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A Reorganized Mess: The Current State Of The Asbestos Bankruptcy Trust System

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Commentary

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[Editor's Note: Marc C. Scarcella is a Principal and Peter R. Kelso is a Manager at the Washington, DC office of Bates White Economic Consulting. Any commentary or opinions do not reflect the opinions of Bates White Economic Consulting or LexisNexis, Mealey's. © 2015 by Marc C. Scarcella and Peter R. Kelso. Responses are welcome.]

Introduction

In 2005, the Chairman of our firm, Dr. Charles Bates, testified before a United States Senate Judiciary Committee as to the long-term financial feasibility of the proposed \$140 billion federal asbestos trust fund (S. 852 Fairness in Asbestos Injury Resolution (FAIR) Act). In his testimony and associated report, Dr. Bates cautioned that the proposed claim qualification criteria of the FAIR Act established a lower compensable claim threshold for certain injury classes relative to the tort system. As a result, he predicted that the number of claims filed against the national fund would far exceed the levels one would expect by extrapolating the tort history. Therefore, in order for the FAIR Act to be financial feasibility either 1) the funding would need to be set to a level sufficient to compensate all current and future claims based on the economic incentives created by the trust procedures and qualification criteria, or 2) the trust procedures and qualification criteria would need be more closely tailored to mimic the resolution and valuation process in the tort system from which the \$140 billion in proposed funding was based. In general, ignoring such differences between the incentives of the tort system and those created by an administrative trust would lead to an underestimate of the number of

expected trust claims and would result in the premature insolvency of the fund decades prior to its intended duration.¹ Though the FAIR Act failed to pass in 2006, nearly a decade later there are dozens of individual asbestos bankruptcy trusts that are operating under a similar procedural construct; and as Dr. Bates predicted in 2005 in relation to the FAIR Act trust, many of these current asbestos trusts have experienced a dramatic, premature depletion of funds.

Asbestos bankruptcy trust funds are intended to pay initial and future claims in an equitable manner decades into the future. However, due to the accelerated depletion of funds, many asbestos trust claimants receive only half as much today as compared to the amounts similarly situated claimants received from the same trusts just six years ago. In fact, on April 28, 2014, the UNR Asbestos Disease Claims Trust filed a motion with the United States Bankruptcy Court for the Northern District of Illinois, requesting permission to terminate operations in the year 2019; decades prior to the expected duration of the trust and forecasted compensable claim filings. While the UNR trust termination represents the most extreme case of trust insolvency, the events that led to the UNR trust motion for premature termination are indicative of the systemic flaws of the current trust system and its procedural construct that incentivizes the over filing and payment of tenuous claims. The resulting disparate treatment between initial and future claimants raises concerns over the lack of trust operational transparency, and whether or not the procedural design of these trusts has resulted in a system of "Institutionalized Fraud"² that has led to the improper depletion of funds and financial harm to those plaintiffs that are the most impaired.

The following commentary will illustrate how the status quo trust procedural construct is flawed, resulting in an adverse treatment of future claimants, and similarly placing those trusts at the risk of premature insolvency. Additionally, the commentary will demonstrate that the continued inequitable treatment of current and future claimants necessitates a change in the procedures governing these trusts, and at the very least requires a greater level of trust operational transparency.³

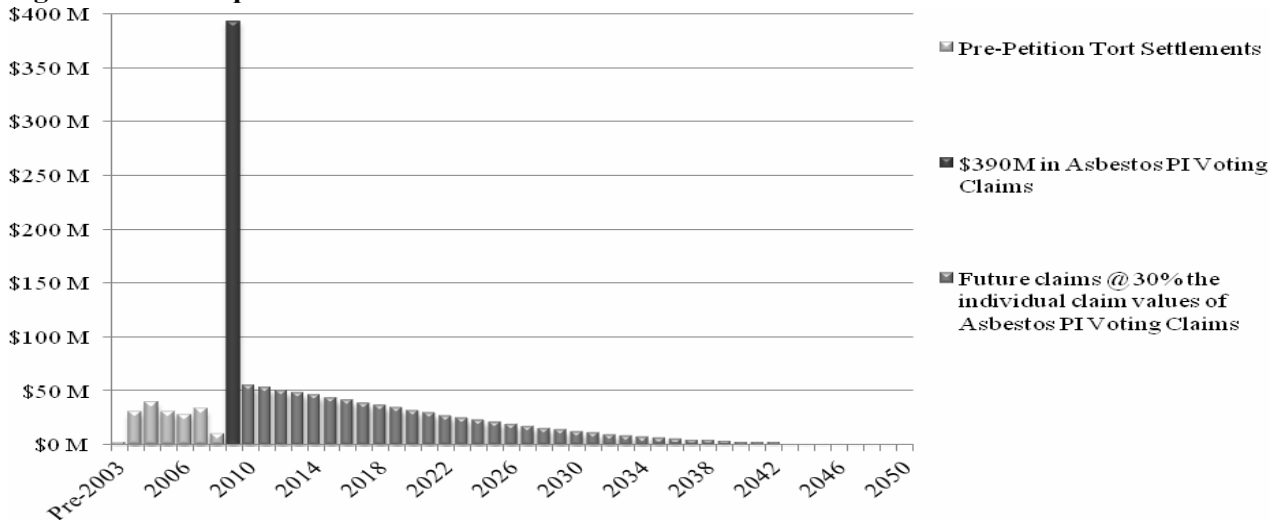
Trusts Continue to Reduce Their Net Payouts to Individual Claimants

Asbestos bankruptcy under section 524(g) of the U.S. bankruptcy code is unique compared to traditional chapter 11 reorganizations in that a majority of the creditors do not exist at the time of confirmation. The latent nature of asbestos-related injuries, where the diagnosis of an asbestos-related disease can occur decades after exposure, creates a future creditor class of claimants that is unknown in terms of both quantity and compensable value at the time of bankruptcy. Nevertheless, the basic principle of 524(g) reorganization and bankruptcy in general, is that claimants within the same creditor class be treated in an equitable manner. Therefore, bankruptcy courts allow for the estimation of future financial claim obligations in order to determine a sufficient level of funding necessary to provide equitable treatment for both initial and future claims. However, the estimation process can only be effective if the eventual Trust Distribution Procedures (“TDP”) that govern the compensability and valuation of claims are based on the filing and resolution expectations that underlie the actual bankruptcy estimation forecasts. Any

divergence between the forecasted value of future financial obligations and the actual application of the trust administrative process will create shortfalls in funding to the detriment of future claimants.

Possibly the most egregious example of inequity between initial and future asbestos claimants in a 524(g) bankruptcy occurred during the reorganization of T H Agriculture & Nutrition (“THAN”); the focus of our co-authored 2011 Mealey’s commentary titled “Pre-Packaged Plan of Inequity: the financial abuse of future claimants in the T H Agriculture & Nutrition 524(g) asbestos bankruptcy.”⁴ The commentary details the events that led to the THAN trust paying initial claimants a 333% premium compared to future claimants. In short, the bankruptcy plan proponents all assured the bankruptcy court that the \$900 million in proposed trust funding would be sufficient to pay all current and future claims in an equitable manner. However, these assurances were supported by projections of future claim obligations that were not estimated based on the resolution and valuation criteria set forth in the proposed THAN TDP. As a result, the THAN trust immediately distributed close to \$400 million in negotiated claim obligations to pending claimants that voted in favor of the plan of reorganization (“Asbestos PI Voting Claims”). After the fact, THAN reduced the net payout available to future claimants to 30% the level of those initial Asbestos PI Voting Claims. Figure 1 illustrates the dramatic, and immediate inequity between initial and future claimants under the THAN plan of reorganization and proceeding trust.

Figure 1: The inequities of the THAN trust



The ability for the THAN trust to reduce net payouts to future claimants was the result of a “Payment Percentage” mechanism that bankruptcy courts allow asbestos trusts to adopt in order to manage claim payment distributions in the event that future financial expectations change over time. For example, if future liability expectations increase relative to assets, then trusts will likely decrease individual claim payments in an attempt to maintain sufficient assets for future claimants. Conversely, if future liability expectations decrease relative to assets, then trusts will likely increase individual claim payments, and in most instances will provide a retroactive, or “True-Up”

payment to previously paid claimants equal to the difference between what they previously received from the trust and what the trust is currently paying similarly situated claimants.

Unfortunately for future claimants, recent history has seen a dramatic decline in Payment Percentages. For example, currently there are 23 trusts that are paying claimants less today than in 2008, and 11 of the 23 trusts have had to decrease the net claim payment amount more than once.⁵ In contrast, only nine trusts are paying more on a per claim basis today than in 2008. Figure 2 summarizes these changes in Payment Percentages.

Figure 2: Summary of Payment Percentage Changes since 2008

Trust	Initial Pay%	12/31 2008	12/31 2009	12/31 2010	12/31 2011	12/31 2012	12/31 2013	12/31 2014
A-Best	3.6%	3.6%	17.4%	17.4%	17.4%	17.4%	17.4%	17.4%
API, Inc.	13.5%	13.5%	55.0%	55.0%	30.0%	30.0%	30.0%	30.0%
Armstrong World Industries	20.0%	20.0%	20.0%	20.0%	20.0%	20.0%	35.0%	35.0%
ARTRA	7.5%	7.5%	7.5%	7.5%	0.5%	0.5%	0.5%	0.5%
Babcock & Wilcox	34.0%	34.0%	15.0%	15.0%	11.9%	7.5%	7.5%	7.5%
C. E. Thurston & Sons	40.0%	40.0%	40.0%	40.0%	80.0%	25.0%	25.0%	25.0%
Celotex ⁶	12.0%	14.1%	14.1%	9.4%	9.4%	9.4%	6.5%	6.5%
Combustion Engineering	48.3%	48.3%	48.3%	48.3%	48.3%	44.0%	44.0%	33.0%
Congoleum	6.3%	0%	0%	0%	6.3%	6.3%	6.3%	12.5%
DII Industries ⁷	100%	100%	52.5%	52.5%	52.5%	52.5%	35.6%	35.6%
Eagle-Picher Industries	31.9%	38.0%	38.0%	38.0%	31.0%	31.0%	28.0%	28.0%
G-I Holdings (GAF)	8.6%	0.0%	8.6%	8.6%	7.4%	7.4%	7.4%	7.4%
H.K. Porter	4.6%	4.6%	6.3%	6.3%	6.3%	4.0%	4.0%	3.0%
J.T. Thorpe (California)	50.0%	40.0%	40.0%	45.0%	45.0%	45.0%	45.0%	45.0%
J.T. Thorpe (Texas)	18.5%	38.0%	57.0%	57.0%	57.0%	57.0%	57.0%	57.0%
Kaiser Aluminum & Chemical	39.5%	39.5%	39.5%	39.5%	35.0%	35.0%	35.0%	35.0%
Keene Creditors Trust	1.1%	1.1%	1.1%	0.8%	0.8%	0.8%	0.8%	0.8%
Leslie Controls	40.0%	0.0%	0.0%	0.0%	40.0%	40.0%	40.0%	5.0%
Lummus (ABB)	100%	100%	100%	100%	10.0%	10.0%	10.0%	10.0%
Manville	10.0%	7.5%	7.5%	7.5%	7.5%	7.5%	7.5%	6.3%
National Gypsum ⁸	55.6%	55.6%	55.6%	55.6%	18.0%	18.0%	18.0%	18.0%
OCF - Fibreboard	25.0%	25.0%	11.0%	11.0%	9.5%	7.6%	7.6%	7.6%
OCF- Owens Corning	40.0%	40.0%	10.0%	10.0%	10.0%	8.8%	8.8%	8.8%
Plibrico	1.1%	8.5%	8.5%	8.5%	1.2%	1.0%	1.0%	1.0%
Raytech	2.0%	2.0%	2.0%	2.0%	0.8%	0.8%	0.8%	0.8%
Shook & Fletcher	65.0%	100%	100%	100%	100%	70.0%	70.0%	70.0%
T H Agriculture & Nutrition	100%	0.0%	100%	100%	30.0%	30.0%	30.0%	30.0%
Thorpe Insulation Company	17.5%	0.0%	0.0%	17.5%	17.5%	17.5%	30.5%	30.5%
U.S. Gypsum ⁹	45.0%	45.0%	45.0%	30.0%	30.0%	20.0%	20.0%	20.0%
UNR	18.6%	1.1%	1.1%	1.2%	0.8%	0.8%	0.8%	0.3%
U.S. Mineral	12.5%	12.5%	12.5%	12.5%	12.5%	12.5%	12.5%	14.0%
Western Asbestos/MacArthur	31.5%	40.0%	40.0%	44.0%	44.0%	44.0%	44.0%	48.0%

**Amendments to trust distribution procedures increasing gross payment values in conjunction with, or in lieu of a Payment Percentage change. See endnote for more detail.*

To quantify the impact these changes in Payment Percentages can have on net claim payments, Figure 3 summarizes the net claim payment for 6 large trusts (8 potential payments) that were processing and paying claims at the Delaware Claims Processing Facility (“DCPF”) as of 2008. Even with the Armstrong World Industries trust increasing its net payout by more than 75%, the overall payout to a mesothelioma claimant collecting all 8 potential payments across the 6 trusts is 46% lower as of yearend 2013 compared to yearend 2008.

The experience of the DCPF trusts is consistent with the trust system as a whole. As previously described, the Payment Percentage is a function of relative expectations for both future assets and liabilities. For example, the UNR trust not only experienced an increase in tenuous claim filings, but the trust’s investment in the reorganized debtor also lost significant value over time leading to lower than expected available assets. However, as we detail below, in most instances a decrease in Payment Percentage is primarily due to higher than projected claiming and resolution rates rather than financially-driven factors, even during significant periods of economic recession.

The Current Financial Standing of Bankruptcy Trusts

Prior to 2006 the trust system was a relatively minor source of plaintiff compensation as there were only a handful of active trusts, with total assets of less than

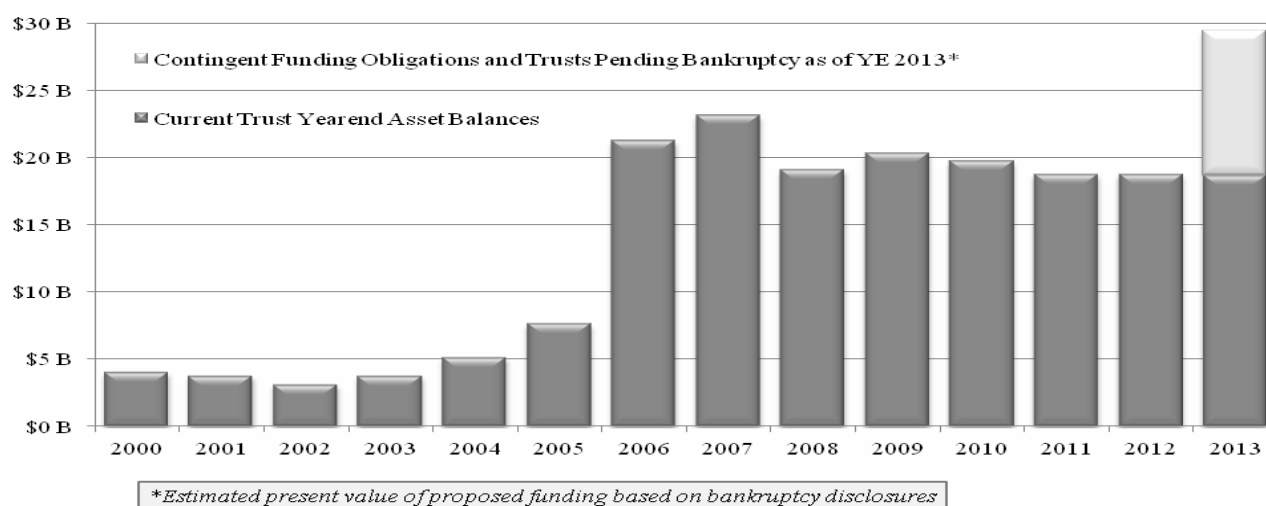
\$8 billion. However, since 2006 more than 30 trusts have been created through bankruptcy reorganization, funding the trust system with more than \$23 billion in assets and yielding \$17 billion in plaintiff compensation. In 2013 alone, the trust system received more than \$1.5 billion in additional funding, the highest level of new funds received since 2009.

A majority of the 2013 funding resulted from the resolution of appeals to the confirmation plans proposed in the A.P. Green, North American Refractory (NARCO), and Thorpe Insulation bankruptcies.¹⁰ In 2014, the confirmations of Pittsburgh Corning, W.R. Grace, Specialty Products Holdings, Metex, Quigley, and Flintkote will provide more than \$8 billion in additional funding that was still pending as of yearend 2013. Figure 4 illustrates the annual assets of the trust compensation system.

In addition to direct funding from debtor contributions and insurance settlements, the trust system has also earned \$6.6 billion on its investments since 2006 (4.1% annual return), which includes significant losses in 2008 during the stock market recession. Between investment income and capital gains, the \$6.6 billion in earnings and asset appreciation since 2006 has offset nearly 40% of the claim payments made over the same period. In fact, in 2012 the trust system earned more in investment income and capital gains than was paid out to claimants. Figure 5 summarizes the financial activity of the trust system since 2006.

Figure 3: Net Mesothelioma Claim Payments from DCPF trusts (*dollars in thousands*)

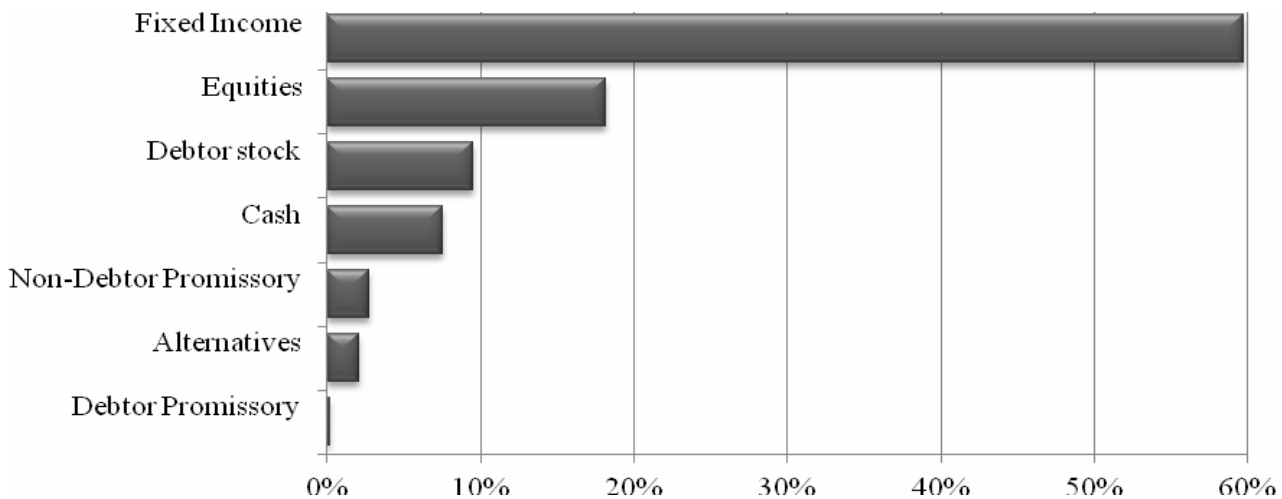
Trust	12/31 2008	12/31 2009	12/31 2010	12/31 2011	12/31 2012	12/31 2013
Armstrong World Industries	\$26	\$26	\$26	\$26	\$26	\$46
Babcock & Wilcox Company	\$41	\$18	\$18	\$14	\$9	\$9
Celotex	\$18	\$18	\$12	\$12	\$12	\$8
DII Industries - Halliburton	\$29	\$40	\$40	\$40	\$40	\$27
DII Industries - Harbison-Walker	\$68	\$96	\$96	\$96	\$96	\$65
OCF - Fibreboard	\$45	\$20	\$20	\$17	\$14	\$14
OCF- Owens Corning	\$108	\$27	\$27	\$27	\$24	\$24
U.S. Gypsum	\$101	\$101	\$68	\$68	\$45	\$45
Total Net Payment	\$437	\$346	\$306	\$300	\$265	\$238
Percent Change from 2008	--	21%	30%	31%	39%	46%

Figure 4: Trust Yearend Assets**Figure 5: Confirmed Trust Annual Financial Activity¹¹ (dollars in millions)**

Balance	2006	2007	2008	2009	2010	2011 ¹²	2012 ¹³	2013 ¹⁴	Total
Beginning Assets	\$7,641	\$21,217	\$23,116	\$18,662	\$19,910	\$18,817	\$17,992	\$18,083	
Funding Received	\$13,305	\$2,928	\$988	\$3,104	\$584	\$706	\$208	\$1,586	\$23,408
Investment Gains/Income ¹⁵	\$897	\$670	(\$1,971)	\$2,363	\$1,313	\$764	\$1,450	\$1,106	\$6,592
Claim Payments	(\$463)	(\$1,450)	(\$3,360)	(\$3,927)	(\$2,779)	(\$2,037)	(\$1,244)	(\$1,737)	(\$16,996)
Trust Expenses	(\$95)	(\$132)	(\$156)	(\$147)	(\$180)	(\$176)	(\$173)	(\$221)	(\$1,279)
Taxes/Other Deductions	(\$68)	(\$117)	\$44	(\$145)	(\$30)	(\$82)	(\$151)	(\$330)	(\$879)
Ending Assets	\$21,217	\$23,116	\$18,662	\$19,910	\$18,817	\$17,992	\$18,083	\$18,487	
								Deferred funding ¹⁶	\$160
								Current Confirmed Trust Assets	\$18,647

From a high level, the trust system appears to be earning a reasonable rate of return, especially considering that most trust agreements mandate a relatively conservative investment strategy geared towards asset preservation as opposed to high growth. Figure 6 summarizes the weighted-average asset allocation from 2007 through 2013 for 15 of the largest trusts as measured by total fair market value of investments as of yearend 2013.¹⁷ The 2013 fair market value of investments totaled over \$15 billion across the 15 trusts, representing more than 80% of confirmed trust assets. The data indicates that trusts allocate a majority of assets in conservative fixed income holdings as opposed to equities that are subject to more potential volatility.

The data illustrated in Figure 6 also shows that while many trusts emerge from bankruptcy with significant equity in the reorganized debtor, most of those shares are liquidated following confirmation, which in turn helps to diversify the overall trust portfolio and minimize risk; a strategy that may have helped the UNR trust, assuming the liquidation of the reorganized debtor stock was a viable option in the late 1990s. Therefore, from an investment perspective, most current trusts clearly take a conservative approach to asset management. However, as important as a reasonable return on investment is to the trusts, the long-term financial viability of any individual trust, and the trust system as a whole, is even more

Figure 6: Trust average asset allocation from 2007 through 2013

dependent on the proper liability management and procedural standards surrounding the distribution of claim payments.

It's Not the Economy, It's the Claims

Despite the recent trend of declining Payment Percentages that yield significant payment reductions to today's similarly situated claimants, many of the individual trusts rarely disclose any meaningful, public explanation for the decrease. Rather most trusts choose to provide only vague public notices of the change, with little to no justification. To that end, it has been a common misconception in recent years that the stock market recession of late 2008 and early 2009 was the primary reason why so many trusts subsequently decreased their Payment Percentages. However, the actual experience of most trusts both during and following the 2008 stock market recession contradicts this notion.

As the previous section showed, while the recession certainly created a temporary loss in trust assets, the subsequent recovery has yielded an average annual return of 7.5% since 2009 across the entire trust system. In fact, the individual trust that was impacted the most by the 2008 stock market recession was the Armstrong World Industries (AWI) Asbestos PI Settlement Trust, which held roughly two-thirds of its assets (nearly \$1.5 billion) as of yearend 2007 in the reorganized debtor's stock. As of yearend 2008, the reorganized AWI stock value was nearly 45% less than it had been the year before.¹⁸ Fortunately the stock recovered the following year and continued to grow

in subsequent years, yielding substantial dividend distributions to the trust. In fact, the recovery and sustained growth of the Armstrong stock more than made up for the previous losses and allowed the trust to increase its Payment Percentage from 20% to 35% in 2013. However, what's more significant about the experience of AWI is that the trust never lowered its Payment Percentage despite its temporary, albeit substantial, loss in asset value.

A second trust that was heavily impacted by the 2008 stock market recession was the Owens Corning subfund of the Owens Corning/Fibreboard ("OCF") Asbestos PI Trust. The OCF trust was confirmed in September 2006, and the Owens Corning subfund was provided with approximately \$3.4 billion in present value assets, which included 28.2 million shares of reorganized Owens Corning common stock valued at \$820 million on the date of transfer to the trust. By May 31, 2009 the trust had incurred unrealized losses of roughly \$440 million of the stock's original transfer value, plus an estimated \$330 million in additional unrealized losses from other equity and bond investments.¹⁹ This substantial unrealized loss of approximately \$770 million was likely further magnified by an expectation that the trust assets would have experienced a modest return on investment during its first 30 months of operations rather than a significant loss.

Overall, the temporary, yet substantial investment loss likely cost the Owens Corning subfund approximately \$1 billion of its initial present value of \$3.4 billion (~30%). Therefore, when the trustees decided

to adopt a new Payment Percentage in June 2009, the initial Payment Percentage of 40% should have been decreased to approximately 28% had the stock market recession been the only factor leading to the reduction. Instead, the trust reduced the Payment Percentage to just 10%; proving that the stock market recession was not the primary factor that drove the reduction in Payment Percentage. In fact, if the dramatic decline in Payment Percentage was primarily due to a stock market recession, then the Owens Corning subfund would have increased the Payment Percentage in subsequent years as the market recovered. However, rather than increasing the Payment Percentage, the Owens Corning subfund eventually dropped the Payment Percentage again in September 2012 to just 8.8%.

Owens Corning is not alone. As previously noted, 11 trusts have reduced their Payment Percentages more than once since 2009, suggesting that the entire trust system is not suffering from a poor investment strategy or the lingering effects of the stock market recession, but rather higher than projected levels of claim filings and resolutions. To illustrate the degree to which claiming rates have outpaced initial projections just look at the experience of the United States Gypsum ("USG") trust. When the USG trust was confirmed in 2006, it was funded with \$4 billion in assets to resolve all existing and future asbestos claims over the proceeding four decades. The trust began processing claims in February 2007, and by the end of 2009 it had made \$1.5 billion in claim payments, including nearly \$900 million in 2009 alone. In reaction to this higher than expected level of expenditure, the trust dropped its initial Payment Percentage of 45% down to 35% in April 2010, and then again to 30% in November 2010. The most recent reduction occurred in September 2012 when the Payment Percentage was dropped to 20%.

In order to fully appreciate the divergence from initial to current claim expectations it helps to translate the Payment Percentage and claim payment statistics into gross claim valuation terms ("Liquidated Value").

- **Upon confirmation the USG trust valued all present and future claims at a present value of \$8.3 billion:** At an initial Payment Percentage of 45%, this implies an initial expectation that the Liquidated Value of all current and

future trust claims was approximately \$8.3 billion (in present value terms) when the trust was confirmed in 2006.²⁰

- **As of yearend 2013, the USG trust had already resolved a gross Liquidated Value of \$6.9 billion in claims:** Through 2013, the trust made \$2.6 billion in claim payments net of applicable Payment Percentages applied over time. When these payments are represented in gross terms (e.g. gross of any Payment Percentage application) it suggests that since 2006 the USG trust has already resolved approximately \$6.9 billion in claim Liquidated Value. That's 83% of the total claim Liquidated Value the trust initially expected to pay over the course of 40-plus years.
- **Current estimates suggest that the USG trust will ultimately resolve a gross Liquidated Value of more than \$16 billion:** The fact that the USG trust had \$1.9 billion in assets remaining as of January 2014 and a Payment Percentage of 20%, suggests that the trust expects the future Liquidated Value of claim resolutions to be \$9.2 billion (in present value terms) in addition to the \$6.9 billion previously valued.²¹

If their current estimates are correct, the USG trust will eventually close its doors decades from now having resolved more than \$16 billion in claim Liquidated Value; nearly double initial expectations. The experience of the USG trust, which has been shared by nearly two dozen other trusts, raises questions regarding the manner in which bankruptcy trusts qualify and value claims. To date, the current valuation and qualification criteria of the USG trust, and many others, have not been in-line with tort expenditures or bankruptcy court expectations at the time of plan confirmation; which is to say that the procedures adopted at plan confirmation were not designed in a manner consistent with the bankruptcy estimates of expected tort expenditure and related funding.²² As a result, there has been a precipitous decline in trust payments to similarly situated claimants.

Do the Trust Administrative Processes Sacrifice Diligence to the Detriment of Future Claimants?

In 2002, the Manville trust adopted a new TDP, which provided an updated framework for the administration, review, resolution, and payment of claims.²³

Figure 7: Trust expenses category as a percent of total Trust expenses²⁴

Trust Expenses Category	2006	2007	2008	2009	2010	2011	2012	2013
Trustee Fees and Expenses	9.7%	8.7%	7.6%	8.1%	7.1%	7.6%	7.7%	7.8%
TAC Fees and Expenses	3.0%	1.8%	1.6%	1.4%	1.7%	1.5%	1.1%	0.8%
FCR Fees and Expenses	1.8%	1.7%	1.3%	1.1%	2.0%	1.6%	1.8%	2.1%
Legal and Professional Fees	30.9%	26.7%	25.2%	26.9%	34.9%	30.4%	25.3%	38.4%
Investment Fees	8.1%	19.0%	19.0%	16.3%	16.5%	17.9%	18.9%	16.9%
Insurance Expense	6.4%	3.5%	2.5%	2.5%	2.2%	2.4%	2.9%	1.9%
General Administration	14.5%	10.3%	9.3%	9.5%	7.3%	7.4%	9.9%	11.5%
Claim Processing Costs	21.1%	28.5%	33.9%	34.7%	27.0%	30.9%	31.9%	20.5%
Other Expenses ²⁵	4.6%	-0.1%	-0.4%	-0.5%	1.3%	0.3%	0.5%	0.0%
Total	100%	100%	100%	100%	100%	100%	100%	100%

These procedures were subsequently adopted by dozens of proposed trusts that were pending bankruptcy reorganization during that time. In regards to claimant qualifying medical and exposure criteria, there are nearly 40 trusts that currently operate under procedures that are substantively similar, if not identical, to the Manville 2002 TDP. These boilerplate trust procedures are designed to compensate qualifying claimants expeditiously with minimal administrative and transactional costs. Unlike lawsuits filed in the tort system, the trust compensation process is intended to avoid the time, expense, and resource burden often associated with litigation.

As previously summarized in Figure 5, since 2006 the trust system has spent just under \$1.3 billion in operations, administrative, and litigation costs relative to \$17 billion in claim payments. The figures in Figure 8 further suggest that over this same period, approximately 30% of trust expenses were associated with claim processing costs, or roughly \$370 million. When compared to the \$17 billion in claim payments made over that same span, it suggests that the trusts are spending approximately 2 cents to review, process, and pay \$1.00 in claim payments. Furthermore, even if one assumes that 100% of the Legal and Professional Fees are dedicated to the audit and verification of claim approvals, these costs would only account for an additional 2 cents for every \$1.00 in claim payments.

The manner in which trusts administer claim resolutions can be inexpensive for the trusts, as well as for the claimants, and claimants' counsel. The standardization of resolution procedures across trusts allows claimant counsel to utilize the same claims material for multiple trust submissions, thus minimizing the filing cost per claim. However, as we will discuss further below, to the extent this common procedural construct allows for inconsistent or questionable claiming behavior, the ease in which multiple trust claims can be made will only perpetuate that accelerated depletion of funds.

Further expediting the ability to file claims against multiple trusts is the use of joint processing facilities. Most trusts either contract with existing asbestos claim facilities such as Verus, LLC ("Verus"), or by partnering with one another to establish a multiple trust processing facility like DCPF. These facilities reduce administrative and processing expenses by leveraging overhead and other fixed costs across multiple trusts. In doing so, these facilities create a "one-stop shop" allowing plaintiff attorneys to electronically file bulk claim submissions against multiple trusts.²⁶ Verus and DCPF represent the two largest facilities both in number of trusts and total assets. In fact, as of yearend 2013, of the \$18.6 billion in confirmed trust assets, \$14.2 billion is associated with one of these two facilities. The two facilities were

Figure 8: Trust Assets and Claim Payments by Claims Administrator (*dollars in millions*)

Claims Processing Administrator	No. of Trusts	2013 YE Assets	2013 Claim Payments	2006-13 Claim Payments
Verus Claims Services ²⁷	16	\$4,588	\$377	\$2,641
Delaware Claims Processing Facility	7	\$9,628	\$937	\$11,187
MFR Claims Processing, Inc. ²⁸	6	\$781	\$36	\$151
Western Asbestos Settlement Trust	4	\$1,468	\$123	\$899
Claims Resolution Management Corp.	4	\$1,333	\$209	\$1,337
Claims Processing Facility	4	\$450	\$45	\$278
Trust Services, Inc. ²⁹	4	\$326	\$8	\$429
Other ³⁰	9	\$74	\$2	\$74
Total	54	\$18,647	\$1,737	\$16,996

responsible for over 75% of all trust claim payments in 2013, and over 80% since 2006. Figure 9 provides a summary of these figures.

The cost and time-saving benefits of the current trust system are obvious as billions of dollars in claim payments are made each year with minimal transactional burden. However, the ease in which claims can be made against multiple trusts at one time, coupled with the limited level of trust due diligence, generates more claims than any single trust would have otherwise received.

For instance, the Celotex Asbestos Settlement Trust was confirmed in December 1996 and began processing claims as of February 1998 with an initial Payment Percentage of 12%. During the late 1990s and early 2000s, the trust was inundated with non-malignant filings, leading to higher than expected claim volumes.³¹ As a result, Celotex lowered its Payment Percentage to 10% in June 2001. At the time, this was a common reaction amongst other operating trusts to the wave of non-malignant filings, as Manville, Eagle Picher, and UNR also lowered Payment Percentages. However, in subsequent years, the levels of qualifying non-malignant claims subsided, and many trusts began to increase Payment Percentages through the mid-2000s. In June 2006 Celotex increased its Payment Percentage to 14.1%.

Also in 2006, the Celotex Trust entered into a joint-facility agreement with four other trusts that were recently confirmed from bankruptcy reorganization; Armstrong World Industries, Babcock & Wilcox, Owens Corning Fibreboard, and United States Gypsum. The joint facility became the DCPF.³² As previously noted, this consolidation of trusts at a single facility creates cost-sharing benefits to the trusts and resource efficiencies for claimants and claimants' counsel. However, it also makes it very easy for claims to be filed against a particular trust that may otherwise not have been made.

For Celotex, 2007 yielded the lowest number of claims paid to date. In turn, the trust increased its net individual claim payments in June 2008, effectively yielding an 18.3% Payment Percentage.³³ However, these higher payment levels were short-lived. By 2010, Celotex dropped its Payment Percentage to 9.4% and then again to 6.5% in 2013; decisions that seem counterintuitive considering that overall levels of new claim filings against Celotex should have been a fraction of the peak levels experienced during the non-malignant wave of the late 1990s and early 2000s. One potential explanation as to why claim filings and resolutions were once again outpacing projections is the fact that by 2009 many of the newly formed DCPF trusts had received high volumes of pre-petition and pending claims that

may have created residual filings against Celotex that otherwise might not have been made.

Is the Current Trust Procedural Construct Antiquated?

A TDP will provide a list of compensable disease categories that may range from malignant asbestos-related injuries such as mesothelioma to less severe non-malignant respiratory conditions such as asbestosis and pleural plaques. The compensable disease categories and corresponding settlement values are *intended* to compensate claimants based on the relative values for substantially similar claims in the tort system.³⁴ However, as previously noted, the TDPs and compensable claim criteria are often less discriminating than individual claim resolutions in the tort system. As a result, the trusts are incentivized to create an over filing of claims. Moreover, as trust compensation criteria and settlement values are static relative to tort system, their procedures become antiquated relative to a shifting litigation environment in the tort system. This raises questions about the appropriateness of trust payment and qualification criteria relative to current tort compensation. Figure 10 summarizes the minimum presumptive qualification criteria adopted by most trusts under the boilerplate TDP.

The general willingness by trusts to continue to pay claims that are tenuous from either a medical or

causal standpoint creates an alternative compensation system far removed from current tort standards. For example, while recent tort trends show an increase in lung cancer lawsuits, there is little indication that a significant proportion of these cases are currently being resolved for payment in the tort system. On the other hand, the trust qualification criteria of many trusts are not as discriminating. In fact, the UNR trust cited a recent increase in lung cancer cases as an unanticipated development leading to their motion for early termination. Limited trust disclosures with injury-level summary statistics indicate that lung cancer claims constitute an increasing proportion of malignant trust filings relative to mesothelioma claims. Though lung cancer trust claims are paid amounts substantially lower than mesothelioma claims, any unanticipated increase in filing and resolution rates could undermine current Payment Percentages. Figure 11 illustrates this growing shift in malignant trust filings towards lung cancer claims.

An even starker example of the antiquated nature of current TDPs is the continued payment of certain non-malignant injury claims. For nearly a decade most tort jurisdictions have adopted inactive dockets for non-malignant claims that do not meet minimum medical impairment thresholds; thresholds that far exceed the qualification criteria accepted by most

Figure 9: Trust Presumptive Medical and Exposure Criteria³⁵

Disease categories	Expedited Review Qualifying Claim Procedures
Mesothelioma	(1) Mesothelioma, (2) product exposure prior to December 31, 1982, and (3) 10-year latency
Lung Cancer 1	(1) Primary lung cancer plus underlying Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure prior to December 31, 1982, (3) 5-years Significant Occupational Exposure, (4) medical causation statement, and (5) 10-year latency
Lung Cancer 2	(1) Primary lung cancer plus underlying Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure prior to December 31, 1982, (3) medical causation statement, and (4) 10-year latency
Other Cancer	(1) Primary colo-rectal, laryngeal, esophageal, pharyngeal, or stomach cancer, plus underlying Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure prior to December 31, 1982, (3) 5-years Significant Occupational Exposure, (4) medical causation statement, and (5) 10-year latency
Severe Asbestosis	(1) Asbestosis with ILO of 2/1 or greater, or asbestosis determined by pathological evidence of asbestos, plus a PFT less than 65% of normal, with (2) six months product exposure prior December 31, 1982, (3) 5-years Significant Occupational Exposure, (4) medical causation statement, and (5) 10-year latency
Asbestosis/ Pleural III	(1) Bilateral Asbestos-Related Nonmalignant Disease plus a PFT less than 80% of normal, with (2) six months product exposure prior December 31, 1982, (3) 5-years Significant Occupational Exposure, (4) medical causation statement, and (5) 10-year latency
Asbestosis/ Pleural II	(1) Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure prior December 31, 1982, and (3) 5-years asbestos exposure, and (4) 10-year latency

Figure 10: Shifts within trust malignant claim filings

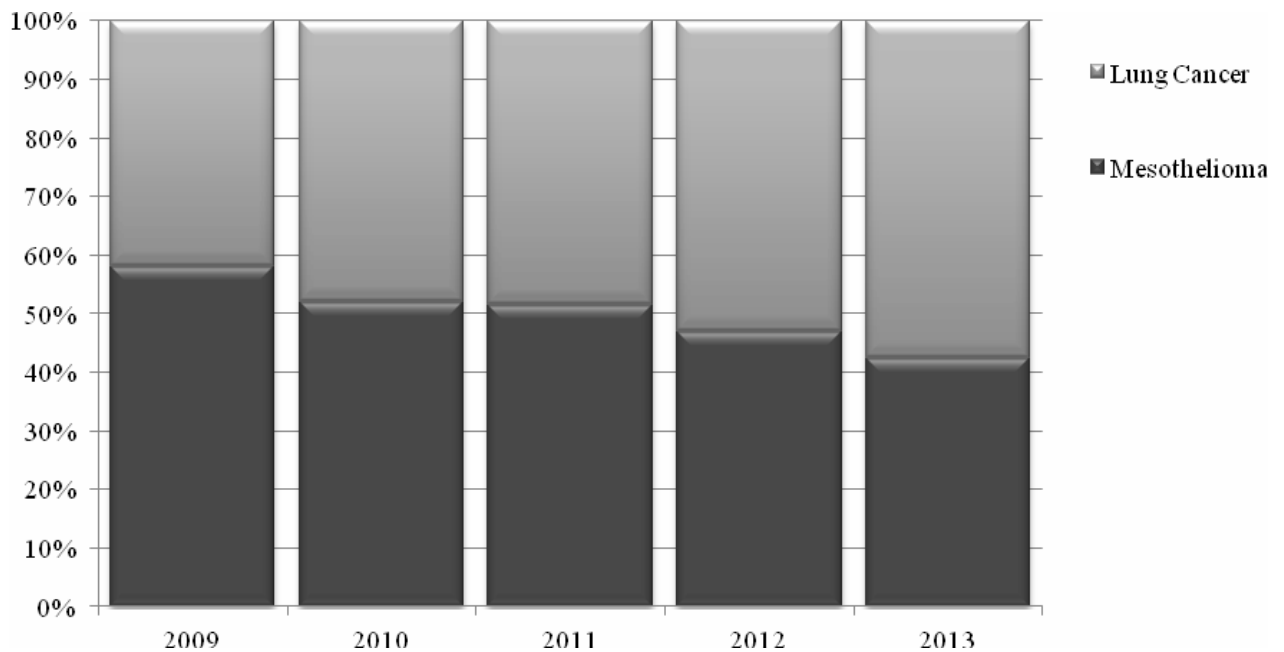
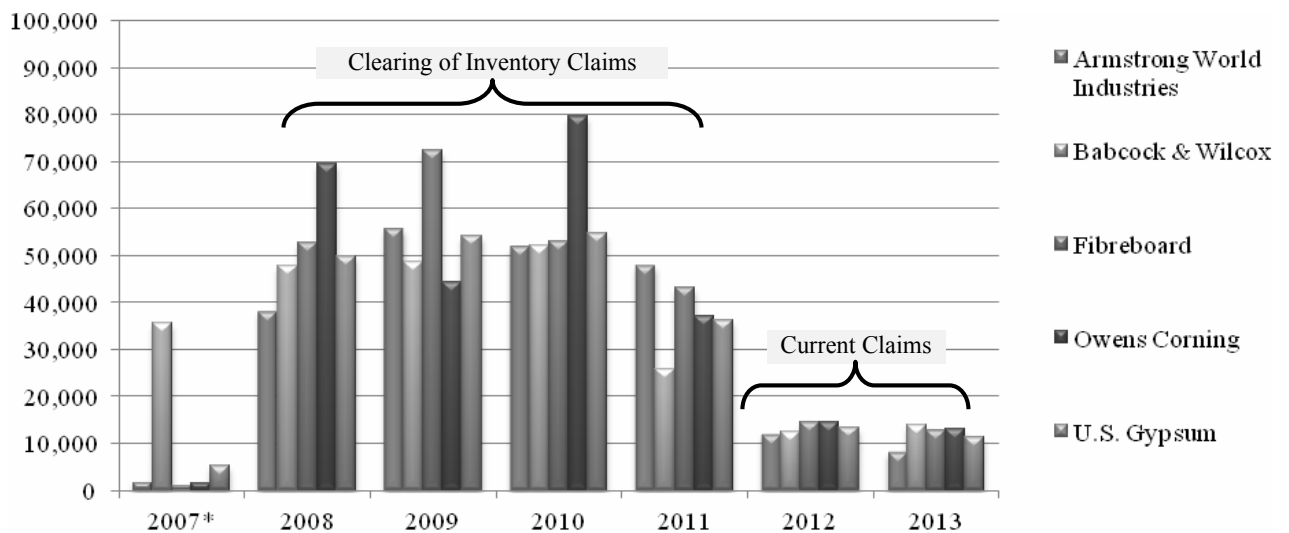


Figure 11: Number of claims paid by select trusts that were confirmed in 2006

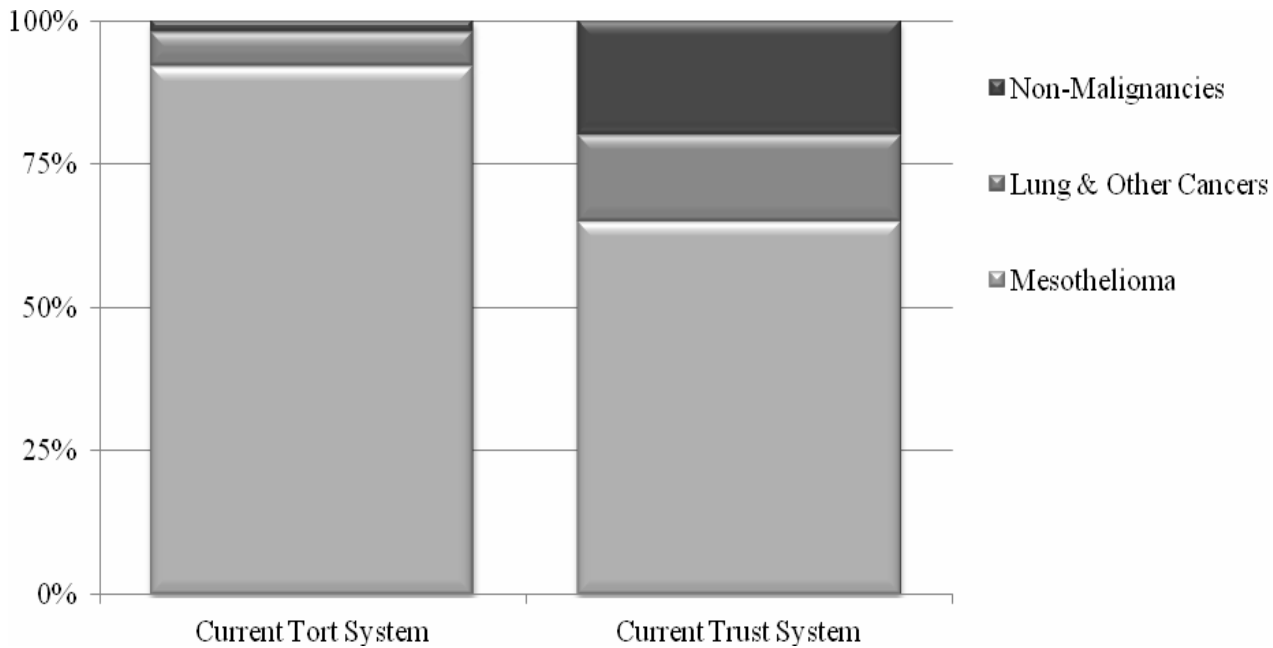


**The Babcock & Wilcox bankruptcy was confirmed in January 2006, allowing the trust to establish its operations and begin paying a significant number of claims in 2007. The other four bankruptcies were not confirmed until the second half of 2006.*

trusts for the lesser impaired non-malignant injury categories. Moreover, other trust disclosures seem to suggest that non-malignant screening operations are once again being utilized, albeit on a smaller scale. As illustrated in Figure 12, large trusts such as Armstrong World Industries, Babcock & Wilcox, Owens

Corning, Fibreboard, and U.S. Gypsum each cleared significant non-malignant pending claim inventories between 2008 and 2011, yet have still paid on average more nearly 13,000 claims in each of the last two years. With less than 3,000 new diagnoses of mesothelioma each year in the United States, this

Figure 12: Trust and tort system distribution of claim payments by disease



data suggests that up to 10,000 contemporary, non-mesothelioma claims were paid by the trust system in each of the last two years.³⁶

Regardless of whether the current levels of compensable trust claims are being influenced by a new focus on lung cancer recruitment, or a renewed interest in non-malignant screenings, it is the current TDP criteria that provide the economic incentives for plaintiff attorneys to seek out and file such claims. As a result, claim resolutions in the trust system represent a stark divergence from contemporary tort compensation trends. Figure 13 illustrates the current difference in claim payment distribution between the trust and tort system.³⁷

Moreover, the incentives and resulting claim behavior could have been reasonably predicted even prior to most trusts becoming operational. One of the many legislative debates over the aforementioned FAIR Act centered on the trust fund's willingness to provide compensation to lung cancer claimants who may have smoked tobacco products. Dr. Bates' testimony before the U.S. Senate Judiciary Committee provided a report detailing how the trust would become insolvent due to the looser criteria established to compensate lung cancer claimants.³⁸ The qualification criteria proposed under the FAIR Act was based on the same procedures adopted by the Manville Personal Injury Settlement Trust in 2002 and in place for dozens of trusts today. In fact, given that hundreds

Figure 13: Summary of Trust Assets and Claim Payments by TAC Firm (dollars in millions)

TAC Member Firm / Affiliation	No. of Trusts	2013 YE Assets	2013 Claim Payments	2006-13 Claim Payments
Kazan, McClain, Lyons, Greenwood & Harley	20	\$14,020	\$1,360	\$14,360
Baron & Budd, P.C.	16	\$11,670	\$1,150	\$13,140
Motley Rice, LLC	12	\$11,300	\$1,130	\$12,830
Cooney & Conway	15	\$11,400	\$1,180	\$11,360
Weitz & Luxenburg	15	\$10,990	\$1,090	\$12,230

of thousands of individuals are diagnosed with lung cancer each year in the United States, the trusts should have anticipated that the recent lung cancer filing rates would rise as more lung cancer claimants are recruited – as would anyone who has seen the many ads on television in recent years seeking individuals with lung cancer for trust claim filings.

Should Trusts Re-Consider the Current Procedural Construct?

Adopting lower Payment Percentages is an appropriate response to higher than expected claim volumes. Especially since most trusts allow for the aforementioned “True-Up” payments if and when Payment Percentages are increased. Thus, from a management perspective, taking a conservative position on Payment Percentage levels allows trustees the ability to better assess the current and future payment expectations without sending too much money out the door to current claimants. Unfortunately, this conservative approach is rarely adopted from the onset of trust operations. As we’ve summarized in Figure 2 and Figure 3, the initial claimants received substantially more money than subsequent claimants for a number of trusts. However, the conservative application of Payment Percentages that many trusts appear to be currently adopting seems to be nothing more than just a stop-gap for a much larger issue that needs to be addressed; the current set of trust procedures produce claim filing and resolution rates that far exceed tort experience and bankruptcy confirmation funding.

Given the current trends in dropping Payment Percentages and higher than expected claim volumes, it’s a wonder why more trusts are not following the lessons of UNR. In 2001, the UNR trust amended its procedures to value different disease levels at ratios that were more in-line with the contemporary tort system.³⁹ Yet, current trusts seem unwilling to adapt and remain antiquated in regards to certain disease qualification criteria and relative valuations. Moreover, very few trusts have adopted filing fees; a decision UNR made in 2000 in an attempt to deter the over filing of tenuous claims.⁴⁰ Even at minimal levels, filing fees can significantly reduce the mass filing of tenuous or poorly documented claim submissions. As previously noted, there are nine trusts that are currently paying even more to claimants today than they did in 2008; notably, five of these nine impose filing fees of various levels.⁴¹

As shown, the trust system’s willingness to pay claims that would not be compensable in the tort system creates a vast gap in the number of claims a company (debtor) historically resolved for payment in the tort system versus the number of claims that a debtor’s trust will qualify for compensation. Exacerbating this disparity in claim volumes is the fact that future claim projections have traditionally been weighted heavily on the previous tort experience of the debtor and not on what claims the trust criteria will allow for payment. The resolution procedures and related claim qualification criteria for each trust should be predicated on the valuation and related claim expectations developed during the bankruptcy estimation process. This is critical to ensuring that sufficient trust assets are available to equitably pay claims over time.

However, even with the benefit of hindsight, the current trust advisors continue to propose and adopt the same TDP that has led to the significant reduction in Payment Percentages for nearly two dozen trusts. Since 2011, at least nine trusts have been confirmed with substantially the same TDP payment criteria, including the recently confirmed Specialty Products Holding Corporation (Bondex) and Metex (Kentile) trusts. Moreover, the pending plan of reorganization filed in December 2014 in the Yarway bankruptcy proposes a similar TDP construct; decisions that seem to perpetuate past missteps by a number of other trusts. For example, in January 2011 the Leslie Controls Asbestos Personal Injury Trust was confirmed with the same TDP and an initial Payment Percentage of 40%. As of May 2014 the trust had already lowered the Payment Percentage to just 5%.

What makes the perpetual use of this flawed TDP even more questionable is that another trust distribution construct does exist and it being utilized by three asbestos bankruptcy trusts in California.⁴² Each of these trusts institute a filing fee to discourage tenuous claiming and have set qualification criteria that more closely resemble medical and exposure valuations in the tort system. Unlike the TDP used by most other trusts, these alternative procedures value all claims exclusively through an individual review process, which values each claim on multiple dimensions of medical severity, supporting exposure evidence, and economic loss. More importantly, these trusts are able

to value weaker, albeit qualifying claims at amounts that can be as low as just 10% of base values.⁴³ As a result, each of these trusts has increased their respective Payment Percentages in recent years, allowing greater compensation to more worthy future claimants instead of paying these worthy future claimants less than worthy pending claimants.

Is External Oversight Needed to Ensure Finite Trust Assets Are Preserved?

As previously outlined, the TDP coupled with the joint-facility model and electronic claim filing systems utilized by nearly every asbestos bankruptcy trust creates a claim filing process that can seamlessly integrate multiple trusts. However, the individual resolution and valuation of each trust claim is an independent process that does not consider the claims that are made across multiple trusts. Moreover, the trusts do not seem to be concerned with inconsistent allegations that may be made in the underlying tort case as evident by inclusion of “Sole Benefit” clauses in many TDPs; often adopted post-bankruptcy plan confirmation. The Sole Benefit clause states that:

“Evidence submitted to establish proof of exposure to [Predecessor Company] is for the sole benefit of the Asbestos PI Trust, not third parties or defendants in the tort system. The Asbestos PI Trust has no need for, and therefore claimants are not required to furnish the Asbestos PI Trust with evidence of exposure to specific asbestos products other than those for which [Predecessor Company] has legal responsibility, except to the extent such evidence is required elsewhere in the Asbestos TDP. Similarly, failure to identify [Predecessor Company] products in the claimant’s underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the Asbestos PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of the Asbestos TDP.”⁴⁴

From a tort defendant perspective, the trust process of operating in a vacuum cuts against the fundamental principles of fault allocation across multiple parties, either on a proportional or several basis. However, the independent structure of the current trust system, both as it relates to the tort system and across trusts, may be a calculated design. In an article

written by former asbestos plaintiff attorney Tom Wilson entitled, *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, Wilson describes certain trust procedures as “loopholes” that were created during the bankruptcy reorganization process and allow claimant attorneys to ultimately “game the system.” According to Wilson:

“Institutionalized fraud is an inherent part of the current asbestos bankruptcy trust system. As shown, the trusts, designed by the same individuals who are now submitting claims, contain “loopholes” allowing for ease of payment, often without the need for any real proof. By using the loopholes which have been integrated into the system itself, asbestos claimants can legitimately obtain compensation which they are otherwise precluded from obtaining in the tort system.”

A trust system that is designed to make multi-trust filing as inexpensive as possible clearly has the infrastructure capabilities to leverage a higher degree of transparency through more robust disclosures. However, it appears that while the current trust compensation system is highly integrated for the filing of trust claims, there does not appear to be the same level of integration at the resolution or post-payment audit phases. Thus, to the extent Institutionalized Fraud exists, it is perpetuated by a lack of inter-trust transparency or integration with the tort system.

Ultimately, the current trust process is efficient for compensating large numbers of claims, but such efficiency is compromised when participating players do not act in good faith. The procedures and rules established by the trusts presume that claims filed against them will be legitimate and based on meaningful medical and exposure evidence. However, these same procedures can also create avenues for specious claiming and *Institutionalized Fraud*. Therefore, it is disturbing when the subhead of a 2014 brief filed by Waters and Kraus in Los Angeles, California state court arguing against trust transparency is entitled, *“Many Bankruptcy Trust Claims Are Not Even Evidence of Exposure.”*⁴⁵ Moreover, the brief is just a continuation of the same type of rhetoric proffered by other plaintiff attorneys throughout the years in various forums. In 2008, plaintiff attorney Steven Baron made similar statements in Texas state court before Judge Mark Davidson.

"You asked some questions about the claim form. Interestingly the claim form and what you must prove, you do not even have to prove exposure. The trusts readily acknowledge our products were at many, many job sites and they give you the list. They are on the web for the whole world to see. If you worked at one, all you have to say is, I worked there. That is all. No more inquiry. No more statements. No more allegations. By the way, with respect to mesothelioma, all one needs to prove their compensation, at least for an expedited claim, which is what he [Robert Riley] was talking about, is a pathology report for an accredited hospital that says mesothelioma. No causation. Nothing like that. One fiber - no fiber. I worked at a place decades after the product was there works for mesothelioma."⁴⁶

It would appear from these statements by practicing asbestos plaintiff attorneys that the avenue for compensation from bankruptcy trusts is not contingent on exposure to the asbestos products and/or operations of the reorganized company. The statements seem more in-line with Tom Wilson's article and support the fact that the current trust compensation rules can allow for trust assets to be depleted by tenuous claims. This type of bankruptcy claim filing behavior raises issues regarding the lack of governance currently in place to eliminate payment to such claims as well as the ethical duty of plaintiff counsel to only file claims that allege exposure to the products and/or operations of reorganized companies.

The most logical form of external oversight to the operations and activities of asbestos bankruptcy trusts would seem to come from the federal bankruptcy and district courts that confirm the debtor's plan of reorganization. However to date, those court's oversight of the trusts seems to end in a "de-facto" manner upon plan confirmation, as the oversight of a resultant bankruptcy trust is left largely with appointed trustees and trust advisors.

The administrative governance and structure of each trust is established during the pendency of the bankruptcy case and involves negotiations between the debtor and various creditor classes. The most influential of these creditor classes is the current asbestos claimants represented by the Asbestos Claimant

Committee ("ACC"), which is typically comprised of the plaintiff attorneys that hold the highest number and/or value of pending claims against the debtor at the time of bankruptcy. Not only does the ACC hold the highest number of creditor votes towards bankruptcy confirmation, but often times it is the ACC that negotiates with the debtor over the appointment of a legal representative for future claimants ("FCR"). Likewise, the ACC also participates in the selection of Trustees to be appointed as trust fiduciaries upon bankruptcy plan confirmation. Following bankruptcy confirmation, the ACC assumes a trust advisory role as the Trust Advisory Committee ("TAC") along with the FCR.

Figure 14 summarizes ACC law firms that have attorneys as TAC members on the highest frequency of trusts and the recent assets held and claim payments made collectively across those trusts. As evidenced from the number of trusts and the billions of dollars in trust assets that these plaintiff firms both advise to and claim against, this trust advisory role has largely been a repeated over time with many of the same players. Moreover, the ACC/TAC members appear to be almost exclusively responsible for the design of the trust procedures. In addition to the aforementioned quote by Steve Baron in front of Texas state court Judge Mark Davidson, he goes on to explain his role in the drafting of TDPs: *"I personally, me, wrote much of the language in these documents. What I didn't write, I was there and negotiated."⁴⁷*

The influence of the ACC as to the appointment of Trustees and FCRs, has led to a similar pattern of consolidation at both these positions. Currently, there are a number of individuals serving as either Trustees or FCRs across multiple trusts, which raises questions as to their independence from the ACC, who is in large part responsible for their initial and subsequent appointments. In turn, to the extent such a paradigm exists, it could foster a "fox guarding the henhouse" culture, which seems to be supported by Tom Wilson's claims of *Institutionalized Fraud*. Absent a complete restructuring of the current trust governance and procedural construct, there are alternative solutions that could help disincentivize inconsistent or specious claiming behavior, and help prevent further inequitable treatment of future claimants.

One such solution is a greater level of trust transparency through claim level disclosures that are standardized across the entire trust system. Proposed federal legislation such as the Furthering Asbestos Claim Transparency (FACT Act) bill would require public, quarterly trust disclosures that will provide a level of claim detail akin to what is currently publically available for civil tort claims.⁴⁸ When an asbestos lawsuit is filed in the tort system, a public complaint discloses the identity of the plaintiffs, and all the defendants named in the lawsuit for which the plaintiffs are seeking compensation. In addition, these complaints typically provide general allegations of exposure, and in some cases they will include a very detailed account of the victim's work and exposure history. Furthermore, publically available case dockets will typically provide status information on each defendant named in the lawsuit.

The FACT Act seeks the same level of public disclosure from the trusts, which in effect, can help bridge the transparency gap between the two compensation systems. Perhaps more importantly, such transparency and related public accountability would make it more difficult for bad actors to intentionally assert inconsistent exposure or medical allegations across

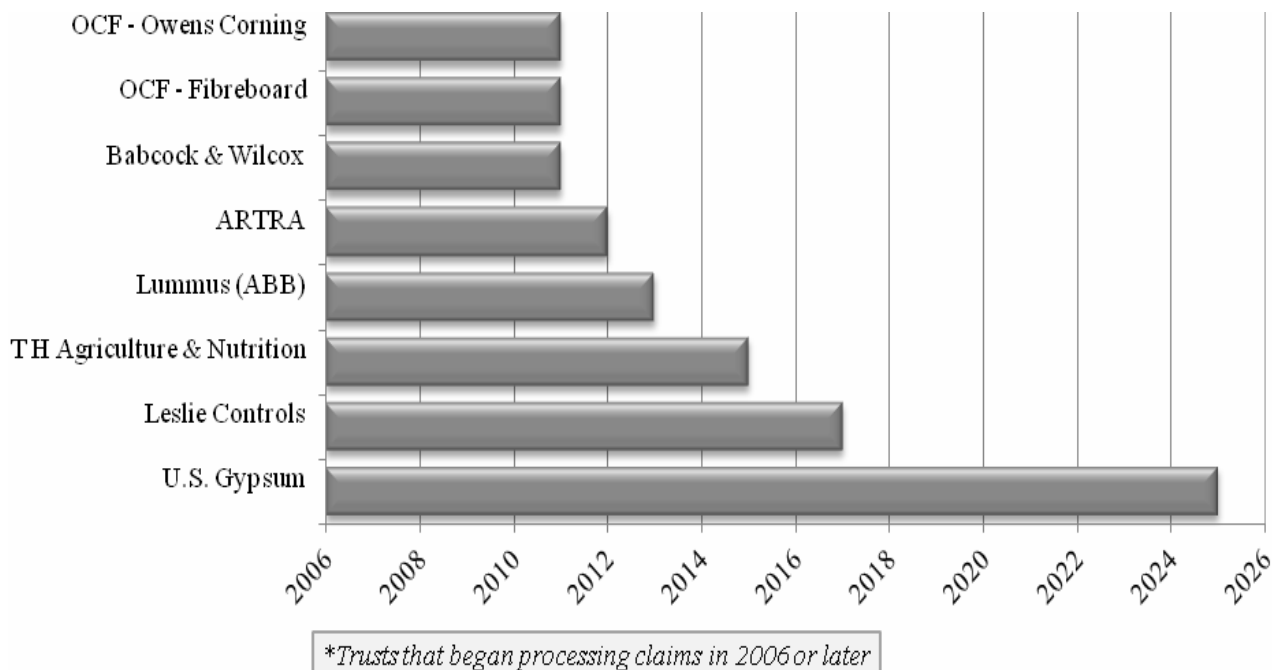
various trusts and tort defendants. As evident by recent cases such as the Garlock bankruptcy, transparency can highlight inconsistent or potentially fraudulent behavior, and in turn can deter such activity from perpetuating in the future.

Conclusion

The news of the impending UNR trust insolvency is likely to reverberate through the entire trust compensation system. A cautionary tale to other trusts currently utilizing similar payment criteria, UNR's premature termination may finally be a wake-up call to the current trust leadership, and prompt serious consideration for amending the antiquated TDP. With a number of trusts lowering Payment Percentages to levels similar to UNR, it raises concerns over the premature termination of other trusts in the coming years. Moreover, even if current operating trusts are able to ward off insolvency, the fact that nearly two-dozen trusts have dropped their net claim payments since 2008 seems to be indicative of a larger, systemic failure of the trust system as a whole.

The critical mission of section 524g and the implementation of an asbestos bankruptcy trust is that similarly situated current and future claimants are

Figure 14: Year of estimated trust insolvency under each initial Payment Percentage*



treated equitably. Yet with no current external oversight of the trusts' post-confirmation operations, the majority of trusts confirmed under section 524g have failed to meet that legal mandate. As noted earlier, some trusts recently have taken a more conservative approach to claim payments by further reducing their payment percentages to account for a greater than anticipated volume of claims. However, had the trusts paid claims equitably to both current and future claimants at the initial payment percentage, several trusts would already be insolvent or face insolvency in the near term. For example, Figure 15 shows the year in which other currently active trusts would, or would have become insolvent if they had not lowered Payment Percentages and paid all claimants equitably as initially planned.

As indicated in Figure 14, there are five trusts that became operational in 2006 or later, that would already be bankrupt had they continued to pay future claimants at the same level as the initial claimants. Not coincidentally, these trusts all compensated claimants with the same TDP.

The latest iteration of section 524g bankruptcies have failed to pay claims equitably under the current trust governance due to the inaction of the trust leadership to modify compensation standards in light of a greater volume of anticipated claims. Beginning with Manville and UNR, and continuing with other active trusts today, the current class of claimants has been liquidated at a higher value than the similarly situated future class time and time again. This inequitable treatment raises valid concerns about whether the implementation of section 524g asbestos bankruptcy plans through the trust construct is effective without some type of public accountability. Efforts by public policy makers to create more trust transparency have shed some light on the issue but without external oversight it is likely that future claimants will continue to be prejudiced. Absent changes, it is also possible that other asbestos bankruptcy trusts like UNR will become insolvent.

Endnotes

1. Bates, Charles E. and Charles H. Mullin, Analysis of S. 852 Fairness in Asbestos Injury Resolution (FAIR) Act, September 2005.

2. Wilson, Thomas M., "Institutionalized Fraud in Asbestos Bankruptcy Trusts," Mealey's Litigation Report: Asbestos, Volume 29, Issue #7.
3. The statistics and other information in this paper are derived from the publicly available documentation produced by various asbestos bankruptcy trusts established pursuant to Section 524(g) of the U.S. bankruptcy code and the publicly available documentation produced during the proceedings of various Section 524(g) bankruptcy reorganizations.
4. Hartley, Kirk T., David C. Christian II, Marc C. Scarcella, and Peter R. Kelso. "Pre-Packaged Plan of Inequity: the financial abuse of future claimants in the T H Agriculture & Nutrition 524(g) asbestos bankruptcy." Mealey's Asbestos Bankruptcy Report 11, no. 4 (2011).
5. The total number includes the T H Agriculture & Nutrition, LLC Industries Asbestos PI Trust and the Leslie Controls, Inc. Asbestos PI Trust, both of which did not become operational until 2009 but have since lowered their respective net claim payments.
6. In June 2008 the Celotex Trust increased its TDP values in lieu of increasing the Payment Percentage from 14.1% to 18.3%. Notice is available on Celotex Trust website.
7. In October 2009 the DII Trust increased its TDP values by more than double (e.g. Harbison-Walker Mesothelioma average value increased from \$68K to \$182K), prior to decreasing the Payment Percentage from 100% to 52.5%.
8. NGC trust decreased its Payment Percentage twice in 2011 (First to 41% in July and then to 18% in November).
9. United States Gypsum trust decreased its Payment Percentage twice in 2010 (First to 35% in April and then to 30% in November).
10. In addition to its existing trust funds, the NARCO trust will continue to receive annual funding installments up to \$140 to \$150 million, contingent on the level of trust qualifying claims.

11. Balances may differ slightly from prior commentaries due to corrections made to financial data we collected from the U.S. Mineral trust annual reports.
12. 2011 annual reports were not available for the Rutland Fire and M.H. Detrick Trusts so these amounts have been estimated.
13. 2012 annual reports were not available for the Rutland Fire and M.H. Detrick Trusts so these amounts have been estimated.
14. 2013 annual reports were not available for the Rutland Fire and M.H. Detrick Trusts so these amounts have been estimated.
15. 2008 Investment Gains/Income includes \$166 million in special dividends received by the Armstrong World Industries Asbestos PI Settlement Trust that we previously classified as "Other Additions" in our 2012 commentary.
16. These assets include \$160 million in deferred note payments to the Federal Mogul U.S. Asbestos Personal Injury Trust that was not included in the trust's accounting of Net Claimant Equity.
17. Armstrong World Industries Asbestos Personal Injury Settlement Trust; Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust; Celotex Asbestos Settlement Trust; Combustion Engineering 524(g) Asbestos PI Trust; DII Industries, LLC Asbestos PI Trust; Eagle-Picher Industries Personal Injury Settlement Trust; Kaiser Asbestos Personal Injury Trust; Manville Personal Injury Settlement Trust; NGC Bodily Injury Trust; Owens Corning Fibreboard Asbestos Personal Injury Trust - FB Subfund; Owens Corning Fibreboard Asbestos Personal Injury Trust - OC Subfund; United States Gypsum Asbestos Personal Injury Settlement Trust; Western MacArthur-Western Asbestos Trust; ASARCO LLC Asbestos Personal Injury Settlement Trust (2010-2013); TH Agriculture & Nutrition, LLC Industries Asbestos Personal Injury Trust (2010-2013).
18. On December 31, 2006, the AWI stock closed at \$39.45/share. On December 29, 2009 the AWI stock closed at \$22.06/share.
19. As of December 31, 2008, the value of the Owens Corning stock had fallen to less than \$490 million; 60% of its original transfer value of \$820 million. In addition to the \$330 million in unrealized loss in the Owens Corning stock, the subfund also incurred an additional \$250 million in unrealized losses from other equity investments and bond holdings. As of May 31, 2009, the Owens Corning stock had fallen to less than \$380 million. Assuming the other equity investments and bond holdings experienced a similar rate of decline during the first five months of the year, the total asset loss due to investment performance would have been as much as \$770 million as of May 31, 2009.
20. Calculation assumes that the trust expected to spend \$200 million in present value terms on non-claim expenditures. As a result, \$3.75 billion of its initial \$3.95 billion in funding would be for claim payments (\$3.75 billion is 45% of \$8.33 billion).
21. Calculation assumes that as of January 2014 the trust expects to spend \$100 million in present value terms on non-claim expenditures. As a result, \$1.85 billion of the \$1.95 billion in yearend 2013 assets would be for claim payments (\$1.85 billion is 20% of \$9.25 billion).
22. *Supra* 4.
23. An alternative name for a TDP is Claims Resolution Procedures ("CRP").
24. Percentages based on 48 Trusts that provided sufficient expense detail as part of the annual report. The trust financials we reviewed included additional line-item detail on expenses totaling \$1.1 billion, or approximately 86% of the total expenses reported in Figure 5.
25. Other expenses may include refunds and other similar accounting entries that may create negative balances.
26. *See for example:* Sample Excel file for Electronic Filing offered by Verus <http://www.kaiserasbestos.com/Files/KACC%20Sample%20Excel%20Files.zip>.

27. Verus Claims Services processes claims for the A&I Corporation Asbestos Bodily Injury Trust. This trust was not established through 524(g) bankruptcy reorganization and annual financial statements are not publically available. As a result, aggregate asset and claim payment figures are underestimated.
28. MFR Claims Processing processes claims for the Shook & Fletcher Asbestos Settlement Trust. To date, this trust has not made annual reports publically available on its bankruptcy docket. As a result, aggregate asset and claim payment figures are underestimated.
29. Trust Services, Inc. processes claims for the Fuller-Austin Asbestos Settlement Trust. We have been unable to locate publically available trust annual reports for Fuller-Austin. As a result, aggregate asset and claim payment figures are underestimated.
30. Asset and claim payment amounts include estimates for the Rutland Fire and M.H. Detrick Trusts. However, not enough information was publically available to estimate asset and claim payment amounts for the Rock Wool Manufacturing or Amatex Trusts. As a result, aggregate asset and claim payment figures are underestimated.
31. By yearend 2000 the Celotex trust had received 326,000 claims.
32. Since 2006, the DCPF has also contracted with the DII Industries and Federal Mogul trusts, and most recently the W.R. Grace trust, to process claims.
33. See Notice on the Celotex Asbestos Settlement Trust website dated June 23, 2008. In lieu of increasing the Payment Percentage, the trust amended its Claims Resolution Procedures to increase the gross valuations for each disease; which effectively represented a Payment Percentage increase to 18.3%.
34. Combustion Engineering 524(g) Asbestos PI Trust, First Amended and Restated Asbestos PI Trust Distribution Procedures (effective September 16, 2009), Section 2.1 Asbestos PI Trust Goals: *"The goal of the Asbestos PI Trust is to treat all claimants equitably. The TDP furthers that goal by setting forth procedures for processing TDP Claims and paying generally on an impartial, first-in-first-out ("FIFO") basis, with the intention of paying all holders of TDP Determined Claims over time as equivalent a share as possible of the value of their claims based on historical values for substantially similar claims in the tort system."*
35. Amended and Restated Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures, pg. 11-12.
36. According to estimates by the Surveillance, Epidemiology, and End Results (SEER) Program of the National Cancer Institute, there are approximately 3,000 diagnosis of mesothelioma each year in the United States, and our experience analyzing trends in tort filings suggest that approximately 25% of these estimated diagnoses never file a lawsuit.
37. Biggs, Jennifer L., "Casualty Loss Reserve Seminar, LOB-6: State of the Risk Transfer Market for Asbestos" presentation given on September 16, 2011 in Las Vegas, Nevada.
38. *Supra* 1.
39. Annual Report, Summary of Claims Disposed, Financial Statements, and Account of the Trustees of the UNR Asbestos-Disease Claims Trust for the Fiscal Year Ended December 31, 2002.
40. *Ibid.*
41. A-best, API, JT Thorpe (CA), Thorpe Insulation, and Western Asbestos all require a filing fee.
42. Western Disease Settlement Trust; J.T. Thorpe Settlement Trust; and Thorpe Insulation Settlement Trust.
43. Second Amendment to and Complete Restatement of Western Asbestos Settlement Trust Case Valuation Matrix, pg. 2.
44. See for example Section 5.7(b)(3) of the Kaiser Aluminum & Chemical Corporation 3rd Amended Asbestos Distribution Procedures.
45. Response of Plaintiffs Represented by Waters, Kraus & Paul in Opposition to Defense Motion Proposing

- Disclosure Requirements for Personal Injury Claims to 11 USC 524(g) Asbestos Trusts, June 20, 2014.
46. Steve Baron, Baron & Budd, Texas Legislative Hearing on RTPs, October 16, 2008.
47. Ibid.
48. H.R. 526 "Furthering Asbestos Claim Transparency (FACT) Act of 2015" 114th Congress, 1st Session, January 26, 2015. ■

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