-malignant claims, even an isolated, passing "exposure" may be sufficient to qualify for payment. Indeed, it is not clear how this language would disqualify those whose sole basis for claiming exposure is an isolated walk across a clean, unbroken asbestos-containing tile floor or a brief conversation with someone who might have worked in proximity to such tiles "three buildings over."¹²² For all other claims, six months at an approved job site or work around those who might have worked with asbestos-containing products may be sufficient for the trusts' purposes, regardless of the claimant's actual degree of exposure to airborne asbestos fibers.

In addition, fourteen of the trusts include language that expressly authorizes claimants to assert exposure histories that are inconsistent with representations made in the tort system.¹²³ Specifically, these provisions state that evidence submitted in support of trust claims "is for the sole benefit of the trust, not third parties or defendants who remain in the tort system,"¹²⁴ and further note that:

120. *See infra* Appendix B. Several trusts also have no minimum requirement for Level 1 Cancer Claims, but most of these trusts treat this class of claims as requiring individual review. This category typically includes cancer claims that do not satisfy other cancer claim category criteria, including claims submitted by those with disqualifying smoking histories.

121. *See id.*

122. Symposium, *supra* note 113, at 287.

123. *See infra* Appendix B.

124. This language is taken from the Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust TDP, § 5.7(b)(3), and is materially indistinguishable from language in the TDPs of fifteen other trusts in this study.

The [trust] has no need for, and therefore claimants are not required to furnish the [trust] with evidence of exposure to specific asbestos products other than those for which [the trust] has legal responsibility. . . . Similarly, failure to identify [the trust defendant's] products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the [trust], provided the claimant otherwise satisfies the medical and exposure requirements of the Asbestos TDP.¹²⁵

Given the limited information required in the trusts' claim forms, even the claimant's submission of conflicting work histories with different trusts¹²⁶ and sworn denials of exposure to the trust predecessor's products in the tort system are unlikely to draw scrutiny.¹²⁷

This exposure standard is considerably less demanding than those found in the tort systems in most states, many of which have expressly rejected similarly expansive theories of causation in asbestos litigation.¹²⁸ The commonly applied "frequency, regularity and proximity" test articulated in *Lohrmann v. Pittsburgh Corning Corp.*, for example, assumes that a reasonable inference of substantial causation requires "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."¹²⁹

125. *Id.*

126. GAO REPORT, *supra* note 13, at 23 ("Although the possibility exists that a claimant could file the same medical evidence and altered work histories with different trusts, each trust's focus is to ensure that each claim meets the criteria defined in its TDP, meaning the claimant has met the requisite medical and exposure histories to the satisfaction of the trustees.").

127. Less than half of the trusts involved in the *GAO Report* advised that they track public information and court filings. *Id.* at 21.

128. See David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 59 (2008) ("The recent, increasingly strict exposure cases . . . reflect a welcome realization by state courts that holding defendants liable for causing asbestos-related disease when their products were responsible for only *de minimis* exposure to asbestos, and other parties were responsible for far greater exposure, is not just, equitable, or consistent with the substantial factor requirements of the *Restatement (Second)* and *Lohrmann*.").

129. 782 F.2d 1156, 1162-63 (4th Cir. 1986). This test is the most frequently cited standard for establishing substantial causation. Charles T. Greene, *Determining Liability in Asbestos Cases: The Battle to Assign Liability Decades After Exposure*, 31 AM. J. TRIAL ADVOC. 571, 572 (2008) (noting that a majority of federal circuits and several states have adopted the *Lohrmann* test).

It is not sufficient, however, to produce evidence that a company's product was present at the workplace; mere exposure to a product without evidence demonstrating evidence to airborne asbestos fibers over a reasonable period of time is generally not enough to support a reasonable inference of causation.¹³⁰ Although the plaintiff is not required to prove that asbestos fibers from the defendant's products "actually began the process of malignant cellular growth," this standard most often requires a "reasonable medical probability" that it was "a substantial factor" contributing to the risk of developing the disease,¹³¹ and "single exposure" or "each and every breath" theories generally do not provide a sufficient basis for causation.¹³²

130. See *Lohrmann*, 782 F.2d at 1162-63; see also *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005) ("[A] mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient" to establish causation); *Peerman v. Georgia-Pacific Corp.*, 35 F.3d 284, 287 (7th Cir. 1994) ("Although under the 'job site' test or any similar test for causation a plaintiff need not produce evidence of actual exposure to the product that is alleged to have caused an asbestos-related disease, a plaintiff still must produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product. Of course, this inference can be made only if it is shown that the defendant's product, as it was used during the plaintiff's tenure at the job site, could possibly have produced a significant amount of asbestos dust and that the asbestos dust might have been inhaled by the plaintiff."); *Menne v. Celotex Corp.*, 861 F.2d 1453, 1461-62, n.12 (10th Cir.1988) (concluding that the mere presence of a defendant's asbestos-containing product at the plaintiff's work site is insufficient to establish causation and characterizing cases concluding otherwise as "extremely attenuated"); *Kraus v. Celotex Corp.*, 925 F. Supp. 646, 653 (E.D. Mo. 1996) ("Plaintiffs' evidence that AWI's products were used at the Kincaid Powerhouse job does not support a reasonable inference that Mr. Kraus was exposed to asbestos from those products, much less that AWI products caused his injuries and death. Because plaintiffs have not set forth specific facts which raise an issue of material fact for trial, defendant AWI's motion for summary judgment should be granted."); *Henderson v. Allied Signal, Inc.*, 644 S.E.2d 724, 727 (S.C. 2007) (quoting *Lohrmann*, 782 F.2d at 1162). But see *Lockwood v. AC&S, Inc.*, 722 P.2d 826, 840 (Wash. Ct. App. 1986), *aff'd en banc* 744 P.2d 605 (Wash. 1987).

131. *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1206, 1223 (Cal. 1997).

132. *Martin v. Cincinnati Gas & Elect. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) (concluding that such theories "would render the substantial cause requirement 'meaningless'"); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482-83 (11th Cir. 1985); *Summers v. Certaineed Corp.*, 997 A.2d 1152, 1171-72 (Pa. 2010) (rejecting the "each and every exposure" theory of substantial

In states that allow single exposure theories to get to a jury, the evidence submitted to satisfy these standards with a trust is unlikely to be subjected to adversarial scrutiny comparable to that found in the tort system. Even in these states, juries are free to discount expert opinions as speculative and insufficient to establish causation, and this is likely where causation requires an extreme leap of faith¹³³ or other potential causes are more readily established. And given the extent to which jury assessments of causation and the allocation of fault in asbestos personal injury cases often hinges upon relative exposures to the defendants' products; a reasonable jury seems unlikely to consider an isolated exposure to an undisturbed product containing encapsulated asbestos a substantial cause of the plaintiff's disease where the plaintiff had long-term, direct exposure to airborne asbestos from other sources. Yet the trusts' criteria treat a single or otherwise very limited exposure to a product or site as equivalent to long-term, direct exposure to airborne asbestos fibers. Thus, these common trust exposure criteria appear to be over-inclusive and to over-compensate weak claims, at least when compared to state law tort systems.

The fact that the trusts employ standards that are less exacting than the tort system is unsurprising, but the divide between the two systems is nonetheless remarkable. In designing trusts to minimize subjective considerations and reduce the time required to process claims, prevailing exposure standards strip a critical common sense component in evaluating individual claims. Some level of departure from the level of scrutiny possible in the tort system may be necessary to advance the objective of prompt

causation); *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216, 226 (Pa. 2007) (“[A]ny exposure” expert opinions “do not suffice to create a jury question in a case where exposure to the defendant’s product is *de minimis*, particularly in the absence of evidence excluding other possible sources of exposure (or in the face of evidence of substantial exposure from other sources).”). As one commentator recently observed, “the ‘any exposure’ theory is failing across the spectrum of asbestos cases, regardless of disease and type of exposure.” Mark A. Behrens, *What’s New in Asbestos Litigation?*, 28 REV. LITIG. 501, 531 (2009).

133. See, e.g., *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1175-76 (D.C. 2005) (concluding that the causation premised upon “every exposure” testimony should be submitted to the trier of fact but expressing doubt that the fact-finder would find such testimony sufficient).

recovery for victims.¹³⁴ Nonetheless, these standards may be fairly read to embrace causation frameworks that have been expressly rejected by several state courts, preclude consideration of evidence that may undermine causation entirely, and otherwise afford claim reviewers insufficient leeway to reject claims that appear unlikely to survive early dispositive motions at trial under applicable state law.¹³⁵

2. *Medical Criteria.* The medical criteria employed by bankruptcy trusts have tightened gradually over time. Many trusts today require some evidence of exposure as a contributing cause to the asserted injury, and “there has been an increasing tendency to require more and more rigorous tests and diagnoses.”¹³⁶ Asbestos-related cancer diagnoses must be based on either a physical examination conducted by the diagnosing physician or a pathology report.¹³⁷ Newer trusts may also require the submission of additional supporting medical evidence, including X-rays, CT scans, detailed pulmonary function test results, laboratory tests, tissue samples, and evidence that the medical evidence submitted is based on equipment, testing methods and procedures that comply with recognized medical standards.¹³⁸ Several trusts have also adopted provisions clarifying that a physician’s finding “that a claimant’s disease is ‘consistent with’ or ‘compatible with’

134. See NAGAREDA, *supra* note 100, at 150 (“The problem of overclaiming inheres in any move from a tort system predicated on individualized proof toward a streamlined administrative regime. Efficient application of a compensation grid necessarily involves cutting corners by comparison to the detailed proof that might be demanded in tort litigation.”); Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179, 188 (2001) (“[T]housands of lesser-value claims may be resolved en masse according to negotiated schedules of damages that pay little attention to individual claim differences and involve little adversarial litigation.”).

135. See S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEM. L. REV. 559, 572 (2012) [hereinafter Brown, *Specious Claims*] (noting that bankruptcy trust claim processing “neither resembles the traditional adversary process nor compensates for the policing functions of adversary litigation that have been stripped away”).

136. McGovern, *supra* note 101, at 172.

137. *Id.*

138. ACandS, Inc. Asbestos Settlement Trust TDP, § 5.7(a)(2).

asbestosis shall not alone be treated by the Trust as a diagnosis.”¹³⁹

Notwithstanding these changes, establishing a compensable injury remains considerably less demanding than in the tort system. As with juries in the tort system, trust claim reviewers typically defer to the expertise of medical professionals in determining whether a plaintiff has a compensable injury if the diagnosis otherwise complies with trust criteria. The primary difference between the trusts’ administrative claim review and the tort system, however, is that defendants in tort litigation most often hire and rely upon the advice and testimony of their own medical experts when evaluating the plaintiff’s claim. By contrast, trusts do not hire independent medical experts for the purpose of testing the veracity of medical evidence, and few appear to consult independent medical experts even in connection with audited claims.¹⁴⁰ This sole reliance on the opinion of a single medical professional selected by the claimant or claimant’s counsel risks supplanting the search for the truth of the claimant’s injury with a search for a doctor who is willing to provide a favorable report.¹⁴¹

In addition, trusts rely extensively on plaintiffs’ willingness to make admissions that may be against their interests on claim forms, and claim reviewers may have little opportunity to challenge these admissions. For example, a claim submitted by a smoker is not eligible for compensation under expedited review at several trusts, but this information will become available to the trust only if the claimant admits to a smoking history on the claim form. In practice, some plaintiffs’ firms may not inquire about or verify clients’ smoking histories before submitting claim forms indicating that they were non-smokers,¹⁴² and

139. *Id.* at § 5.7(a)(1).

140. Of the trusts interviewed by the GAO, only one advised that it sends medical records to an independent doctor, and that was only with respect to claims selected for audit. GAO REPORT, *supra* note 13, at 23.

141. See Rohan Price, *The Need for a Regulatory Response to Diagnosis Fraud in Mesothelioma Cases*, 19 AUSTRALIAN J. L. & MED. 196, 198-200 (2011) (discussing the United States experience with asbestos diagnosis fraud and outlining similar concerns in Australia).

142. See Transcript of Deposition of David Thomas Robeson, Sr. at 9, 20, 23-24, 47-48, 61, 67, 80, 63-84, *Robeson v. Ametek*, No. 2004-15722 (La. Dist. Ct. Jan. 24, 2011) [on file with author] (testimony from decedent’s son that his

claimants have a clear incentive to conceal this information when the likelihood of any additional inquiry is low. Nonetheless, the extent to which this opportunity to transform lower value smoking claims into higher value non-smoking claims has been exploited is impossible to quantify given the limited claim-level information currently available.

Standing alone, a straightforward comparison of the trusts' approach to establishing qualifying injuries to the tort system does not provide a compelling critique of the trust system. Any administrative scheme must balance the costs of testing the veracity of the medical evidence submitted against the risk that some of the medical evidence submitted is manufactured or otherwise unreliable. The present record is sparse concerning the actual costs of more searching examinations of the medical evidence or requiring more objective testing. To date, trusts appear to operate on the assumption that they cannot match or approach the potential of the tort system for identifying and deterring specious claims without also incurring the high transaction costs associated with asbestos litigation.

3. *Audits and Adaptability.* The difficulty in balancing the need to test intrinsic merit against the costs of doing so is common across global settlements and compensation funds involving mass tort claims.¹⁴³ To that end, a stronger test of the impact of the power imbalance created by section 524(g) on bankruptcy trusts is to contrast the trusts' mechanisms for testing the veracity of claimants' representations against similar mechanisms in other global settlement plans that are established in other forums. Such comparisons are imperfect given the differences in the injuries involved, the state of the scientific understanding of these injuries, and the degree to which asbestos plaintiff and defendant elasticity may alter litigant behavior in fashioning settlement terms. Moreover, some of these settlements may also have the luxury of relying on governmental authorities to investigate suspected fraud or

father was a smoker and advising that counsel never consulted with his father or others concerning smoking status).

143. See Ian Ayres, *Optimal Pooling in Claim Resolution Facilities*, 53 LAW & CONTEMP. PROBS. 159, 160 (1990) (discussing litigation costs associated with individualized proof of damages).

funding from third parties that are not currently available to bankruptcy trusts. Finally, there are few global settlements that match the claim volume and assets distributed by bankruptcy trusts, so it is difficult to build a statistically significant sample for comparison. Nonetheless, contrasting bankruptcy trusts' approach to auditing individual claims with similar provisions in other global settlements may reveal additional opportunities for trusts to bridge the gap with evidentiary testing in the tort system without unduly draining scarce trust assets.

In other global settlements that follow similar administrative claim review and payment models, settlement administrators typically attempt to identify and deter fraudulent patterns and practices through the use of a robust claim audit process. As Kenneth Feinberg recently observed, "anytime you establish a very generous public compensation program, it will trigger a certain amount of fraudulent activity."¹⁴⁴ Every major claims resolution facility in recent history—including state-level workers compensation programs, the Black Lung Fund,¹⁴⁵ the Katrina and Rita hurricane disaster relief programs,¹⁴⁶ the 9/11 Victims Compensation Fund,¹⁴⁷ and the Gulf Coast Claims Facility,¹⁴⁸ to name but a few—have experienced fraudulent claim submissions. Moreover, this history demonstrates that some repeat players will adopt patterns and practices that exploit

144. Jay Weaver, *Fraud Pollutes BP Oil-Spill Compensation Fund for Gulf Coast Victims from Florida to Louisiana*, MIAMI HERALD (Aug. 19, 2012), available at <http://www.miamiherald.com/2012/08/19/2959468/fraud-pollutes-bp-oil-spill-compensation.html> (quoting Kenneth Feinberg).

145. Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 734 (1989).

146. U.S. DEP'T OF JUSTICE, DISASTER FRAUD TASK FORCE, REPORT TO THE ATTORNEY GENERAL FOR FISCAL YEAR 2011, at i ("Through the end of Fiscal Year 2011, 47 United States Attorney's Offices across the country charged 1,439 people in 1,350 cases with various fraud-related crimes stemming just from Hurricanes Katrina and Rita.").

147. See, e.g., Bruce Golding, *\$3M Slap for 9/11-fund Scammer*, N.Y. POST, Sept. 15, 2011, at 8; Nedra Pickler, *Retired Cmdr. Sentenced for 9/11-related Fraud*, NAVY TIMES (Dec. 12, 2011, 6:00 AM), <http://www.navytimes.com/article/20111212/NEWS/112120314/Retired-cmdr-sentenced-for-9-11-related-fraud>.

148. See, e.g., John Swartz, *BP Fund Is a Magnet for Fraud, Experts Say*, N.Y. TIMES, June 19, 2010, at A11; Weaver, *supra* note 144.

weaknesses in comprehensive settlement or public compensation plans that allow them to obtain compensation for claims that satisfy settlement criteria but nonetheless lack intrinsic merit.¹⁴⁹

Asbestos litigation and bankruptcy trusts specifically have a long history with specious and manufactured claims.¹⁵⁰ The specious claim development practices identified and discredited in the Silica MDL¹⁵¹ generated asbestos claims that dominated asbestos litigation, settlement, and bankruptcy trust submissions for more than a decade. The frequently cited *Kananian v. Lorillard Tobacco Co.* case involved factual representations to certain trusts that, according to the plaintiffs' lawyer's private communications with his partners, were effectively manufactured from whole cloth.¹⁵² Other recent cases suggest that some firms submit trust claims based on affidavits from family members and others who are unlikely to have the personal knowledge of the facts asserted¹⁵³ and work and medical evidence that is inconsistent with sworn testimony in other proceedings.¹⁵⁴

149. See Brown, *Specious Claims*, *supra* note 135, at 561.

150. *Id.* at 572-79.

151. *Id.* at 579-83.

152. No. CV 442750, at 6 (Ohio Ct. Common Pleas Jan. 18, 2007). In this case, the plaintiff's claim form submitted to the Manville Trust represented that he was a shipyard laborer who worked with certain specified Johns-Manville products. *Id.* at 5. Mr. Kananian, however, was not a shipyard laborer—he was at the shipyard “one day to pick up his ship”—and there was “no evidence that [he] ever worked with these products.” *Id.* at 5-6. As the court concluded, “[t]his fiction, of course, improved chances of recovery from the trust, but was not based on Mr. Kananian’s work history, client interview(s), or deposition.” *Id.* at 9-10. The claim was processed and paid.

153. See Complaint for Declaratory Judgment at 7, *W. Asbestos Settlement Trust v. Mandelbrot*, No. 02-46284 (N.D. Cal. Sept. 19, 2012).

154. *Id.*; *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112 Cong. 103-04 (2011) (written Statement of James L. Stengel, Esq.) (discussing cases litigated in Baltimore); Memorandum of Law in Support of Defendant Chrysler LLC’s Motion for Leave to Renew, *D’Ulisse v. Amchem Prods., Inc.*, No. 113838/04 (N.Y. Sup. Ct. Jan. 22, 2008) (alleging that plaintiff denied exposure to trust defendants’ products under oath in state court and filed claim forms alleging exposure to same products under penalty of perjury with trusts); Transcript of Hearing, *Dunford v. Honeywell Corp.*, Case No. CL-25113, at 3-4

Notwithstanding this history, the audit provisions at many bankruptcy trusts appear to be more of an afterthought than a vital component of preserving trust assets. Of the trusts included in this study, only four provide for mandatory audits, and twenty-four require the advance consent of the TAC before any new audit plan may be adopted.¹⁵⁵ Two of the distribution procedures reviewed included provisions authorizing insurers to request audits.¹⁵⁶ Although eight trusts authorize open-ended audits without expressly requiring TAC approval, only two of the trusts surveyed by the GAO in connection with its 2011 report on bankruptcy trusts used random and targeted sampling of claims.¹⁵⁷ Indeed, given the history of asbestos litigation and global compensation systems generally, the trusts' representations to the GAO that they have uncovered no fraud¹⁵⁸ are more suggestive of weaknesses in their internal controls than evidence that the trust system has managed to avoid fraud and abuse.

By contrast, other recent global settlements have consistently included aggressive, independent mechanisms for auditing claims and seeking civil and criminal sanctions where fraudulent and specious claims are uncovered. The Fen-Phen national settlement, for example, initially provided for mandatory audits of 15% of the claims submitted and provided for severe penalties against the law firms, doctors and claimants who submitted claims that lacked a le-

(Va. Cir. Ct. Dec. 10, 2003) (identifying numerous conflicting representations under oath in state court proceedings and bankruptcy trust claim forms).

155. See *infra* Appendix C (Audit Provisions).

156. Once insurers settle with bankruptcy trusts, however, they have little interest in how trust proceeds are distributed. Their primary interest at this stage is to obtain information that may improve their defenses and offset potential in state court proceedings involving the same claims, but their efforts to use any negotiated audit rights for such purposes have not been successful. See *Renfrew v. Hartford Accident & Indem. Co.*, 406 F. App'x 227 (9th Cir. 2010).

157. GAO REPORT, *supra* note 13, at 23. For a discussion of the need for random and targeted audits in global settlements, see Brown, *Specious Claims*, *supra* note 135, at 619-23.

158. GAO REPORT, *supra* note 13, at 23.

gitimate medical foundation.¹⁵⁹ Similarly, the Vioxx Master Settlement Agreement provided for mandatory audits of between 2.0% and 5.0% of all claims submitted,¹⁶⁰ allowed for targeted audits with respect to repeat players with a history suggestive of fraudulent or specious submissions,¹⁶¹ authorized the defendant to conduct its own audits in its sole discretion and at its own expense,¹⁶² and included several provisions for pursuing civil and criminal actions against those submitting fraudulent claims.¹⁶³ The recent medical class action settlement in the Deepwater Horizon litigation also includes mandatory audits of five percent of all claims paid,¹⁶⁴ requires the submission of additional supporting documentation for all audited claims,¹⁶⁵ authorizes targeted audits of claims based on indicia of potential abuse,¹⁶⁶ and provides for potential civil and criminal penalties for those submitting misleading or fraudulent claims.¹⁶⁷

Audit plans are tailored to the nature of the settlement and the claims being reviewed,¹⁶⁸ and their design typically reflects a rational balancing of the costs and benefits of auditing claims. Where defendants must bear the costs of paying specious claims out of their own pockets, the experience in other global settlements suggests that they consistently accept the costs of mandatory, targeted audits to identify and deter these claims because, on balance, such audit costs reduce the total cost of the settlement. With the defendants' risk capped by section 524(g), however, defendants and

159. Nationwide Class Action Settlement with American Home Prods. Corp. (as amended) § VI(E)(1), *Brown v. Am. Home Prods. Corp.*, No. 99-20593 (E.D. Pa. Nov. 18, 1999).

160. Settlement Agreement Between Merck & Co., Inc. and Counsel § 10.2.1 (Nov. 9, 2007).

161. *Id.* § 10.2.2.

162. *Id.* § 10.3.1.

163. *See id.* §§ 10.1.3, 10.4.

164. Deepwater Horizon Medical Benefits Class Action Settlement Agreement (as amended) § XXI(G)(1), *Plaisance v. BP Exploration & Prod.*, No. 12-CV-28 (May 1, 2012).

165. *Id.* § XXI(G)(2)-(3).

166. *Id.* § XXI(G)(4).

167. *See id.* §§ XXI(G)(9), (H).

168. MANUAL FOR COMPLEX LITIGATION § 21.66 (4th ed. 2004).

trust fiduciaries have not demanded comparable claim audit procedures across bankruptcy trusts. The primary difference appears to be that the parties who will bear the costs of rampant overpayment to current bankruptcy trust claimants—future victims—are not able to speak for themselves, and those who are appointed to speak for them lack sufficient leverage and, perhaps, the will to demand comparable protections.

Even those trust fiduciaries who favor more aggressive audits must take into account potential internal challenges from TAC members and potential litigation with other plaintiffs' lawyers. Here, the Manville Trust's efforts to employ an aggressive claim audit program in the late 1990s serves more as a cautionary tale for trust officials than a warning for those who advance dubious claims. The trust's initial audit was designed "in favor of confirming the disease documented by the claimant and to give the benefit of any doubt to the claimant."¹⁶⁹ Even under this approach, this initial audit suggested that 41% of the claimants had no disease or a less severe condition than claimed, and the doctors most often used by plaintiffs had an average failure rate of 63%.¹⁷⁰ The trust then sought to expand the audit, but it was challenged by the affected law firms, and drew criticism from the presiding judge, who, among other things, stated that "the Trust had no business medically auditing claims (regardless of any authority to do so in the Trust documents)."¹⁷¹ And though the judge ultimately reversed course following dramatic reductions in the Manville payment percentage in subsequent years,¹⁷² and many of the Manville Trusts' apparent concerns about claim quality were arguably verified in the Silica MDL,¹⁷³ no bankruptcy trust has proposed similarly aggressive audits in the time since.

169. Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 131 (2003) (internal citation omitted).

170. *Id.* at 132.

171. *Id.* at 134 (internal citation omitted).

172. *Id.* at 135-36.

173. *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 597-98 (S.D. Tex. 2005) (finding widespread abuse in litigation screenings that followed the asbestos litigation screening model).

III. TRUST PERFORMANCE AND IMPLICATIONS

According to some estimates, the historical weaknesses in the asbestos trust system have led to unwarranted payments of hundreds of millions, if not billions, of dollars.¹⁷⁴ Although many trusts no longer accept medical reports from the doctors involved in manufacturing asbestos claims in the past, they have not adopted audits designed to identify similar patterns and practices today, and the lingering propensity for trusts to accept and pay far more claims than projected continues to interfere with efforts to provide equitable compensation for future claimants. This section analyzes the public reports of the thirty-two trusts identified in Part II and outlines the implications of the trusts' claim payment and payment percentage adjustment patterns for future victims and future asbestos bankruptcy cases.

A. *Assets and Payment Percentages*

From 2000 through 2006, bankruptcy trust payments hovered around \$500 million each year, spiking to slightly more than \$1 billion in 2004 before returning to the mean in 2005.¹⁷⁵ From 2007 through the end of 2011, verified payments from bankruptcy trusts to claimants were \$13.55 billion, or roughly 73% of the value of the assets remaining in the trusts at the end of 2011 (\$18.467 billion).¹⁷⁶ As reflected in Figure 1, claim payments exceeded new contributions to the trusts each year since 2008, and collectively outpaced new trust funding by more than \$5 billion.¹⁷⁷ Payments as a percentage of total assets peaked at 16.4% in 2009 and subsequently declined to 10.2% in 2011 as several trusts reduced their payment percentages.

174. Roger Parloff, *Mass Tort Medicine Men*, THE AM. LAWYER, Jan. 3, 2003, at 98 (estimating the cost to the Manville Trust from 1995 through 2001 at \$190 million); accord Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1341 (2008) (explaining how billions of dollars in settlements may have been paid on account of specious asbestos claims in tort and through the bankruptcy trust system).

175. See Scarcella & Kelso, *supra* note 14, at 3, ex. 3.

176. See *id.* at 3-5, exs. 2-5.

177. See *id.* at 3, ex. 2 (approximately \$3 billion of this difference was offset by investment and other income).

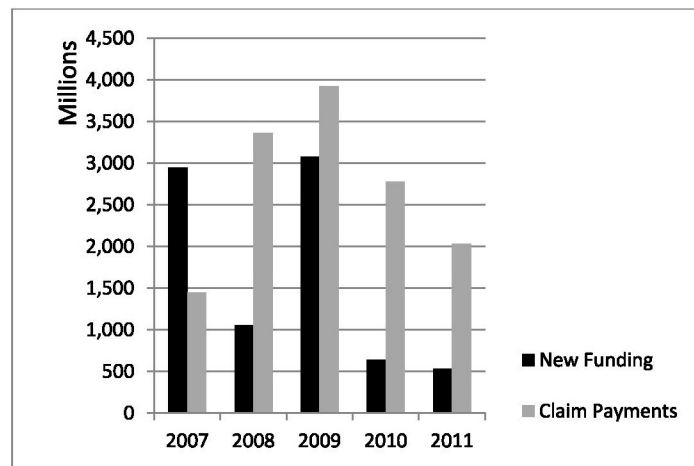


Figure 1: New Trust Funding and Payments, 2007–2011

This data does not tell the full story. The spike in payments across trusts trails a period of rapid growth in trust assets; as new trusts processed and paid thousands of new claims submitted in connection with their corporate predecessors' bankruptcies, the aggregate trust payments increased dramatically. As the number and size of new trusts declined, aggregate trust payments also slowed as trusts that came on line from 2005 through 2009 finished processing their initial claims. Even controlling for new trust submissions, however, trust payments largely exceeded projections in the latter part of the last decade.

Moreover, an analysis of the payment percentages adopted at bankruptcy trusts in recent years demonstrates that projections continue to underestimate claim submissions and payments. In its 2010 report on asbestos bankruptcy trusts, RAND Corporation found that only one of the twenty-nine trusts it analyzed—the T H Agriculture & Nutrition Trust—applied a 100% payment percentage, and that trust had not paid any claims through 2008.¹⁷⁸ The median payment percentage was 25%, and every trust included in the sample other than the THAN Trust paid less than 60%.¹⁷⁹

178. 2010 RAND REPORT, *supra* note 38, at 36-38 (noting that payment percentages ranged from 1.1% to 100%, with a median of approximately 25%).

179. *Id.* at 36.

As reflected in Figure 2, twenty of the thirty-two trusts surveyed have reduced their payment percentages since the 2010 *RAND Report*, and two others are in the process of revising their payment percentages.¹⁸⁰ These changes reflect a decline in per-claim compensation of 9% to 93.33% from 2010 levels, with a median of 38%. Shortly after the 2010 RAND REPORT was published, for example, the THAN Trust reduced its payment percentage from 100% to 30%.¹⁸¹ Thus, although approved mesothelioma claims asserted against the trust in the THAN bankruptcy and settled at the scheduled value for those claims (\$150,000) in 2010 would have been paid \$150,000, current and future mesothelioma claimants against the trust stand to receive less than one-third of this amount (\$45,000). As a result of these adjustments, payment percentages today range from .5% to 70% and have a median of 14%.¹⁸²

180. The DII Trust recently announced its intention to reconsider its payment percentage. See DII Industries, LLC Asbestos PI Trust Notice of Payment Percentage Reconsideration (Feb. 22, 2013) [hereinafter DII Industries Notice], available at <http://www.diiasbestostrust.org/files/20130222%20Notice%20of%20Payment%20Percentage%20Reconsideration.pdf> (“This re-evaluation will likely result in a reduction of the percentage.”). Moreover, this figure does not include the trustee’s proposed reduction of the Combustion Engineering payment percentage, which was to be effective June 18, 2012, but is currently being challenged by the TAC. See Notice to Holders of Combustion Engineering TDP Claims (May 17, 2012), available at http://www.cetrust.org/docs/20120517_CE_Payment_Percentage_Notice.pdf.

In addition, on April 9, 2013, the UNR Asbestos-Disease Claims Trust initiated a moratorium on claims processing to “examine the Trust’s recent, material increase in malignancy filings and review Trust payment procedures.” UNR Claims Processing Moratorium Notice (Apr. 9, 2013), available at <http://www.cpf-inc.com/upload/temp/UNRMoratorium.pdf>.

181. See T H Agric. & Nutrition, L.L.C. Asbestos Personal Injury Trust Payment Percentage Notice (Mar. 21, 2011) (on file with author).

182. If trusts that have not reported completing their initial claim review—ACandS (5.78%), ASARCO (22%), Burns and Roe (25%), Christy Refractories (11%), and Hercules Chemical (6.7%)—are included, the median drops to 10.5%.

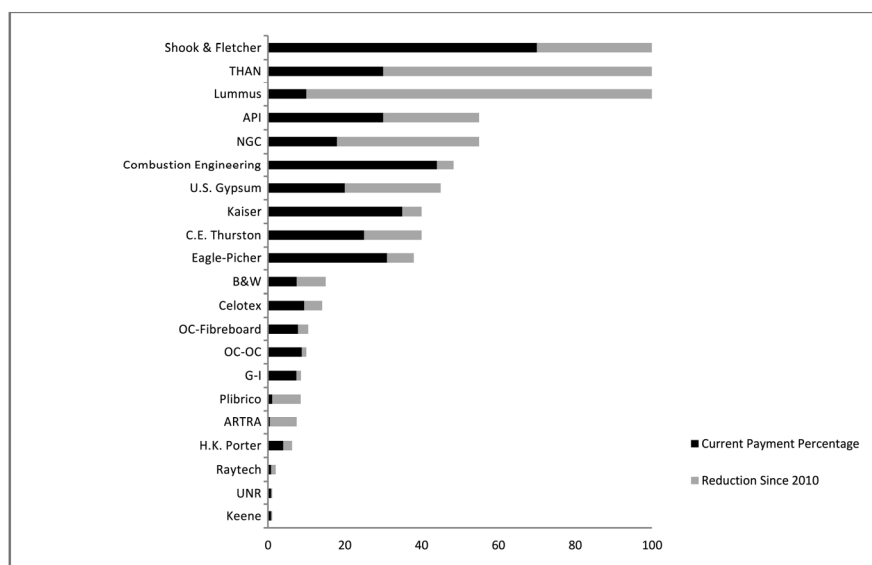


Figure 2: Payment Percentage Reductions Since 2010

A trust's decision to reduce its payment percentage reflects that the trust previously underestimated its long-term liabilities, overestimated its projected assets, or both. The recent surge in payment percentage reductions does not appear to be driven primarily by lingering investment losses associated with the recent financial crisis¹⁸³ or significant increases in trust litigation and other expenses.¹⁸⁴ Rather, these reductions reflect significant, lingering disparities in projected and actual claim submissions and payments in recent years. Indeed, where trusts have provided an explicit explanation for the payment percentage reductions, they have identified unexpected growth in claim submissions as a significant factor in their decisions.¹⁸⁵

183. Although trust investments lost \$2.137 billion in 2008, these investments gained \$2.363 billion and \$1.306 billion in 2009 and 2010, respectively. See Scarcella & Kelso, *supra* note 14, at 3, ex. 2.

184. Trust expenses remain less than 1% of assets under management. *Id.* at 3, ex. 2.

185. See, e.g., C.E. Thurston & Sons Asbestos Trust, Notice of Offer Suspension (Jan. 2012), available at <http://www.claimsres.com/documents/CET/Notice%20of%20Offer%20Suspension%20-%20January%202012.pdf> (noting that it was the product of "claims filings

This miscalculation begins during the bankruptcy case. Although estimation proceedings are common in asbestos bankruptcies, they do not provide a basis for ensuring that the trust is in position to pay current and future claimants equitably. These proceedings focus on the debtor's long-term liability under state law, not the trust's estimated lifetime liabilities under its TDP. But the trusts' liabilities under their TDPs, of course, will be significantly higher than the debtor's estimated tort system liability, given the TDPs' generous terms.¹⁸⁶ At most, the initial payment levels are negotiated between the claimants' committee and the legal representative for future claimants,¹⁸⁷ but there is little in the public record to determine whether and to what extent these discussions occur prior to confirmation in any given case. These estimates consistently fall short, thereby allowing current claimants to obtain high initial recoveries and requiring substantial reductions in payments to future claimants.

B. *The Impact on Future Victims*

Today's current claimants are yesterday's future claimants. And the rapid depletion of trust assets and corresponding payment percentage reductions means that individual trusts will not pay them at the same levels as they paid similar claimants in the past. If these trends continue, today's future claimants will receive less compensation than the trusts pay now. In sum, although section 524(g) draws legitimacy from its focus on ensuring that claims will be treated in "substantially the same manner" regardless of when they are submitted,¹⁸⁸ experience shows that equitable compensation across past, current and future claimants will not be realized.

significantly in excess of levels projected); *see also* Memorandum from the UNR Asbestos-Disease Claims Trust to Claimant's Counsel (Mar. 21, 2011) (citing an "unanticipated significant increase in claim filings" as the reason the Claims Trust reduced its payment percentage to 0.82%).

186. *See* discussion *supra* Part II.B.

187. Given that the debtors' exposure will be capped by their contributions to the trusts they establish, they do not typically take an active role in negotiating TDPs.

188. 11 U.S.C. § 524(g)(2)(B)(ii)(V) (2006).

Although this disparate treatment conflicts with the primary objective of section 524(g), a common defense of the trust system is that future victims are nonetheless better off with an imperfect trust system than without it. As one court succinctly put it, “at least future claimants receive something.”¹⁸⁹ This is perhaps true as far as it goes in some cases, but it does not go far enough to have any meaning. Even if trusts are currently capable of paying something to current claimants, the ongoing downward trend in payment percentages at formerly well-financed trusts suggests that more trusts will join the ranks of those that are currently inactive, have payments suspended intermittently in the future, or pay such a small fraction of scheduled values that the available recoveries no longer justify submitting claims.

Moreover, section 524(g) is not limited to companies that would be forced into liquidation otherwise. The Mid-Valley bankruptcy, for example, ultimately channeled the liabilities of the Halliburton entities to the DII Industries (DII) Trust notwithstanding clear evidence that these entities had no immediate or long-term risk of liquidation.¹⁹⁰ In capping this solvent company’s asbestos exposure at a fixed amount, the court also capped the pool of assets available for asbestos victims and imposed the full risk that the trust might be underfunded on future victims. Today, the DII Trust pays 52.5% of the assigned claim value, and, as noted previously, this percentage is likely to decline in the near future.¹⁹¹

The equitable compensation requirement also reflects the value created by binding future claimants to the trust. Although defendants historically settled large volumes of claims in blocks in an effort to manage their asbestos liabilities,¹⁹² such wholesale settlements only encouraged more litigation and increasingly aggressive client

189. *In re Quigley Co.*, 449 B.R. 196, 201 (Bankr. S.D.N.Y. 2011).

190. Ronald Barliant et al., *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441, 451-52 (2004). To the contrary, the debtors “repeatedly advised the bankruptcy court that they were solvent notwithstanding their asbestos liabilities.” Plevin et al., *supra* note 28, at 297 n.116.

191. See *ER Claim Values*, DII INDUS., LLC ASBESTOS PI TRUST, http://www.diiasbestostrust.org/page.asp?page_id=43 (last visited Mar. 18, 2013); DII Industries Notice, *supra* note 180.

192. Brown, *Specious Claims*, *supra* note 135, at 570.

solicitations by plaintiffs' firms. Few defendants today are thus willing to enter into truly global settlements through private agreement without the "total peace"¹⁹³ promised by channeling future claims to the trust. Thus, impairing future victims generates value for all claimants that would not otherwise be available.

Finally, the potential for future victims to offset these lower trust values by obtaining larger judgments and settlements in the tort system is no panacea. As states adopt higher causation standards¹⁹⁴ and many of the defendants remaining in the tort system have increasingly tangential ties to the asbestos industry,¹⁹⁵ future victims

193. See Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 980-81 (2010) (discussing the impact of the defendants' demands for "total peace" on the failed asbestos class actions of the late 1990s); Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 128 (2004) (stating that any defendant seeking "global peace" would want all future claims behind it); see also Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 DEPAUL L. REV. 457, 474 (2001) (stating that defendants demand "global peace").

194. See Bernstein, *supra* note 128, at 59, 69.

195. See Behrens, *supra* note 132, at 528 ("Now, an increasing number of plaintiffs are bringing claims for *de minimis* or remote exposures, such as 'shade tree' brake work on the family car or one remodeling job using asbestos-containing joint compound."); Sheila Jasanoff & Dogan Perese, *Welfare State or Welfare Court: Asbestos Litigation in Comparative Perspective*, 12 J.L. & POL'Y 619, 628 (2004) ("Defendants' bankruptcies . . . have not dissuaded further asbestos mass tort claims as might have been expected. Instead, plaintiffs' lawyers are filing even more claims . . . against defendants whose involvement with asbestos production is increasingly tangential."); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1171 n.223 (2010) (noting the expansion of asbestos personal injury litigation to "more remote defendants outside the traditional asbestos industry"); David G. Owen, *Against Priority*, 37 SW. U. L. REV. 557, 561 (2008) ("Peripheral defendants appear now to be bearing the largest burden of damage assessments in asbestos litigation, but claims against them typically are weaker in terms of causation, apportionment, and defensive challenges to the foreseeability of the risk. What all this means is that the aggregate pot of available resources in asbestos litigation appears to be increasingly insufficient to cover the many tens of thousands of new claims, piled on top of hundreds of thousands of existing claims, made upon the resource pot each year. Thus, a major aspect of the asbestos problem is one of limited funds.") (internal citation omitted); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. CIN. L. REV. 1319, 1340 (2002) ("The future of asbestos litigation will likely involve claimants whose exposure to asbestos is increasingly fleeting. Moreover, these claimants will sue defendants whose involvement in the chain of commerce for

appear to be less likely to obtain full compensation for their injuries, even in states with relatively low joint liability thresholds. Although commentators often refer to asbestos personal injury litigation as though the collective pool of assets available for victims is limitless, this does not mean that each individual plaintiff will be able to obtain full recovery through bankruptcy trusts and the tort system. Some current plaintiffs may be able to make up some of the difference by obtaining compensation from trusts against which they have little or no actual evidence of exposure, but this depletes the pool of assets that would otherwise be available to plaintiffs with strong evidence of exposure to these trusts' predecessors' products.

C. *Implications for Future Asbestos Bankruptcies*

Just as defendants require peace as a condition of global settlement, lawyers who control sufficient votes to veto any section 524(g) plan frequently seek a premium for their support. In the asbestos "pre-pack" bankruptcies of the early 2000s, this premium frequently took the form of a two-tier trust or similar settlement structure that effectively front-loaded payments to lead plaintiffs' firms' current clients and left only a fraction of the funds set aside for asbestos claims for other current and future victims.¹⁹⁶ And prior to 2004, lower courts routinely accepted these plans notwithstanding section 524(g)'s requirement that current and future claims receive substantially the same treatment. Following the Third Circuit's criticism of the two-tier bankruptcy trust model in *Combustion Engineering, Inc.*¹⁹⁷ and subsequent critique of the conflicts of interests underlying a similar plan in *Congoleum Corp.*,¹⁹⁸ plan proponents have largely abandoned two-tier and similar asbestos bankruptcy settlements.

Nonetheless, the inequities and self-dealing concerns that animated the Third Circuit's analyses in *Combustion*

asbestos products is increasingly tangential. These claims will likely be increasingly difficult to win at trial.").

196. For a detailed discussion of these "pre-pack" bankruptcies, see Mark D. Plevin et al., *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. TEX. L. REV. 883 (2003).

197. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 240-42 (3d Cir. 2004).

198. *In re Congoleum Corp.*, 426 F.3d 675, 691-94 (3d Cir. 2005).

Engineering and *Congoleum* remain. New trusts may pay the initial wave of claims at a high rate and postpone any revisions to payment percentages until after this initial review is complete, even where early claim data suggests that the projections that supported the initial payment percentage were flawed.¹⁹⁹ After the claimants who voted on the plan are paid, the downward revisions to payment percentages can begin. We are left with a system in which few trusts continue to pay claims at historic highs, and roughly two-thirds are paying claims at historic lows.²⁰⁰

This continuing trend raises serious questions concerning the confirmation of future asbestos bankruptcy plans. The bankruptcy trust system is long past the point where participants can look at the rapid depletion of newly-established trusts as unanticipated and unintended consequences of generous compensation criteria. Bankruptcy trusts continue to employ largely the same claim criteria, are managed by many of the same players from one to the next, and, with few exceptions, approach claim audits and quality control in the same manner. If we can be reasonably assured of anything, it is that a trust that employs the same criteria and follows the same practices as its predecessors is extremely *unlikely* to “value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner” as required by section 524(g).²⁰¹ And unless future plan proponents can provide reasonable assurances that the proposed trust’s criteria, practices and audit plans are sufficiently tailored to address these historical weaknesses, it is difficult to fathom how the judges overseeing these cases can conclude that

199. See Kirk T. Hartley et al., *Pre-Packaged Plan of Inequity: The Financial Abuse of Future Claimants in the T H Agriculture and Nutrition 524(g) Asbestos Bankruptcy*, MEALEY’S ASBESTOS BANKR. REP., Nov. 2011, at 31 (discussing how this unfolded in the THAN bankruptcy and subsequent trust, notwithstanding the fact that the legal representative appointed in that case appears to have challenged plaintiffs’ efforts to obtain undue premiums throughout the bankruptcy case). Although some defense lawyers assert that this disparity is driven by manipulation of the individual review process—namely that preferred firms’ clients receive payments far in excess of their respective schedule values in order to obtain their favorable votes on the plan of reorganization—these assertions cannot be tested empirically because the trusts do not disclose claim-level data.

200. See *supra* notes 9-12 and accompanying text.

201. 11 U.S.C. § 524(g)(2)(B)(ii)(V) (2006).

they provide reasonable assurance of equitable compensation for future victims.

IV. RESTORING THE PROMISE OF SECTION 524(g)

If we view section 524(g) as a statutory experiment,²⁰² it has been an effective proof-of-concept whose shortcomings are attributable to statutory gaps and failures in enforcement and monitoring rather than intrinsic flaws in its premise. Bankruptcy has an inherently collective focus, and it is intended to ensure that all parties' interests are adequately represented even when those parties are unable to speak for themselves. The weaknesses observed in asbestos bankruptcies to date stem from the vague parameters of this representation, the absence of any meaningful post-confirmation trust oversight and disclosure provisions, and the courts' limited options for bringing recalcitrant parties to the bargaining table in contested cases. These flaws, rather than any intrinsic weakness in the trust-injunction framework, generate the shortcomings of section 524(g).

Historically, critics have focused most of their attention on developing proposals for modifying the process for establishing trusts,²⁰³ but such changes will do little to alter the management of the roughly \$30 billion in assets held or soon to be held by existing trusts. Even with respect to these trusts, however, considerable opportunities for advancing the objectives of section 524(g) remain. This section outlines the potential benefits and costs of recent transparency initiatives and the potential scale economies across trusts that create opportunities for reducing existing administrative burdens and limiting the costs of a more robust cross-trust disclosure and audit system.

202. The legislative history of Section 524(g) of the Bankruptcy Code suggests that it was intended to not only codify the Manville approach in asbestos cases but also serve as a test case to determine "whether the [trust-injunction] concept should be extended into other areas." 140 CONG. REC. H. 27,692 (1994).

203. See, e.g., Barliant et al., *supra* note 190, at 468-69 (praising courts that reject pre-packs for fundamental fairness); Brown, *supra* note 1, 932-33 (arguing for systematic changes in the asbestos bankruptcy process); Plevin et al., *supra* note 28 (arguing for reform in the selection of future claimants' representatives in asbestos bankruptcies).

A. *Claim Transparency*

Transparency has been a critical component of reforms aimed at unwinding and preventing abuse; allowing creditors, the United States trustee, courts, other parties in interest and, ultimately, Congress to identify and address these shortcomings and preserve the integrity of the bankruptcy process.²⁰⁴ Given the level of private control over trust management and claim processing, the absence of comparable transparency within the trust system necessarily raises concerns about whether the funds are administered in a manner consistent with the objectives of Section 524(g).²⁰⁵ Indeed, although trust officials and trust critics frequently make sweeping statements about the amount of fraud in the bankruptcy trust system, no one person or organization currently has access to sufficient information across trusts to provide any meaningful empirical assessment of the extent to which fraudulent claims are, or are not, prevalent in the bankruptcy trust system. This necessarily limits their potential to identify dubious claiming patterns, and it likewise limits the information available for predicting the impact of changes to their criteria and quality control mechanisms.

Moreover, the focus on claim-level transparency holds particular promise as a means of modifying trust management. Although bankruptcy trusts tend to be reactive rather than proactive, they appear to be attuned to the broader public perception of their activities and place a premium on managing negative public opinion. For example, substantially all of the trusts that were active at the time of the Silica MDL acted quickly to disqualify the doctors in screening

204. See *Furthering Asbestos Claim Transparency (FACT) Act of 2012: Hearing on H.R. 4369 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 26-28 (2012) (statement of Professor S. Todd Brown).

205. See *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 362 (3d Cir. 2012); *In re Congoleum Corp.*, 426 F.3d 675, 693 (3d Cir. 2005) (“As this case demonstrates, leaving the procedures for allocation of resources predominantly in the hands of private, conflicting interests has led to problems of fair and equal resolution. The need for counsel with undivided loyalties is more pressing in cases of this nature than in more familiar conventional litigation. Correspondingly, the level of court supervision must be of a high order.”).

companies involved in the fraud uncovered in that case.²⁰⁶ Of course, to do otherwise in the face of clear fraud and abuse is to invite litigation and legislative or judicial second-guessing of the trusts' operations and management. At the same time, enhanced claim transparency may discourage claim submissions that omit critical information or conflict with the claimant's representations to other trusts and in the tort system. The trusts' confidentiality and sole benefit provisions may simplify claim processing, but they also create opportunities for avoiding detection when claim forms omit unfavorable information or conflict with sworn representations elsewhere. Conversely, a more transparent system should improve state courts', defendants', and vigilant trust officials' access to the information they need to identify and address such manipulation.

1. *Recent Transparency Proposals.* In the last two years, legislators at both the state and federal level have considered far-reaching legislation aimed at reducing the secrecy that surrounds trust claim submissions today. The state and federal proposals are generally referred to by similar names—the Asbestos Claims Transparency Act (for state-level initiatives) and the Furthering Asbestos Claims Transparency Act of 2012 (federal)²⁰⁷—and are supported by largely identical interest groups, so it is perhaps unsurprising that many legislators, lawyers, opposing interest groups and others frequently appear to confuse the state and federal proposals. Yet these proposals have few overlapping provisions and target distinct concerns in the intersection of bankruptcy trusts and state tort law.

At the state level, Ohio's recently-passed transparency act, H.B. 380,²⁰⁸ is less a public transparency bill than a framework for managing the discovery of bankruptcy trust submissions and payments in tort litigation in Ohio state courts. Indeed, it does not provide for public disclosure of trust information outside of the discovery process or otherwise address trust governance. Among other things, this act

206. See, e.g., Mark A. Behrens, *Asbestos Litigation Screening Challenges: An Update*, 26 T.M. COOLEY L. REV. 721, 724-25 (2009).

207. Furthering Asbestos Claim Transparency (FACT) Act of 2012, H.R. 4369, 112th Cong. (2d Sess. 2012) [hereinafter FACT Act]. The FACT Act was passed out of committee, but it was not put before the full House for a vote.

208. OHIO REV. CODE ANN. § 2307.952 (West 2013) (this act became effective on Mar. 27, 2013).

provides that asbestos personal injury plaintiffs must provide defendants with a sworn statement “identifying all existing asbestos trust claims” made by the plaintiff and “all trust claims material pertaining to each identified asbestos trust claim” within thirty days of the commencement of discovery or submission of the trust claim.²⁰⁹ Moreover, defendants are authorized to request a stay of the state tort action for the purpose of requiring the plaintiff to submit additional claims to bankruptcy trusts.²¹⁰ Other states have considered or are expected to consider similar legislation in the near future.

At the federal level, following a failed effort to amend the Federal Rules of Bankruptcy Procedure to require mandatory disclosure of trust submissions and payments,²¹¹ legislation to amend the Bankruptcy Code to require these disclosures was introduced in 2012.²¹² Specifically, the FACT Act proposed amending section 524(g) of the Bankruptcy Code to require quarterly reports from the each trust that described “each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant” during the quarter.²¹³ These disclosures would not include confidential medical records or the claimant’s full social security number.²¹⁴ In addition, the FACT Act required trusts to disclose trust claim forms and supporting documentation to defendants in related state tort litigation.²¹⁵

2. Striking the Appropriate Balance. Although distinct in focus and operation, critics contend that both proposals will unduly increase the costs and delays associated with trust administration and state tort litigation.²¹⁶ In addition,

209. *Id.*

210. *Id.* § 2307.953(B).

211. FACT ACT REPORT, *supra* note 105, at 13-14.

212. *Id.*

213. FACT Act, *supra* note 207, at § 2.

214. *Id.* This tracks Bankruptcy Rule 9037(a), which allows parties to include only the last four digits of their social security number where the number is required.

215. *See id.*

216. *See generally* FACT ACT REPORT, *supra* note 105, at 31-40 (dissenting views).

critics contend that the FACT Act is “an assault against asbestos victims’ privacy interests.”²¹⁷ These objections identify concerns that should be considered in any transparency proposal. After all, any such proposal will entail costs and carry the potential for revealing private information that may be embarrassing or subject to misuse in the wrong hands. These concerns are discussed in turn.

a. *Avoiding Unnecessary Costs and Delays.* The Ohio legislation clearly imposes additional requirements upon plaintiffs early in the litigation process, though many of these costs will be incurred regardless of when trust claims are filed. And in empowering defendants to pursue a stay of the proceedings and litigate questions concerning the plaintiffs’ potential trust recoveries in state court, the act may provide defendants with an opportunity to delay (and increase the cost of) state court proceedings until these questions are resolved. Although this raises the specter of defendants simply seeking stays for the sole purpose of prolonging the litigation, plaintiffs may pre-empt such requests by filing all of their expected trust claims early in the case or avoid the stay by filing claims with the trusts identified by the defendant within the statutory period.²¹⁸ Moreover, courts overseeing these cases retain discretion to limit abusive stay requests.²¹⁹

While the various state-level initiatives impose direct costs on plaintiffs and their counsel, the FACT Act imposes additional obligations on bankruptcy trusts only.²²⁰ Plaintiffs will face additional delays only if the trusts are unable to meet these obligations without interfering with claim review and payment. These costs will be offset to a degree by reducing state tort defendants’ shotgun-style discovery requests to trusts, and any trust claim payment delays may likewise be offset by discouraging plaintiffs’ firms from de-

217. *Id.* at 29 (dissenting views).

218. *See* OHIO REV. CODE ANN. § 2307.953(C)(1)(a) (West 2013) (explaining a stay motion is disposed of upon demonstration that trust claims have been submitted).

219. *See id.* § 2307.953(D) (stating defendant must demonstrate that claims can be submitted to the trusts in good faith, and plaintiffs are not required to submit claims where the costs of doing so will exceed the potential recovery).

220. *See generally* FACT Act, *supra* note 207.

laying submissions to avoid this discovery.²²¹ Moreover, to further offset any additional costs to the trusts, the final version of the FACT Act authorized trusts to assess discovery-related fees from state tort defendants.²²²

b. Resolving Privacy Concerns. Perhaps the most strident critique of the FACT Act is that it “could further victimize unsuspecting asbestos victims by requiring information about their illness to be made publically available to anyone who has access to the Internet.”²²³ This is so because the act would require trusts to file quarterly claim-level reports with the bankruptcy court, and these reports would become part of the public docket for the bankruptcy case in which the trust was established.²²⁴ These reports, in turn, might “be used by data collectors and other entities for purposes that have absolutely nothing to do with compensation for asbestos exposure.”²²⁵

With respect to public transparency, the policy question is not one of dueling absolutes (i.e., public disclosure of large volumes of potentially embarrassing or damaging private information versus no disclosure of any claim-level information); it is whether sufficient claim transparency can be achieved without undermining plaintiffs’ legitimate privacy interests. Of course, it is possible to protect a claimant’s anonymity without fully shielding relevant information concerning her claims from public scrutiny, just as it is possible to tailor claim-level disclosures so that the information is of no use to identity thieves and other data collectors with nefarious motives.

This balancing of interests is hardly novel. To the contrary, debtors provide similar information about their creditors pursuant to section 521 of the Bankruptcy Code, and Official Form B10 (the proof of claim) requires all creditors—including tort creditors—to disclose their names, addresses, email addresses, telephone numbers, the legal and factual foundations for their claims, and “copies of any documents that support the claim[s]” in connection with sub-

221. See 2011 RAND REPORT, *supra* note 104, at 19.

222. FACT ACT REPORT, *supra* note 105, at 28.

223. *Id.* at 31 (dissenting views).

224. *Id.* at 32 (dissenting views).

225. *Id.*

mitting a claim. Many plaintiffs have historically filed this information through their counsel in asbestos bankruptcies²²⁶ and in connection with their personal injury cases in state court.²²⁷ Indeed, the API Trust already releases this information in its annual reports,²²⁸ and there is no evidence that this data has been misused. Finally, documents on the public dockets in several closed asbestos bankruptcy cases are not available on the Internet today,²²⁹ and courts have the flexibility to otherwise modify access where necessary to avoid misuse.²³⁰

Ultimately, the level of transparency required to identify and deter specious claims, promote confidence in the trust system and otherwise protect future victims' interests is lower than already required of other bankruptcy creditors. Claim-level analysis requires no more than sufficient information for independent outsiders to distinguish claims across trusts and match these claims to the applicable plaintiffs' cases in the tort system. Limiting personal identification to the claimant's last name and last four social security number digits should be sufficient for this purpose and preserve the claimant's anonymity with respect to all parties other than their named defendants in the tort system. Named defendants will have access to sufficient information through that litigation to make the connections necessary to protect their interests.

226. For example, some of this information is currently available in the Flintkote claims register. *Chapter 11 Bankruptcy Administration Website*, THE FLINTKOTE CO., <http://cert.gardencitygroup.com/flk/fs/searchcr> (last visited Apr. 7, 2013).

227. For example, plaintiff names and diseases are routinely disclosed in submissions and orders that are freely available on the New York City asbestos litigation website. *See New York City Asbestos Litigation Website*, NYCAL, <http://www.nycal.net/index.htm> (last visited Apr. 7, 2013).

228. *See, e.g.*, API Inc. Asbestos Settlement Trust, Annual Report of the Trustee, No. 05-30073, Dkt. No. 611 (Bankr. D. Minn. Apr. 23, 2012).

229. Bankruptcy courts have increasingly closed asbestos bankruptcy cases following plan confirmation, and Internet access to these closed cases on PACER is limited to docket reports. Thus, those seeking access to documents in these closed cases must either be parties to the case or acquire them manually.

230. *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 560 (Bankr. D. Del. 2005) (stating bankruptcy court acted appropriately in limiting electronic access to Bankruptcy Rule 2019 disclosures).

B. *Leveraging Economies of Scale*

Much of the appeal of the recent transparency initiatives comes from the previously noted pause that attends to any process that places so much control over asset distribution in the hands of interested parties. These concerns are amplified by the growing secrecy that surrounds trust administration and examples of trust-related claim fraud or, at least, manipulation that have been uncovered notwithstanding this secrecy. Collectively, the trusts' efforts to preserve the appearance as conscientious stewards of assets for the sole benefit of legitimate victims seem unlikely to hold over the long term barring more meaningful change to their operations, audit practices, and willingness to accept independent outside review.

Beyond the need for transparency and audit plans that do not require the consent of TACs, the growth of the bankruptcy trust system has generated a potential for cooperation and sharing of common tasks that has not been realized to date. Most trusts employ similar claim criteria, process claims advanced by the same professionals and plaintiffs, and are confronting similar challenges in balancing the interests of current and future victims. Although some trust administrators have recognized and taken advantage of the potential economies of scale these common features provide within the trusts they serve, this potential is far more significant if extended across trusts regardless of the claim administrator. This consolidation of administration and quality control efforts provides a far more cost-effective and robust system for processing claims, discouraging abuse, and avoiding conflicts with state efforts to manage ongoing asbestos litigation.

Moreover, as more state courts authorize tort defendant discovery into plaintiffs' trust submissions, a centralized filing system may provide comparable economies of scale for the benefit of trusts and tort litigants alike. Trusts are increasingly besieged with document requests, many of which concern plaintiffs who have not even submitted claims to them. Channeling these requests to a centralized claim submission administrator can thus allow trusts to avoid the time and expense associated with responding to inapplicable document requests. At the same time, it will provide a

one-stop shop for verifying trust submissions across multiple trusts, thereby avoiding the need to subpoena this information across numerous trusts and reducing the associated costs and delays.

The primary drawback to this approach is the up-front costs of developing a uniform filing system across trust administrators who currently employ different forms and may require integration of proprietary software. Although administrators may have found competitive advantages in centralizing claim submissions across the trusts they serve, they stand to lose these advantages under a broader consolidation of the trust submission process. And the transition from a system with numerous, diverse individual submission systems to a consolidated filing system may also delay and confuse filings in the short term. As suggested previously, however, trusts may offset these costs by charging fees for responding to claim inquiries and modest, reimbursable claim submission fees to claimants.

The adoption of a mandatory system-wide claim-level audit plan free from interference by the trusts' respective TACs likewise has promise. Given the overlap in relevant data, parties, and practices in claim submissions, trusts could pool their aggregate claim data for random and stratified sampling. This should improve the trusts' ability to identify suspicious claim patterns and practices and allow for targeted audits of a sample of these claims.²³¹ Cross-trust claim audits should also reduce each trust's individual costs associated with the audit by dividing these costs across the participating trusts. And by tracking claims asserted by each claimant across all or substantially all of the active trusts, such a centralized audit system is far more likely to uncover materially conflicting representations from one trust to the next even in the absence of a centralized filing system. In sum, such an approach would yield more data for identifying suspicious claim patterns, provide economies of scale to improve the economic feasibility of such audits, and discourage claimants and repeat players from submitting claims based on conflicting representations.

231. See Brown, *Specious Claims*, *supra* note 135, at 621-22 (discussing the use of stratified sampling to uncover suspicious patterns and practices in global settlements).

C. *The Need for Legislative Action*

Bankruptcy trust officials appear focused on sustaining an image of the system as striking an appropriate balance between deterring specious claims and managing the costs of doing so. Today, this strategy centers on preserving the confidentiality of claims and mounting aggressive challenges to efforts to inquire into trust submissions and payments. Although this strategy may be seen as a way of limiting undue public criticism of the trust system, it ultimately backfires when clear examples of fraud and abuse become public knowledge. As these examples continue to appear²³² and trust officials continue to deny that there is any fraud,²³³ even those who may be inclined to give trusts the benefit of the doubt will harbor doubts about the trusts' credibility and quality controls.

Bankruptcy trusts still have time to get out ahead of legislative efforts, though they appear unlikely to change course. Each of the public transparency, centralization of claim submissions and disclosure and cross-trust audit mechanisms outlined above can be implemented across trusts privately. From a governance standpoint, however, any measure to roll back the secrecy surrounding claim-level data is unlikely to draw the consent of TAC members across trusts. As noted previously, centralizing claim submissions and discovery management is unlikely beyond current levels. Though the costs of an independent, comprehensive cross-trust claim audit program may be relatively modest if shared across multiple trusts, this, too, is unlikely to overcome the need for TAC consent at all of the relevant trusts. If, however, the trust system can overcome these internal obstacles and demonstrate a firm commitment to

232. See *supra* notes 150-52 and accompanying text; see also Complaint, *In re Garlock Sealing Techs., LLC*, 10-BK-31607 (Bankr. W.D.N.C. June 4, 2012) (alleging fraud in a pre-bankruptcy asbestos case, in which plaintiffs' attorneys were allegedly aware of conflicting representations in the state court proceeding and ballots submitted in connection with asbestos bankruptcy cases and failed to disclose the latter as required in the state proceeding); Pretrial Hearing Transcript, *In re Asbestos Litig. (Montgomery v. Am. Steel & Wire Corp.)*, 09C-11-217, at 3 (Del. Sup. Ct. Nov. 7, 2011) (criticizing plaintiff's conduct in concealing trust submissions as "egregiously bad behavior," "misrepresenting," and "trying to defraud" and noting that such conduct "is an example of the games that are being played").

233. See GAO REPORT, *supra* note 13, at 23.

greater transparency, aggressive quality control, or both, it may avoid more sweeping regulatory interventions down the road.

In the absence of private reform, the case for prompt regulatory action at the state and federal level is compelling. As noted, the depletion of trust assets continues at an alarming rate. Some active trusts have reduced payments so far that they appear on the verge of becoming inactive. Others have taken aggressive actions to preserve assets through adopting low payment percentages, but in doing so they have ensured that current and future victims will receive far less than past victims received. Once depleted, these funds will not be recovered, and as noted previously, this depletion increases the divide between future plaintiffs' losses and their potential recoveries across trusts and in the tort system.

CONCLUSION

Given the limits of the class action device, multidistrict litigation and other aggregative mechanisms; bankruptcy's appeal as a means of bringing finality to complex mass harm litigation is obvious. Yet the trust system also demonstrates the danger of employing the power of the bankruptcy process to bind claimants without strict adherence to its case oversight, claim review, cram-down and other mechanisms for balancing stakeholder interests. Today's trust shortfalls are the product of yesterday's policy failures in the design and application of section 524(g), and this history suggests that shortfalls are virtually certain tomorrow given the continuing misalignment of private incentives and public policy.

As demonstrated, however, the barriers to achieving the promise of section 524(g) are surmountable. Enhanced transparency in this area appears likely to influence trust management, deter specious claims, and improve trust design over the long term without undermining claimants' privacy interests. Moreover, a centralized submission and audit framework should produce considerable scale economies and enable the trusts to employ far more effective and efficient claim audits and other quality controls. The legitimacy of this process hinges upon the willingness of bankruptcy trusts to adopt—or, given the internal difficulties of voluntary adoption, for courts and Congress to demand—a more transparent and aggressive framework for protecting

trust assets for the benefit of legitimate future victims. The question at this stage is whether we will continue to follow the practices and procedures that have failed future victims for a quarter century or take advantage of the remaining opportunities to preserve their prospects for meaningful recovery.

Appendix A
Payment Percentages

<u>Trust</u>	<u>Current %</u>	<u>% on 1/1/2010</u>	<u>Reduction</u>	<u>Historic Low</u>
A-Best Asbestos Settlement Trust	17.4	17.4		
API, Inc. Asbestos Settlement Trust	30	55	-45.45%	X
Armstrong World Industries Asbestos Personal Injury Settlement Trust	20	20		
ARTRA 524(g) Asbestos Trust	0.5	7.5	-93.33%	X
Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust	7.5	15	-50.00%	X
C.E. Thurston & Sons Asbestos Trust	25	41	-39.02%	X
Celotex Asbestos Settlement Trust	9.4	14.1	-33.33%	X
Combustion Engineering 524(g) Asbestos PI Trust	48.33 (contested effort to reduce to 44%)	48.33	-8.96%	X, if current proposed revision to 44% is approved
Congoleum Plan Trust	6.25	6.25		
DII Industries, LLC Asbestos PI Trust	52.5 (under review)	52.5		X

<u>Trust</u>	<u>Current %</u>	<u>% on 1/1/2010</u>	<u>Reduction</u>	<u>Historic Low</u>
Eagle-Picher Industries Inc. Personal Injury Settlement Trust	31	38	-18.42%	X
Federal Mogul Asbestos Personal Injury Trust—Turner & Newall Subfund	6	6		
Fibreboard	7.8	11	-29.09%	X
G-1 Holdings Inc. Asbestos Personal Injury Settlement Trust	7.4	8.6	-13.95%	X
H. K. Porter Asbestos Trust	4	6.3	-36.51%	X
J.T. Thorpe Company Successor Trust	57	38	50.00%	
J.T. Thorpe Settlement Trust	45	40	12.50%	
Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust	35	35		
Keene Creditors Trust	0.8	1.1	-27.27%	X
Leslie Controls	40	40		
Lummus 524(g) Asbestos PI Trust	10	100	-90.00%	X
Manville Personal Injury Settlement Trust	7.5	7.5		

<u>Trust</u>	<u>Current %</u>	<u>% on 1/1/2010</u>	<u>Reduction</u>	<u>Historic Low</u>
NGC Bodily Injury Trust	18	55	-67.27%	X
Owens Corning	8.8	10	-12.00%	X
Plibrico 524(g) Trust	1	8.5	-88.24%	X
Porter Hayden Bodily Injury Trust	1.8	1.8		X
Raytech Corporation Asbestos Personal Injury Settlement Trust	0.84	2	-58.00%	X
Shook & Fletcher Asbestos Settlement Trust	70	100	-30.00%	X
T. H. Agriculture & Nutrition, LLC Asbestos Personal Injury Trust	30	100	-70.00%	X
United States Gypsum Asbestos Personal Injury Settlement Trust	20	45	-55.56%	X
Western Asbestos Settlement Trust	44	40	10.00%	
UNR Asbestos-Disease Claims Trust	0.82	1.1	-25.45%	X

Appendix B
Exposure and Medical Criteria

<u>Trust</u>	<u>Specific Exposure Minimum</u>	<u>Total Exposure Minimum</u>	<u>Site List</u>	<u>Sole Benefit Provision</u>
A-Best Asbestos Settlement Trust	6 mos.	5 years	Y	N
API, Inc. Asbestos Settlement Trust	NA	NA	N	N
Armstrong World Industries Asbestos Personal Injury Settlement Trust	5.3(a)(3) Meso, LC2, L1 nonmal - none; Others - 6 mos.	5.7(b)(2) 5 years	Y	5.7(b)(3)
ARTRA 524(g) Asbestos Trust	5.3(a)(3) Meso - none; others 6 mos	5.7(b)(2) 5 years	N	N
Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust	5.3(a)(3) Meso, LC2, L1 nonmal - none; Others - 6 mos.	5.7(b)(2) 5 years	Y	5.7(b)(3)
C.E. Thurston & Sons Asbestos Trust	7.3(a)(3) Meso - none; others 6 mos	7.7(b)(2) 5 years	Y	N
Celotex Asbestos Settlement Trust	NA	5.4(c) Cancers vary, meso and others none	N	N

<u>Trust</u>	<u>Specific Exposure Minimum</u>	<u>Total Exposure Minimum</u>	<u>Site List</u>	<u>Sole Benefit Provision</u>
Combustion Engineering 524(g) Asbestos PI Trust	5.3(a)(3) meso and level 1 nonmal - none, others 6 mos	5.7(b)(2) 5 years	Y	5.7(b)(3)
Congoleum Plan Trust	6.2(a)(3) Meso, LC2, L1 nonmal - none; Others – 6 mos.	6.6(b)(2) 5 years	N	6.6(b)(3)
DII Industries, LLC Asbestos PI Trust	5.3(a)(3) Meso, LC2, L1 nonmal - none; Others – 6 mos.	5.7(b)(2) 5 years	Y	5.7(c)
Eagle-Picher Industries Inc. Personal Injury Settlement Trust	NA	NA	Y	7.1
Federal Mogul Asbestos Personal Injury Trust—Turner & Newall Subfund	5.3(a)(3) Meso, LC2, L1 nonmal - none; Others – 6 mos.	5.7(b)(2) 5 years	Y	5.7(b)(3)
Fibreboard	5.3(a)(3) Meso, LC2, L1 nonmal L1 - none; Others – 6 mos.	5.7(b)(2) 5 years	Y	5.7(b)(3)
G-I Holdings Inc. Asbestos Personal Injury Settlement Trust	5.3(a)(3) Meso, LC2, L1 nonmal - none; Others – 6 mos.	5.7(b)(2) 5 years	Y	5.7(b)(3)
H.K. Porter Asbestos Trust	NA	NA	N	N

<u>Trust</u>	<u>Specific Exposure Minimum</u>	<u>Total Exposure Minimum</u>	<u>Site List</u>	<u>Sole Benefit Provision</u>
J.T. Thorpe Company Successor Trust	5.6(b)(1) Meso - none; others 6 mos	5.6(b)(1) 5 years	N	N
J.T. Thorpe Settlement Trust	VII.b, Case Valuation Matrix Meso - 3 mos or at least 10% but can be 1 mo. At reduced value; all others at least 1 year or 25% of exposure but can be as low as 3 mos at lower value	NA	Y	N
Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust	5.3(a)(3) Meso, LC2, L1 nonmal L1 - none; Others - 6 mos.	5.7(b)(2) 5 years	Y	5.7(b)(3)
Keene Creditors Trust	5.3 Meso & LC1 - none; others - 6 mos.	5.5(b)(2) 5 years	Y	N
Leslie Controls	5.3(a)(3) Meso & LC2 - none; others - 6 mos.	5.6(b)(2) 5 years	N	5.6(b)(3)
Lummus 524(g) Asbestos PI Trust	5.2(a)(3) Meso, LC2, L1 nonmal L1 - none; Others - 6 mos.	5.6(b)(2) 5 years	Y	N
Manville Personal Injury Settlement Trust	D Meso, LC1 and L1 Other - none; others - 6 mos.	E.2(b) 5 years	N	N

<u>Trust</u>	<u>Specific Exposure Minimum</u>	<u>Total Exposure Minimum</u>	<u>Site List</u>	<u>Sole Benefit Provision</u>
NGC Bodily Injury Trust	3.1 Affidavit establishing reasonable inference of exposure	NA	N	N
Owens Corning	5.3(a)(3) Meso, LC2, L1 nonmal L1 - none; Others – 6 mos.	5.7(b)(2) 5 years	Y	5.7(b)(3)
Plibrico 524(g) Trust	5.2(a)(3) Meso, LC2, L1 nonmal L1 - none; Others – 6 mos.	5.6(b)(2) 5 years	Y	N
Porter Hayden Bodily Injury Trust	5.3(a)(3) Meso - none; others 6 mos	5.7(b)(2) 3 years	Y	5.7(b)(3)
Raytech Corporation Asbestos Personal Injury Settlement Trust	7.2(a) Meso - none; others 6 mos	7.2(b) 5 years	Y	N
Shook & Fletcher Asbestos Settlement Trust	5.2(e) Meso - none; others 6 mos	5.2(e) 5 years	Y	N
T. H. Agriculture & Nutrition, LLC Asbestos Personal Injury Trust	5.3(a)(3) Meso, LC2, L1 nonmal L1 - none; Others – 6 mos.	5.7(b)(2) 5 years	N	5.7(b)(3)

<u>Trust</u>	<u>Specific Exposure Minimum</u>	<u>Total Exposure Minimum</u>	<u>Site List</u>	<u>Sole Benefit Provision</u>
United States Gypsum Asbestos Personal Injury Settlement Trust	5.3(a)(3) Meso, LC2, L1 nonmal L1 - none; Others – 6 mos.	5.7(b)(2) 5 years	Y	5.7(b)(3)
Western Asbestos Settlement Trust	VII.c, Matrix Meso - 3 mos or at least 10% but can be 1 mo. at reduced value; all others at least 1 year or 25% of exposure but can be as low as 3 mos at lower value	NA	Y	N
UNR	NA	NA	N	N

Appendix C
Audit Provisions

<u>Trust</u>	<u>TDP Section</u>	<u>TAC Approval</u>	<u>Mandatory/Discretionary</u>
A-Best Asbestos Settlement Trust	4.5	N	Discretionary
API, Inc. Asbestos Settlement Trust	5.1(m); 7.2	N	Mandatory; Reasonable request of FCR; discretion of FCR
Armstrong World Industries Asbestos Personal Injury Settlement Trust	5.8	Y	Discretionary
ARTRA 524(g) Asbestos Trust	5.8	Y	Discretionary; insurers may request audits
Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust	5.8	Y	Discretionary
C.E. Thurston & Sons Asbestos Trust	7.8	Y	Discretionary
Celotex Asbestos Settlement Trust	7.3	Y	Mandatory
Combustion Engineering 524(g) Asbestos PI Trust	5.8	Y	Discretionary
Congoleum Plan Trust	6.7	Y	Discretionary
DII Industries, LLC Asbestos PI Trust	5.8	Y	Discretionary

<u>Trust</u>	<u>TDP Section</u>	<u>TAC Approval</u>	<u>Mandatory/Discretionary</u>
Eagle-Picher Industries Inc. Personal Injury Settlement Trust	7.1	N	Mandatory
Federal Mogul Asbestos Personal Injury Trust—Turner & Newall Subfund	5.8	Y	Discretionary
Fibreboard	5.8	Y	Discretionary
G-I Holdings Inc. Asbestos Personal Injury Settlement Trust	5.8	Y	Discretionary
H. K. Porter Asbestos Trust	7.1	N	Discretionary
J.T. Thorpe Company Successor Trust	5.7	Y	Discretionary
J.T. Thorpe Settlement Trust	5.7(a)	Y	Discretionary
Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust	5.8	Y	Discretionary
Keene Creditors Trust	5.6	N	Discretionary
Leslie Controls	5.7	Y	Discretionary
Lummus 524(g) Asbestos PI Trust	5.7	Y	Discretionary

<u>Trust</u>	<u>TDP Section</u>	<u>TAC Approval</u>	<u>Mandatory/Discretionary</u>
Manville Personal Injury Settlement Trust	C.8	N	Discretionary
NGC Bodily Injury Trust	3.12	N	Mandatory
Owens Corning	5.8	Y	Discretionary
Plibrico 524(g) Trust	5.7	Y	Discretionary; insurers may request audits
Porter Hayden Bodily Injury Trust	5.8	Y	Discretionary
Raytech Corporation Asbestos Personal Injury Settlement Trust	7.1	N	Discretionary
Shook & Fletcher Asbestos Settlement Trust	5.7	Y	Discretionary
T. H. Agriculture & Nutrition, LLC Asbestos Personal Injury Trust	5.8	Y	Discretionary
United States Gypsum Asbestos Personal Injury Settlement Trust	5.8	Y	Discretionary
Western Asbestos Settlement Trust	5.7(a)	Y	Discretionary
UNR	5.8	Y	Discretionary