ASBESTOS LEGISLATION I: A DEFINED CONTRIBUTION PLAN

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I. INTRODUCTION

Despite the frequent and sharp disagreements among the various participants in the asbestos litigation, there is one point on which agreement seems to be the norm—litigation is spinning out of control and the present system is ill-equipped to deal with the impending crisis. According to this view, injured victims already wait years for the payment they deserve, and they now face an even greater threat—the very real risk that they will never be able to get full payment. Almost all of the “traditional” asbestos defendants have already been forced into bankruptcy. Recent reports by financial analysts opine that much of the insurance industry, which has to date financed a major portion of the compensation to victims, is dangerously close to collapse as well. The limited resources of the judicial system are being strained to the breaking point by hundreds of thousands of claimants, the vast preponderance of whom cannot possibly be given a day in court. Unless Congress overhauls the system for addressing asbestos claims, there is the real possibility that the sheer number of claims may overwhelm available resources, leaving victims unpaid and forcing already over-stressed union and employer pension funds and governmental medical programs to fill the void.

There is also substantial support for the view that the litigation crisis also presents an impending disaster for the economy at large. The so-called traditional asbestos defendants—the dozens of companies that actually manufactured asbestos products—have already disappeared into insolvency. The demise of these companies has resulted in the loss of economic opportunities and productivity.

Asbestos litigation now extends beyond those companies. The explosion in case filings and payments in recent years has threatened the stability of the insurance industry. Numerous mainstream insurers are being pushed to the breaking point. Ordinary Americans now face a significant prospect that some of the insurance carriers from which they purchased life, property, or

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automobile insurance will not be in existence to pay benefits when they come due. Moreover, the asbestos litigation now imperils critical sectors of the nation’s industry that the general public would not even associate with asbestos. The automobile industry, the aerospace industry, and the energy industry—just to name a few—are now increasingly confronted with deluges of claims that place massive clouds over their future operations, earnings, and solvency. The ramifications of the massive amount of asbestos litigation on employees, investors, and our national economy are potentially dire indeed.

For years, many have thought that this crisis would never materialize and that the proverbial “light at the end of the tunnel” was just around the corner. The view that the “peak” of the curve for asbestos-related diseases had been reached, that claims would soon drop off, and that only the process of windup the litigation would remain is something approaching an article of faith. Today, as the number of claims has continued to increase far beyond the most pessimistic predictions, as more and more companies are driven into insolvency, and as the litigation spreads to additional sectors of the economy, the only certainty is that there is no end in sight.

The following Article lays out a the first of several proposed statutory alternatives by outlining specific federal legislation that would provide full and fair recovery to plaintiffs, while preserving their rights to pursue their claims in the tort system if they so desire. This legislation would also eliminate the company- and industry-threatening consequences of the present system and would relieve the asbestos burden on the judiciary. Future articles contain yet additional approaches that Congress may select to address this national problem.\(^1\) The overall aim is to expand the academic conversation on legislative approaches so that legislators can achieve an equilibrium that is acceptable for the passage of a single statute.

II. SUMMARY

The elements of the proposed solution are set forth in detail below, but its basic structure is as follows. Federal legislation would establish a national Trust to administer and pay virtually all asbestos claims. The legislation would set forth the duties, responsibilities, and obligations of the Trust and charge the trustees with implementing the Trust plan. The legislation would further specify a detailed distribution process by which the Trust would process, evaluate, and pay all asbestos claims that are either pending as of the date of enactment or are filed in the future against the companies participating in and funding the Trust (the “Participating Defendants”).

The Trust would be funded by an initial amount of $[\_\_\_\_]^2$ billion paid over the first $[\_\_\_]$ years after the date of enactment ("Initial Trust Funding"), and then by subsequent payments beginning in the $[\_\_\_]$ year after enactment of up to $[\_\_\_]$ billion annually and declining over time, but subject to inflation (the "Annual Trust Funding"). The Annual Trust Funding would decrease over time and would stop or be limited whenever the Trust reached one of the designated levels of surplus described in Subpart IV.E. The Trust’s funding would be provided entirely by defendants and insurers, without any governmental contribution. This level of funding from defendants and insurers would be possible only as part of an overall, final resolution that affords them predictability in payment obligations and eliminates the spectre of insolvency.

Asbestos plaintiffs with claims against Trust participants would initially file claims with the Trust rather than in the tort system. The Trust’s claims-administration and payment process would be patterned after the trust distribution processes in existing bankruptcy trusts and the Fibreboard trust. Upon receipt of a fully documented claim, the Trust would promptly make the claimant an offer of settlement based on all criteria set forth in the legislated distribution process. If the claimant was dissatisfied with the Trust’s offer for any reason, the claimant would retain the ultimate right to exit into the tort system and seek full compensation, with the Trust substituting as the defendant.

The Trust’s extraordinary level of funding—together with the massive savings of transaction costs that would flow from creation of a single payment trust—should permit all present and future claims to be paid fair value without undue delay. In the event it does not, the Trust would be subject to “spendthrift” rules that would establish payment priorities and limit the amount that could be paid out in any one year. These spendthrift rules would also be patterned after the Fibreboard Trust, although they would provide for payment priority with respect to the Initial Trust Funding to those claimants that had asbestos lawsuits pending as of $[\_\_]$. Amounts unpaid during a year in which the spendthrift rules were triggered would roll over into the next year, but would ultimately be paid.

Participating Defendants and insurers would fund the Trust. In addition, a substantial portion of the assets of asbestos defendants in ongoing bankruptcy proceedings (such as those in which no plan of reorganization has been finally confirmed by the courts) would be folded into the Trust. The assets of an asbestos trust that have arisen from a completed bankruptcy

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2. The dollars, dates, and time frames are left blank throughout. Defining these factors will involve significant negotiations among the relevant parties before this proposal is adopted.

3. Studies have shown that only about 40% of the money expended in the asbestos litigation actually reaches plaintiffs, with the remainder going to transaction costs and attorneys’ fees. By contrast, the Trust this Article proposes anticipates a far higher percentage of the Trust’s funding reaching claimants.
proceeding also would be folded into the Trust if the trustees of such trust elected to do so.

Participation in the Trust would be mandatory for defendants that have exceeded one of a number of specified threshold “triggers” based on the amount of asbestos payments or judgments. In addition, actual or potential defendants that have not exceeded one of the triggers could voluntarily elect to become Participating Defendants by agreeing to make specified, lower-level contributions to the Trust. All asbestos claims against Participating Defendants would have to be submitted to the Trust. Although claimants would retain the ultimate right to pursue such claims in the tort system, with the Trust substituting as defendant, those claims could not be directly pursued against Participating Defendants or their insurers. Asbestos claims could still be brought in the tort system against any defendant that is not required to participate in or that does not elect to voluntarily participate in the Trust. However, if future litigation brings any company above one of the Trust’s triggers, participation in the Trust, with the accompanying higher payment obligations of a mandatory participant, becomes mandatory and further asbestos claims against the entity would have to be submitted to the Trust.

Participating Defendants’ payments to the Trust could include cash contributions, the exercise of specified credits in relation to insurance policies, and the contribution of specified financial instruments designed to permit the Trust to share in the financial and market upside that can be predicted to arise from the resolution of asbestos litigation. Insurers would be required to contribute to Trust funding in relation to their policies by making payments reflecting credits appropriately exercised by Participating Defendants.

III. FORMATION AND STRUCTURE OF THE TRUST

The legislation would provide for the creation of a trust known as the National Asbestos Compensation Trust. The Trust would be a private trust chartered under and governed by the trust laws of the United States. It would be placed under the continuing jurisdiction of the U.S. District Court for the District of Columbia (the “District Court”), which would be assigned a general oversight role similar in many respects to the role exercised by individual federal district courts over existing asbestos bankruptcy trusts. The District Judge would be selected by the Judicial Panel for Multi-District Litigation from the members of the District Court.

The Trust would be governed by a board of seven trustees, with one trustee designated by the AFL-CIO, one trustee designated by an appropriate asbestos victims’ organization, one trustee designated by the Participating Defendants, one trustee designated by the insurers, and three trustees selected by the foregoing four. In addition, a representative appointed by the Secretary of Labor would be an ex officio, non-voting member of the board entitled to receive copies of all documents relevant to Trust operations and to be present at, and participate in, all board deliberations and decision-making.
The trustees would serve five-year terms and would be eligible for re-election. The trustees’ terms would be staggered so that at most only two trustees’ terms would expire in any one year. Successor trustees would be selected by the process outlined above. If a vacancy were to occur in a seat filled by designation of one of four constituencies listed above, the vacancy would be filled by a new designee chosen by that constituency. In the case of a vacancy in one of the other three seats, the vacancy would be filled by selection of the four designated trustees. Any trustee could be removed by a supermajority vote of five trustees on grounds specified in the legislation, which would include violations of rules against conflicts of interest, a consistent pattern of neglect or failure to perform the duties of trustees, and breaches of the duty of loyalty or the duty of care. The Secretary of Labor or any person aggrieved by the removal of a trustee would be entitled to seek review in the District Court. The District Court’s review would be limited to whether the trustees acted unreasonably in concluding that grounds for removal existed.

The legislation would require the trustees to create a Trust plan incorporating and conforming to the requirements set forth in the remainder of the legislation within ninety days of the selection of the initial trustees, but in no event later than 180 days after enactment. The requirements would include a recognition (1) that the primary goal of the Trust is the fair and equitable treatment of present and future asbestos victims consistent with the Trust’s rights and resources, and (2) that present and future asbestos victims are the beneficiaries of the Trust. The requirements would also include the distribution process.\(^4\) Within ninety days of the creation of the Trust plan, the Secretary of Labor or any person aggrieved by the plan could challenge the plan in the District Court on the ground that it is inconsistent with the legislation. While this claim would be the exclusive avenue for challenging the Trust plan as being inconsistent with the legislation, claimants would still have the right to exit into the tort system, as outlined in Part IV, if they are not satisfied with the trust’s offer of settlement in their individual cases.

The legislation would specify that the Trust plan and its contained distribution process apply to all pending and future asbestos claims against Participating Defendants. The Trust would not apply to an asbestos claim that either (1) reached judgment prior to \[\_\_\_\_\_\_\], (2) reached final judgment prior to the date of enactment of the legislation, or (3) was settled by virtue of a fully executed, written settlement or other processing agreement under which terms the claim was fully submitted and payment on the claim was due prior to the date of enactment.\(^5\) In the case of a claimant that, as of the date of enactment, had reached a settlement with some, but not all, of the Participating Defendants against whom the claimant had filed a claim, the Trust process

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\(^4\) See infra Part IV.

\(^5\) As detailed in Subpart V.D below, these provisions would operate slightly differently as to defendants that entered bankruptcy prior to the date of enactment.
would apply to the claim against the non-settling defendants, and the Trust would receive a set-off in the amount described in Part IV to reflect the prior settlement. The legislation would state that no asbestos claims to which the Trust process applies could be pursued against Participating Defendants or their insurers. Instead, such claims would have to be submitted to the Trust, with the claimants having the ultimate right to exit to the tort system to pursue their claims against the Trust.6

The legislation would further set forth a process for judicial review of Trust operations. The Secretary of Labor would have the right to challenge in the District Court any practice, policy, or procedure used in implementing the Trust plan on the grounds that it would be arbitrary, capricious, an abuse of discretion, inconsistent with the legislation, or in breach of the trustees' fiduciary duties to asbestos victims, Participating Defendants, or insurers. Claimants' basic right to challenge decisions by the Trust would be to exit to the tort system against the Trust. Once in the tort system, claimants could seek review of Trust actions, practices, policies, or procedures in the District Court only in the case of bad faith or willful misconduct by the trustees. The Trust and trustees could not be sued except as expressly specified in the legislation.7

The legislation would also specify general rules regarding Trust operations. The Trust would have the right (1) to sue to collect the funding provided for in the remainder of the Act; (2) to seek to void or enjoin fraudulent conveyances by Participating Defendants or insurers; (3) to sue for recovery of money paid to a claimant based on the provision of knowingly false or fraudulent information; and (4) to take other actions necessary or proper to protect the Trust's integrity and function. By a vote of six or more, the trustees would have the right to amend the Trust plan in any manner consistent with the legislation, provided that the Secretary of Labor or any person aggrieved by the amendment could challenge the amendment in the District Court within ninety days of the amendment on the ground that it is inconsistent with the legislation. The legislation would also give the Trust rights in the event that a Participating Defendant enters bankruptcy proceedings.8 The legislation would also have provisions regarding Trust administration, Trust powers, tax treatment of the Trust, limitations on the amount of administrative expenses the Trust could incur, confidential information, investment authority, and the liability and powers of trustees. Finally, the legislation would also create an obligation to make quarterly reports to Congress and the Secretaries of the Treasury, Commerce, and Labor regarding the Trust's finances and operations.

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6. The legislation would likewise bar direct action and similar claims against insurers.
7. Thus, the legislation would make clear that the Trust could not be sued for contribution by non-participating defendants.
8. See infra Subpart V.D.
IV. TRUST OPERATIONS AND DISTRIBUTION PROCESS

The legislation would set forth a distribution process designed to process and evaluate claims impartially, to pay claims over time, and to maintain reasonable reserves in the Trust. For constitutional reasons, the legislation would have to establish the process in detail, which would include setting forth more specific standards for the Trust’s administration of claims than are contained in some prior asbestos trust distribution processes. The following discussion provides a description of the basic elements of the distribution process.

A. Overview

The claims process would begin by claimants filing a proof of claim with the Trust. The Trust would then make a determination as to whether the claim meets the criteria for any of four scheduled diseases—Mesothelioma, Lung Cancer, Other Cancer, and Asbestos Lung Disease (ALD)—each of which would be defined in the legislation. If the Trust determines that the claim meets the criteria for a scheduled disease, the Trust would then evaluate the claim based on specified factors having significance in the resolution of similar claims in the tort system by settlement or by trial. If the Trust were to determine that the claim does not meet the criteria for one of the scheduled diseases, the Trust would then evaluate whether the claimant nevertheless asserts a compensable claim for an asbestos-related injury.9

After evaluation, the Trust would make a good faith settlement offer or advise the claimant of the reasons for rejecting the claim. When the Trust makes a settlement offer, the claimant could either accept or reject that offer, or negotiate further with the Trust. If the claimant rejects the Trust’s offer, the claimant could submit supplemental information and would then have the right to have the claim re-evaluated by the Trust and to negotiate further with the Trust. If negotiations with the Trust fail, the claimant would proceed to arbitration, which would be non-binding on the claimant but binding on the Trust. In cases where the Trust initially rejects the claim, the claimants could either resubmit the claim to the Trust with additional information or proceed to arbitration.10

If, after participating in good faith arbitration, the claimant rejects the Trust’s offer and the arbitration award, the claimant would then have the right to exit to the tort system. A claim in the tort system would be brought by filing a lawsuit against the Trust in any jurisdiction in which the claimant resides or the asbestos exposure took place. No punitive damages, pre- or postjudgment interest, or damages for risk of cancer could be recovered

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9. For further details regarding the proof of claim and the Trust evaluation process, see infra Subpart IV.B.
10. For further details regarding the foregoing, see infra Subpart IV.C.
against the Trust in the tort system. In addition, certain procedural and evidentiary restrictions would apply, and judgments could be collected only in the manner specified in the legislation.\footnote{See infra Subpart IV.D for further details regarding the right to exit to the tort system.}

Claims would be eligible for payment once they were liquidated through settlement, arbitration, or judgment. Claims resolved prior to exit to the tort system would generally be paid out over a three-year period while claims resolved after exit to the tort system would generally be paid out over a five-year period. Total payments from the Trust in each year would be limited to the amounts set forth in Subpart IV.E. Although the legislation anticipates that such amounts would permit the Trust to pay all claims as they arise, if amounts are insufficient in any year, the payment priority set forth in Subpart IV.F would govern as follows: (1) in recognition of the reality that, on balance, claimants with pending claims have first access in the tort system to the defendants’ existing finances, claims pending by [_____] would have priority as to payment from the $[_____] billion Initial Trust Funding over claims not pending by that date; and (2) for all other purposes, including payment from the Annual Trust Funding, claims for more serious illnesses would receive priority over claims for less serious illnesses. Any claims that could not be paid because the amounts available in that year were insufficient to make all payments due would be deferred for payment until the following year, subject to the same payment priority.

B. Claim Procedure

1. Submission of Claims

Beginning on the date of enactment, any asbestos claimant with an unresolved claim against a Participating Defendant could submit claims to the Trust for payment. To do so, the claimant would provide a proof of claim to the Trust on forms approved by the trustees pursuant to standards set forth in the legislation. The proof of claim would at least include the following information regarding the person exposed to asbestos: name; address; social security number; date of birth; date of death (if applicable); marital status; number and age of dependents; spouse’s name and social security number; occupation; complete work history; smoking history; year of first exposure to any asbestos or asbestos-containing products; identification and source of identification of all asbestos-containing products for which a Participating Defendant bears responsibility and to which the exposed person was exposed; the years of such exposures, including specific descriptive comments concerning the duration and intensity of such exposure; the status of related workers’ compensation or civil litigation regarding asbestos exposure, including the date of the commencement and status as of the date of enactment of any asbestos-related action brought by the claimant or the exposed person;
the terms and conditions of any settlement of any such actual or potential action; the amount, source, and terms of any other payments received by the claimant or the exposed person on account of asbestos exposure; and the scheduled disease for which the claimant believes the claim qualifies, or a statement of the disease or injury that the claimant asserts the exposed person has or had if the claim does not qualify for a scheduled disease. The claimant would also be required to certify to the Trust that neither he, nor the exposed person has obtained or will seek any monetary payment on the basis of any claim that a product or substance other than asbestos caused or contributed to the disease alleged. Furthermore, if the claimant or the exposed person has obtained or will seek such payment, the claimant must also identify the other product or substance, the status of any such claim, and the amount, source, and terms of any such payment.

In addition, the claimant would be required to provide the Trust with medical evidence demonstrating an asbestos-related physical injury or disease. No specific forms or types of medical reports would be required. However, the legislation would provide that the size of the Trust's settlement offers are to reflect the detail, quality, reliability, and probative value of the medical evidence and reports submitted by the claimant. In this regard, the Trust would be instructed to publish, beginning 180 days after the date of enactment and annually thereafter, a list of doctors whose work elicits greater levels of confidence.

All of the information and evidence specified in the two preceding paragraphs would require submission by the claimant or his legal representative through an affidavit or declaration under penalty of perjury. In addition to verifying the information specified above, the affidavit or declaration would be required to state further that all medical reports relating to any alleged asbestos-related condition suffered by the claimant have been submitted to the Trust. The Trust would be required to keep all such information and evidence confidential.

2. Expedited Review Option

The Trust would be instructed to establish a process, subject to the following requirements, for expediting the review of ALD claims from persons desiring an accelerated settlement in return for a lower, one-time payment. A claimant seeking expedited settlement in return for a lower, one-time payment. A claimant seeking expedited review would submit an abbreviated proof of claim for review by the Trust. The abbreviated proof of claim would provide the following information concerning the person exposed to asbestos: name; address; social security number; date of birth; date of death (if applicable); marital status; spouse’s name and social security number; occupation; complete work history; the scheduled disease for which the claimant believes the claim qualifies; the circumstances of exposure to asbestos-containing products for which a Participating Defendant bears responsibility and to which the exposed person was exposed, including such information specified by the
Trust as adequately demonstrating such exposure; the date of the commencement and status as of the date of enactment of any asbestos-related action brought by the claimant or the exposed person; the terms and conditions of any settlement of any such actual or potential action; and the amount, source, and terms of any other payments received by the claimant or the exposed person on account of asbestos exposure. In addition, the claimant would supply the Trust with medical evidence demonstrating ALD and state that all medical reports relating to any alleged asbestos-related condition suffered by the claimant have been submitted to the Trust. In submitting a claim for expedited review, the claimant would agree to be bound by the Trust’s offer and to waive any right to proceed to arbitration or to exit to the tort system.

The Trust would be required to expeditiously review the abbreviated proof of claim and would be authorized, but not required, to offer to settle the expedited review claim for a single fixed cash payment of an amount not to exceed 50% of the amount the Trust would offer to settle a similarly situated and documented claim submitted in the manner described in Section IV.B.1. Such payment would be required to be made within twelve months of the Trust’s receipt of an executed release as provided in Section IV.B.4.

Pursuant to procedures to be included in the Trust plan, the Trust would have authority to eliminate or suspend the expedited review claim option if it determines by a majority vote of the trustees that the option is encouraging the filing of claims that would not otherwise be eligible for payment under the Trust plan or is using more than 5% of the Trust’s assets.

3. Ordering of Claims for Processing

Claims would be ordered for processing by the Trust in the following manner. As a general practice, the Trust would review its claims files on a regular basis and notify all claimants whose claims are likely to be processed in the near future. A claimant’s position in the first-in, first-out (FIFO) queue for processing would be determined by the date of receipt by the Trust of a properly completed proof of claim form. Priority among claims received on the same day would be determined by the date of diagnosis of the disease on which the claim is based. If a claimant files an incomplete proof of claim, the Trust would notify the claimant of the need for additional information and would not process the claim until the file is complete. A claimant would not receive a position in the FIFO processing queue until his proof of claim is properly completed.

4. Initial Evaluation of Claims

As a proof of claim is reached in the FIFO queue, the Trust would evaluate it to determine whether the claim qualifies as one of the four scheduled diseases. A claimant’s right to assert a valid claim for an asbestos-related
injury or disease would not be prejudiced by failure of the claimed asbestos-related injury or disease to qualify as one of the scheduled diseases. If a scheduled disease is determined to exist, the Trust would evaluate the claim using criteria relevant to the resolution of asbestos claims for that scheduled disease, including:

(1) Mesothelioma: age at diagnosis; venue and status of action; amount of lost income; whether the claimant is alive or deceased; number of dependents; quality of medical evidence; prior compensation for non-malignancy; and inflation beginning at the date of enactment.

(2) Lung Cancer: year of diagnosis; venue and status of action; degree of functional impairment; industry of most significant exposure; amount of lost income; number of dependents; current or former smoker; length and extent of exposure; quality of medical evidence; prior compensation for non-malignancy; limited release; and inflation beginning at the date of enactment.

(3) Other Cancer: age at diagnosis of cancer; venue and status of action; degree of functional impairment; industry of most significant exposure; time since first exposure; prior claim of less severe injury; employment status; number of minor dependents; length and extent of exposure; quality of medical evidence; prior compensation for non-malignancy; limited release; and inflation beginning at the date of enactment.

(4) ALD: venue and status of action; degree of functional impairment; industry of most significant exposure; disputed claim; claimant alive or deceased; claimant housebound and sedentary; claim for lost wages; length and extent of exposure; quality of medical evidence; and inflation beginning at the date of enactment.

If the Trust determines that the injury or disease claimed does not meet the criteria for a scheduled disease, it would then determine whether the claimant has nevertheless asserted a meritorious claim for an asbestos-related physical injury or disease involving impairment to bodily function or significant probability of reduced longevity based on scientifically reliable evidence. If the Trust determines that a non-scheduled disease claimant’s claim is meritorious, the Trust would evaluate the claim criteria factors relevant to the resolution of similar claims by settlement or trial, including the criteria set forth above. If the Trust accepts such a claim for disposition, the Trust would place the claim in a category for payment-priority purposes based on the scheduled disease that the injury most closely resembles.

In addition, pursuant to procedures set forth in the Trust plan, the Trust would be permitted (1) to request that a claimant provide additional kinds of medical evidence when the Trust believes it would be helpful in evaluating a claim and to take into account when making a settlement offer whether the requested evidence was then provided; and (2) to require that additional kinds of medical evidence be provided when the Trust believes it is necessary to properly evaluate a particular claim.

Once the evaluation is completed, the Trust would be required to make a written, good-faith offer of settlement based upon such evaluation. If the Trust
rejects a claim, it is required to advise the claimant of the reasons for rejection. In addition to the requirement that the Trust’s settlement offers be based on its evaluation of the criteria listed above, the Trust would be bound by several other requirements.

First, if (1) prior to the date of enactment, a claimant (or exposed person) had settled his claim against a Participating Defendant pursuant to a fully executed, written settlement agreement, and (2) as of the date of enactment, the claim was fully eligible and ripe for processing and liquidation under the settlement agreement, but had not been fully submitted or payment was not yet due, then the Trust would be required to base the component of its settlement offer, reflecting such Participating Defendant’s share of responsibility, on the amount the claimant (or exposed person) was eligible to recover under the settlement agreement.

Second, the Trust would be required to reduce its offer of settlement (1) by the amount the claimant (or exposed person) collected or, at the time of enactment, was eligible to collect with respect to the claimant’s claim under a judgment for damages entered prior to [__] (or a judgment for damages that became final prior to the date of enactment); and (2) by the amount that the claimant (or exposed person) collected or is eligible to collect under any prior settlements with the Participating Defendants or their insurers as to which the claim had been fully submitted and payment on the claim was due prior to the date of enactment.\(^\text{12}\)

Third, in the event an existing asbestos trust was not folded into the Trust, the Trust would also be required to reduce its offer of settlement by an amount reflecting the proportionate share of fault with respect to the claimant’s claim of the asbestos defendant whose bankruptcy gave rise to such existing trust.

Fourth, as to claims when further monetary payment has been obtained, is being sought, or will be sought on the basis of a claim that a product or substance other than asbestos caused or contributed to the disease alleged, the Trust would also be required (1) to reduce its offer of settlement by an amount equal to such other payment (if already obtained), and (2) to make its offer of settlement expressly conditioned on the claimant’s agreement that the Trust succeeds to all rights under any judgment or settlement providing for any such payment in the future, up to the full amount of the offer of settlement.

Fifth, as to any claim that was pending as of [__], the Trust’s total offer would be required to be substantially similar to what the Trust determines to be such claim’s reasonable total settlement value in the tort system as of such date, taking into account the claim’s status (including its proximity to trial) as of such date, subject to the requirements and reductions set forth above.\(^\text{13}\)

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12. The first requirement and this requirement would be slightly different with respect to the Participating Defendants that were in ongoing bankruptcy proceedings without a finally confirmed plan of reorganization as of the date of enactment. See Subpart V.D.

13. The legislation would provide that, in the event an existing asbestos trust were folded into the Trust, the Trust would not be bound by the full liquidated value of the claim under the
Finally, the legislation would also set forth a limitations period for cases to be filed with the Trust that would be the later of four years from the date of diagnosis or the statute of limitations of the State in which the claimant resides at the time of filing.

The Trust would be given the right to request from claimants the power to obtain the information necessary to make the foregoing determinations from the Participating Defendants, insurers, bankruptcy trusts, and others. In the event a claimant failed to provide requested information, the Trust would be entitled to take that failure into account in making its settlement offer.

After the Trust’s settlement offer is made, the claim would not be processed further until the Trust receives a response from the claimant. The claimant and the Trust would then negotiate in good faith toward resolution of the claim. Once the Trust receives confirmation of resolution of the claim, it would be required to forward an appropriate form of release approved by the Trust to the claimant’s counsel or representative, or to the claimant. The claim’s eligibility for payment would be based on the date the executed release is received by the Trust.

5. Further Claims Processing

If the claimant was to reject the Trust’s initial offer, he could elect to negotiate further with the Trust and could submit additional information to the Trust in support of the claim. Alternatively, the claimant could proceed to arbitration. If the claimant was to submit supplemental information to the Trust, the Trust would reevaluate the claim and either make a written, good-faith settlement offer or reject the claim based on the same standards, criteria, and requirements set forth above. In conducting this reevaluation, the Trust would be entitled (1) to ask for discovery of relevant information from the claimant, including a medical examination of the claimant conducted by a doctor designated by the Trust at the Trust’s expense, and (2) to decline further consideration of the claim if the discovery were not provided. The claimant could then reject or accept any new Trust offer using the procedures outlined above for rejection or acceptance of the Trust’s initial offer. If the claimant was to reject such offer, the claimant could elect to negotiate further with the Trust or proceed to arbitration.

6. Second Injury Claims

The Trust’s offers to settle all claims other than malignancy claims would be made in exchange for a limited release covering all asbestos-related personal injury claims other than subsequent malignancy claims. As previously noted, the Trust’s settlement offer for non-malignancy claims

existing trust’s agreement or distribution process in determining a claim’s reasonable total settlement value in the tort system.
would take into account that only a limited release is being provided. A subsequent malignancy claim brought by or on behalf of a claimant that had previously given a limited release would be ordered in the FIFO queue for processing based upon the date of receipt by the Trust of the subsequent claim and would be treated as a new claim under the distribution process.

7. Audit Procedures

In all cases, the legislation would instruct the Trust to require that medical X-rays, tests, laboratory examinations, and other medical evidence comply with recognized medical standards regarding equipment, testing methods, and procedures to assure that such evidence is reliable. The Trust would be required to develop effective methods for auditing the reliability of all data, evidence, and information submitted in support of claims, including exposure, product identification, and medical evidence. Furthermore, the Trust may require independent interpretation of CT scans, X-rays, pathology specimens, or other physical evidence submitted. The legislation would specify that the Trust is to audit a minimum of 5% of the claims processed in the first year of Trust operations and 10% of the claims processed thereafter. The legislation would also specify the claims to be chosen for audit and would incorporate a means to audit a greater percentage of claims if an unacceptable level of unreliability is shown. In addition, if the audits showed an unacceptable level of unreliability for evidence submitted from specific individuals or institutions, the Trust would be authorized to refuse to accept evidence from them in the future.

8. Exigent Health and Extreme Hardship

Notwithstanding the FIFO order processing rules described in Sections IV.B.2 through IV.B.4, the Trust would process extreme hardship claims and exigent health claims at any time. The legislation would define what constitutes extreme hardship and exigent health, and would specify that all living mesothelioma claimants would be deemed to have exigent health claims. Pursuant to standards in the legislation, the Trust would be instructed to include within the Trust plan (1) procedures to expedite the processing, evaluation, and negotiation of exigent health and extreme hardship claims, and (2) procedures the claimant asserting such a claim would be required to follow prior to exiting to the tort system under Subpart IV.C. With respect to exigent health claims, the expedited procedures would be required to provide that the Trust is to make its initial settlement offer within thirty days of presentation of a fully completed and documented proof of claim and that, if accepted, the first 40% payment on such offer is due on the first quarterly payment date after the Trust's receipt of a fully executed release as provided in Section IV.B.4. With respect to extreme hardship claims, the Trust would waive or limit the three- or five-year payout requirements (but not the payment priority.
provisions) when the claimant needs greater financial assistance than would otherwise be afforded by the payout scheme.

9. Withdrawal of Claims

If the claimant was not to respond to the Trust’s offer on initial evaluation or reevaluation within thirty days, the Trust’s offer and the claim would be deemed to be withdrawn without prejudice, unless the claimant has requested in writing one or more extensions of time, not to exceed six months in the aggregate, within which to respond to the offer. If the claimant still has not responded to the Trust’s offer at the end of the extension period, the Trust’s offer and the claim would then be deemed to be withdrawn without prejudice. A claimant could also elect to withdraw a claim at any time without prejudice. A claim that is withdrawn or deemed to have been withdrawn could be resubmitted to the Trust at anytime and would be reordered in the FIFO queue for processing based on the date of receipt by the Trust of a properly completed, refiled proof of claim.

C. Arbitration Procedures

If the claimant was to (1) reject the Trust’s initial offer and choose not to submit supplemental information or negotiate with the Trust, or (2) reject the Trust’s offer based on its evaluation of such supplemental information and elect not to negotiate further with the Trust, the claimant’s claim would be referred to arbitration. The arbitration would be commenced by a written demand for arbitration by the claimant served on the Trust. The arbitration would be non-binding on the claimant, but binding on the Trust. The Trust and the claimant would bear their own fees and costs, except that the Trust would pay the administrative fees and costs of conducting the arbitration unless the arbitrator in her sole discretion assesses such administrative fees and costs against any claimant for delaying or abusing the arbitration procedures.

The Trust would maintain a list of qualified arbitrators. Arbitrations would be conducted by a single qualified arbitrator pursuant to the rules of the American Arbitration Association. The claimant and the Trust would attempt to agree on a qualified arbitrator from the list maintained by the Trust. If the parties were unable to agree on a qualified arbitrator, one would be selected pursuant to the procedures of an independent arbitration facility selected by the Trust and meeting qualifications set forth in the legislation. Not less than thirty days prior to the arbitration hearing, the parties would provide the qualified arbitrator and each other with copies of all relevant materials concerning the claim and any supplementary information they wish the qualified arbitrator to consider. The qualified arbitrator could require the parties to submit such additional information as deemed necessary. The qualified arbitrator would conduct a hearing on the claim, during which testimony may be offered, unless both parties were to agree to waive such
hearing. The claimant would be required to attend the hearing in person unless, in the judgment of the qualified arbitrator, his physical or psychological condition would make such attendance impossible. The qualified arbitrator would issue an award promptly but in no event later than 120 days from the date on which the arbitrator receives the last submission of information relevant to the claim from either of the parties, unless the parties were to agree to extend such time. The award would be based on the same standards, criteria, and requirements applicable to the Trust’s evaluation of claims and its making of initial offers of settlement.

Neither party would have the right to appeal the award other than on the grounds set forth in the Federal Arbitration Act. The award would become final and binding if the claimant was not to reject the award by so notifying the Trust in writing within thirty days after receipt of the award. If the claimant was not to reject the award as provided above, the claimant would be deemed to have accepted it. If the claimant was to reject the award, the award would no longer be binding on the Trust and the claimant could proceed to the tort system under the procedures set forth below.

The Trust would establish procedures, to be set forth in the Trust plan, to conduct arbitrations at scheduled intervals at locations around the United States, to include all cities in which federal district courts are located and, if necessary, additional locations needed to avoid imposing undue burden on claimants.

D. Litigation

A claimant could not proceed to litigate his claim against the Trust in the tort system unless the claimant in good faith (1) submitted a proof of claim and rejected the resulting settlement offer from the Trust, and (2) participated in arbitration and rejected the resulting arbitration award. The following procedures would govern any claimant that elected to litigate in the tort system his claim against the Trust.

First, any claimant that were to elect to resolve a claim through the tort system could pursue the claim in any appropriate forum, subject to the procedures set forth herein. An appropriate forum would be any jurisdiction or venue in which the claimant resides or in which the exposed person’s asbestos exposure took place. However, payment of any resulting judgment would be governed by the provisions of Subpart IV.F. If an exposed person chose to bring an action in state court, the legislation would provide that the Trust could not remove the action to federal court on grounds of its own citizenship for purposes of the diversity jurisdiction statute.

Second, in defending a claim in the tort system, the Trust could assert any and all defenses or procedural rights available to it or that would have been available to any of the Participating Defendants or their insurers in the tort

system against whom the claim could have been asserted absent the legislation.

Third, in suits against the Trust in the tort system, a claimant could not recover punitive or exemplary damages of any sort, damages for risk of cancer, or pre- or postjudgment interest. In addition, the Trust would be entitled to set-offs (1) in the amount the claimant or exposed person collected or was, at the time of enactment, eligible to collect with respect to the claimant’s claim under a judgment for damages entered prior to [_____] or a judgment for damages that became final prior to the date of enactment; (2) in the amount the claimant or exposed person collected or is eligible to collect under any prior settlements with the Participating Defendants or their insurers as to which the claim had been fully submitted and payment on the claim was due prior to the date of enactment; (3) in an amount reflecting the proportionate share of fault with respect to the claimant’s claim of the asbestos defendant whose bankruptcy gave rise to such existing trust in the event an existing asbestos trust were not folded into the Trust; (4) in an amount equal to the amount of monetary payment in the event the claimant or exposed person has obtained further monetary payment on the basis of a claim that a product or substance other than asbestos caused or contributed to the disease alleged; and (5) any additional set-off available to the Trust or that would have been available to the relevant Participating Defendants under applicable law. Any other damages available under the applicable law would remain recoverable except as provided in the fifth procedure below.

Fourth, the following restrictions would govern the identity and number of parties. The Trust would be the sole defendant—claimants could not name or join a defendant other than the Trust. No more than ten claimants’ claims could be brought together, joined, or consolidated for any purpose including, but not limited to, trial. In addition, in paying any judgment resulting from any trial that included more than one claimant’s claim, the Trust would be required to add an additional year to the five-year payment period under Section IV.F.3 for each additional claimant above one.

Fifth, in no event would the Trust be required to post a bond to stay collection of a judgment in the tort system. Judgments would be paid by the Trust in the order set forth in Subpart IV.F below, and no claimant would be permitted to take steps to collect a judgment from the Trust except as set forth in the distribution process. The Trust would not be responsible to pay postjudgment interest; in lieu thereof, the procedures set forth in the last sentence of Section IV.F.1 would apply.

Sixth, the death of a claimant after the filing of a proof of claim with the Trust would not eliminate compensable elements of his claim accruing prior to the date of death. For example, damages for pain and suffering occurring prior to the date of death, or creating an offset to a lost earnings award for personal consumption occurring prior to the date of death would not be eliminated by the legislation, notwithstanding applicable state law to the contrary. However, compensable elements of claims accruing prior to the date of death could not be recovered after exit to the tort system unless the claimant
was to show that he could have recovered such damages absent compliance with the requirements of the distribution process.

Seventh, at trial the defendant would be the Trust, and the Trust and claimant would be required to jointly request that the Trust be introduced to the trier of fact (judge or jury, as the case may be) in the following fashion, or in another substantially similar fashion as the trial court may direct, in addition to any other evidence permitted by the District Court about the Trust's identity, goals, and operations:

Members of the jury, this is an action for damages for [personal injury/wrongful death] brought by plaintiff[s] against the National Asbestos Compensation Trust.

The National Asbestos Compensation Trust was created by an act of Congress to provide fair and equitable treatment for persons with asbestos injury for which Participating Defendants might bear legal liability. The following companies are Participating Defendants: [list all companies raised in action that are Participating Defendants and have been raised or mentioned in the action]. The Trust has a fixed amount of money with which to compensate all persons with an asbestos injury to whom any Participating Defendants are found to be legally liable. This sum of money must cover all victims, past and future. Under no circumstances may you award any sum designed or intended to punish or make an example of any Participating Defendant or the Trust.

If you should find that a Participating Defendant or products manufactured by or associated with a Participating Defendant were a legal cause of injury to plaintiff[s], any payment of damages awarded with respect to those products will be made by the Trust, not by the Participating Defendant itself. The fact that a trust exists is in no way an indication that you should impose any liability on the Trust. No sum you might award will be paid by either the Participating Defendant or by insurance; any award will be paid only by the Trust.

Eighth, any claimant electing to resolve a claim through the tort system would be required to provide the Trust (without cost to the Trust) with copies of all pleadings, discovery materials, evaluations, and other similar nonprivileged documentation requested by the Trust in connection with its defense of the claim in the tort system, so that the Trust could efficiently and economically prepare for trial.

Ninth, in the event that a state court declined to enforce or employ any of the foregoing procedures or requirements, the action would be removable to the federal district court for the district and division in which such state court is located.

E. Funds for Payment of Claims

The legislation would specify that the Trust is to administer two separate trust funds. Fund I would contain the Initial Trust Funding of $[____] billion
paid over [ ] years. Fund II would contain the Annual Trust Funding of up to $[ ] billion per year declining over time, but subject to inflation. The annual payments to Fund II would commence in year [ ] and would decrease over time. Annual payments to Fund II would also be subject to the following limits: (1) the annual payments would stop and would not resume any time the Trust were to reach a designated level of surplus; and (2) including any adjustments for inflation, if in any year beginning after the twenty-fifth year after enactment, the annual payment would exceed the Mesothelioma Surplus Amount, defined as the total amounts paid by the Trust in the preceding calendar year on claims for asbestos-related mesothelioma plus 25%, the annual payment for that year would be limited to the Mesothelioma Surplus Amount. If a payment in one year were limited by operation of the first limitation, payments for subsequent years would not necessarily be affected; instead, subsequent payments would return to the scheduled annual payments unless such payments were likewise to exceed the Mesothelioma Surplus Amount.

The legislation would specify investment goals, restrictions, and permissible investments for the funds. Subject to the limit on administrative expenses set forth in the legislation, the funds could be drawn upon to pay the Trust’s administrative expenses as needed. Administrative expenses would be drawn from each fund in proportion to the relative amounts remaining in each fund.

Distributions from the funds to claimants would be made quarterly. The Trust would be instructed to distribute on each payment date the lesser of (1) the amount of payments that are due to claimants on that date, or (2) the full amount available in the respective funds after making due allowance for payment of the Trust’s administrative expenses. Subject to such spendthrift provisions, the Trust would make quarterly payments in the payment priority set forth in Subpart IV.F. After the resolution of all claims that were pending as of [ ] and were submitted to the Trust within one year of the date of enactment, any remaining funds in Fund I would be transferred into Fund II.

F. Order, Timing, and Limitations on Payment of Claims

1. Eligibility for Payment

All claims would become eligible to begin receiving payments from the Trust at the end of the first calendar quarter following the calendar year in which such claims are liquidated. Settled or arbitrated claims would be deemed liquidated on the date the Trust receives the executed release required by Section IV.B.4. Judgments obtained in the tort system would be eligible for payment in the same order as claims liquidated by settlement or arbitration, except as provided in Subsection IV.F.3.b below, and would be treated as having been liquidated on the date the claimant obtains a final, nonappealable
judgment, except that upon an unsuccessful appeal by the Trust, the date of liquidation would be the date of the trial court judgment.

2. Order of Payment

Payments distributed from Fund I would be distributed in the following order: (1) claims for mesothelioma that were pending as of [__]; (2) claims for lung cancer that were pending as of [__]; (3) claims for other cancer that were pending as of [__]; (4) the first payment on claims for ALD that were pending as of [__] when such payment was due and unpaid on four or more consecutive prior quarterly payment dates; (5) the second payment on claims for ALD that were pending as of [__] when such payment was due and unpaid on four or more consecutive prior quarterly payment dates; (6) the third payment on claims for ALD that were pending as of [__] when such payment was due and unpaid on four or more consecutive prior quarterly payment dates; (7) any remaining payments on claims for ALD that were pending as of [__]; (8) all other claims for mesothelioma; (9) all other claims for lung cancer; (10) all other claims for other cancer; and (11) all other claims for ALD.

To the extent the payments owed on claims were not made from Fund I, payments would be distributed from Fund II in the following order: (1) claims for mesothelioma; (2) claims for lung cancer; (3) claims for other cancer; (4) the first payment on claims for ALD when such payment was due and unpaid on four or more consecutive prior quarterly payment dates; (5) the second payment on claims for ALD when such payment was due and unpaid on four or more consecutive prior quarterly payment dates; (6) the third payment on claims for ALD when such payment was due and unpaid on four or more consecutive prior quarterly payment dates; and (7) any remaining payments on claims for ALD.

Although it is anticipated that the Trust would be able to pay all claims as they become due, all payments due from a particular fund on claims in a higher-priority category would have to be made before any payments due on claims in lower-priority categories could be made from that fund. Within each of the payment-priority categories, payments due would be made in FIFO order based on date of liquidation, whether by settlement, arbitration, or judgment.

3. Terms of Payment

a. Claims Resolved Outside the Tort System

Except as provided in Sections IV.B.2 (expedited review claims) and IV.B.8 (extreme hardship and exigent health claims), claims resolved without filing an action against the Trust in the tort system would be eligible for payment over a three-year period, with 40% due on the first quarterly payment
date following the calendar year in which the claim was liquidated and 30% due on the first quarterly payments dates in each of the two calendar years following the year in which the 40% payment was due.

b. Claims Resolved Inside the Tort System

Claims resolved after the filing of an action against the Trust in the tort system would be eligible for payment on the following schedule. On the first quarterly payment date following the calendar year in which the claim was liquidated, the amount due would be the lesser of (1) 30% of the amount of the judgment or settlement, or (2) $500,000. The remaining balance of the judgment or settlement would be due in equal installments on the first quarterly payment date in the four calendar years (or such additional years as provided in Subpart IV.D) following the calendar year in which the payment described in the preceding sentence was due, except when each such installment would exceed $250,000. In the event that each such installment would exceed $250,000, the balance of the judgment or settlement remaining after deducting the payment due under the second sentence of this subparagraph (1) would be due in $250,000 installments in each year (on the first quarterly payment date in each such year) until fully paid. In the event that the claimant’s judgment against the Trust was less than the proposed award in arbitration with the Trust pursuant to Subpart IV.C, the Trust would be entitled to recover as a cost of litigation and deduct from the judgment its cost of arbitration pursuant to the procedures set forth in Subpart IV.C.

4. Deferral of Payments

When a payment that is due could not be made because of the spendthrift provisions set forth in Subpart IV.E, the payment would be deferred to the following quarterly payment date. Any payment obligation so deferred would retain its position in the FIFO queue and be accorded priority as set forth in Section IV.F.2. Deferrals could continue from year to year until funds are sufficient to make the payments due on deferred obligations consistent with the spendthrift provisions.

V. PARTICIPATION IN AND FUNDING OF THE TRUST

A. Overview

The legislation would strive to fairly allocate the burdens of funding the Trust among all companies that have a demonstrated significant exposure to liability on pending and future asbestos claims, to eliminate the threat to those companies’ solvency and operations arising from that potential liability, and to ensure those companies’ ability to compete within their particular industries. In so doing, the legislation would be guided by the reality in asbestos
litigation that the past is not a prologue—the number of claims against and the amount paid by a company in the past is a poor guide to the company’s exposure on pending and future claims. Consequently, the legislation would recognize—as has been shown in the last five years of the litigation in particular—that significant liability exposure on pending and future claims is not limited to the so-called traditional defendants. Moreover, the legislation would also recognize that among non-traditional defendants, the extent of a company’s exposure is almost entirely driven by the type of industry in which it was engaged: virtually none of these defendants’ alleged liability arises from any alleged wrongful conduct different from or greater than that of other defendants within the same industry. Accordingly, while the legislation would only require contributions to the Trust from companies that have a demonstrated level of potential asbestos exposure, the size of individual companies’ obligations would be more a function of their industry membership than their past experience in asbestos litigation.

The legislation would first set forth a means of identifying those companies that have a demonstrated substantial level of asbestos liability from which it is, therefore, appropriate to require contributions to the Trust in accordance with Subpart IV.B. Companies that do not have this level of demonstrated liability but nonetheless want the protection of the legislation’s litigation bar, would be given an opportunity to voluntarily commit to make a lower level of contribution to the Trust.¹⁵

The legislation would also make provisions for asbestos defendants that entered bankruptcy proceedings prior to the date of enactment. Defendants in ongoing bankruptcy proceedings that do not have a finally confirmed reorganization plan as of the date of enactment would be subject to the following provisions under the legislation: the bankruptcy proceeding would be unwound; the defendant would be deemed a Participating Defendant with specified payment obligations to the Trust; and asbestos claims against that defendant would be submitted to the Trust. By contrast, in bankruptcy proceedings in which a plan of reorganization has received final confirmation prior to the date of enactment, the resulting asbestos trust would be given the option of folding into the national Trust.¹⁶

The legislation would then identify different industry “sectors” and allocate a percentage share of the Trust funding to each sector. Pursuant to specified criteria, the legislation would instruct the Secretary of Commerce to (1) assign each Participating Defendant to an appropriate sector, and (2) assign each member of a sector a share of that sector’s payment responsibilities. Maximum amounts of a company’s payment obligations would be calculated to ensure that those obligations would not threaten a

¹⁵. See infra Subpart V.C.

¹⁶. For details of the treatment of prefiling judgments and settlements with respect to defendants in ongoing bankruptcy proceedings and the treatment of claims submitted to existing asbestos trusts, see infra Subpart V.D.
company's solvency and continued operations. In addition, the legislation would give a company the option to make the payments due in the initial years in the form of specified equity or other financial instruments. The purpose of allowing companies to contribute securities for payment obligations is to allow Participating Defendants and the Trust to capitalize on the financial and market upside expected to arise from the resolution of asbestos litigation and consequent lifting of the cloud that now drags down the value of many Participating Defendants.\footnote{See infra Subpart V.E.}

The legislation would also contain provisions regarding the treatment of insurance. It would seek to ensure that (1) insurance, when remaining to a Participating Defendant, could be drawn upon to cover a specified percentage of each required Trust payment; (2) the insurance industry would be called upon to fund a large percentage of the total Trust payments, including the Initial Trust Funding; and (3) defendants required to make Trust payments ultimately would be entitled to recognition of the full amount of their remaining insurance for asbestos-related liabilities. The legislation would also greatly simplify the insurance process by eliminating or cutting through the myriad of insurance law issues that would otherwise arise so as to make recognition of insurance a more predictable affair and to eliminate the expense and uncertainty of protracted coverage battles. At the same time, the legislation would ensure that the insurance industry would not be overwhelmed in one year in order that the industry could, in fact, be capable of paying the full amount of defendants' remaining insurance for asbestos-related liabilities. The legislation would accomplish this by limiting the percentage of each defendants' required Trust payments that the insurance industry would be required to pay in any one year.\footnote{See infra Subpart V.F.}

The legislation would also contain provisions designed to protect the Trust's ability to collect the required payments. In particular, the legislation would provide that Participating Defendants must (1) give thirty days notice to the Trust of material transfers; (2) give the Trust the right to seek to enjoin fraudulent conveyances by Participating Defendants; and (3) provide that required payments to the Trust are not subject to the automatic stay and are not dischargeable in any subsequent bankruptcy.\footnote{See infra Subparts V.G-H.}

B. Mandatory Participation

The legislation would require participation by defendants that have a demonstrated level of asbestos liability. The legislation would establish the following triggers that would bring defendants under the purview of the legislation: (1) final judgments in favor of ten plaintiffs on asbestos claims; (2) total final judgment(s) on asbestos claims in an amount that is the lower of
$5 million, 10% of average gross operating income for the past five years, or 5% of the entity's total equity value as of [ ]; (3) total payments on judgments or settlements in connection with asbestos claims—including payments made with, or reimbursed by, insurance proceeds—that are the lower of $5 million, 10% of average gross operating income for the past five years, or 5% of total equity value as of [ ]; and (4) settlement of 500 asbestos claims. The legislation would define gross operating income and equity value and would specify a methodology for determining equity value for nonpublic entities.

Any asbestos defendant whose asbestos litigation history exceeds any of the triggers as of the date of enactment would be required to be a Participating Defendant upon enactment of the legislation. In addition, any defendant that is not above any of the triggers as of the date of enactment and does not voluntarily elect to participate as provided in Subpart IV.B, but is pushed above any of the triggers by tort-system results at some future date, would be required to be a Participating Defendant as of such future date.

A mandatory Participating Defendant would be required to make payments to the Trust as summarized in Subpart IV.E. In return, the legislation would permanently bar asbestos lawsuits against the defendant, with the exception that lawsuits in which a judgment imposing damages against it had been entered prior to [ ] or became final prior to the date of enactment would remain enforceable.\textsuperscript{20} If the defendant or its insurers had previously entered into a settlement or processing agreement covering pending or future asbestos claims, the defendant or its insurers would be required to perform only as to those claims that had been fully submitted and on which payment was due under the terms of the settlement as of the date the defendant became a Participating Defendant.\textsuperscript{21}

\textbf{C. Voluntary Participation}

The legislation would also afford any person or entity that has not exceeded any of the triggers as of the date of enactment to voluntarily participate in the Trust. Each such person or entity would have a one-time opportunity, ending 120 days after the date of enactment, to elect to participate as a voluntary Participating Defendant. To become a voluntary Participating Defendant, an entity would be required to commit to make annual payments to the Trust, beginning in the year of enactment and continuing for the same number of years as payments are required from mandatory participants. The annual payments by voluntary Participating Defendants would be as follows: (1) in the case of an entity that had 250 or more asbestos claims pending against it in the tort system as of the date of enactment but was not above one

\textsuperscript{20} The legislation would not affect rights of appeal of such pre-enactment judgments.

\textsuperscript{21} These provisions are slightly different in the case of defendants that entered bankruptcy proceedings prior to the date of enactment. See \textit{supra} Subpart IV.D.
of the triggers, the annual payment commitment would equal the higher of $750 and 0.3% of average gross operating income for the 5 fiscal years preceding enactment, but could not exceed $1.5 million; and (2) in the case of all other entities, the annual payment commitment would equal the higher of $500 and 0.2% of average gross operating income for the five years preceding enactment, but could not exceed $1 million. All such payments would be subject to inflation. A voluntary Participating Defendant would also be required to commit to not seeking recovery of any such payments from an insurer. In return, voluntary Participating Defendants would receive the same rights and tort-system protections as mandatory Participating Defendants.

Entities that decline to voluntarily participate in the trust would remain exposed to asbestos claims in the tort system. In addition, the legislation would bar them from asserting contribution claims or other claims-over against the Trust or Participating Defendants. Finally, if subsequent litigation were to push a nonparticipating entity above one of the triggers, its participation would become mandatory. From that point on, the entity would have the higher payment obligations of a mandatory Participating Defendant as determined by Subpart IV.E. In addition, if the entity had more than 250 asbestos claims pending against it in the tort system as of the date of enactment, the entity would have a further obligation to "true up" any contributions to both the Initial and Annual Trust Funding it had missed by virtue of not being a mandatory Participating Defendant as of the date of enactment.

D. Defendants in Bankruptcy Proceedings

As part of its goal of consolidating all asbestos claims processing into a single trust in order to minimize transaction costs and maximize the speed and size of payments to victims, the legislation would contain provisions regarding claims against asbestos defendants that entered bankruptcy prior to the date of enactment. These legislation provisions would treat separately (1) asbestos defendants that are above the triggers, but whose bankruptcy proceedings are ongoing as of the date of enactment ("Ongoing Bankruptcies"), and (2) those asbestos defendants whose bankruptcy proceedings are complete, with a

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22. However, the legislation would specify that total payments by voluntary Participating Defendants could not exceed 50% of the total Trust payment due in the year in question. Any excess would be refunded to voluntary Participating Defendants in proportion to their relative contributions during that year.

23. In addition, a voluntary Participating Defendant would have to certify that, as of the date it became a voluntary Participating Defendant: (1) it was not above any of the triggers; and (2) in the case of any entity with average gross operating income for the five years preceding enactment of above $[____] or total equity value as of [____] of above $[____], that the entity is not aware of any circumstances under which it knowingly or recklessly caused any asbestos-related injury.
finally confirmed plan of reorganization, as of the date of enactment ("Completed Bankruptcies").

1. Ongoing Bankruptcies

The legislation would provide that Ongoing Bankruptcies are unwound as of the date of enactment. The legislation would then specify that an asbestos defendant that filed its bankruptcy petition prior to the enactment of the legislation is a Participating Defendant with all of the rights of a mandatory Participating Defendant, including the bar against asbestos claims in the tort system. In return for the bar on tort claims, the defendant would have specified payment obligations to the Trust; the legislation would specify that all asbestos defendants in Ongoing Bankruptcies are to be assigned to a separate industry sector with certain larger funding obligations.24

Because such a defendant would be a Participating Defendant, all pending and future asbestos claims against it would have to be submitted to the Trust pursuant to the distribution process. The only exceptions would be as follows. First, any lawsuit in which a judgment imposing damages against that defendant had been entered prior to its bankruptcy filing would not be included in the Trust process and could proceed in the tort system.25 Second, if the defendant or its insurers had entered into a settlement or processing agreement covering pending or future asbestos claims prior to its bankruptcy filing, the Trust process would not apply to claims that, as of the date of enactment, had been fully submitted and on which payment had been fully made under the terms of the settlement.26

The Trust would evaluate claims against these previously bankrupt Participating Defendants pursuant to the same standards, criteria, and requirements applied to claims against other Participating Defendants subject to the following two exceptions.

24. See infra Subpart V.E. In the case of a defendant whose non-asbestos liabilities necessitate a bankruptcy filing, the defendant would have the option of addressing those other liabilities via bankruptcy. However, if it so choses, the entity could continue to be treated as a Participating Defendant, and its payment obligations to the Trust would be subject to the provisions outlined in Subpart V.H. In particular, obligations under Subpart V.H would not be subject to the automatic stay and would not be dischargeable, and the Trust process would apply to asbestos claims against it.

25. The legislation would not affect rights of appeal of such prefiling judgments.

26. This is slightly different than the comparable provision with respect to Participating Defendants that had not entered bankruptcy. As noted above, as to prior settlements entered by those defendants or their insurers, the Trust process does not apply to claims that, as of the date the defendant became a Participating Defendant, had been fully submitted and on which payment was due under the terms of the settlement. By contrast, as to prior settlements entered by asbestos defendants in Ongoing Bankruptcies or their insurers, the Trust process does not apply to claims that had been fully submitted and on which payment had actually been made under the terms of the settlement.
First, the Trust would be required to consider the amount the claimant was eligible to recover under the prior settlement in formulating its settlement offer when prior settlements in which the claim was fully eligible and ripe for processing and liquidation but as of the date of enactment the claim had not been fully submitted or payment was not due or had not been fully made. However, the Trust would not be required to base the component of its settlement offer reflecting the defendant’s share of responsibility on the amount the claimant was eligible to recover under the settlement agreement.

Second, the requirements set forth in Section IV.B.4 and Subpart IV.D with respect to reduction of Trust offers and set-offs would apply to prefiled judgments against, and prior settlements entered by, previously bankrupt Participating Defendants. However, the reduction or set-off arising from prior settlements with these defendants or their insurers would apply only to the extent that the payment had actually been made.

2. Completed Bankruptcies

Completed Bankruptcies would be treated differently. To avoid any potential constitutional issue with respect to whether Congress has overturned a final order of a federal court, the legislation would not require that existing asbestos trusts that have resulted from bankruptcies be folded into the national Trust. Instead, the legislation would provide a mechanism by which the respective trustees of each of those trusts could elect to participate within 180 days of enactment if they determine, pursuant to the trust’s procedures, that it is in the interest of the respective trust’s beneficiaries for them to do so.

If the trustees of a trust elected to participate in the national Trust, the trust would transfer to the national Trust all of its existing assets, as well as all of its rights to receive additional funding in the future. Such additional funding would then be owed to and collected by the national Trust on the same timetable as it was owed to the existing trust. Apart from any continued funding obligations pursuant to the plan of reorganization, the reorganized, former asbestos defendant would not owe any additional payments to the Trust. The Trust process would then apply to all claims for which no payment was due from, or had been made by, the existing trust prior to the date of enactment. The Trust process would not apply to claims for which any payment was due from, or had been made by, the existing trust prior to the date of enactment unless the claimant could demonstrate that (1) he is or will in the future be owed additional payment by the existing trust, and (2) he had not, prior to the date of enactment, received total compensation from or on behalf of other defendants equaling or exceeding the amount of such additional payment.\footnote{27} Claimants with claims to which the Trust process...
applies would thereafter seek and receive compensation from the national Trust with respect to the share of liability for which the existing trust would otherwise have been responsible.

If the trustees of an existing trust were to decline to participate, the existing trust would continue operations, claimants would be required to seek compensation with respect to the bankrupt defendant’s share from the existing trust, and the Trust would receive a set-off reflecting that proportionate share against any additional compensation to which the claimant is entitled from the Trust.28

E. Funding Obligations

1. Initial Trust Funding

The Initial Trust Funding would be $[ ] billion to be paid over [ ] years beginning in the year of enactment to be funded as follows.

The legislation would direct that the following assets be allocated to the Initial Trust Funding: (1) all payments to be made by voluntary Participating Defendants during the first [ ] years (the same number as in the initial sentence of this section), with the amount being fully calculable 120 days after enactment—the deadline for companies to elect to become voluntary Participating Defendants; and (2) the existing assets of each of the existing asbestos trusts whose trustees elect to participate, as well as all additional funds those trusts have the right to receive over the next [ ] years (again, the same number).

The remaining amount needed for initial funding would be allocated among the Participating Defendants in the following manner. The legislation would establish a number of industry sectors. Examples of sectors include asbestos defendants in Ongoing Bankruptcies, asbestos products manufacturing/mining, asbestos distribution, railroads, aerospace/aviation, automobile manufacturing, chemical, and petroleum/petrochemical. The legislation would then assign each sector a payment percentage with respect to the Initial Trust Funding (the “Initial Payment Percentage”). The Initial Payment Percentage would be based on an estimation of the liability each sector would face with respect to unresolved asbestos claims pending as of [ ], without factoring in the bankruptcy stay. Each sector would owe a

28 However, the existing trust could not bring a contribution claim or other claim-over against the Trust.
portion of the remaining amount of the Initial Trust Funding in proportion to its relative Initial Payment Percentage.

The legislation would then instruct the Secretary of Commerce to assign each Participating Defendant to a sector. The legislation would identify the goal of the sector assignments as being to assign each company to a sector that equitably reflects its potential liability with respect to unresolved asbestos claims pending as of [__], in a way that minimizes any damage to the company’s ability to compete in its core sector. To achieve this goal, a company would presumptively be assigned to (1) the sector that best corresponds to the operations from which the preponderance of the company’s potential liabilities on pending asbestos claims arises, or (2) the sector that best corresponds to its principal business operations if the preponderance of that company’s gross operating income arises from operations that best correspond to other sectors with lower Initial Payment Percentages, and the net income from those other operations for the preceding five years substantially exceeds the company’s likely asbestos liabilities on pending claims. 29

The Secretary would then determine the payment responsibilities of each company within each sector. 30 Generally, each company would be assigned a share of the sector’s Initial Payment Percentage in relation to its relative average market share of operations within that sector during years in which asbestos was used compared to that of the other sector members. 31 The legislation would specify, however, that the minimum contribution of each mandatory Participating Defendant equal the lower of 3% of its average gross operating income for the 5 years preceding enactment or $15 million, subject to the cap set forth below.

The maximum allowable amount on each company’s share would be as follows: no company could be assigned a contribution to the Initial Trust Funding greater than [__]% of its [__] (measure to adjust present asset/equity value to eliminate asbestos-uncertainty drag), except that the relevant cap for asbestos defendants in Ongoing Bankruptcies would be set at the higher level

29. The legislation would provide that, in the event that a company was assigned to a sector other than its presumptive sector, the Initial Payment Percentage of its presumptive sector and the sector to which it was assigned would be adjusted so that other members of each sector would be neither advantaged nor disadvantaged by the assignment in the determination of their respective shares of the Initial Trust Payment although the adjustment would not take into account advantages or disadvantages resulting from potential spreading as described below.

30. All determinations by the Secretary would be reviewable in the manner provided by the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2000).

31. When more than one mandatory Participating Defendant would bear liability for the same market share, the legislation would specify a mechanism for avoiding double-counting and for fairly accounting for each company’s responsibility. In addition, for those industry sectors in which such market share is not subject to calculation, the legislation would specify an alternate means of measuring the relative size of each sector member’s business operations within the sector during the years in which asbestos was used.
Generally, any portion of a company’s share above the cap would be spread (1) to all other sector members in proportion to their respective shares, or (2) if the entirety of that portion could not be spread to other sector members without violating the cap, the remaining amount would be spread to all other sectors in proportion to their Initial Payment Percentages and then among the members of each other sector in proportion to their respective shares. Amounts unpaid by a company because of the cap provision would be required to be made up, with interest, as soon as possible in subsequent years to the extent in each subsequent year that such make-up payment, together with the payment due in the subsequent year, is consistent with the cap. As make-up payments are made, the companies to which amounts were spread pursuant to this paragraph would get a dollar-for-dollar credit up to the additional amounts they paid, with interest in proportion to the relative amounts spread to them.

A Participating Defendant could pay its share of the Initial Trust Funding in cash. In addition, a mandatory Participating Defendant would have the option of paying its share in the form of contribution of specified financial instruments or paying a certain portion of its share through the exercise of certain credits in relation to insurance policies. The legislation would promulgate a list of approved stock, debt issuances, or other instruments, and the method of valuation applicable to each, to which a mandatory Participating Defendant could contribute in lieu of cash to satisfy its share of the Initial Trust Funding. As described more fully in Subpart V.F, a mandatory Participating Defendant could exercise an insurance credit of up to [___]% of its share of the Initial Trust Funding depending upon the amount of its unexhausted liability insurance for asbestos-related claims.

2. Annual Trust Funding

Annual Trust Funding would be up to $[___] billion per year declining over time, but subject to inflation and the limits specified in Subpart IV.E. Annual Trust Funding would include the payments to be made by voluntary Participating Defendants for the year in question and would also include all

32. The cap would be presumptively calculated in this fashion. However, there would be an exception where the Secretary determines that an entity’s (same measure as above) provides a substantially less accurate indication of the entity’s financial condition than the indication that is ordinarily provided by that data.

33. In the event that the scheduled payment amount for mandatory Participating Defendants for that year was limited by virtue of operation of the Mesothelioma Surplus Amount, see supra Subpart IV.E, the payments to be made to by voluntary Participating Defendants for the year in question would be decreased by a percentage equal to the relative percentage of contributions to the Annual Trust Funding in the preceding calendar year made by voluntary Participating Defendants compared to contributions made by mandatory Participating Defendants in the preceding calendar year.
funds received during that year by existing trusts that fold into the national Trust. Annual Trust Funding would likewise include the amount due that year on true-up payments by companies that had more than 250 asbestos claims pending against them as of the date of enactment but failed to become Participating Defendants until a later date.

The remaining amount owed would then be allocated among mandatory Participating Defendants in much the same way as the Initial Trust Funding. The legislation would assign each sector a payment percentage with respect to the Annual Trust Funding (the “Annual Payment Percentage”). The Annual Payment Percentages, which could differ from the Initial Payment Percentages, would be based on an estimation of the liability each sector would face with respect to future asbestos claims. Each sector would owe a portion of the remaining amount of the Annual Trust Funding in proportion to its relative Annual Payment Percentage.

The Secretary would then assign each mandatory Participating Defendant to a sector. A mandatory Participating Defendant would be presumptively assigned to the same sector to which they were assigned for Initial Trust Funding unless the Secretary were to conclude that the criteria for sector assignment, outlined in Section V.E.1 above, as modified to refer to future asbestos claims, would lead to a different sector assignment. As to new mandatory Participating Defendants that were pushed over the triggers after the date of enactment, the Secretary would make sector assignments based on the criteria, with the modification described in the preceding sentence and with the further modification that the relevant data would be gross operating income and net income for the five years preceding the first date the company was required to become a Participating Defendant, unless the Secretary determines that such data does not accurately reflect the company’s financial position or business operations.

The Secretary would then determine the payment responsibilities of each company within each sector. Generally, as with the Initial Trust Funding, each company would be assigned a share of the sector’s Annual Payment Percentage in relation to its relative average market share of operations within the sector during years in which asbestos was used compared to that of the

34. As with the Initial Trust Funding, a company’s reassignment from its presumptive sector would result in a readjustment of both sectors’ payment percentages in the manner discussed in Section V.E.1.

35. In the event that the Secretary determines (1) that the operations giving rise to the preponderance of a new mandatory Participating Defendant’s asbestos liabilities do not fall within any existing sector, and (2) that the remaining criteria for sector assignments do not apply, the Secretary would be authorized to create a new sector and to assign that sector an Annual Payment Percentage that reflects the sector members’ estimated liability with respect to future asbestos claims. The Secretary could modify the new sector’s Annual Payment Percentage in subsequent years if additional new mandatory Participating Defendants were added to it. The Annual Payment Percentages of all other sectors would be reduced to reflect the new sector’s Annual Payment Percentage in proportion to their respective percentages.
other sector members. There would be a minimum contribution equal to the lower of 0.6% of the company’s average gross operating income for the five years preceding enactment or $3 million, subject to the cap set forth below.

A cap would also be imposed on each company’s share: no company could be assigned a contribution to the Annual Trust Funding greater than [____]% of its gross operating income for the preceding year.\textsuperscript{36} Any portion of a company’s share above the cap would generally be spread to all other sector members in proportion to their respective shares. If the entirety of that portion could not be spread to other sector members without violating the cap, the remaining amount would be spread to all other sectors in proportion to their Annual Payment Percentages and then among the members of each other sector in proportion to their respective shares. A make-up provision corresponding to the make-up provision set forth in connection with the Initial Trust Funding would apply to Annual Trust Funding as well.\textsuperscript{37}

A Participating Defendant could pay its share of the Annual Trust Funding in cash, or it could elect to pay up to [____]% of its share of each payment by exercising remaining credits in relation to insurance policies.\textsuperscript{38}

\section*{F. Treatment of Insurance}

The legislation would ensure that insurance could cover a substantial percentage of required Trust payments by (1) providing that mandatory Participating Defendants would be entitled to have [____]% of the required Initial Trust Funding payment and [____]% of each required Annual Trust Funding payment defrayed by their remaining insurance; (2) providing that such defendants would ultimately be entitled to recognition of the full amount of their remaining insurance for asbestos-related liabilities; (3) eliminating the uncertainty and unpredictability created by the array of insurance-law issues that presently mark the asbestos litigation; and (4) ensuring that the insurance industry is able to make the payments this entails by capping the percentage of Trust funding it could be required to provide in any one year.

The legislation would provide that Participating Defendants could not seek recovery of Trust payments under their insurance policies. Instead, mandatory Participating Defendants would be required within ninety days of their assignment to a sector to submit specified information to the Secretary about all policies, including excess policies, that they claim provide unexhausted

\textsuperscript{36} The cap would be presumptively calculated in this fashion. However, there would be an exception should the Secretary determine that an entity’s gross operating income for the preceding year provides a substantially less accurate indication of the entity’s financial condition than the indication that is ordinarily provided by that data.

\textsuperscript{37} As with the Initial Trust Funding, all determinations by the Secretary would be reviewable in the manner provided by the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2000).

\textsuperscript{38} See infra Subpart V.F.
coverage for asbestos-related liabilities. Required information about unexhausted insurance coverage would include identification of policy year, insurer, level of coverage, and amount of total coverage claimed to remain under each policy for asbestos-related liabilities. In this regard, the legislation would address the issue of unlimited “nonproducts” coverage by specifying a multiple of aggregate limits that Participating Defendants would be entitled to claim for policies that do not contain general aggregate limits which would be different for each industry sector. Likewise, the legislation would make provisions for potential policies having no aggregate limit for “products” coverage by specifying a multiple of occurrence limits that a Participating Defendant having such a policy would be entitled to employ.

The Secretary would promptly notify each insurer whose policies are named by Participating Defendants of the amount of remaining coverage claimed under each of its policies. The insurers would each have a designated period of time to contest the claim on the following grounds only: (1) that a claimed policy does not exist; (2) that a claimed policy contains an asbestos exclusion; (3) that the Participating Defendant that claimed a policy is not an insured under that policy; and (4) that the amount of total remaining coverage for asbestos-related liabilities under a policy claimed by the Participating Defendant has not been correctly calculated. After a hearing before a qualified examiner to resolve any disputed issues of material fact, the Secretary would then determine an initial amount of remaining insurance for each Participating Defendant, with such determination reviewable under the Administrative Procedure Act.

Each mandatory Participating Defendant would then be eligible to exercise, at its option, a credit against its Trust payments to the extent of the amount of its remaining insurance. However, as noted, a Participating Defendant could make no more than [__]% of its Initial Trust Funding payment and no more than [__]% of any individual Annual Trust Funding payment in the form of an exercise of this credit. The amount of potential credits available to a Participating Defendant would be drawn down both by the exercise of credits and by any payments an insurer is required to make under the policies at issue for non-asbestos liabilities so long as those payments would count towards the policies’ aggregate limits.

39. If, prior to the date of enactment, a mandatory Participating Defendant had entered into a settlement or other agreement with an insurer specifying the amount of total coverage provided under a policy for asbestos-related liabilities, that amount minus any amounts already drawn on it would govern.

40. Industry sectors whose asbestos-related liabilities are more likely to stem from “nonproducts” coverage would be entitled to higher multiples than industry sectors whose liabilities are more likely to fall within the products or completed operations hazard of the pre-1987 ISO form liability policy.

41. 5 U.S.C. §§ 551-559.

42. The legislation would provide that an insurer could count the exercise of a credit
The legislation would then require insurers to reimburse the Trust for the credits exercised by Participating Defendants as follows. The legislation would fix a percentage share for each insurer reflecting its average market share in the liability insurance market from 1950 to 1987. Each insurer would then be obligated to pay the Trust its percentage share of the aggregate credit exercised that year. The legislation would also place the following cap on each insurer’s payment obligations: with respect to the Initial Trust Funding, no insurer could be required to reimburse the Trust in an aggregate amount greater than 25% of its property/casualty surplus; with respect to the Annual Trust Funding, no insurer could be required to reimburse the Trust in any one year in an aggregate amount greater than 15% of its property/casualty surplus. Any portion of an insurer’s share above the cap would be spread (1) to guaranty funds where the insurer is insolvent or in liquidation if and to the same extent that those funds would have paid for that insurer’s obligations as a result of asbestos-related judgments against or settlements by its insureds; and (2) to all other insurers in proportion to their respective shares to the extent not spread to guaranty funds with a corresponding make-up provision to that set forth for Participating Defendants.

Insurers could pay their shares in cash. In addition, as to the Initial Trust Funding, insurers—similar to mandatory Participating Defendants—would have the option of paying their share in the form of a contribution of financial instruments specified and valued as provided in the legislation. Finally, insurers would be eligible for credits to reflect reinsurance recoveries as described below.

The legislation would address reinsurance by specifying that payments to the Trust by insurers are to be recoverable under reinsurance treaties and policies to the same extent as an indemnity payment on the underlying claims resolved that year by the Trust. Furthermore, the legislation would mandate that a reinsurance claim is not to be prejudiced by the fact that the payments for which recovery is sought arose by virtue of the legislation rather than by operation of the tort system. The Trust would be deemed to have resolved all claims pending as of [____] in the first [____] years (the number of years equals the number of years for Initial Trust Funding payments), and to have resolved all other claims in the later of the [____] year of Trust operations (the year after the end of Initial Trust Funding payments) or the year the claim was submitted to against the aggregate limits of its policies in the event a Participating Defendant seeks coverage with respect to a non-asbestos-related occurrence or injury. Exercise of credits against policy limits would be allocated pro rata across the years of all policies issued by the insurer to that Participating Defendants that provide remaining coverage for asbestos liabilities.

43. The insurers’ caps would be presumptively calculated in this fashion. However, as with the caps applicable to Participating Defendants, there would be an exception where the Secretary determines that an insurer’s property/casualty surplus provides a substantially less accurate indication of the insurer’s financial condition than the indication that is ordinarily provided by that data.
the Trust. An insurer would be deemed to have made payments in the year resolved on all claims that identify a Participating Defendant to whom the insurer had issued a policy which contributed to that Defendant’s amount of remaining insurance as determined by the Secretary. The legislation would provide that when an insurer asserts a reinsurance claim for Trust payments against a reinsurer not authorized to do business in the state of the insurer’s principal place of business, the reinsurer must post bond in the full amount of the claim in order to file a pleading contesting the claim. The legislation would also contain additional provisions to ensure that insurers are not to be prejudiced in seeking reinsurance recoveries, including provisions specifying how much an insurer is deemed to have paid on individual claims resolved by the Trust.

Insurers would be permitted to negotiate with or proceed against their reinsurers themselves. In addition, insurers would also have the option of making a required Trust payment and then turning over to the Trust for collection purposes its reinsurance claim arising out of that payment. In the event that an insurer subrogated its reinsurance claim to the Trust, the Trust would have a duty to maximize the reinsurance recovery and all such recovery would be paid into the Trust. Furthermore, the Trust would be entitled to recover from the reinsurer its costs and attorneys’ fees in a proceeding in which it is the prevailing party. The insurer would then receive a dollar-for-dollar credit applicable to its next required Trust payment(s) until fully exercised.

G. Miscellaneous Funding Provisions

The payment obligations would be the responsibility of the Participating Defendants alone, except in the case of a fraudulent conveyance to an affiliated or related entity to the extent of the value of the assets fraudulently conveyed or a prior contractual assumption of liability to the extent of the liability assumed. Affiliated or related entities of Participating Defendants, however, could be Participating Defendants in their own right if they meet the criteria for participation. In addition, cash payments to the Trust would be deductible in the year made for purposes of federal income taxes.

H. Provisions to Ensure Collection

The legislation would also contain a number of provisions designed to ensure the Trust’s ability to collect the payments owed. The Trust would have the right to sue any Participating Defendant or insurer whose payments are thirty days past due. The legislation would provide that such an action would be brought in the District Court. In any such action in which the Trust prevails, the Trust would be entitled to recover its costs and attorneys’ fees, as well as interest at the prime rate plus 2% calculated from the date on which the
payment was due. In addition, the court could impose a penalty of up to treble the payment in the case of a knowing failure to pay.

The legislation would further provide the Trust various rights with respect to transfers of assets by, and bankruptcies involving, Participating Defendants as follows: (1) Participating Defendants and their insurers would have to give the Trust thirty days notice of any material transfers; (2) the Trust would have the right to sue Participating Defendants or their insurers to enjoin or set aside fraudulent conveyances; (3) the Trust would have the right to collect payments due from companies in bankruptcy as an administrative expense without being subject to the automatic stay; (4) Trust payments would not be dischargeable in bankruptcy; and (5) payments due would be the responsibility of any successors or assigns of Participating Defendants or insurers.

VI. CONCLUSION

There is an emerging consensus that the most appropriate end game for asbestos litigation is legislation. This Article is the first in a series of mutually exclusive proposals designed to expand debate rather than to advocate any particular position. The desire is to assist legislators in selecting from a menu of different options in order to create a viable statute.

The proposal herein is a defined contribution plan—a plan that is bounded by the financial contributions of defendants and their insurance carriers. The approach deals separately with the current and future claimants and seeks to leave an exit to the tort system without crippling the fund. At the same time, it addresses the need for predictability and finality.

Any eventual legislation will in all probability be a hybrid compilation that addresses present and future claims, the level of contributions, the level of benefits, qualifications for payment, and administration. The critical point espoused here is to focus on all these variables at the same time, rather than sequentially. Asbestos litigation is a polycentric problem, not susceptible of piecemeal solution.44 This has been one of the primary difficulties faced by the judiciary—the procedural inability to grapple with the problem as a whole. Hopefully this series of articles will assist decision makers in their quest for an equitable and efficient end game.

44. See Francis E. McGovern, Strategic Mediation, 20 OHIO ST. J. ON DISP. RESOL. (forthcoming Winter 2004), for further discussion of this point.