

THE EVOLUTION OF ASBESTOS BANKRUPTCY TRUST DISTRIBUTION PLANS

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INTRODUCTION

The evolution of asbestos litigation from the early 1970s to the present has become the source of much analysis.¹ One commentator divides this history into several phases: the heroic phase, bureaucratic floundering, adaptation and maturity, search for global settlement, expansion of the number of cases, and legislative reform in a new era.² A neglected aspect of the history of asbestos litigation has been the evolution of asbestos bankruptcy trust distribution plans. Since 1982 there have been more than 70 corporations which have filed bankruptcy proceedings because of their

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1. See, e.g., STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION, AN INTERIM REPORT (2002); DEBORAH R. HENSLER, WILLIAM L.F. FELSTINER, MOLLY SELVIN & PATRICIA A. EBENER, RAND INST. FOR CIVIL JUSTICE, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985); MARK A. PETERSON & MOLLY SELVIN, RAND INST. FOR CIVIL JUSTICE, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES (1988); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

2. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 Conn. Ins. L.J. (forthcoming).

exposure to asbestos liability.³ As these corporations emerge from bankruptcy, their plans of reorganization establish trust distribution plans to pay asbestos claimants.⁴ These distribution plans provide a unique window into the evolution of a marketplace for the evaluation of asbestos claims among plaintiffs' lawyers. Notwithstanding the "maturity"⁵ of the mass tort, this evolution reveals the historic development of relative values and differentiation among asbestos personal injury claims from the perspective of lawyers who represent plaintiffs. Specifically, plaintiffs' counsel have voluntarily strengthened qualification criteria and altered the balance of payments for discrete diseases to deal with the scarcity of resources in the bankruptcy trust context.

I. BACKGROUND

Once a corporation files for bankruptcy in accordance with Chapter 11 of the Bankruptcy Code,⁶ its plan of reorganization to emerge from bankruptcy must make provision for the equivalent payment of present and future asbestos personal injury claims; that is, a fund must be established with guidelines to ensure that all claims are paid equitably and efficiently—a trust distribution plan.⁷ This trust distribution plan must be approved by the bankruptcy court, by vote of 75% of the current claimants, and by a representative for future claimants appointed by the court.⁸ Negotiation among the various interested parties can be extensive and convoluted. The current claimants have an interest in maximizing immediate payments, whereas the future representative looks to conserve funds to ensure equivalent payments to an as of yet unknown, but projected, number of future claimants.⁹ Although the current and future claimants are allied in seeking the largest amount possible for all asbestos personal injury plaintiffs, they may have differences in how that amount should be divided.

3. STEPHEN J. CARROLL, ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 110 tbl.6.1 (2005).

4. See 11 U.S.C.A. § 524(g) (2005) (providing the requirements for bankruptcy distribution plans).

5. See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1841–45 (1995) (discussing the different strategies that judges should use at various stages of the life cycle of mass torts).

6. 11 U.S.C.A. §§ 1101–1174 (2005).

7. 11 U.S.C.A. § 524(g) (2) (B) (ii) (V) (2005).

8. 11 U.S.C.A. § 524(g) (2) (B) (ii) (IV) (bb), (3) (A), (4) (B) (i)–(ii) (2005).

9. Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1747–50 (2002).

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There also may be disagreement among the current claimants depending upon the type of disease they have—mesothelioma, lung cancer, other cancer, asbestosis, and “pleural disease.”¹⁰ Some law firms represent only plaintiffs who have malignancies, whereas other firms represent predominantly non-malignancies or a combination of the two.¹¹ Their analysis of the total value of asbestos claims may be the same, but how that value should be allocated among the disease categories can be substantially different.¹² Other areas where there could be varying opinions include the leadership of a fund, the administration of the fund, the criteria for qualification, the level of transaction costs, and alternative dispute resolution mechanisms.

The prepackaged asbestos bankruptcies have a slightly different dynamic. Under one scenario the current claims are partly “settled” prior to the filing of the bankruptcy leaving the unsettled portion as an unliquidated “stub” claim against the debtor.¹³ This gives the holders of the “stub” claims voting rights with respect to the plan. Because the plan also provides that the holders of the “stub” claims will not be paid the settled portion of their claims unless the plan is confirmed, the holders of the “stub” claims will all vote for the plan and thus ensure its acceptance.¹⁴ Another approach involves settling the current claims prior to the filing of the bankruptcy so that, as a practical matter, the only “present” claimants are those whose claims arise between the bankruptcy filing and the voting deadline.¹⁵ In either event, because the negotiations and payments of claims pending prior to the bankruptcy are accomplished before there is bankruptcy court jurisdiction, courts have scrutinized these pre-bankruptcy developments in some detail. Notwithstanding the “settlement” of the pending claims, courts tend to focus on a respectable level of equivalency between monies dedicated immediately prior to the filing and monies available for future claimants.¹⁶

The negotiations concerning the trust distribution plans over the last twenty years provide an opportunity to examine how plaintiffs’ lawyers have viewed asbestos litigation when they are given the

10. *Id.* at 1747–49, 1749 n.93.

11. *Id.* at 1748–49.

12. *Id.*

13. *In re Combustion Eng’g Inc.*, 391 F.3d 190, 201–02 (3d Cir. 2004).

14. *Id.*

15. *Id.* at 202, 238.

16. *See, e.g., In re Congoleum Corp.*, 426 F.3d 675, 692–94 (3d Cir. 2005); *In re Combustion Eng’g*, 391 F.3d at 239.

responsibility, within the constraints of the Bankruptcy Code, of devising a method of deciding how to allocate scarce funds outside of the tort system. The other participants in the bankruptcy negotiations—the debtor, the financial creditors, the U.S. Trustee, and others—tend to defer to the committee of asbestos personal injury plaintiffs appointed by the U.S. Trustee in the bankruptcy.¹⁷ The members of this committee—either claimants themselves or their lawyers, but for all practical purposes, the lawyers—reflect the interests of the personal injury plaintiffs who are making claims against the bankrupt company. These lawyers are the legislators, judges, and juries in deciding the appropriate mechanism for paying current and future asbestos personal injury plaintiffs. Their negotiations constitute a marketplace for determining criteria and values, just as the tort system and proposed legislative approaches set criteria and values.

II.

BANKRUPTCY TRUST DISTRIBUTION PLANS

The bankruptcy trust distribution plans (“TDPs”) typically have ten elements: trustees, administration, governance provisions, diseases, exposure criteria, medical criteria, valuation criteria, defenses, payment limitations, and court access.¹⁸ The number of

17. See Francis E. McGovern, *Asbestos Litigation II: Section 524(g) Without Bankruptcy*, 31 PEPP. L. REV. 233, 235–36 (discussing the appointment of a committee to ensure the representation of all groups in bankruptcy proceedings).

18. See *In re Armstrong World Indus., Inc., et al.*, Case No. 00-4471 (Bankr. D. Del. 2003) [hereinafter *Armstrong TDP*] (on file with the *NYU Annual Survey of American Law*); Babcock & Wilcox Company, Diamond Power International, Inc., Babcock & Wilcox Construction Co., Inc., and Americon, Inc. Asbestos PD Trust Agreement (2003) [hereinafter *Babcock & Wilcox TDP*] (on file with the *NYU Annual Survey of American Law*); DII Industries, LLC Asbestos PI Trust Agreement (2003) [hereinafter *DII Industries TDP*] (on file with the *NYU Annual Survey of American Law*); NGC Bodily Injury Trust, First Amended Claims Resolution Procedures, *In re Asbestos Claims Mgmt. Corp.* (N.D. Tex. 2003) [hereinafter *National Gypsum TDP*] (on file with the *NYU Annual Survey of American Law*); Pittsburgh Corning Personal Injury Settlement Trust, Exhibit B to the Second Amended Plan of Reorganization: Distribution Procedures (2002) [hereinafter *Pittsburgh Corning TDP*] (on file with the *NYU Annual Survey of American Law*); The Celotex Corporation and Carey Canada Inc., Second Amended and Restated Asbestos Personal Injury Claims Resolution Procedures, Annex B, Nos. 90-10016-8B1, 90-10017-8B1 (Bankr. M.D. Fla. June 15, 1999) [hereinafter *Celotex TDP*] (on file with the *NYU Annual Survey of American Law*); Manville Personal Injury Settlement Trust, 1995 Trust Distribution Process (1995) [hereinafter *Manville 1995 TDP*] (on file with the *NYU Annual Survey of American Law*); UNR Asbestos-Disease Claims Trust, Claims Resolution Procedures, Annex B to the Proposed Trust Agreement (1995) [hereinafter *UNR TDP*] (on file with the *NYU Annual Survey of American Law*);

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trustees can vary, and they are usually entrusted with the responsibility for all aspects of the trust fund subject to court review.¹⁹ The administrative process is usually loosely specified, but experience has normally led to the creation of a unique organization for each fund.²⁰ The governance provisions provide varying consultative and decision-making roles for the current and future plaintiffs' representatives.²¹ The exposure and medical criteria for plaintiffs to qualify for payment have changed considerably over the last twenty years.²² The relative value of asbestos claims has been the subject of the most intense negotiation.²³ Defenses to claims have historically been limited but also have varied.²⁴ Limitations on payment to current and to non-malignants have expanded over time.²⁵ Access to the tort system has become more theoretical than real.²⁶

Normally the trust distribution plans evolve into an administrative process run by claim processing professionals that requires a claim form to be filed containing the basic exposure, medical, and personal history necessary to evaluate a claim.²⁷ The plan administrators then attempt to apply horizontal equity by evaluating similar

Manville Personal Injury Settlement Trust, Trust Distribution Process (1988) [hereinafter Manville 1988 TDP] (on file with the *NYU Annual Survey of American Law*).

19. See, e.g., National Gypsum TDP, *supra* note 18, at 1–3, 5, 11, 15, 20.

20. Francis E. McGovern, *The What And Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1362 (2005).

21. See, e.g., Pittsburgh Corning TDP, *supra* note 18, at 7 (the Trustees of the TDP must obtain the consent of both the current and future claimants representatives for certain matters).

22. Compare Manville 1988 TDP, *supra* note 18, at 10 (allowing claimants to recover for cancers other than lung cancer by showing “pathological evidence of asbestosis” or bilateral lung or pleural disease and proving exposure to Manville asbestos), with Armstrong TDP, *supra* note 18, exhibit 1.24 at 11 (requiring cancers other than lung cancer to be accompanied by a diagnosis of “an underlying Bilateral Asbestos-Related Disease” and proof of six months exposure to Armstrong World Industries asbestos prior to December 31, 1982).

23. See, e.g., Pittsburgh Corning TDP, *supra* note 18, at 19–21 (categorizing claims according to the amount of exposure to Pittsburgh Corning asbestos compared to other asbestos, the financial need of the claimant, and whether the claimant was exposed solely through a person exposed occupationally).

24. See, e.g., Manville Personal Injury Settlement Trust, 2002 Trust Distribution Process 12 (2002) [hereinafter Manville 2002 TDP] (on file with the *NYU Annual Survey of American Law*).

25. See, e.g., Pittsburgh Corning TDP, *supra* note 18, at 17–18.

26. See, e.g., National Gypsum TDP, *supra* note 18, at 7, 13 (providing that the only appeal possible from an expedited review claim is informal mediation and that claimants may generally not file a lawsuit against the trust unless they first lose non-binding arbitration).

27. See, e.g., National Gypsum TDP, *supra* note 18, at 2–3.

claims similarly so that the equivalency mandate of the Bankruptcy Code is met.²⁸ The trust then makes an offer to the claimant and, if accepted, payment is rapid.²⁹ If the offer is not accepted, then there may be some limited negotiation or mediation or even arbitration.³⁰ If no agreement is reached, the claimant may have access to the tort system for a jury's determination of the value of the claim.³¹

The following description of these ten elements of trust distribution plans attempts to reveal the outcomes in the marketplace of negotiation among plaintiffs' counsel over time. The accompanying eight charts give a more detailed schematic of that evolution with references to ten different trust distribution plans.³² Each chart on the horizontal axis contains the names of the ten different trusts that were negotiated over a period of twenty years. The vertical axis in charts I-VII consists of fourteen different disease specific aspects contained in each of the TDPs. On chart VIII, however, the vertical axis consists of nine non-disease-specific requirements. By comparing the differences among these trusts concerning each of the elements, it is possible to make a longitudinal analysis of the evolution of the TDPs.

28. *Id.* at 10; *see also* 11 U.S.C.A. § 524(g)(2)(B)(ii)(V) (2005) (requiring trusts to operate in a manner that allows similar present and future claims to be paid in a similar manner).

29. *Id.* at 9–10.

30. McGovern, *supra* note 20, at 1373.

31. *Id.* The newer TDPs all require the claimant to undergo non-binding arbitration as a pre-requisite to entering the tort system. *See, e.g.*, Armstrong TDP, *supra* note 18, exhibit 1.23, at 18; Manville 2002 TDP, *supra* note 24, at 30–31; Babcock & Wilcox TDP, *supra* note 18, exhibit E, at 46; Pittsburgh Corning TDP, *supra* note 18, at 23–24.

32. The charts and summaries provided here are intended as summaries and necessarily can never capture all the subtlety of the language of the trust distribution plans. The purpose of the charts is not to define all of the categories in detail but to indicate in a graphic manner the fundamental elements of the TDPs and their evolution over time. For a more complete understanding, it is necessary to review the individual TDPs with special attention to their intricacies and details. There are also semantic differences that exist between the drafters of the TDPs in the various plans of reorganization and the interpreters of those plans in the various claims resolution facilities. The effort here has been to err on the side of the semantic interpretations that have been given to each TDP by the respective claims resolution facilities.

A. Trustees³³

All of the trust distribution plans are funded by a qualified settlement trust overseen by one to six trustees.³⁴ In the original Manville Trust the selection of trustees was made by both the debtor and the asbestos personal injury plaintiffs and approved by the bankruptcy court.³⁵ Trustees in subsequent bankruptcy cases have been designated by the plaintiffs and the future representative in the plan documents, but they must be approved by the relevant bankruptcy courts as part of the plan confirmation process. The composition of trustees is generally reflective of the bargaining power of the various segments of the plaintiffs' bar. Funds that are liquid have a preponderance of lawyers; funds with illiquid assets have more business-oriented trustees. The most marked changes in the selection of trustees have involved their experience with mass torts and their compensation. The original Manville trustees were selected in part because of their lack of experience with asbestos litigation whereas more recent appointments have focused on more familiarity with the task at hand. Compensation for trustees has also been increased as an additional allure to recruit the desired candidates.

B. Administration³⁶

Although the trustees are given discretion to establish the organization of the administrative process for the valuation of claims, they have generally followed a consistent pattern. With a few exceptions, the trustees have established their own organization with a claims administrator, counsel, financial officer, claims handlers, and support staff.³⁷ These asbestos claims resolution facilities have between ten and one hundred employees and are funded by the trust with annual budgets of up to \$7,000,000.³⁸ The similarity of

33. See, e.g., Chart IX, line 9.

34. See, e.g., National Gypsum TDP, *supra* note 18, at 1 (naming one trustee); UNR TDP, *supra* note 18, at 135.

35. Manville 1988 TDP, *supra* note 18, at 2.

36. See generally McGovern, *supra* note 20 (discussing extensively the administration of claims resolution facilities).

37. *Id.* at 1369.

38. Annual Report and Account of Ruth R. McMullin, David L. McLean, and James McMonagle, as Trustees of the Eagle-Picher Indus. Personal Injury Settlement Trust, for the year ended December 31, 2003, *In re* Eagle Picher Industries, Inc., exhibit A at 3, 12, exhibit C at 11 (2003) [hereinafter Eagle-Picher TDP] (on file with the *NYU Annual Survey of American Law*) (operating expenses of over \$6,000,000); see also McGovern, *supra* note 20, at 1368–70 (discussing the employment practices of claims resolutions facilities).

administrative organizations over time suggests a stable model similar to the organization of analogous claims handling by insurance companies. Because the trust is designed to distribute all its assets to claimants, the incentive is to be claimant-oriented rather than focused on reserving funds for shareholders or other stakeholders.

C. *Exposure Criteria*³⁹

One of the most evolutionary elements of the various trust distribution plans has been the requisite exposure to asbestos and asbestos containing products required of claimants.⁴⁰ Because Manville asbestos products were ubiquitous, the original Manville plan required proof of exposure to asbestos in general, not to specific Manville asbestos.⁴¹ The Celotex plan, and all subsequent plans, have required proof of exposure to each specific debtor's products in addition to general exposure to asbestos.⁴² Because the filters used by plaintiffs' counsel in the early stages of the asbestos litigation were stricter than in later years, it was assumed that sufferers of asbestosis had experienced years of exposure in an occupation that involved significant levels of asbestos exposure.⁴³ That assumption was relaxed in later trusts, and additional requirements of occupational exposure and latency were required.

D. *Governance*⁴⁴

All of the trust distribution plans have provisions for judicial oversight and consultation with a trust advisory committee and a legal representative.⁴⁵ After the experience of the original Manville plan in its allocation of funds between the current and future claim-

39. See, e.g., Charts I-VIII, lines 1, 5, 6, 7. For some TDPs, the basic purpose of the Chapter 11 asbestos bankruptcy is to set up a 524(g) trust to pay personal injury claims based on exposure to the debtor's asbestos-related products or conduct where the claimant can also show that the exposure was a contributing cause of his or her disease. See, e.g., Armstrong TDP, *supra* note 18, exhibit 1.23 at 2. What has varied among the TDP documents are the other exposure requirements set forth on the changes, such as the requirement of "Significant Occupational Exposure." Compare Manville 1988 TDP, *supra* note 18, at 10 (no specific requirement of "Significant Occupational Exposure"), with Pittsburgh Corning TDP, *supra* note 18, at 22 (requiring a showing of "Significant Occupational Exposure" to asbestos).

40. National Gypsum TDP, *supra* note 18, at 16-17.

41. See Manville 1988 TDP, *supra* note 18, at 5 (noting that claims will be evaluated according to, among other factors, Manville's market share).

42. Celotex TDP, *supra* note 18, at 6.

43. CARROLL ET AL., *supra* note 1, at 17.

44. See, e.g., Chart IX, line 13.

45. See, e.g., Celotex TDP, *supra* note 18, at 2.

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ants and the passage of § 524(g) to the Bankruptcy Code⁴⁶ requiring a futures representative, the plans have also made provisions for a role for future claims as well.⁴⁷ There has been some ebb and flow in the powers of the present and future advisors, but, as a practical matter, the trustees consult with their constituents on a regular basis during quarterly or semi-annual meetings and as needed.⁴⁸ These advisors have limited veto power as well, particularly if the trustees desire to use another trust's administration to process claims. The advisors have their expenses and the fees of their lawyers and consultants paid by the trust.⁴⁹

*E. Diseases*⁵⁰

The early distribution plans envisioned five or six levels of disease among mesothelioma, lung cancer,⁵¹ other cancer, and non-malignancy.⁵² The most recent plans have seven or eight levels of asbestos-related disease.⁵³ These additions reflect the substantial shift toward finer distinctions related to proof and thus the level of compensation.

*F. Medical Criteria*⁵⁴

Another element that has changed over time has been the medical criteria.⁵⁵ Medical causation was assumed in the early

46. 11 U.S.C.A. § 524(g) (2005).

47. *See, e.g.*, National Gypsum TDP, *supra* note 18, at 1, 4–5, 9.

48. Eagle Picher TDP, *supra* note 38, at 3–6, exhibit A at 10.

49. *See id.* exhibit A at 3–10, exhibit C at 3–11.

50. *See* Mesothelioma Chart I; Lung Cancer I Chart II; Lung Cancer II Chart III; Other Cancer Chart IV; Severe Asbestosis Chart V; Asbestosis Level III Chart VI; Asbestosis Level II Chart VII; Other Asbestosis Disease Chart VIII.

51. Lung Cancer II is a category of lung cancer disease that in newer TDP documents as well as in Manville-Revised does not have the same level of specific requirements as Lung Cancer I, i.e., there is no requirement as such that the claimant show “Significant Occupational Exposure,” “5 years cumulative occupational exposure,” or “Underlying bilateral asbestos-related nonmalignant disease.” *See, e.g.*, Pittsburgh Corning TDP, *supra* note 18, at 14; Manville 1995 TDP, *supra* note 18, at 10–11. All claims for Lung Cancer II are individually reviewed under the newer TDPs, and the presence or absence of one or more of these factors will affect the value of the claim, but none of these factors are TDP requirements. *See, e.g.*, Pittsburgh Corning TDP, *supra* note 18, at 14.

52. *See, e.g.*, Pittsburgh Corning TDP, *supra* note 18, at 13–16.

53. *See, e.g.*, National Gypsum TDP, *supra* note 18, at 17–20. Although Levels III and II require PFT readings showing a specified level of TLC or FVC and FEV1/FVC, the specified levels themselves differ between the two diseases, which is the primary medical distinction between them. *See id.*

54. *See, e.g.*, Charts I–VIII, lines 2, 3, 4, 8, 9, 10, 11, 12, 13, 14.

55. *See, e.g.*, National Gypsum TDP, *supra* note 18, at 17.

years, but evidence of exposure as a contributing cause has now been required. Likewise there has been an increasing tendency to require more and more rigorous tests and diagnoses. Mesothelioma criteria have not changed dramatically, generally because of the nature of the disease: it is rare and invariably an asbestos-related disease that should be readily identifiable by pathology. Asbestos-related lung cancers are more problematic because of their normal background risk, confounding factors, and variance in medical interpretation. Some trust distribution plans have required chest x-rays read by a B-reader, pathology, underlying bilateral asbestos-related non-malignant disease, and a physical exam.⁵⁶ Likewise for other cancers, the prerequisites have become stricter: chest X-rays read by a B-reader, pathology, and underlying bilateral asbestos-related non-malignant disease.⁵⁷

The asbestosis and asbestos-related diseases are the source of the most dramatic changes over time. There are now four levels of disease. Level IV is the most severe requiring significantly impaired lung function in accordance with pulmonary function tests conducted according to the American Thoracic Society standards and chest X-rays read by a B-reader exhibiting a substantially elevated International Labor Organization rating. Level III has the same tests but with lower impairment. Level II and other asbestos disease are relatively new categories designed to accommodate claimants who are even less significantly impaired. The other asbestos disease category has the least requirements of any disease category.

56. The more recent TDPs do not require chest x-rays read by a B-reader plus pathology for non-malignant diseases; pathology is simply an alternative basis for a diagnosis of a non-malignant disease. *See, e.g.*, National Gypsum TDP, *supra* note 18, at 18–19. Also, “chest x-ray” is not an absolute requirement in any case, much less “chest x-ray read by B-reader.” *Id.* Instead, claimants can in all cases provide the trust with either an x-ray or a CT scan, which in either case can be read by any qualified physician, which generally means board-certified in a relevant specialty. *See id.* The charts reflect this thought by the use of the word “indirect.”

57. In the more recent TDPs “Bilateral asbestos-related non-malignant disease” is not a requirement per se but is a summary of the various evidentiary alternatives (chest x-ray, CT scan, pathology, etc.) for meeting the requirements of Other Asbestos Disease (Level I), Asbestosis (Level II), and Asbestosis (Level III). *See, e.g.*, Pittsburgh Corning TDP, *supra* note 18, at 21. As a general matter, Mesothelioma, Lung Cancers, and Other Cancers can be established by medical reports from qualified physicians who conduct a physical exam of the patient or by pathology. *See, e.g.*, National Gypsum TDP, *supra* note 18, at 17–19. In addition, Lung Cancer I and Other Cancer require evidence of bilateral asbestos-related non-malignant disease, which may be established by a variety of means including chest x-rays, CT scans, pathology, etc. *See id.* at 17–20. The charts reflect this thought again by the use of the word “indirect.”

*G. Valuation Criteria*⁵⁸

Another of the most dramatic changes over time has involved the valuation of asbestos claims. Manville attempted to mimic the tort system.⁵⁹ UNR established what is now known as a discounted cash payment, a quick pay option for claimants who would settle their case for a lower than tort system value without having to provide extensive proof to support their claim.⁶⁰ UNR also had a minimal description of factors that should be taken into account in evaluating a claim and a much more streamlined review process.⁶¹ As time passed, the procedure for evaluating claims became more systematic: a discounted cash payment or an individualized review process. The factors to be taken into account by the claims evaluators became more standardized, evolving into a more formulaic methodology. Payments now are made based upon a schedule with maximum benefits.⁶²

Probably the most dramatic evidence of a change in valuation criteria can be seen by the variation in the relative amount of money paid to malignancy claims as opposed to the lowest non-malignancy claims. Manville-Original can be used to illustrate the ratio of Mesothelioma to Other Asbestos Disease which was in the range of 17:1; for Lung Cancer I 3:1; and for Severe Asbestosis 4:1.⁶³ The Babcock & Wilcox plan has corresponding ratios of 360:1; 140:1; and 140:1.⁶⁴ The shift to the malignants has been dramatic. In terms of liquidation value, the scheduled benefits for Mesothelioma have gone from \$200,000 up to \$500,000.⁶⁵ The lowest value Other Asbestos Disease liquidated values have been reduced from \$12,000 to \$0.⁶⁶ There are similar movements in the

58. See, e.g., Chart XI, line 1.

59. See generally Manville 1988 TDP, *supra* note 18.

60. See UNR TDP, *supra* note 18, at 135.

61. See *id.*

62. See generally Mesothelioma Chart I; Lung Cancer I Chart II; Lung Cancer II Chart III; Other Cancer Chart IV; Severe Asbestosis Chart V; Asbestosis Level III Chart VI; Asbestosis Level II Chart VII; Other Asbestosis Disease Chart VIII.

63. Manville 1988 TDP, *supra* note 18, at 7–11; see also, Mesothelioma Chart I and Other Asbestos Disease Chart VIII.

64. Babcock Wilcox TDP, *supra* note 18, “Presumptive Medical/ Exposure Criteria” app., at 1–4.

65. Compare Manville 1988 TDP, *supra* note 18, at 11 (value is \$200,000), with Pittsburgh Corning TDP, *supra* note 18, at 18 (value is \$500,000); see also, Mesothelioma Chart I and Other Asbestos Disease Chart VIII.

66. Compare Manville 1988 TDP, *supra* note 18, at 11 (lowest value is \$12,000), with Pittsburgh Corning TDP, *supra* note 18, at 18 (lowest value is \$0); see also Mesothelioma Chart I and Other Asbestos Disease Chart VIII; Mesothelioma Chart I; Lung Cancer I Chart II; Lung Cancer II Chart III; Other Cancer Chart IV; Severe

other liquidated claim values. In addition, there have been significant increases in the annual amount available to the malignancies relative to the non-malignancies as described below in the section on payment limitations.

*H. Defenses*⁶⁷

The early trust distribution plans had virtually no defenses.⁶⁸ The strengthened exposure and medical criteria have given the trusts more opportunity to scrutinize claims. In addition, statute of limitation defenses have gone from non-existent to state tort standards to a “bright line” three-year rule, although in some of the newer TDPs the statute of limitations provisions are quite complicated.

*I. Payment Limitations*⁶⁹

The original Manville trust distribution plan had no aggregate caps, collars, percentages, or other limitations on payment to claimants.⁷⁰ After the Manville trust sought relief from the judiciary as its assets dwindled, the newer trusts were constrained in their payments by a number of different restrictions.⁷¹ The most recent plans have caps on the amount of payments that can be made in a given year. Some of the plans have a “collar” on the percentage of money each year that can be paid to non-malignant claimants as opposed to malignant claimants.⁷² A newer idea is to put an absolute cap on the amount of money that the non-malignants can receive in a given year. The existing collars have varied from 45% to 15%.⁷³ Virtually all trusts since the original Manville plan have a fixed percentage pay-out; that is, the percentage amount of a liquidated value that can be paid. If, for example, a claim is valued and

Asbestosis Chart V; Asbestosis Level III Chart VI; Asbestosis Level II Chart VII; Other Asbestosis Disease Chart VIII.

67. *See, e.g.*, Chart IX, line 9.

68. *See, e.g.*, Manville 1988 TDP, *supra* note 18, at 1–4.

69. *See, e.g.*, Chart IX, lines 5, 6, and 7.

70. *See* Manville 1988 TDP, *supra* note 18, at 5, 37.

71. *See, e.g.*, Celotex TDP, *supra* note 18, at 3.

72. A “collar” is a percentage of money each year that can be paid to non-malignant claimants which sometimes functions as an absolute cap on the amount of money a non-malignant can receive in a given year. Collars are also defined as ratios of payments to malignancies versus payments to non-malignancies.

73. For example, there are limits or collars in the Babcock & Wilcox (38%) and Armstrong World Industries (35%) TDPs on non-malignancy payments per year. *See* Armstrong TDP, *supra* note 18, exhibit 1.24 at 4; Babcock & Wilcox TDP, *supra* note 18, at 7.

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liquidated at \$100,000 and a trust can only afford to pay 10% on any given claim because it does not have sufficient funds to pay all present and future claims one hundred cents on the dollar, then the \$100,000 claim would be paid \$10,000. Usually this payment percentage is set in the plan of reorganization and is subject to change over time under specified circumstances.⁷⁴

*J. Court Access*⁷⁵

One of the fundamental principles of the plaintiffs' personal injury bar has been the access to juries for the determination and evaluation of claims.⁷⁶ The original Manville trust distribution plan provided for access to jury trials once certain negotiation and alternative dispute resolution procedures had been exhausted. When it became apparent that there were not sufficient assets to pay all current and future claimants full tort system values, the trust distribution plans were designed with a variety of compromises that retained the right to a jury trial but made it sufficiently unattractive that claimants did not use it. Most plans have extensive and oftentimes expensive requirements before there can be access to a trial. Some plans limit the percentage of payment that can be made in a given award or establish caps on the amount that can be paid in any given year.⁷⁷

CONCLUSION

The trust distribution plans in asbestos bankruptcies were created to distribute available resources to asbestos personal injury plaintiffs. The structure and mechanics of these plans exhibit how plaintiffs' counsel have created their own alternatives to the tort system when confronted with a situation in which there are insufficient funds to pay full tort system values to all present and future claimants. The trust distribution plans became necessary to allocate scarce resources equitably among qualified claimants; the bankruptcy filing itself is predicated upon the lack of funds to pay full value to all present and future claimants. An evaluation of the elements of those trust distribution plans illustrates how plaintiffs' counsel have changed their attitudes regarding the allocation of scarce resources to asbestos personal injury plaintiffs. Starting with the original Manville trust distribution plan, it is possible to see

74. See, e.g., Pittsburgh Corning TDP, *supra* note 18, at 5.

75. See, e.g., Chart IX, line 9.

76. See, e.g., Pittsburgh Corning TDP, *supra* note 18, at 24–25.

77. See, e.g., Pittsburgh Corning TDP, *supra* note 18, at 5–6.

how, within the constraints of the bankruptcy process, plaintiffs' lawyers have strengthened the qualifications for payment and altered the balance of payments for discrete diseases. They have increased exposure criteria and the medical criteria necessary to establish a case; they have increased the relative payment amounts to malignancies over non-malignancies and the relative payment to the more sick over the less sick; and they have limited payments to current claimants in order to ensure that there are sufficient funds for future claimants. These developments have been voluntary efforts that establish substitutes to the tort system when there is a scarcity of resources.

CHART II

Asbestos Bankruptcy Trust Distribution Plans
Lung Cancer I

Requirement	UNR	Manville-Original	Eagle-Picher	National Gypsum	Celotex	Manville-Revised	Babcock & Wilcox	Pittsburgh Corning	Armstrong World Industries	Haliburton
Company exposure shown by affidavit, invoices, or records		X	X	X	X	X	X	X	X	X
Diagnosis of primary cancer		X	X	X	X	X	X	X	X	X
10 year latency		X		X	X	X	X	X	X	X
Physical exam			X		X	X	X	X	X	X
Significant Occupational Exposure						X	X	X	X	X
5 years cumulative occupational exposure						X	X	X	X	X
Evidence exposure was contributing cause				X	X	X	X	X	X	X
Pulmonary function test conducted according to ATS standard										
TLC or FVC and FEV1/FVC										
Chest x-ray						Indirect	Indirect	Indirect	Indirect	Indirect
Chest x-ray read by B reader or board-certified specialist						Indirect	Indirect	Indirect	Indirect	Indirect
ILO				Indirect		Indirect	Indirect	Indirect	Indirect	Indirect
Pathological Evidence		Indirect		Indirect	Indirect	Indirect	Indirect	Indirect	Indirect	Indirect
Underlying bilateral asbestos-related nonmalignant disease		X		X	X	X	X	X	X	X

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CHART III

Asbestos Bankruptcy Trust Distribution Plans
Lung Cancer II

Requirement	UNR	Manville-Original	Eagle-Picher	National Gypsum	Celotex	Manville-Revised	Babcock & Wilcox	Pittsburgh Corning	Armstrong World Industries	Halliburton
Company exposure shown by affidavit, invoices, or records		X	X	X	X	X	X	X	X	X
Diagnosis of primary cancer		X	X	X	X	X	X	X	X	X
10 year latency		X		X	X	X	X	X	X	X
Physical exam			X		X	X	X	X	X	X
Significant Occupational Exposure					1	2				
5 years cumulative occupational exposure										
Evidence exposure was contributing cause				X	X	X	X	X	X	X
Pulmonary function test conducted according to ATS standard										
TLC or FVC and FEV1/FVC										
Chest x-ray										
Chest x-ray read by B reader or board-certified specialist										
II.O				Indirect						
Pathological Evidence				Indirect						

-
1. Aggregate of 3 years or 12 quarters of employment.
 2. 6 months prior to 12/31/82 plus 5 years cumulative.

CHART IV

Asbestos Bankruptcy Trust Distribution Plans
Other Cancer

Requirement	UNR	Manville-Original	Eagle-Picher	National Gypsum	Celotex	Manville-Revised	Babcock & Wilcox	Pittsburgh Corning	Armstrong World Industries	Halliburton
Company exposure shown by affidavit, invoices, or records		X	X	X	X	X	X	X	X	X
Diagnosis of primary cancer		X	X	X	X	X	X	X	X	X
10 year latency		X		X	X	X	X	X	X	X
Physical exam			X		X	X	X	X	X	X
Significant Occupational Exposure						X ¹	X	X	X	X
5 years cumulative occupational exposure						X	X	X	X	X
Evidence exposure was contributing cause				X	X	X	X	X	X	X
Pulmonary function test conducted according to ATS standard										
TLC or FVC and FEV1/FVC										
Chest x-ray						Indirect	Indirect	Indirect	Indirect	Indirect
Chest x-ray read by B reader or board-certified specialist						Indirect	Indirect	Indirect	Indirect	Indirect
ILO						Indirect	Indirect	Indirect	Indirect	Indirect
Pathological Evidence		Indirect		Indirect	Indirect	Indirect	Indirect	Indirect	Indirect	Indirect
Underlying bilateral asbestos-related nonmalignant disease		X			X	X	X	X	X	X

1. 6 months prior to 12/31/82 plus 5 years cumulative.

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CHART V

Asbestos Bankruptcy Trust Distribution Plans
Severe Asbestosis (Level IV)

Requirement	UNR	Manville-Original	Eagle-Picher	National Gypsum	Celotex	Manville-Revised	Babcock & Wilcox	Pittsburgh Corning	Armstrong World Industries	Haliburton
Company exposure shown by affidavit, invoices, or records		X	X	X	X	X	X	X	X	X
Diagnosis of primary cancer			X	X	X	X	X	X	X	X
10 year latency		X		X	X	X	X	X	X	X
Physical exam			X		X	X	X	X	X	X
Significant Occupational Exposure						X ¹	X	X	X	X
5 years cumulative occupational exposure						X	X	X	X	X
Evidence exposure was contributing cause				X (If Deceased)	X	X	X	X	X	X
Pulmonary function test conducted according to ATS standard		X		X	X	X	X	X	X	X
TLC or FVC and FEV1/FVC		X		X	X	X	X	X	X	X
Chest x-ray		X		X	X	X				
Chest x-ray read by B reader or board-certified specialist				X		X				
ILO				X		X	X	X	X	X
Pathological Evidence				X (If Deceased)	X	X	X	X	X	X
Underlying bilateral asbestos-related nonmalignant disease										

1. 6 months prior to 12/31/82 plus 5 years cumulative.

CHART VI

Asbestos Bankruptcy Trust Distribution Plans
Asbestosis (Level III)

Requirement	UNR	Manville-Original	Eagle-Picher	National Gypsum	Celotex	Manville-Revised	Babcock & Wilcox	Pittsburgh Corning	Armstrong World Industries	Haliburton
Company exposure shown by affidavit, invoices, or records		X	X	X	X	X	X	X	X	X
Diagnosis of primary cancer		X		X	X	X	X	X	X	X
10 year latency										
Physical exam			X		X	X	X	X	X	X
Significant Occupational Exposure						X ¹	X	X	X	X
5 years cumulative occupational exposure						X	X	X	X	X
Evidence exposure was contributing cause				X (If Deceased)	X	X	X	X	X	X
Pulmonary function test conducted according to ATS standard		X		X	X	X	X	X	X	X
TLC or FVC and FEV1/FVC		X		X	X	X	X	X	X	X
Chest x-ray		X		X	X	X	X	X	X	X
Chest x-ray read by B reader or board-certified specialist				X		X	X	X	X	X
ILO				X		X	X	X	X	X
Pathological Evidence				X (If Deceased)	X	X	X	X	X	X
Underlying bilateral asbestos-related nonmalignant disease			X	X	X	X	X	X	X	X

1. 6 months prior to 12/31/82 plus 5 years cumulative.

CHART VII

Asbestos Bankruptcy Trust Distribution Plans
Asbestosis (Level II)

Requirement	UNR	Manville-Original	Eagle-Picher	National Gypsum	Celotex	Manville-Revised	Babcock & Wilcox	Pittsburgh Corning	Armstrong World Industries	Haliburton
Company exposure shown by affidavit, invoices, or records		X	X	X	X	X	X	X	X	X
Diagnosis of primary cancer		X		X	X	X	X	X	X	X
10 year latency										
Physical exam			X		X	X	X	X	X	X
Significant Occupational Exposure						1				
5 years cumulative occupational exposure						X	X	X	X	X
Evidence exposure was contributing cause					X					
Pulmonary function test conducted according to ATS standard				X						
TLC or FVC and FEV1/FVC										
Chest x-ray		X		X	X	X	X	X	X	X
Chest x-ray read by B reader or board-certified specialist				X		X	X	X	X	X
ILO				X		X	X	X	X	X
Pathological Evidence					X	X	X	X	X	X
Underlying bilateral asbestos-related nonmalignant disease			X	X	X	X	X	X	X	X

1. 6 months prior to 12/31/82 plus 5 years cumulative.

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CHART IX

Asbestos Bankruptcy Trust Distribution Plans
Non-Disease-Specific Requirements

Requirements	UNR	Manville-Original	Eagle-Picher	National Gypsum	Celotex	Manville-Revised	Babcock & Wilcox	Pittsburgh Corning	Armstrong World Industries	Haliburton
Expedited or Discount Cash Payment	X		X	X	X	X	X	X	X	X
Individual Review Factors	Minimal description	Specified	Minimal description	Specified	Specified	Specified	Specified	Specified	Specified	Specified
Scheduled Payment Values	None	Scheduled Value	Only for Discounted Cash Payment	Scheduled Value, Average & Maximum	Scheduled Value & Maximum	Scheduled Value & Maximum	Scheduled Value, Average & Maximum	Scheduled Value, Average & Maximum	Scheduled Value, Average & Maximum	Scheduled Value, Average & Maximum
Payment Allocations Between Malignancy & Non-Malignancy							X	X	X	X
Cap on payment amounts per year							Yes	Yes	Yes	Yes
Limit on Non-Malignancy Payments Per Year							32%	7% for Asbestos (Level III) & 11% for Asbestos (Level II)	35%	
Initial payment percentage	Unspecified	100%	27.8%	32%	12.00%	10%	34.00%	40.0%	20%	100%
Statute of Limitations	Applicable State Law		Applicable State Law	3-yr "Bright Line"	Applicable State Law	3-yr "Bright Line"	3-yr "Bright Line"	3-yr "Bright Line"	3-yr "Bright Line"	3-yr "Bright Line"
Trial Alternative	Various ADR/ Arbitration, then litigation	Arbitration, then litigation	ADR, then litigation	ADR, then litigation	Various ADR/ Arbitration, then litigation	Arbitration, then litigation	Various ADR/ Arbitration, then litigation	Various ADR/ Arbitration, then litigation	Various ADR/ Arbitration, then litigation	Various ADR/ Arbitration, then litigation

