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**ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11**

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**Introduction**

I am Todd Brown, Associate Professor of Law and Director of the Center for the Study of Business Transactions at SUNY Buffalo Law School, where I teach Bankruptcy, Torts, Mass Torts and related courses. My research focuses on the intersection of mass torts and bankruptcy law, with an emphasis on identifying and preventing practices that undermine the integrity of the judicial process and the operations of global settlement funds. Prior to becoming a law professor, I worked with the Business Restructuring and Reorganization practice at Jones Day from 1999 to 2003, where I served primarily as debtor’s counsel in several large corporate chapter 11 cases. I subsequently worked at Wilmer Cutler Pickering Hale & Dorr from 2003 to 2007, where, among other things, I represented individuals, corporations, banks and insurers in bankruptcy and class action matters.[[1]](#footnote-1)

This written statement outlines several issues in the administration of asbestos-related chapter 11 cases and the resulting reorganization plans and bankruptcy trusts, and it suggests some potential revisions to Section 524(g) of the Bankruptcy Code to address these issues. These issues are more fully explored in a series of recent articles,[[2]](#footnote-2) my prior testimony concerning the Further Asbestos Claim Transparency (FACT) Acts of 2012 and 2013,[[3]](#footnote-3) and my testimony before the ABA TIPS Task Force on Asbestos Litigation and the Bankruptcy Trusts on June 5, 2013.[[4]](#footnote-4) In the interest of time, this statement summarizes the key points rather than revisiting them in detail.

# Background: Asbestos Personal Injury and Bankruptcy

## Early Asbestos Litigation

Asbestos personal injury litigation began as a series of unremarkable discrete cases brought by individuals who had substantial histories of exposure to airborne asbestos fibers and diagnoses of the most severe forms of asbestos related disease.[[5]](#footnote-5) Early litigation was problematic for plaintiffs, who faced difficult evidentiary barriers in establishing a link between their diagnoses and exposures that occurred decades earlier.[[6]](#footnote-6) In response to these difficulties some courts modified procedural and evidentiary rules to lower the barriers to compensation and reduce the transaction costs of litigation.[[7]](#footnote-7) These changes, coupled with the revelation that there had been a conspiracy to conceal the dangers of asbestos exposure,[[8]](#footnote-8) initiated a new phase of asbestos litigation. By the early 1980s it was clear that several of the first line asbestos defendants (those most frequently named in early litigation) would be entering bankruptcy.

## The Johns-Manville Bankruptcy

In 1982, Johns-Manville, a company at the center of the “asbestos conspiracy” and the most prominent defendant in asbestos personal injury suits at the time, petitioned for relief under chapter 11. Manville appeared to be a healthy company on the surface (boasting assets in excess of $2 billion and fixed liabilities of roughly $1 billion), which fueled complaints that the filing was an abuse of the bankruptcy process.[[9]](#footnote-9) Even so, Manville’s auditors had been aware as early as two years before the filing that the company faced enterprise-threatening asbestos liability.[[10]](#footnote-10) In rejecting efforts to dismiss the case, the bankruptcy court thus reasoned that the filing was consistent with the objectives of chapter 11: dismissal or liquidation would ensure that the company’s assets were depleted and “preclude just compensation of some present asbestos victims and all future asbestos claimants.”[[11]](#footnote-11)

Having survived this challenge, the debtors still had to address the futures problem: the financial distress that warranted a chapter 11 filing was as much a product of the company’s long-term liabilities to unknown and unknowable future victims as it was any other liability; and Manville needed to address these future liabilities to emerge from bankruptcy. Yet the Code was silent with respect to: (i) satisfying due process with respect to victims (future claimants) that were not yet aware of their injuries and, for that matter, may not know they were or would be exposed to the debtor’s products; and (ii) as a matter of equitable distribution, preserving sufficient assets to compensate these future victims fairly when their injuries arose.

With respect to the first question, the court ultimately appointed an independent legal representative to stand in for and advance the interests of future victims. The appointment of an independent representative was critical because, as the Second Circuit recognized in connection with the Manville case[[12]](#footnote-12) and the Supreme Court subsequently acknowledged in the asbestos class action cases,[[13]](#footnote-13) the interests of current claimants in maximizing their own recoveries are at odds with the interests of future claimants in obtaining recoveries from the same fund. Ultimately, the court identified and selected a legal representative for future claimants rather than deferring to the current plaintiffs’ or debtors’ preferences.

To address the equitable distribution issue, the Manville plan established a trust to be funded by the debtors and their insurers and contemplated an injunction that “channeled” all current and future claims to this trust. Most claims would be paid according to a matrix that established claim categories and valued individual claims according to injury. Current plaintiffs could thus obtain compensation far more expeditiously than in the tort system, and the debtors could emerge from chapter 11. Future victims may have lost some valuable rights and leverage in the tort system, but this approach was believed to improve the potential for preserving assets to compensate them once they manifested compensable injuries.[[14]](#footnote-14)

## Section 524(g)

The substantial uncertainty concerning the scope of courts’ equitable authority to channel liability to trusts under section 105(a), Congress amended the Bankruptcy Code in 1994 to include Section 524(g), which codified the trust-injunction approach, and section 524(h), which recognized the pre-1994 trusts. Section 524(g) authorizes an asbestos bankruptcy reorganization plan to “enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by [an asbestos trust establishing in accordance with Section 524(g)]” under specified conditions.[[15]](#footnote-15) These conditions include the appointment of a legal representative for future victims;[[16]](#footnote-16) the requirement that the trust treat similar current and future claims “in substantially the same manner”;[[17]](#footnote-17) and the requirement that at least 75% of any class or classes of current asbestos claimants must vote in favor of the plan.[[18]](#footnote-18)

Of course, section 524(g) was not intended to represent a departure from the basic principles that underlie the Code or supplant the Code’s other requirements.[[19]](#footnote-19) Rather, consistent with its origins in the early asbestos bankruptcy cases, the objectives of section 524(g) include: (a) the equal treatment of current and future asbestos claimants; (b) the preservation of going-concern value of debtors (for benefit of all creditors, current and future); and (c) the prompt payment of meritorious asbestos claims.[[20]](#footnote-20)

## Asbestos Bankruptcies after the 1994 Amendments

The 1994 Amendments were largely a non-issue throughout the remainder of the decade. By the time the amendments became law, comprehensive settlements of current and future asbestos claims under Rule 23 were already well underway. After the Supreme Court rejected these settlements in *Amchem*[[21]](#footnote-21) and *Ortiz*[[22]](#footnote-22), however, several lead defendants commenced chapter 11 with an eye toward establishing bankruptcy trusts. To date, roughly 60 asbestos trusts have been established or are in the process of being established, with more than two-thirds of these initiated since 2000.[[23]](#footnote-23) From 2007 through 2011, these trusts distributed more than $13.5 billion to claimants and, as of the end of 2011, held an estimated $18 billion to satisfy claims that will be submitted over the next four decades.[[24]](#footnote-24)

# Section 524(g) in Practice

In theory, the conditions set for protecting future victims should be sufficient to protect against front-loading and other practices criticized by the Court in the asbestos class action cases. Nonetheless, the asbestos pre-packs of the early 2000s largely suffered from the same conflicts of interest and overt attempts to front-load payments to current creditors. After the Third Circuit’s rejection of such overt front-loading in *Combustion Engineering*,[[25]](#footnote-25) plan proponents shifted to other mechanisms for obtaining the votes they need to satisfy the supermajority vote requirement.

Although many of these cases were structured as “pre-packs,” critical issues with certain stakeholders or insurers often remained unresolved at their filing, leading to extensive litigation.[[26]](#footnote-26) Even where judges have taken a hard line concerning preferential settlements, some leading claimants’ counsel have remained firm in demanding them.[[27]](#footnote-27) Some of the cases initiated in the immediate aftermath of the failure of the class action cases remain mired in litigation today.[[28]](#footnote-28)

The demand for preferential treatment, including the use of favorable claim criteria and payment levels for current (voting) claimants, and refusal of some counsel to compromise on these and other points is grounded in the knowledge that the “asbestos veto” is absolute. This section addresses the asbestos veto and how the resulting leverage afforded to lead asbestos counsel undermines the other protections for future victims.

## Influence on Case Administration

### The Asbestos Veto Power

Although the claims allowance and estimation procedures typically employed in Chapter 11 ordinarily provide bankruptcy courts with considerable discretion in limiting the influence of weak claims in the case, tort claims receive special treatment pursuant to Title 28. 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.[[29]](#footnote-29) This section further provides that individual claims cannot be estimated for allowance purposes.[[30]](#footnote-30) Only a handful of the post-2000 asbestos bankruptcy cases allowed opponents to investigate even a sample of the claims asserted, and bar dates are not typically established for asbestos claims. In the absence of provisions authorizing consideration of claim-level information necessary to distinguish strong and weak claims, opponents lack a basic mechanism for ensuring that those who vote on the plan are, in fact, legitimate stakeholders in the debtor’s case.[[31]](#footnote-31)

Moreover, those who control these untested claims may exercise considerable influence in shaping the ultimate design of the trusts and TDPs. Although it is frequently necessary to employ the cram-down (or the threat of a cram-down) to confirm a Chapter 11 plan in non-asbestos cases, it is not possible to cram down a channeling injunction; the 75% vote requirement of Section 524(g) is mandatory.[[32]](#footnote-32) Thus, to get sufficient votes to issue the channeling injunction, the TDP must (i) pay enough to appeal to those advancing high value claims and (ii) have sufficiently generous qualification criteria to appeal to those advancing weak or poorly documented claims. At the same time, plaintiffs’ lawyers and their clients have strong interests in minimizing quality control and audit procedures that may require them to incur additional costs and delay payment of their claims.

Collectively, these features empower lawyers who amass large claim inventories to demand a holdout premium – using the threat of precluding any channeling injunction to extract preferential treatment – even where many of the claims they represent may have little merit and a simple majority of those advancing stronger claims support the proposed plan. This may occur even where the proposed plan and TDP are more generous to most or all of the lawyer’s clients than the tort system or liquidation.[[33]](#footnote-33) Why settle for less when you know that other parties and even the court must eventually accept your demands or doom the debtor to liquidation?

### The Future Claimants’ Representative

Section 524(g) requires the appointment of a legal representative for future victims prior to the issuance of a channeling injunction. Yet Section 524(g) provides no meaningful guidance concerning (i) the standards for selecting the legal representative, (ii) the future demand holders they represent, and (iii) the duties these representatives must, even at a minimum, perform in representing future claimants’ interests. And in the absence of such guidance, these critical questions have been largely resolved in favor of expeditious administration rather than ensuring that future victims’ interests are protected, especially where they conflict with current claimants’ interests. [[34]](#footnote-34)

These legal representatives are frequently repeat players and are most often selected by the debtor in consultation with lead plaintiffs’ firms, which appears to have a punch-pulling effect during bankruptcy negotiations.[[35]](#footnote-35) Of course, the very reason a legal representative is required – namely, that these unknown and unknowable future victims are unable to participate in the case and protect their own interests – also means that they are unable to oversee and ensure loyal representation by their court-appointed representative.[[36]](#footnote-36) Thus, it is perhaps unsurprising that the legal representatives appointed in these cases tend to limit their objections to matters where, if successful, they will advance the interests they share with current claimants (for example, by objecting to settlements with insurers to obtain higher funding for the trust) and largely avoid objecting on matters where the interests of current and future victims conflict (high initial payment percentages based on consistently poor projections, challenging overly generous claim qualification criteria, etc.).

Moreover, the appointed legal representative does not vote on the plan and may not have sufficient leverage to demand changes to TDP’s where current and future claimants’ interests differ. And given these factors and the secrecy that surrounds asbestos bankruptcy negotiations, it seems unlikely that dissatisfied future victims will ultimately be in position to hold even apathetic legal representatives accountable when the resulting trusts ultimately fail to protect their interests. As Professor Tung observed, the use of legal representatives in this context may suggest “not so much a concern for otherwise unrepresented claimants, but instead a need to provide due process cover in order to bind future claimants to a reorganization plan.”[[37]](#footnote-37)

## Trust Design and Management

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). 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). 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. 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. These roles tend to be filled by the same repeat players across multiple trusts.

Most trusts that are active today employ TDPs that are based on similar templates and contain the same basic terms. These TDPs typically identify 5 or 7 classes of claims and outline the exposure and medical criteria that must be satisfied to qualify for payment within each class. They also assign scheduled values for each claim category, outline the procedures used by claim reviewers to evaluate claims, and the process for appealing any adverse determinations by claim reviewers.

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. Claims submitted under individual review may be settled at a much higher figure than the scheduled value at substantially all of the currently active trusts.

Bankruptcy trusts have become less transparent and more aggressive in challenging efforts to investigate their operations.[[38]](#footnote-38) The TDPs of newly established typically include, and several older trusts have been amended to include, confidentiality and “sole benefit” language that preclude public disclosure of any claim-level information and may delay or effectively prevent[[39]](#footnote-39) private discovery of claim-level information. Although most trusts file annual reports, many of these reports are no longer accessible through PACER because the cases are now closed. Some trusts have never provided substantial public information concerning their operations, and others have placed annual reports, notices and other information concerning their activities behind password-protected walls.

# Statutory Objectives and Reality

“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.”[[40]](#footnote-40) These goals are consistent with the broader goals of chapter 11 and provide a starting point for evaluating the trust system.

## Preservation of Assets for Future Victims

The statutory language and legislative history reflect that the “central purpose” of Section 524(g) is to ensure that current and future claimants receive substantially the same benefits from the reorganization.[[41]](#footnote-41) In theory, this should be relatively easy to achieve. The trusts’ streamlined review and payment mechanisms supplant the tort system, where transaction costs account for a majority of the funds devoted to asbestos litigation. Trusts may obtain insurance proceeds up front, thereby avoiding the risk of insurer insolvencies over time. They may also receive stock in the reorganized debtor and, accordingly, share in its increased value post-confirmation. Thus, given the dramatic growth of the trust system over the last decade, the trust system could, in theory, emerge as the primary means of compensation for most plaintiffs.[[42]](#footnote-42)

In reality, these new trusts paid far more in claims than projected and, accordingly, many have reduced payments to control the bleeding, as more fully outlined in III.A.2. In a study of 32 trusts published earlier this year, we found that nearly two-thirds reduced their payment percentages (the percentage of the agreed claim value that is actually paid) from 2010 through the end of 2012,[[43]](#footnote-43) and additional reductions have been announced in the months since the study was completed.[[44]](#footnote-44) In addition, some trusts have adopted caps on annual payments, whereby payments within categories that have reached the cap will be deferred until the next year.[[45]](#footnote-45) A small number of trusts have stopped paying certain categories of claims altogether, suspended processing of new claims for an extended period of time, and reduced claim payments to levels that appear unlikely to warrant the costs involved in submitting a claim.[[46]](#footnote-46)

### How Trusts Expand and Inflate Liability

Why have trust payments exceeded projections so dramatically? The answer is fairly straightforward: while the savings associated with streamlined trust procedures may be substantial in theory, they appear to generate costs and new liabilities that exceed the savings. Specifically, they expand and inflate liability in three primary ways: (a) increasing the pool of compensable claims; (b) raising the floor for compensation through scheduled values; and (c) allowing for claim values that far exceed scheduled values, either through pre-petition settlement in anticipation of bankruptcy or the extensive use of individual review.

#### Increasing the Pool of Compensable Claims

The first mechanism for expanding liability is the consistent adoption of claim qualification criteria that are easier to satisfy than comparable standards in the tort system. Among other things, bankruptcy trusts:

* Apply exposure criteria that are lower, and may be substantially lower, than applicable causation standards in the tort system;[[47]](#footnote-47)
* Do not expressly provide for consideration of some other likely causes of lung cancers and other non-signature diseases or have avenues for testing representations concerning other likely causes (i.e., the claimant’s smoking history);[[48]](#footnote-48)
* Do not consider exposures to other defendants’ products, even where such exposures would be grounds for alternate causation or similar defenses;[[49]](#footnote-49)
* Expand the limitations period beyond the applicable periods in several states;[[50]](#footnote-50)
* Do not typically employ medical professionals to test the veracity of medical evidence submitted with claims that are not audited;[[51]](#footnote-51)
* Depending on the specific audit plan in place, may not consult independent medical experts with respect to audited claims;[[52]](#footnote-52)
* Pay certain non-malignant claims that are unlikely to be compensated due to substantive and procedural modifications in the applicable state tort system;[[53]](#footnote-53) and
* Do not typically employ the sort of targeted and random audit procedures that are more likely to uncover unreliable claim submission patterns and practices, including practices similar to those uncovered by Judge Jack in the Silica MDL.[[54]](#footnote-54)

Collectively, these factors demonstrate a variety of ways in which claims with no settlement value or, at best, nuisance value against the trust’s predecessor in the tort system can qualify for payment from the trust.

Many critics contend that the trusts’ lax qualification criteria and quality controls encourage lawyers to recruit and advance fraudulent claims. In response, trust representatives claim that they have uncovered no fraud in their reviews and audits of submitted claims, with the clear inference being that lawyers are not advancing many, if any, fraudulent claims. The limited publicly available information precludes any significant empirical review of the fraud question. Nonetheless, the inference that there is no fraud is unpersuasive given recent experience across similar mass compensation schemes,[[55]](#footnote-55) numerous examples of fraud and abuse in asbestos litigation generally,[[56]](#footnote-56) and a series of specific cases in which the claims submitted to trusts appear to be specious or, at least, materially inconsistent with representations advanced in state court.[[57]](#footnote-57)

Moreover, after receiving a tip from a former insider that a California law firm routinely submitted fraudulent evidence in support of its claims, the trusts managed by the Western Asbestos Settlement Trust commenced adversary proceedings against the firm, alleging, among other things, that the firm “engaged in a pattern of submitting unreliable evidence in support of claims for substantial amounts of money from the [trusts].”[[58]](#footnote-58) In sum, notwithstanding the inability to conduct a meaningful empirical study of the question, “there is sufficient anecdotal evidence of fraud and/or abuse in the Section 524(g) trust system to raise legitimate concerns with respect to the integrity of the bankruptcy system.”[[59]](#footnote-59)

Of course, any administrative settlement fund must balance the cost of paying dubious claims against the cost of identifying and challenging fraudulent or otherwise specious claims. The presumption at most trusts today appears to be “that thorough fraud prevention systems would be too costly and would leave less money to pay claims.”[[60]](#footnote-60) Yet this presumption remains untested given the limits of publicly available information and the trusts’ apparently limited audit plans,[[61]](#footnote-61) and it appears to ignore the potential for obtaining economies of scale through coordinated audits across trusts.[[62]](#footnote-62) To that end, although trusts appear to have incurred substantial costs challenging defendants’ efforts to obtain discovery of trust submissions – where the benefits appear to flow more to plaintiffs’ lawyers who prefer to keep that information private than the trusts or trust beneficiaries – similarly aggressive measures to protect the funds set aside for legitimate claimants from abusive claiming practices do not appear to be on the horizon.[[63]](#footnote-63)

Even at a trust that is experiencing more claim submissions than projections suggest are possible, altering claim criteria and quality controls may prove difficult. TDPs provide the plaintiffs’ lawyers who sit on trust advisory committees with veto power over key decisions – including any proposed amendments to TDP standards and criteria and proposed audit plans – that may effectively undermine the efforts of even the most diligent trustee or future claimants’ representative. Indeed, the Manville Trust’s experience with its efforts to audit claims in the late 1990’s and the stern rebuke it received as a result of this effort,[[64]](#footnote-64) suggests that fiduciaries that take their duties too seriously may find more resistance than support for their efforts among both plaintiffs and judges.

#### Increasing the Settlement Floor and the Lemons Problem

Second, the scheduled values applied in expedited review raise the “settlement floor” for claims. Many defendants have made the rational decision to settle some claims for mere nuisance value in the tort system, where the transaction costs of defending the claims exceed the amount demanded by the plaintiff. In the trust context, however, these claims will obtain the same payment as stronger claims if all are evaluated under expedited review, where the scheduled value will most often be applied. This scheduled value is rarely low enough to be considered a “nuisance value;” rather, it is a rough gauge of how the defendant valued settled claims (both nuisance and strong) over time. Thus, when a trust that adopts a $50,000 scheduled value for malignant mesothelioma claims, this figure incorporates the trust predecessor’s history of settling many claims for lower amounts and other claims for higher amounts.

It is relatively easy to see how this process can generate a market for lemons. Using the $50,000 figure above and assuming a 100% payment percentage, we should expect all claimants whose claims (after taking transaction costs into account) are likely to be worth less than $50,000 to request expedited review. Those who expect their claims to be worth more than $50,000 after individual review would rationally go that route. Thus, even accounting for judgment errors by counsel, we should still expect most rational claimants with claims worth less than $50,000 under individual review (which, as noted previously, attempts to provide a rough gauge of value in tort) to elect expedited review and obtain a $50,000 settlement value. At the same time, we should expect substantially all of those with significantly higher value claims to elect individual review in order to obtain this higher settlement value.

Does this actually happen? The GAO Report cited interviews with trust officials, in which they claimed that only 2-3% of claims were submitted for individual review.[[65]](#footnote-65) This might suggest that the scheduled values at those trusts are so high that only a small percentage of claimants believe they stand to obtain more through individual review. At the trusts that have reported claim submissions according to type of review selected, however, the percentage of claimants electing individual review far exceeds 3%, especially for high value malignancy claims.[[66]](#footnote-66)

#### Circumventing the Equitable Distribution Requirement

Finally, payouts to current claimants may be front-loaded by pre-petition settlements that exceed scheduled values or even the maximum payments to individual review claimants, understandings that claims submitted by certain firms are entitled to special valuations, or other mechanisms. Specifically, the pre-pack model of the early 2000s typically involved overt front-loading to subscribing plaintiffs; paying a portion of their settlements out of separate funds and providing them with “stub claims” for the remainder in the bankruptcy.[[67]](#footnote-67) The Supreme Court singled out a similar approach as a troubling aspect of the settlement in *Amchem*[[68]](#footnote-68) and, ultimately, led the Third Circuit to reverse the order confirming the plan in *Combustion Engineering*.[[69]](#footnote-69) In the time since *Combustion Engineering*, such front-loading has become less overt; apparently leaving the inflation of some claims ahead of others to the individual review process, adopting unsustainable payment percentages for current claimants, or other mechanisms. The prevalence of intentional surreptitious front-loading is difficult to assess empirically given that these settlements and trust practices are not subject to public reporting requirements, though the results of newly-established trusts in recent years demonstrates that the effect is largely the same: current claimants are receiving far better treatment than future claimants can be reasonably expected to receive.

### The Impact on Trust Performance

As reflected in Figure 1,[[70]](#footnote-70) at least twenty-one of the thirty-two trusts included in the *Bankruptcy Trusts* study have reduced their payment percentages since 2010. During this time, per-claim compensation at these trusts declined between 9% and 93.33%, leaving payment percentages that range from .5% to 70% today. These reductions have been dramatic at some newly established trusts. For example, although the THAN Trust and Lummus Trust were paying claims at 100% at the beginning of this period, they subsequently reduced their payment percentages to 30% and 10%, respectively. [[71]](#footnote-71)

Figure 1: Payment Percentage Reductions Since 2010[[72]](#footnote-72)

Bankruptcy trusts have taken other steps to limit claim payments. For example, the Combustion Engineering 524(g) Asbestos PI Trust employs a MAP (currently set at $75 million) and a Claims Payment Ratio, which allocates 87% ($65,250,000) of the MAP to malignancy claims and 13% ($9,750,000) to non-malignant claims.[[73]](#footnote-73) The trust’s non-malignancy MAP for 2013 was exhausted in January of this year,[[74]](#footnote-74) and its payments to malignancy claims exceeded the MAP for those claims by more than $34 million in 2012.[[75]](#footnote-75) Given these numbers, it is unsurprising that the trustee and future claimants’ representative have attempted to reduce the payment percentage at the trust, though it appears that the TAC continues to oppose this reduction.[[76]](#footnote-76)

### The Impact on Global Compensation Prospects for Future Victims

This recent history suggests that after a quarter century of experience in processing and paying asbestos claims, many bankruptcy trusts continue to underestimate future liabilities and, accordingly, pay claims at unsustainable rates before ultimately reducing payments as old estimates prove woefully inadequate. Some trusts repeat this process several times.[[77]](#footnote-77) New trusts go online – employing largely identical claim criteria and quality control measures – and, for many, the pattern continues. Regardless of whether they enter periods of not accepting and paying claims or simply continue reducing payments, few of the trusts operating today appear likely to “value, and be in a financial position to pay” initial claims and future demands that involve similar claims “in substantially the same manner.”[[78]](#footnote-78) And as more defendants enter bankruptcy to establish their own bankruptcy trusts, which are likely to suffer similarly rapid depletion in the absence of reform, the global prospects for compensation are likely to decline at an accelerating rate over time.[[79]](#footnote-79)

## The Survival of Otherwise Viable Companies

If we view each defendant in isolation, Section 524(g) has provided several defendants with an avenue for obtaining global peace. Some of the companies that now enjoy the protection of the channeling injunction are thriving. And if we exclude cases where the debtors were largely corporate shells by the time they entered chapter 11 and those where the debtors were never at any great risk of failure even in the absence of the channeling injunction, the impact of Section 524(g) on these reorganized debtors has been profound.

This narrow perspective, however, does not capture the global impact of the asbestos bankruptcy system. Section 524(g) made bankruptcy a viable option for companies seeking relief from asbestos liability, but also caused a substantial redistribution of overall asbestos liability. The departure of prominent defendants from the tort system “shifted liability to the remaining solvent defendants in such a way as to increase the chances that those firms, too, eventually would seek protection in bankruptcy.”[[80]](#footnote-80) These subsequent bankruptcies, in turn, increased the liability shares of still other defendants, and many of these defendants have filed or may be required to file bankruptcy in the future.

The redistribution that fuels this cascade failure is exaggerated by common terms found across trusts today. A claimant’s representations to the trusts may be relevant to alternative causation defenses and allocations of liability in the tort system, and, of course, defendants are most often entitled to reduce any verdict against them to account for payments received from the trusts. In light of the sole benefit provisions discussed previously, plaintiffs may be free to advance inconsistent or contradictory narratives concerning the same injuries in the tort system and across trusts. Established trusts have compounded this risk by becoming more secretive and in challenging co-defendants’ efforts to obtain trust claim forms and payment information through discovery.[[81]](#footnote-81) And though a clear majority of courts to have considered the question have concluded that these materials are discoverable and claim payments must be considered in molding a verdict, lawyers may avoid these obligations by simply deferring trust submissions.[[82]](#footnote-82)

## Prompt Compensation for Victims

Once established, bankruptcy trusts have a strong record of processing and paying claims at a faster rate than the tort system. To that end, conventional wisdom tells us that this objective is satisfied.

The trusts’ capacity for processing and paying claims in an expeditious manner, however, only tells part of the story. As noted previously, some cases have lingered in bankruptcy for more than a decade. These delays tend to be due to disputes over efforts to investigate claims, estimation methodology, the belief that a given proposed plan would result in the inequitable treatment of future victims or disenfranchised current claimant groups, and other issues that are not well defined in the statute. Payments may be further delayed or reduced while a trust attempts to obtain insurance proceeds (which frequently make up a large portion of the trusts’ projected assets) through state court litigation. Moreover, as also noted previously, trusts may suspend claim processing or payments once they are overrun with claims they are unable to pay. And where so many trusts have adopted low payment percentages, this necessarily defers any payment for years even in the unlikely event that any subsequent payments will come at all.

# Proposed Revisions to Section 524(g)

## Ensuring the Legal Representative’s Independence

As the first line of protection against encroachment on the interests of future victims, the legal representative role should demand complete independence from parties with interests that conflict with the goal of preserving assets for future victims. Several proposals have been advanced to address this gap in the statute. Some have suggested appointment by the US Trustee or other outside party from a pre-selected panel of legal representatives, rather than the self-interested selections by debtors and claimants’ counsel that occur today. Another suggestion has been that courts reviewing potential legal representatives for conflicts of interest that are not only direct (for example, he or she currently represents clients who have active claims against the debtor) but may also those that may have a “punch-pulling” effect on their advocacy for future victims. Others have suggested tying the legal representative’s compensation to the long-term results achieved for future victims.[[83]](#footnote-83)

Of these proposals, the most straightforward approach would be amending the statute to include an appointment process that mirrors the process for appointing trustees. One nationwide panel, selected and appointed as necessary by the Office of the United States Trustee or other independent body, would most likely be sufficient given the limited number of cases. To address the need for any such representative pre-petition, the statute may provide that such an appointment will be made upon the request of any debtor considering a chapter 11 filing in which a channeling injunction may be sought. Criteria for selection would include, at a minimum: (a) sufficient familiarity with the legal and medical issues that are common in asbestos litigation to advance the interests of future victims; and (b) panel legal representatives must not have a direct or indirect role, or current compensation from active litigants, in asbestos litigation or asbestos-related bankruptcy cases (other than as independently appointed legal representatives).

## Strengthening the Legal Representative and Overcoming the Asbestos Veto

Perhaps the greatest weakness of the legal representative position today is that the representative has insufficient leverage to demand concessions from current claimants, even where the representative may believe that those concessions are necessary to preserve future victims’ interests. This shortcoming, along with the need to establish some check on lead attorneys’ veto power in asbestos bankruptcy cases generally, may be addressed by modifying the supermajority vote requirement to include a cram-down of the channeling injunction over the objection of current claimants where: (a) the class or classes of asbestos claims to be crammed down has accepted the plan under section 1129(a)(8) or may be crammed down under section 1129(b); and (b) the legal representative(s) appointed in the case approve the plan.

Although others have suggested that an asbestos claimant cram-down be available in connection with 524(g), the risk of such a proposal alone is that the pendulum will swing the other way; giving debtors too much power to strip asbestos claimants’ rights in establishing a trust. Combined with strengthened mechanisms to ensure legal representative independence, limiting such cramdowns to cases in which the legal representative approves should provide a check on this risk and give him or her greater leverage in dealing with recalcitrant claimants’ counsel.

## Mandatory Suspension of Claim Payments

To address the modern front-loading problem in asbestos trust compensation, the statute may also be amended to require the plan proponents to submit detailed estimates of projected claim payments by category prior to confirmation and suspend payments when it becomes apparent that the aggregate payments by the trust will exceed those projections by more than a fixed percentage at any time during the first five years of the trust’s operation. Once suspended, the trust will be required to submit revised projections to the court and modify the payment percentage to reflect the new projections prior to resuming payments. Such a requirement runs the obvious risk of delaying payments to current victims, but it will also avoid excessive early depletion of trusts along the lines seen in some recently established trusts.

## Transparency Initiatives

The aforementioned reforms may address the problems that I have identified in asbestos bankruptcy cases, but they appear unlikely to have much effect on the trusts that are already established. To that end, any discussion of the reform of Section 524(g) would be incomplete without consideration of the recent federal initiatives intended to increase claim-level transparency in the bankruptcy trust system.

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. The absence of comparable transparency in asbestos bankruptcy proceedings and trust administration necessarily raises concerns about whether these funds are, in practice, administered in a manner consistent with the objectives of Section 524(g).[[84]](#footnote-84)

In this context, greater disclosure of claim-level data holds promise. If trusts are unwilling or unable to incur the costs of more comprehensive claim review, such disclosures will provide those who are willing to incur those costs access to sufficient information to do so independently. As such transparency increases the prospects that suspicious patterns and practices will be discovered, those who intentionally submit specious claims and others who simply employ poor claim development and submission quality controls will have greater incentives to modify their practices. And just as the Silica MDL provided certain trust fiduciaries with the information and leverage necessary to address dubious nonmalignant claims within their trusts, any such discoveries with respect to the current generation of asbestos claims may likewise increase the prospects for addressing similarly abuse going forward.

Notwithstanding the potential benefits of enhanced trust transparency, critics are understandably concerned that the proposals to date infringe on: (i) state interests in controlling discovery in state tort litigation; and (ii) the legitimate privacy interests of asbestos personal injury victims. I will discuss these concerns in turn.

### Is Mandatory Disclosure an Appropriate Exercise of Congressional Authority?

The vision of asbestos bankruptcy trusts as beyond bankruptcy oversight conflates and thereby confuses the means of organizing asbestos trusts with their function in the asbestos bankruptcy process. Any trust established to fulfill the objectives of Section 524(g), just like a reorganized debtor incorporated as a new entity under the terms of a plan, will be organized under state law. But this necessity is merely a product of the fact that the specific steps of corporate or trust formation are left to state law; it does not obviate the need for these entities to comply with their obligations under the plan, the Bankruptcy Code or other applicable federal law.[[85]](#footnote-85)

The Bankruptcy Code’s recognition of the distinction between state law organization and the obligations that arise under federal bankruptcy law is consistent with even the most restrictive conception of the Bankruptcy Power. Although the precise reach of this power remains poorly defined, it is well settled that it applies to questions concerning the restructuring of a debtor’s relations with its creditors.[[86]](#footnote-86) When trusts are established under Section 524(g), they assign critical aspects of this power to private entities going forward, but this assignment does not strip Congress of its power to regulate these entities to ensure that they are acting in a manner consistent with the objectives they are established to advance.

### Balancing Transparency against Claimants’ Privacy Interests

Accountability may require transparency, but the public disclosure of previously confidential information may unduly embarrass private citizens or be misused by confidence artists or others attempting to exploit victims. These risks must be balanced against the objectives of the transparency proposal at issue and potential restrictions on the proposed disclosures.

Although personal injury victims may have an interest in keeping their injuries private, the decision to pursue compensation for those injuries typically involves waiving that interest. As the federal district court in Delaware recently suggested, individuals who hire a lawyer to pursue potential asbestos-related claims should expect that some level of information about their claims must be disclosed in asbestos-related litigation.[[87]](#footnote-87) Indeed, some courts place more consolidated information concerning asbestos claimants and their injuries than required by the recent federal proposals on the Internet with little or no fanfare.[[88]](#footnote-88)

Filing a claim form with a trust – just like the filing of a complaint in civil litigation[[89]](#footnote-89) or a proof of claim in bankruptcy – is the assertion of a legal right to payment and requires representations under penalty of perjury. Debtors provide information about their creditors’ claims and payments made to their creditors in the year preceding the bankruptcy filing under Section 521. Official Form B10 (the proof of claim) requires 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]” – including previously non-public documents – and other personal information. Although debtors and asbestos plaintiffs have structured asbestos bankruptcy cases to avoid proof of claim filings – apparently to avoid potential objections to individual asbestos claims under Section 502 of the Bankruptcy Code[[90]](#footnote-90) – this information is readily produced by most creditors in bankruptcy.[[91]](#footnote-91)

Likewise, settlement amounts may also be subject to disclosure notwithstanding any confidentiality provision in the settlement agreement. Settlement offers and counter-offers are generally entitled to confidential treatment in bankruptcy claim disputes, but final settlement terms must be disclosed and approved by the court. Likewise, in many asbestos tort cases that go to judgment, prior settlement amounts are frequently disclosed for the purpose of molding the judgment.

Courts routinely balance the public and private interests in transparency against its potential risks to innocent parties. This question is rarely limited to the extremes: full public disclosure, on the one hand, and no disclosure, on the other. The question here is whether disclosure of some information is warranted and whether that disclosure can be tailored – or access to the disclosed information controlled – to limit potential misuse of the information. This balancing of interests is necessary to ensure that objections that are ostensibly grounded in individual privacy interests are not used to block legitimate but unwanted inquiry.

The Bankruptcy Code and Federal Rules of Bankruptcy Procedure contain numerous provisions requiring disclosure of private and, at times, personal information, but they also empower courts to fashion appropriate orders for protecting those who comply with these provisions. Under Section 107(b)(2) of the Bankruptcy Code, bankruptcy courts have the power to “protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.” Likewise, Section 107(c) authorizes the court to limit access to information that “would create undue risk of identity theft or other unlawful injury to the individual or the individual’s property.” Moreover, courts have not been hesitant to employ these tools where requested and necessary, especially in the asbestos bankruptcy context.[[92]](#footnote-92)

**Conclusion**

Thank you again for the invitation to appear today. I hope this summary has been useful, and I am happy to address any questions.

1. The views offered here are mine alone and are not those of my current or former employers or clients. I am not being compensated for this appearance, and I do not accept any personal or professional compensation or funding from any party that is involved in asbestos personal injury or asbestos bankruptcy litigation or legislation. [↑](#footnote-ref-1)
2. S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L. J. \_\_\_ (symposium article, forthcoming 2013) [hereinafter Brown, *Asbestos Compensation*] (outlining the long-term, systemic impact of the bankruptcy trust system on future victims, other defendants in the tort system, and state efforts to incorporate trust information into asbestos personal injury cases in their courts), *draft available at*: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307661>; S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 Buffalo L. Rev. 537 (2013) [hereinafter Brown, *Bankruptcy Trusts*] (studying the performance of bankruptcy trusts to date and noting dramatic reductions in projected payments to new and future victims); S. Todd Brown, *Specious Claims and Global Settlements*, 42 Memphis L. Rev. 559 (2012) [hereinafter Brown, *Specious Claims*] (explaining how long-term, comprehensive settlement plans and bankruptcy trusts encourage firms to recruit and advance specious claims); S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 Colum. Bus. L. Rev. 841 [hereinafter Brown, *Paradox*] (discussing several weaknesses in the design of Section 524(g) that delay case administration and undermine the statutory protections for future victims). [↑](#footnote-ref-2)
3. SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW HEARING ON H.R. 982, THE “FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2013,” March 13, 2013; SUBCOMMITTEE ON COURTS, COMMERCIAL AND ANTITRUST LAW HEARING ON H.R. 4369, THE “FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2012,” May 10, 2012. [↑](#footnote-ref-3)
4. A transcript of these proceedings may be found at: <http://www.americanbar.org/groups/tort_trial_insurance_practice/asbestos_task_force.html>. [↑](#footnote-ref-4)
5. Brown, *Asbestos Compensation*, *supra* note 2, at 4-5. [↑](#footnote-ref-5)
6. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 Conn. Ins. L.J., 255, 260 (2005-2006). [↑](#footnote-ref-6)
7. Brown, *Specious Claims*, *supra* note 2, at 565-68. [↑](#footnote-ref-7)
8. Jock McCulloch, *Saving the Asbestos Industry, 1960 to 2006*, 121 PUB. HEALTH REP. 609, 610 (2006); Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. ECON. PERSP. 183, 185 (2004); Andrew Schneider & David McCumber, AN AIR THAT KILLS 179-84 (Putnam 2004) (outlining W.R. Grace’s efforts to conceal asbestos exposure issues); Michael Bowker, FATAL DECEPTION: THE UNTOLD STORY OF ASBESTOS 87-108 (Rodale 2003) (discussing the asbestos industry’s history of concealing the dangers of asbestos exposure). [↑](#footnote-ref-8)
9. Brown, *Paradox*, *supra* note 2, at 846-48. [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. *In re* Johns-Mansville Corp., 36 B.R. 727, 736 (Bankr. S.D.N.Y. 1984). [↑](#footnote-ref-11)
12. Kane v. Johns-Mansville Corp., 843 F.2d 636, 644 (2d Cir. 1988). [↑](#footnote-ref-12)
13. *See* discussion at Part I.D., *infra*. [↑](#footnote-ref-13)
14. *See In re* Johns-Manville Corp., 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986). [↑](#footnote-ref-14)
15. 11 U.S.C. § 524(g)(1)(B). [↑](#footnote-ref-15)
16. 11 U.S.C. § 524(g)(4)(B)(i). [↑](#footnote-ref-16)
17. 11 U.S.C. § 524(g)(2)(B)(ii)(V). [↑](#footnote-ref-17)
18. 11 U.S.C. § 524(g)(2)(B)(ii)(V)(bb). [↑](#footnote-ref-18)
19. *In re* Combustion Eng’g, Inc., 391 F.3d 190, 234 (3d Cir. 2004) (describing section 524(g) as a “special form of supplemental injunctive relief”). [↑](#footnote-ref-19)
20. *In re* Plant Insulation Co., 469 B.R. 843, 859 (Bankr. N.D. Cal. 2012). [↑](#footnote-ref-20)
21. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997). [↑](#footnote-ref-21)
22. Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999). [↑](#footnote-ref-22)
23. U.S. Gov’t Accountability Office, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 3 (2011) [hereinafter, GAO Report]. [↑](#footnote-ref-23)
24. Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, MEALEY’S ASBESTOSBANKR. REP., June 2012, at 1, 2. This amount excludes the roughly $12 billion set aside for trusts that have not yet become active. *Id.* [↑](#footnote-ref-24)
25. *In re* Combustion Eng’g, Inc., 391 F.3d 190, 240-42 (3d Cir. 2004). [↑](#footnote-ref-25)
26. *See* Brown, *Paradox*, *supra* note 2, at 893-95. [↑](#footnote-ref-26)
27. *Id.* at 881-82 (discussing the Congoleum bankruptcy judge’s insistence that a plan that provided preferential recoveries to favored claimants could not be confirmed and certain claimants’ counsel unwavering demands for such recoveries). In 2009, the judge ordered the Congoleum bankruptcy case dismissed and, on appeal, the district court reversed and withdrew the reference. The district court ultimately confirmed a plan for the company in June 2010. [↑](#footnote-ref-27)
28. For example, Pittsburgh Corning commenced its bankruptcy in April 2000, and its most recent plan is currently winding its way through the appeals process. [↑](#footnote-ref-28)
29. Under 28 U.S.C. § 157(b)(2)(B), 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). [↑](#footnote-ref-29)
30. *Id.* [↑](#footnote-ref-30)
31. *See* Brown, *Paradox*, *supra* note 2, at 920. [↑](#footnote-ref-31)
32. 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."). [↑](#footnote-ref-32)
33. Brown, *Paradox*, *supra note 2,* at 926. [↑](#footnote-ref-33)
34. *See*, *e.g.*, Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 Northwestern L. Rev. 1435, 1438 & 1439 (2004) (concluding that “future claimants are not adequately represented in bankruptcy negotiations” and the risk that the trusts will be inadequate to pay claimants fairly “is borne primarily by future claimants”); Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 Chap. L. Rev. 43, 60 (2000). [↑](#footnote-ref-34)
35. Brown, *supra* note 2, at 900 (noting that future claimants’ representatives are often repeat players and “have strong global incentives against taking positions in any one case that may alienate” lead plaintiffs’ lawyers); Richard A. Nagareda, Mass Torts in a World of Settlement 177 (2007); Frances McGovern, *Asbestos Legislation II: Section 524(g) without Bankruptcy*, 31 Pepp. L. Rev. 233, 248 (2004) (“The selection of the futures representative is problematic because having a weak futures representative is in the interests of both the debtor and the current claimants.”). [↑](#footnote-ref-35)
36. Listokin & Ayotte, *supra* note 34, at 1438; Tung, *supra* note 34, at 60. [↑](#footnote-ref-36)
37. Tung, *supra* note 34, at 64. [↑](#footnote-ref-37)
38. Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, Mealey’s Asbestos Bankr. Rep. 1, 9 (June 2012). [↑](#footnote-ref-38)
39. Even in jurisdictions that require disclosure of trust forms to other parties in state tort litigation, plaintiffs may avoid this disclosure by simply waiting to file trust claims until after the litigation is over. Lloyd Dixon & Geoffrey McGovern, Asbestos Bankruptcy Trusts and Tort Compensation (2011) (noting that some lawyers file all trust claims early in a case, while others elect to wait until after the litigation concludes). [↑](#footnote-ref-39)
40. In re Plant Insulation Co., 469 B.R. 843, 859 (Bankr. N.D. Cal. 2012). [↑](#footnote-ref-40)
41. *Id.* at 860 (“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.”); *see also* In re Flintkote Co., No. 04-11300(JFK), 2012 Bankr. LEXIS 5888, at \*69-70 (Bankr. D. Del. Dec. 21, 2012) (“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.”). [↑](#footnote-ref-41)
42. *See* Charles E. Bates, *The Naming Game*,Mealey’s Litig. Rep. Asbestos, Sept. 2, 2009, at 7. [↑](#footnote-ref-42)
43. Brown, *Bankruptcy Trusts*, *supra* note 2, at 576. These percentages had a range of 0.5% to 70% and a median of 14%. *Id.* [↑](#footnote-ref-43)
44. DII Industries, LLC Asbestos PI Trust Notice to Claimants and Claimants’ Counsel, dated August 7, 2013 (announcing reduction of payment percentage from 52.5% to 35.6%); Notice of Celotex Trust to All Claimants and Counsel, dated July 26, 2013 (reducing payment percentage from 9.4% to 6.5%). [↑](#footnote-ref-44)
45. Brown, *Asbestos Compensation*, *supra* note 2, at 18. [↑](#footnote-ref-45)
46. For example, noting a “material increase in malignancy claim filings,” the UNR Trust instituted a moratorium on claims processing on April 9th of this year. *See* Notice to Claimant Counsel from David E. Maxam, Executive Director, UNR Asbestos-Disease Claims Trust, dated April 9, 2013. [↑](#footnote-ref-46)
47. *See* Panel Discussion, *Asbestos Bankruptcy Trusts and Their Impact on the Tort System*, 7 J. L., Econ. & Pol’y 281 (2010) (“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.”) (Comments of Nathan Finch). [↑](#footnote-ref-47)
48. *See* Brown, *Bankruptcy Trusts*, *supra* note 2,at 567-68. [↑](#footnote-ref-48)
49. *Id.* [↑](#footnote-ref-49)
50. *Id.* at 560. Trusts typically have a 3-year limitations period, which is longer than the period found in many states. [↑](#footnote-ref-50)
51. Brown, *Bankruptcy Trusts*, *supra* note 2, at 567. [↑](#footnote-ref-51)
52. *Id.* [↑](#footnote-ref-52)
53. Several states, for example, have enacted medical criteria laws that require evidence of actual physical impairment rather than mere physiological markers of exposure to qualify for compensation. Moreover, several jurisdictions place claims advanced by those without any observable impairment on deferred dockets; only those with severe impairment will receive a trial date. [↑](#footnote-ref-53)
54. Brown, *Asbestos Compensation*, *supra* note 2, at 46-7. [↑](#footnote-ref-54)
55. *See* Brown, *Bankruptcy Trusts*, *supra* note 2, at 569 (“Every major claims resolution facility in recent history—including state-level workers compensation programs, the Black Lung Fund, the Katrina and Rita hurricane disaster relief programs, the 9/11 Victims Compensation Fund, and the Gulf Coast Claims Facility, to name but a few—have experienced fraudulent claim submissions.”). [↑](#footnote-ref-55)
56. *Id.* at 570. [↑](#footnote-ref-56)
57. *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); Supplemental Report of the Business Bankruptcy Committee Special Task Force on Proposed Bankruptcy Rule 4009, ABA Section of Business Law (Aug. 29, 2011) [hereinafter, Business Bankruptcy Committee Report](listing cases); Memorandum of Law in Support of Defendant Chrysler LLC’s Motion for Leave to Renew, D’Ulisse v. Amchem Prods., Inc., No. 113838/04 (S. Ct. N.Y. 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); Tr. of Hearing, *Dunford v. Honeywell Corp*., Case No. CL-25113, at 3-4 (Va. Cir. Ct. Dec. 10, 2003) (identifying numerous conflicting representations under oath in state court proceedings and bankruptcy trust claim forms). [↑](#footnote-ref-57)
58. Compl. for Declaratory Judgment at 2, *W. Asbestos Settlement Trust v. Mandelbrot*, No. 12-04190 (N.D. Cal. Sept. 19, 2012). Several other trusts suspended the processing of claims from the firm after this litigation commenced. [↑](#footnote-ref-58)
59. Business Bankruptcy Committee Report, *supra* note 42, at 3. [↑](#footnote-ref-59)
60. Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., March 11, 2013, at A1(citing comments from Joe Rice, who serves on the trust advisory committees for several trusts). [↑](#footnote-ref-60)
61. Moreover, even if claim audits reveal inconsistencies or other questionable factual representations, they may be dismissed as mere errors. *See id.* And, of course, it can be extremely difficult to distinguish intentionally fraudulent submissions from those that are the product of mistakes in the claim development and submission processes without top-down assessments of claiming patterns. *See generally* S. Todd Brown, *Specious Claims*, *supra* note 2. [↑](#footnote-ref-61)
62. *See* Brown, *Bankruptcy Trusts*, *supra* note 2, at 590-91. [↑](#footnote-ref-62)
63. A ready explanation for this difference may be found in the TDPs at many trusts. Although TDPs may expressly require trust officials to consider the perceived costs and benefits when contemplating audit procedures, they do not afford the trusts similar grounds for refusing to challenge discovery into plaintiffs’ submissions. Rather, trusts with sole benefit provisions are typically required to “take all necessary and appropriate steps” to resist disclosure without reference to the costs of doing so. [↑](#footnote-ref-63)
64. Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 128-37 (2003) (discussing the Manville Trust audit, mobilization of the plaintiffs’ bar against the audit, the resulting litigation and rebuke from the district court). Professor Brickman also suggests that this failure emboldened lawyers and screening companies, and thus contributed to the surge in specious claim filings against bankruptcy trusts in the early part of the last decade. *Id.*, at 135. [↑](#footnote-ref-64)
65. *See* GAO Report, *supra* note 23, at 20. [↑](#footnote-ref-65)
66. Brown, *Asbestos Compensation*, *supra* note 2, at 20-21 (“The basis for [the GAO] estimate is unclear, but it is dramatically lower than the individual review rates reported by the few trusts that include this information in their annual reports. For example, 31.4% of the cancer and severe asbestosis claims submitted to the Combustion Engineering Trust in 2011 requested individual review, and 30.4% of cancer and severe asbestosis claims paid that year were individual review claims. In 2010, 25.3% of the cancer and severe asbestos claims submitted and 44.1% of the claims in these categories that were paid were individual review claims. Similarly, individual review claims comprised 61.6% of the cancer and asbestosis claims that were paid by the Lummus Trust in 2011. The discrepancy may simply capture the difference in claiming approaches across trusts or between severe injury claims and asymptomatic claims. In any case, the 2-3% figure does not appear to be accurate with respect to all specific claim categories across trusts, especially higher value claims.”). [↑](#footnote-ref-66)
67. Mark D. Plevin, Robert T. Ebert & Leslie A. Epley, *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. TEX. L. REV. 883, 912-13 (2003). [↑](#footnote-ref-67)
68. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997). [↑](#footnote-ref-68)
69. *In re* Combustion Eng’g, Inc., 391 F.3d 190, 241-42, 245 (3d Cir. 2004). [↑](#footnote-ref-69)
70. This chart was initially published in Brown, *Bankruptcy Trusts*, supra note 2, at 577, and has been updated to reflect additional reductions since the article was finalized earlier this year. [↑](#footnote-ref-70)
71. As the Lummus trust explained, this reduction was required because “more cancer claims have been filed with the Trust in its first three years of operations than were forecast during the bankruptcy case to be filed over the 40 year life of the Trust.” *See* Letter to Holders of TDP Determined Lummus Asbestos PI Trust Claims, dated June 13, 2011, at 1<http://www.abblummustrust.org/Files/20110616_Lummus_Letter_To_TDP_Claim_Holders.pdf>. [↑](#footnote-ref-71)
72. This figure does not include trusts that are actively reconsidering their payment percentages, notwithstanding any likelihood that such reconsiderations will result in payment percentage reductions. For example, the trustees proposed a reduction of the Combustion Engineering 524(g) Asbestos PI Trust payment percentage to 44% in May of last year, which was to be effective June 18, 2012. *See* Notice to Holders of Combustion Engineering TDP Claims (May 17, 2012), *available online at:* <http://www.cetrust.org/docs/20120517_CE_Payment_Percentage_Notice.pdf>. The plaintiff-controlled Trust Advisory Committee for this trust informed the trustees that it was withholding its consent to the reduction, as is allowed under the TDP for the trust, and this dispute does not appear to have been resolved as of the preparation of this written statement. *Id.* Accordingly, this reduction does not appear to have gone into effect, and all claims paid in the interim have been paid under the old payment percentage (48.33%). [↑](#footnote-ref-72)
73. *See* Combustion Engineering 524(g) Asbestos PI Trust 2013 Maximum Annual Payment, Claims Payment Ratio notice, *available online at:* <http://www.cetrust.org/docs/CE_2013_MAP_Notice.pdf>. [↑](#footnote-ref-73)
74. *Id.* [↑](#footnote-ref-74)
75. The trust was able to pay these amounts due to a “carryover” from years earlier. Combustion Engineering 524(g) Asbestos PI Trust Annual Report for the Fiscal Year Ended December 31, 2011, at 4. [↑](#footnote-ref-75)
76. *See* discussion at note 72, *supra.* [↑](#footnote-ref-76)
77. For example, the USG Trust has reduced its payment percentage three times since 2010, for a net reduction from 45% to 20%. *See* Letter to Counsel for Claimants Regarding the USG Payment Percentage dated April 20, 2010 (reducing the percentage from 45% to 35%); Notice From Trustees Regarding USG Payment Percentage dated Jan. 6, 2011 (reducing the percentage to 30%); Notice of Payment Percentage Change dated Sept. 28, 2012 (reducing the percentage to 20%). All notices are available online at: <http://www.usgasbestostrust.com/>. [↑](#footnote-ref-77)
78. 11 U.S.C. § 524(g)(2)(B)(ii)(V). [↑](#footnote-ref-78)
79. *See generally*, Brown, *Asbestos Compensation*, *supra* note 2. [↑](#footnote-ref-79)
80. Nagareda, *supra* note 35, at 167. [↑](#footnote-ref-80)
81. Brown, *Asbestos Compensation*, *supra* note 2, at 22. [↑](#footnote-ref-81)
82. *Id.* at 23-29. [↑](#footnote-ref-82)
83. *See* Listokin & Ayotte, *supra* note 34. [↑](#footnote-ref-83)
84. 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, 684 F.3d 355, 362 (3d Cir. 2012). [↑](#footnote-ref-84)
85. Indeed, section 1142(a) of the Code recognizes that “the debtor and *any entity organized or to be organized for the purpose of carrying out the plan* shall carry out the plan and shall comply with any orders of the court.” [↑](#footnote-ref-85)
86. *See*, *e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (characterizing “the restructuring of debtor-creditor relations” as being “at the core of the federal bankruptcy power”). [↑](#footnote-ref-86)
87. Opinion, *In re* Motions for Access of Garlock Sealing Technologies LLC, Civ. No. 11-1130-LPS, Dkt. No. 64, at 28 (D. Del. March 1, 2013). [↑](#footnote-ref-87)
88. For example, the New York City Asbestos Litigation website frequently posts lists of pending asbestos personal injury cases – including plaintiffs’ full names, counsel, injuries asserted and other information – apparently without objection by plaintiffs or their counsel. [↑](#footnote-ref-88)
89. *See, e.g.,* Ferguson v. Lorillard Tobacco Co., 2011 U.S. Dist. LEXIS 135183 (E.D. Pa. Nov. 22, 2011) (“a claim submitted to a bankruptcy trust is more akin to a complaint than to an offer of compromise”) (citing cases). [↑](#footnote-ref-89)
90. See Brown, *Paradox*, supra note 2, at 841. [↑](#footnote-ref-90)
91. That said, the bankruptcy schedule identifying all known asbestos claimants (and their respective counsel) in at least one bankruptcy case is readily available to anyone with access to Google. In addition, the API Trust already discloses the information required under the FACT Act available in its annual reports. Annual Report of the Trustee, 2011, API, Inc. Asbestos Settlement Trust, No. 05-30073, Dkt. No. 611 (Bankr. D. Minn. Apr. 23, 2012). [↑](#footnote-ref-91)
92. *See* Opinion, *In re* Motions for Access of Garlock Sealing Technologies LLC, Civ. No. 11-1130-LPS, Dkt. No. 64 (D. Del. March 1, 2013) (discussing the numerous steps taken by Bankruptcy Judge Fitzgerald to limit public access to information in asbestos bankruptcy cases). [↑](#footnote-ref-92)