Unlocking the Code:

The Value of Bankruptcy to Resolve Mass Torts

December 2022

U.S. Chamber of Commerce
Institute for Legal Reform

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Executive Summary

Chapter

01

For much of the modern history of the U.S. legal system, mass tort litigation played a relatively minor role in the various state and federal courts, where it proceeded sedately.[1]

By the mid-1980s though, courts had taken notice of the mounting "avalanche of litigation" caused by an explosion of asbestos claims.[2] The Judicial Conference Ad Hoc Committee on Asbestos Litigation's 1991 report concluded that the "situation has reached critical dimensions and is getting worse," that the litigation was "a disaster of major proportions to both the victims and the producers of asbestos products," and that courts were "ill-equipped" to handle such litigation fairly or efficiently.[3]

"U.S. courts have struggled to find effective solutions to resolve mass tort claims within the confines of the tort system."

The decades since have not improved matters. While still facing thousands of asbestos cases a year, state and federal courts have also been inundated with mass torts involving sports-related concussions, opioids, talcum powder, earplugs, antacids, weed killers, and a myriad of other claims. Court systems nationwide have struggled to manage the high claim volume many of these litigations bring, a problem exacerbated by the backlog created by the COVID-19 pandemic. The cases also have increased in complexity and scope, which has imposed greater financial exposure and risk for defendants, compounded by solicitation of claims by the plaintiffs' bar through advertising, increased use of litigation funding, and naming an ever-widening circle of defendants.

U.S. courts have struggled to find effective solutions to resolve mass tort claims within the confines of the tort system. Most courts have employed available mechanisms to aggregate cases into class actions and/or consolidate them into multidistrict litigation (MDL) proceedings to address issues of commonality and discovery, and ultimately to drive settlements. Unfortunately, these traditional mechanisms of claim aggregation and resolution generally fall short in providing a level playing field for litigants, complicate the process of tort resolution by incentivizing unmeritorious filings, and fail to provide means to globally and finally resolve mass torts that involve latent injuries.[4] Likewise, existing aggregation mechanisms have failed to provide meaningful, timely relief to injured claimants, while proving lucrative for attorneys.

An Effective Alternative

As an alternative to civil tort-based options, the Chapter 11 bankruptcy process has developed as an efficient mechanism to aggregate claims into a single forum and pool assets from a variety of available sources to compensate claimants. For example, bankruptcy cases involving latent injuries associated with asbestos can be brought under Section 524(g) of the Bankruptcy Code,[5] which allows for the establishment of a post-confirmation settlement trust that compensates current and future claims and halts future lawsuits against the debtor and other protected parties. Even mass torts that are largely limited to a current set of claimants without a significant risk of latent injury claims have found bankruptcy to be an effective mechanism to aggregate both claims and assets under a post-confirmation settlement model that can eliminate the high costs of managing a prolonged mass tort.[6]

Although the bankruptcy process has proven to be an effective mechanism for consolidating claims and assets, history has shown that the mismanagement of claimant trust funds and the use of flawed compensation procedures can artificially inflate the number and value of claims made to bankruptcy trusts to the detriment of future claimants and potential third-party indemnitors. Specifically, the trusts have historically paid claims without rigorously evaluating their merits. Without more transparency and oversight over this process, the failure to equitably distribute bankruptcy assets will continue to deplete those finite assets and strip away compensation to deserving claimants.

This commentary will examine the dichotomy between the resolution of mass tort claims in the tort system versus the bankruptcy process. Our research shows that with changes to how aggregated assets are distributed to claimants via the bankruptcy process, resolving mass tort litigation through bankruptcy reorganization can be more efficient and provide a more equitable approach for plaintiffs, companies, insurers, and the courts.

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The Procedural Weakness of Mass Tort Litigation

02

Partially by design, tort litigation moves slowly. Litigants can use the lengthy discovery, motions practice, expert, trial, and appellate phases to investigate, challenge, and strengthen claims, but do so while incurring substantial costs. With a low barrier to entry into the tort system, active advertising and solicitation of new claims, and third party litigation funding, the pace of filings typically far exceeds the pace of resolution.

Indeed, excessive filings are incentivized, as they put pressure on defendants to settle litigations en masse rather than assess and defend each claim. Thus, as dockets grow in size, the scrutiny given to the merits of each claim diminishes. In this system, defendants cannot reduce their risk nor courts their backlog in a way significant enough to counter the drain on either's resources. In his memorandum opinion permitting a subsidiary of Johnson & Johnson to proceed in bankruptcy to resolve its talc liabilities, federal bankruptcy Judge Michael Kaplan remarked:

> The fact remains that since 2014—over seven years ago—only 49 trials have gone to verdict, and many of those remain on appeal or have been remanded to retry. Given the pace of the litigation to date, as well as the mounting escalation in the number of new actions being brought monthly, the vast majority suffering from illness in the existing backlog of cases will not see a penny in recovery for years. The tort system has struggled to meet the needs of present claimants in a timely and fair manner. The system is ill-equipped to provide for future claimants.[7]

Compounding the difficulties in resolving mass tort claims caused by their slow speed and high volume are the rules of the jurisdictions where those claims tend to be aggregated. In mature mass tort litigations, cases often are "forum-shopped": filed in jurisdictions where court rules favor plaintiff standing and recovery. In asbestos litigation, for example, nearly 90% of the approximately 3,700 annual asbestos personal injury claims are filed in just 15 jurisdictions despite the thousands of other state or federal courts where the cases could be filed.[8]

These jurisdictions initially attract mass tort claims like asbestos due to favorable procedures such as

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consolidation, standing for out-of-state plaintiffs, lax rules on the admissibility of expert evidence, and the imposition of punitive damages, all of which increase plaintiffs' chances of recovery. Once identified as favorable places to file mass tort claims, these jurisdictions tend to become even more favorable through the exertion of influence by the plaintiffs' bar. As repeat litigants, plaintiffs' attorneys become familiar with the judges who oversee the asbestos dockets and who often look to plaintiffs' firms, who are familiar with the status of cases they have filed, to help manage overloaded dockets; they take advantage of the courts' rules and influence them through revisions to case management orders; and they use their large volumes of claims and influence over trial settings to gain settlement leverage.[9] While exacerbated by the COVID-19 pandemic, this filing pattern shows that "clogged" mass tort dockets and overwhelmed courts are a problem of plaintiffs' law firms' creation, which they use to their advantage.

This dynamic substantially increases the risk to defendants trying cases in those jurisdictions. While some economic barriers still exist for defendants to deter the mass filing of meritless claims, such as time delays associated with discovery, depositions, appeals, and removal to federal court, the advantages to plaintiffs in these "select" jurisdictions are difficult to overstate. Moreover, the high volume of cases and control exerted over the dockets by the plaintiffs' bar often result in defendants incurring substantially more costs associated with defending the cases than they spend in indemnity payments to injured litigants. Thus, defendants are often forced to defend a large portfolio of cases in fora that favor their opponents.

In the face of this imbalanced system that incentivizes the filing of more cases, courts have turned to procedural devices in an attempt to manage the imposing number of mass tort cases, provide adequate compensation to injured plaintiffs, and provide a vehicle for group settlement with sufficient finality to end the litigation. Yet the two most common procedural aggregation methods, class actions and multidistrict litigations (MDLs), fall far short of these goals.

Class Actions

The traditional mechanism to aggregate and resolve litigation involving similar claims in the tort system has been the class action mechanism under Federal Rule of Civil Procedure 23.[10] Under this method,

lawsuits involving common injuries and issues of fact are consolidated and a state or federal judge may certify that all the individual lawsuits may move forward as a single class. Class actions seeking damages must prove that common issues prevail over individual matters such that litigating as a class is preferable to trying the claims individually. Under Rule 23, potential class members must be provided an opportunity to opt out. Those that do so can pursue their claims individually without being bound by the terms of a class settlement.

While this system can in theory be an efficient means of resolving similar claims, its utility for dealing with latent injuries—those that can take years or even decades after exposure to manifest—has been judicially limited. In 1997, the U.S. Supreme Court issued its prevailing opinion on class actions involving latent injuries in *Amchem Products v. Windsor*.[11] Affirming a Third Circuit U.S. Court of Appeals ruling, *Amchem* shut the door on a proposed asbestos class action. The proposed class included thousands of current asbestos claimants and potentially millions of future claimants who alleged injuries caused by exposure to asbestos in products made by 20 of the most prominent asbestos defendants, who had formed a common defense group known as the Center for Claims Resolution. These defendants accounted for a vast majority of the historical market share of asbestos-containing products, including those containing the most potently carcinogenic forms of asbestos and those with the greatest potential for release of asbestos fibers. In its ruling, the U.S. Supreme Court rejected the proposed class as too diverse because it included both malignant and unimpaired claims. The Court also held that future asbestos claimants, whose diseases had not yet manifested, could not be bound to the settlement under the guidelines of Rule 23 because they lacked an opportunity to opt out of the class.[12] A global settlement of claims against such significant defendants would have altered the course of asbestos litigation that, in its absence, continues today. Moreover, the Court's ruling had broad implications for mass torts beyond asbestos, effectively nullifying the use of the class action model for litigations that involve latent injuries.

Multidistrict Litigation Courts

The other aggregation mechanism for claims involving common allegations of injury is the consolidation of claims in federal Multidistrict Litigation (MDL) courts. Under the MDL statute, a special panel of the federal judiciary can authorize the

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aggregation of individual claims into one court under the direction of a single judge for pre-trial proceedings.[13] Courts facing numerous individual but similar mass tort cases routinely use MDLs to centrally consolidate cases filed in multiple state and federal courts at the request of parties or the courts where they are filed.[14] Consistent with their goals of avoiding inconsistent rulings and promoting efficiency, the MDL statute permits MDL courts to supervise the aggregated claims through discovery and preliminary evidentiary proceedings before transferring them back to the courts where they were originally filed for trial. In practice, however, most cases are resolved within the MDL through withdrawal, dismissal, or settlement.[15]

In recent years, the use of MDLs for mass torts has grown dramatically. In 2013, there were 73 MDLs across the country related to a variety of different mass tort litigations.[16] In 2019, that number had grown to over 200 MDLs pending in federal courts, more than 90% of which concerned product liability or mass torts.[17] In 2021, over 60% of all cases in the tort system resided in MDL courts.[18]

Widespread Criticism of MDLs

When used properly, the MDL mechanism can be an efficient way of resolving pretrial matters, but the steep increase in its use for mass tort case aggregation should not be mistaken as an indication of its efficiency or equity in all circumstances. On the contrary, MDLs have faced increasing criticism as their use has become more widespread. A recent example of the limits of MDL proceedings—both in their ostensible goal of promoting efficient management of large dockets and as means to facilitate global settlements—is the litigation against Bayer AG regarding its glyphosate-based herbicide Roundup. In 2016, cases involving allegations that Roundup caused cancer were consolidated in the Northern District of California. In 2020, Bayer announced that it had reached an agreement with plaintiffs that would resolve approximately 75% of the total current claims for $10 billion.[19] As part of the settlement, Bayer proposed to contribute an additional $2 billion fund to compensate glyphosate claims that may arise in the future. However, in his May 2021 opinion rejecting the settlement for future

claimants on grounds similar to the Supreme Court's in the *Amchem* case, MDL Judge Vince Chhabria found "glaring flaws" in the settlement because it stripped future claimants of certain legal rights and failed to provide adequate notice to those future claimants of their rights to opt out of the settlement.[20] Following Judge Chhabria's decision, Bayer withdrew its proposed $2 billion settlement structure to satisfy future claimants and announced in July 2021 that it will remove Roundup from the residential consumer market in 2023, setting aside $4.5 billion to compensate any potential future claims it may face in the tort system.

"'The combination of advertising-induced filing of masses of unvetted claims and a preordained expectation of settlement often create a high-volume cudgel that inflates settlement value, or—as is the case with the Combat Arms MDL—precludes any reasonable settlement.'"

3M expressed the same frustration with the tort system's inability to resolve claims alleging injuries from its Combat Arms earplugs, which had been aggregated in an MDL in Florida.[21] In its informational bankruptcy brief, 3M subsidiary Aearo Technologies LLC (Aearo) stated that its bankruptcy filing was due, in part, to the MDL court's allowance of hundreds of thousands of claims despite the lack of evidentiary support. Of its concerns with the MDL process, Aearo wrote that "[t]he combination of advertising-induced filing of masses of unvetted claims and a preordained expectation of settlement often create a high-volume cudgel that inflates settlement value, or—as is the case with the Combat Arms MDL—precludes any reasonable settlement."[22]

Bankruptcy as an Improvable Tool

03

Because achieving global resolution of mass tort liabilities through mechanisms such as class actions or MDL courts can be difficult if not impossible, many defendants over the past few decades have turned to the reorganization process of Chapter 11 of the Bankruptcy Code as the preferred method to consolidate mass tort claims into a single forum so they can be resolved. In asbestos litigation, over 100 companies have used the bankruptcy process to permanently resolve their asbestos liabilities, and dozens of other non-asbestos defendants facing mass torts have similarly utilized bankruptcy to successfully reorganize.[23]

The federal bankruptcy process offers several advantages that the tort system's models of resolution are unable to achieve. For instance, defendant companies in bankruptcy (i.e., debtors) can aggregate or pool assets from a variety of funding sources including (1) parent companies and other related affiliates, (2) insurers that wrote policies covering the liabilities, and (3) other parties who may have a vested interest in contributing to the estate to eliminate any derivative post-confirmation liability. Collectively, these funding sources effectively provide the estate with a single, more comprehensive pool of assets to efficiently and completely compensate plaintiff creditors. In asbestos litigation, the consolidation and aggregation of funding from a variety of sources through bankruptcy reorganization has generated over $50 billion[24] from debtors, affiliated companies, and insurers to the benefit of current and future claimants, with billions more in contingent assets potentially available from the transfer of insurance policies to the estate.[25]

In addition to pooling necessary assets, bankruptcy can serve as an effective tool for aggregating mass tort claims into one forum for final resolution of both known claimants and future claimants, whose latent injuries may not manifest until many years or decades in the future. Mass torts involving toxic exposures to products or

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environmental conditions that can allegedly lead to the latent manifestation of a bodily injury often face uncertainty surrounding the quantity and value of future claims, which can make global resolution in the tort system difficult as most class action consolidations are only able to resolve current claims.[26] Therefore, for latent personal injury mass torts, such as asbestos, dozens of companies have utilized bankruptcy reorganization under Section 524(g) as an effective option for achieving global finality.

Path to Finality: Section 524(g)

In a 524(g) asbestos bankruptcy, assets are placed into a qualified settlement trust designed to compensate current claimants as well as claimants that may file claims in the future. The court appoints a Future Claims Representative (FCR) to represent the interests of future claimants, and the claim estimation process allows the various parties an opportunity to present independent projections of current, intermediate, and long-term financial obligations to decide how many assets are needed to fund the resultant post-confirmation trust. Once the asbestos defendant-debtor emerges from bankruptcy, all future claims are brought against the trust rather than the reorganized debtor, providing finality for the reorganized entity and usually allowing it to remain economically viable.

The Creation of Bankruptcy Settlement Funds Under 524(g)

Bankruptcy filings under Section 524(g) are unique to traditional chapter 11 reorganizations in that they are intended to resolve the debtors' financial obligations beyond just the current creditor class of asbestos claimants. Under Section 524(g), the interests of the creditor class of current claimants are represented by the Asbestos Claimants Committee (ACC), which is typically comprised of those plaintiffs' law firms representing the largest number of pending tort lawsuits against the debtor at the time of bankruptcy filing. By controlling the largest number of creditor votes in a 524(g) bankruptcy, the ACC has a great deal of negotiating influence over the reorganization process, including the terms of settlement fund distribution following confirmation.

The FCR, who is tasked with protecting the interests of the creditor class of future claimants, can approve or object to plan confirmation. In addition to the negotiations with the FCR and ACC, 524(g) bankruptcy reorganizations may involve negotiated settlements with insurance carriers and other third-party indemnitors that could otherwise object to confirmation if they believe their contractual rights are compromised under the plan of reorganization. In many instances, the bankruptcy process will involve a formal claim estimation, which allows the various parties an opportunity to present independent projections of current, intermediate, and long-term financial obligations that can lead to settlements. Therefore, the confirmation of a bankruptcy plan of reorganization under Section 524(g) represents a negotiated settlement between the debtors, legal representatives of both current and future claimants and, in some instances, other affiliated parties, which results in the creation of settlement trust funds to compensate current and future claimants.

> "The availability of divisive mergers has allowed more companies to reorganize and use the obvious advantages of the bankruptcy process to aggregate claims and assets into one forum capable of providing permanent resolution of past and future claims."

Recently, several asbestos defendants have utilized state divisive merger statutes, including a Texas divisive merger law, to reorganize before filing for bankruptcy.[27] For example, in October 2021, Johnson & Johnson used the Texas divisive merger statute to form a new entity, LTL Management LLC (LTL), which aggregated its talc-related liabilities into a new separate entity so they could be equitably resolved.[28] The Texas law allows companies to reorganize quickly and place assets and liabilities into a new company that is formed. That company, in turn, can file for bankruptcy and aggregate claims under Chapter 11 so scientific and evidentiary issues related to the pre-petition mass tort liabilities can be decided and a plan can be put forward for confirmation.

The availability of divisive mergers has allowed more companies to reorganize and use the obvious advantages of the bankruptcy process to aggregate claims and assets into one forum capable of providing permanent resolution of past and future claims.[29] In addition to LTL, several other asbestos defendants over the past five years have used state laws to reincorporate and file bankruptcy cases with funding for a resultant trust.[30] In 2020, Owens-Illinois used a divisive merger law in Delaware to quickly create Paddock Industries, Inc. (Paddock) and file the unit into bankruptcy. The Paddock trust was confirmed under Section 524(g) of the Bankruptcy Code just two years later, in May 2022, after the debtor reached a settlement with the current ACC, the FCR, and other parties in the case to fund a trust with $610 million. The Paddock case, and the other recent bankruptcy filings involving pre-petition corporate restructuring, provide strong examples of how bankruptcy reorganization can both provide relief to defendant companies and expedite fair compensation to claimants.

The Distribution of Bankruptcy Trust Assets to Mass Tort Claimants

The administrative procedures of bankruptcy settlement trust funds are designed to eliminate certain transaction costs, time delays, and other burdens that the tort system can impose on litigants, such as discovery, depositions, expert testimony, motions and briefings, settlement negotiations, and in some instances, trial and appeals. In this respect, administrative settlement trusts can be an effective and less burdensome mechanism to distribute compensation efficiently

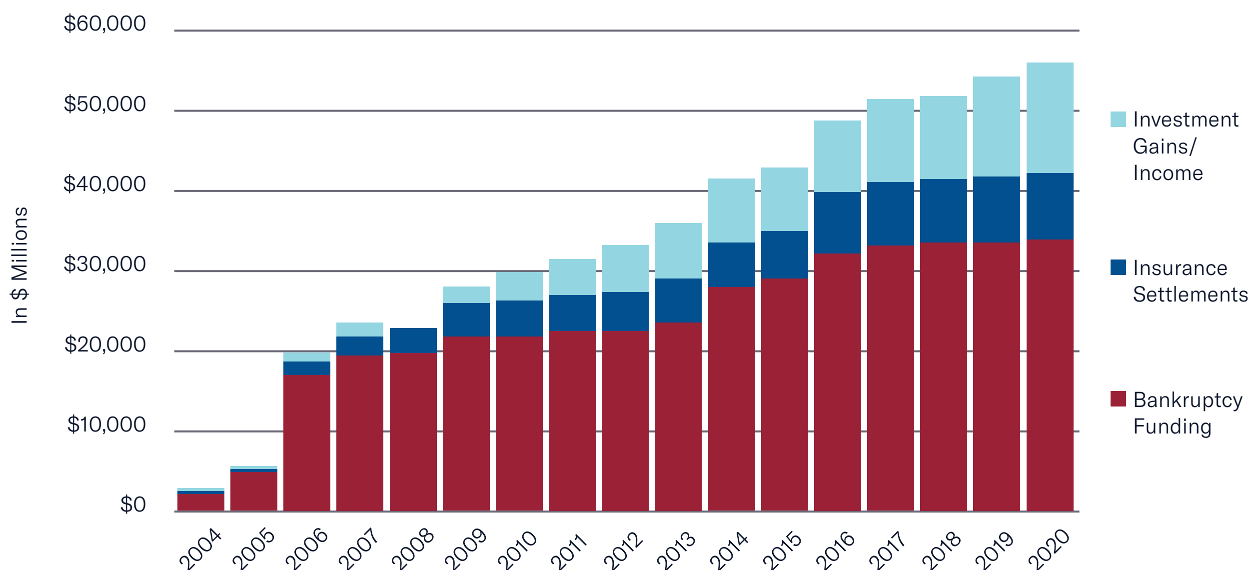
and expeditiously to an aggregated pool of qualified claimants. However, these trusts can incentivize an increased level of claim submissions, particularly from groups of more tenuous claims. This would be of minimal concern if administrative trusts were equipped to differentiate between meritorious and specious claims. Unfortunately, they are not. As a result, trust funds have been depleted faster than anticipated to the detriment of valid claimants.

Rapid Consolidation of Assets

As discussed above, asbestos defendants over the past two decades have used Section 524(g) of the Bankruptcy Code to find global resolution for liabilities more than any other mass tort litigation. Prior to 2004, the asbestos bankruptcy trust system was comprised of only a handful of active trusts with total assets of less than $4 billion.[31] However, by the end of 2010 the number of active trusts nearly tripled, flooding the trust compensation system with more than $26 billion in assets from debtor contributions, settlements with insurers, and affiliated companies.[32]

From 2004 through 2020, the number of active trusts increased four-fold and, as shown in Figure 1, provided nearly $42 billion in asset contributions, not including billions in deferred funding and the additional billions in potential recoveries from contingent insurance policies that were not settled prior to confirmation. Moreover, these trust funds have earned nearly $14 billion in investment income and gains over the same time span.

Figure 1: Cumulative Trust Asset Contributions (2004-2020)



"Unfortunately, the lack of rigor in the trusts' processes for receiving, qualifying, and paying claims has led to an increased level of post-bankruptcy claim valuations and a resulting disconnect between initial Payment Percentages and the actual quantum of liability the trusts incur."

This vast consolidation of assets has expedited the distribution of funds to claimants, yielding nearly $34 billion in claim payments from 2004 through 2020, for an average of approximately $2 billion annually.[33] As of year-end 2020, the trust system still maintained assets totaling nearly $23 billion inclusive of deferred funding commitments, with a number of bankrupt defendants still pending reorganization which, once confirmed, will provide additional substantial assets to the overall trust compensation system.

Lack of Rigor Exposes Vulnerabilities

The distribution of these assets is almost always governed by the findings of a formal estimation of current and future claim liabilities, either through an estimation hearing or at confirmation as a necessary component to determining plan feasibility. Typically, this process involves projecting the amount the debtor would have paid in indemnification had it not filed for bankruptcy and continued to resolve claims in the tort system. These estimation levels are then used to set initial liquidation shares (Payment Percentages) that reduce the gross claim valuations by a fixed percentage to preserve assets based on expectations of future claim payments. Correct projections allow trust assets to be paid out to future claimants in the same proportional amounts as current claimants. If the projections prove inaccurate because more claims are filed with the trust than were anticipated, trust assets will run out sooner than expected. Unfortunately, the lack of rigor in the trusts' processes for receiving, qualifying, and paying claims has led to an increased level of post-bankruptcy claim valuations and a resulting disconnect between initial Payment Percentages and the actual quantum of liability the trusts incur.

Claim Liability Inflation

While settlement trusts avoid the tort system's problematic transaction costs and time delays, settlement trust structures lack the few barriers to tenuous claiming that the tort system purports to offer: judicial supervision, evidentiary burdens, and procedural requirements. Without these barriers, it is common for administrative settlement structures to receive a high rate of unmeritorious claim submissions. These claims are subject to an expedited process under which they are considered

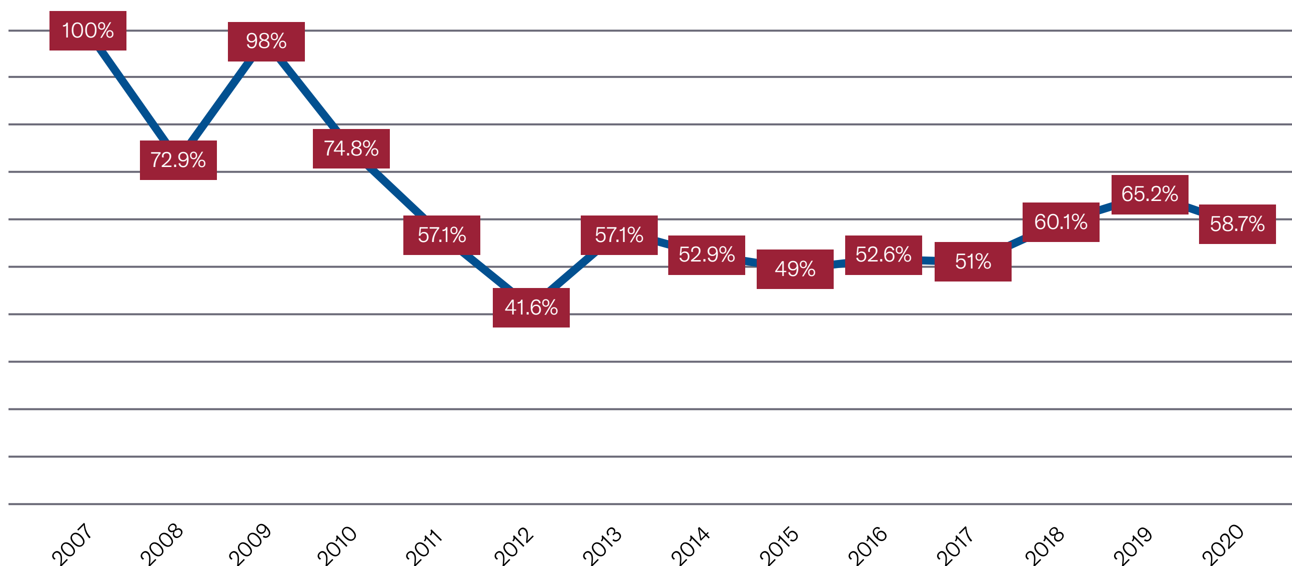
presumptively qualified for payment if they meet only a minimum set of uniform criteria. These criteria are easy to allege with only the barest evidentiary support and ignore the nuances of case-specific defenses and the relative strength of allegations. Without rigorous processes to assess claims, the trusts are unable to differentiate and weed out the weaker, non-compensable claims. As a result, plaintiffs' lawyers are incentivized to file claims, and many asbestos bankruptcy trusts receive, qualify, and pay a substantially higher rate of claims relative to the pre-bankruptcy tort experience of their respective debtors.[34] The result of paying claims regardless of their merits has been an accelerated depletion of finite trust assets, to the detriment of future claimants.

Mitigating Asset Depletion

To guard against this accelerated depletion of asset value and preserve at least some of their finite asset bases for future claimants, trusts have decreased their Payment Percentages over time.

According to annual trust financial disclosures, there were 24 trusts that made claim payments as of 2007 and continued to make claim payments as of 2020. As Figure 2 illustrates, asbestos bankruptcy trusts that were confirmed and actively paying claims in 2007 have experienced a collective drop in Payment Percentages that has reduced net recoveries to subsequent claimants by 25% to 60%, with current claimants in 2020 receiving only 59% of what similarly situated claimants received in 2007.

Figure 2: Composite Payment Percent Changes Relative to 2007 Levels[35]

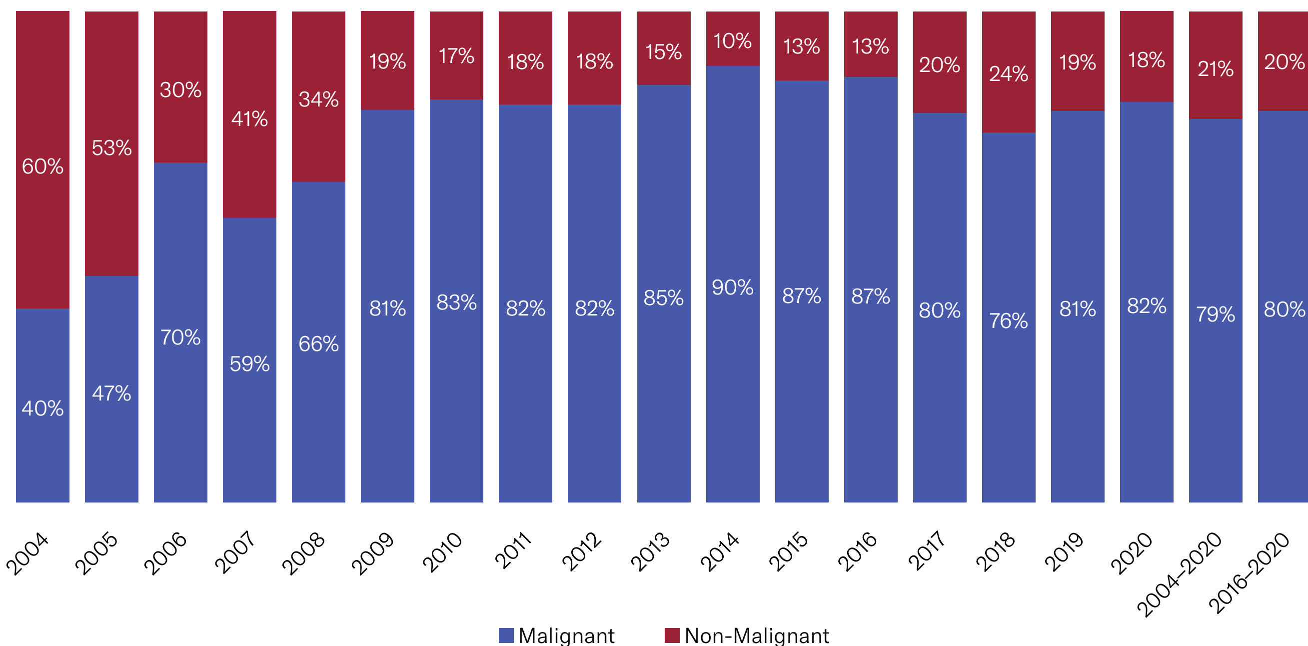


Of the 24 trusts from 2007 that still existed in 2020, 16[36] (roughly 67%) paid lower amounts to claimants in 2020 than in 2007 as compared to only seven[37] (roughly 29%) that paid higher amounts as measured by their respective Payment Percentages.[38] More significantly, the 16 trusts that had lower Payment Percentages in 2020 as compared to 2007 held more than 83% of the collective 2007 trust assets across the 24 trusts. Ultimately, more than a dozen of the 24 trusts would be insolvent today had they continued to pay future claimants at the same designated level of compensation that similarly situated claims initially received in the years immediately following bankruptcy confirmation. In fact, one of the trusts, UNR Asbestos Disease Claims Trust, was dissolved in 2019 due to an accelerated depletion of assets, which was decades prior to the expected duration of forecasted compensable claim filings.

Trust Payments to Non-Malignant Claims

While most trusts do not report claim payments by specific disease level (e.g. mesothelioma, lung cancer, asbestosis, etc.), many do provide a breakdown of payments by two general claim categories: Category A typically includes malignant disease claims and, in some instances, severely impaired or disabled asbestos claims; Category B claims include lesser impaired non-malignant claims. Of the

Figure 3: Trust Claim Payments by Disease Group



nearly $34 billion paid by the trust system to claimants since 2004, $29 billion can be tracked to either a malignant or non-malignant disease grouping. Figure 3 illustrates the proportional claim payments across the disease groups.

Since 2004, the proportional level of non-malignant claim payments has fluctuated between 10% and 60%, with an average of 20% during the last five-year reporting period from 2016 through 2020. Overall since 2004, non-malignant claims have received 21% of trust claim payment distributions. This implies that more than $7 billion of the nearly $34 billion in trust claim payments made since 2004 have been paid to non-malignant claims. Note, these proportional payments to each claim group or category differ slightly from the established annual aggregate maximum amounts established under the Claims Payment Ratios summarized above, with a higher proportion of payments distributed to malignant claims.

The Transfer of Tort Contingency Fees to the Trust Compensation System

In mass tort cases in the U.S. civil justice system, plaintiffs' law firms are typically compensated under a contingency fee arrangement whereby they receive a portion of their client's recovery, which is typically contractually set at 30-40% of the client's recovery plus expenses.[39] The contingency fee arrangement is designed to cover the internal costs of advertising to obtain clients and the legal expenditures incurred to bring the cases to court. Importantly, it also accounts for the contingent risk plaintiffs' firms bear that a case against solvent defendants in state or federal courts could end without a settlement or monetary verdict.

Disproportionate Fees Drain Assets

Unlike the tort system, applying for and receiving compensation from

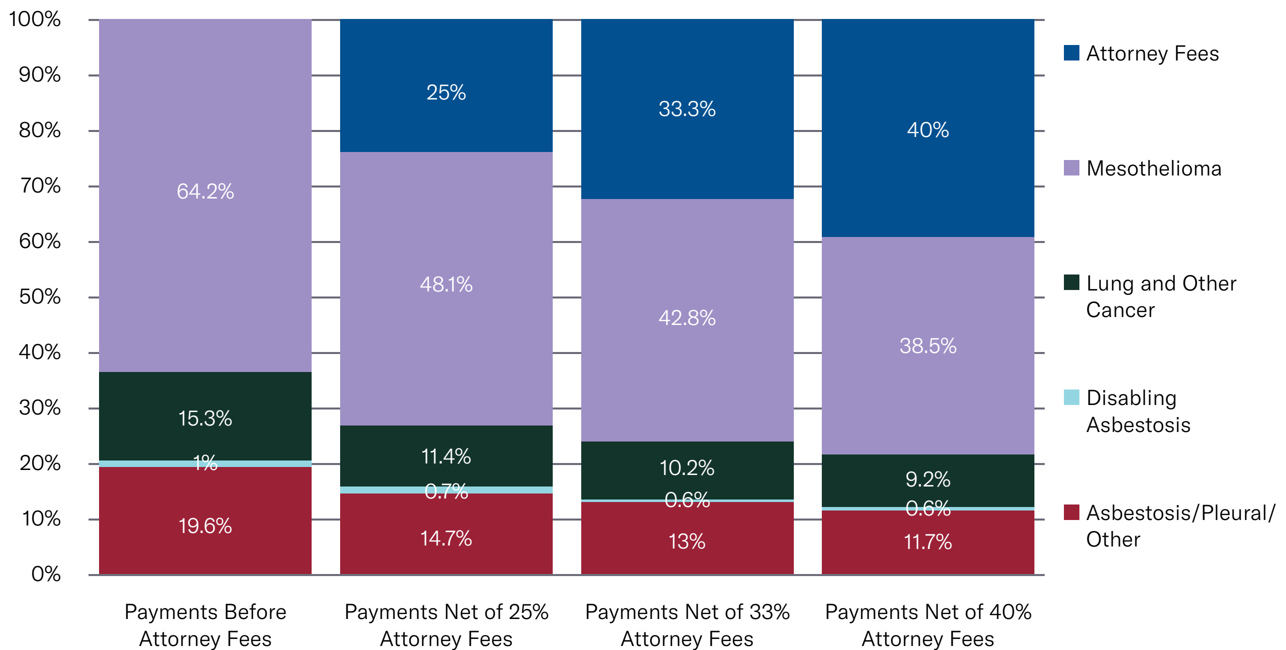
"This implies that more than $7 billion of the nearly $34 billion in trust claim payments made since 2004 have been paid to non-malignant claims."

asbestos bankruptcy trusts is an administrative process devoid of any meaningful contingent risk. As discussed above, the trusts' procedures provide a low bar for demonstrating entitlement to compensation. For example, the trusts publish approved site lists of where the debtors' asbestos-containing products were used, and a plaintiffs' firm need only assert their client's presence at such a site to entitle the claim to payment. Thus, the risk of non-recovery is negligible in the trust system as compared to the tort system. Additionally, the burden of expenses is much lower in the administrative trust structure than the adversarial tort system.

For example, bankruptcy trusts allow law firms to electronically file multiple claims at once (a task often performed by non-lawyer employees) and select an expedited payment option for compensation. However, despite the dichotomy of risk between the two compensation systems, plaintiffs' law firms have transferred the same level of contingency fees and expenses into the trust system.[40]

As Figure 4 shows, it is likely that less than 50% of all trust assets are paid to mesothelioma claimants after attorneys' fees, payments to the other disease categories, and trust expenses are considered.

Figure 4: Estimated Trust Claim Payments by Disease (2016-2020)*



*Percentages may not sum exactly to 100 due to rounding.

… [T]he risk of non-recovery is negligible in the trust system as compared to the tort system …. [Yet] plaintiffs' law firms have transferred the same level of contingency fees and expenses into the trust system.

Keeping What Works, Changing What Doesn’t

04

The use of the bankruptcy system as a means to resolve claims outside the tort system has recently faced criticism. While the legitimate concerns discussed above regarding the lack of rigorous claim standards and the resulting depletion of trust resources have received attention in the past, recent criticisms have focused on the use of bankruptcy itself as an alternative to litigation in resolving tort claims.

In the wake of the LTL bankruptcy filing, some plaintiff creditor attorneys and members of Congress have criticized bankruptcies, particularly those of companies formed through divisive merger statutes, as a mechanism to resolve mass torts. These critics argue that bankruptcy allows corporations to escape responsibility and deprives injured plaintiffs of their day in court.[41] Although there is no trickery in following established legal procedures like bankruptcy, this rhetoric has even made its way into the court system.[42]

In characterizing tort claim-related bankruptcies as abusive tricks, these criticisms ignore the fact that bankruptcies of this type are legally authorized ways to provide defendants with finality while effectively and efficiently compensating claimants that, in many respects, are superior to the tort system. As such, bankruptcy provides a valuable tool for all parties to mass torts and should not be discarded, but rather further improved.

Balancing Claim Volume With Payments

Ultimately, a successful administrative settlement structure needs to strike the appropriate balance between the number of claims that are qualified for payment and the payment each claim receives. This can be achieved either by raising the evidentiary requirements for qualification, lowering the individual claim values, or some combination of both. Yet many asbestos trusts confirmed during the 2000s offered claim values equal to or even higher than the debtors' pre-petition tort settlement amounts, without the evidentiary rigors, qualification standards, or discerning evaluation that would yield payments based on the merits of the claims. This system was perpetuated as subsequent trusts adopted virtually identical distribution procedures, leading to more trusts paying more claimants higher values than previously forecasted, to the detriment of both current and future claimants.

> "… [B]ankruptcy provides a valuable tool for all parties to mass torts and should not be discarded, but rather further improved."

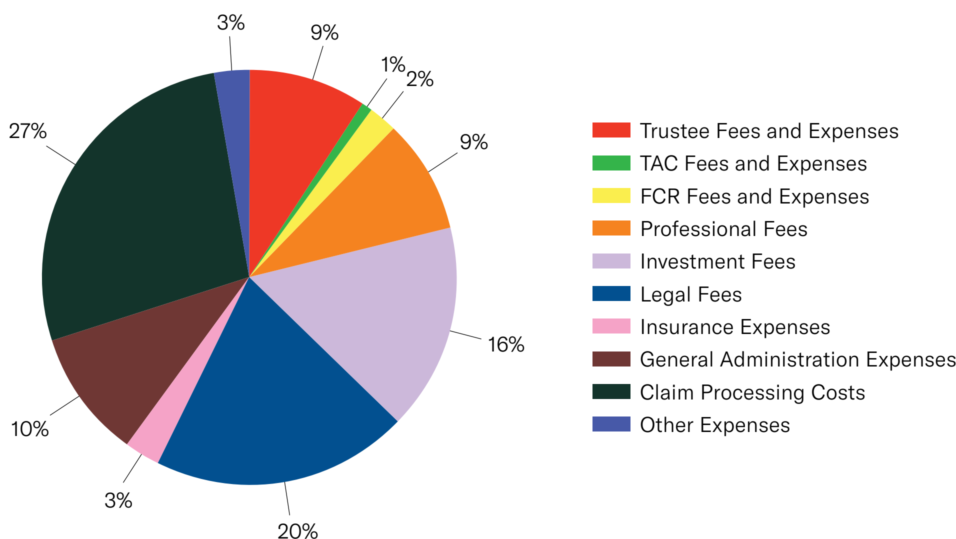
According to trust annual disclosures, the collective trust system spends about 8.5 cents on operational and administrative expenses for every dollar in net claim payments.[43] However, as Figure 5 details, only about one-quarter of trust expenses are related to reviewing and qualifying claims (denoted as Claim Processing Costs). This implies that the trust system collectively spends just 2.3 cents processing and qualifying claims for every dollar in net claim payment distributed. Simply put, a number of legacy asbestos trusts were designed to allow claimants and their attorneys to "have their cake and eat it too" by lowering procedural standards for claim qualification while maintaining claim valuation levels at, or above, pre-petition amounts.

Garlock Offers Path to Improvement

The recently confirmed Garlock Settlement Trust (Garlock Trust) provides an alternative to the inadequacies of other asbestos claims administration models. The Garlock Trust's Claims Resolution Procedures (CRP) and accompanying Claims Matrix deviate from the status quo trust distribution procedures that have been adopted by dozens of trusts over the past two decades.

Unlike many of the trusts that had to decrease their Payment Percentages since inception, the Garlock Trust's CRP was designed to account for the debtors' share of liability as compared to other asbestos exposures that each claimant may have experienced from both occupational and non-occupational activities, by analyzing factual allegations in the case provided in

Figure 5: Summary of Trust Operational and Administrative Expenses (2004-2020)[54]



sworn depositions.[44] The Garlock Trust's CRP considers how many other tort and trust claims each claimant has made and how much they have recovered from them to more accurately determine the debtor's contribution to the claimant's total damages.[45] Moreover, unlike other trust distribution procedures, the Garlock Trust CRP requires more stringent evidentiary standards to support a claimant's alleged contact with and exposure to the debtor's products.[46] As a result, the Garlock Trust CRP's claims evaluations more closely resemble the more rigorous assessments of claims in the tort system. In fact, with the added transparency conferred by requiring disclosure of other bankruptcy trust claims, the Garlock Trust CRP may be more robust and equitable than the tort system in certain jurisdictions.[47] Yet even with these protections against distribution to unmeritorious claimants, the Garlock Trust provides claimants with a quicker, more efficient resolution of their claims than the tort system.

Simply put, a number of legacy asbestos trusts were designed to allow claimants and their attorneys to "have their cake and eat it too" by lowering procedural standards for claim qualification while maintaining claim valuation levels at, or above, pre-petition amounts.

Ensuring Fair Payments for Sick Claimants

Additionally, payment allocations could be more equitably distributed to the sickest claimants. One means to this end would be adjusting Claims Payment Ratios to reduce the amount paid to minimally impaired or unimpaired claimants and reallocating that money to mesothelioma claimants and other similarly ill claimants.

Further, more trust funds could flow to ill claimants if contingency fees were reduced and capped in the trust system, consistent with the lower contingent risk of non-recovery born by plaintiffs' firms in the trust system versus that which they bear in the tort system.

More widespread adoption of these measures could make the bankruptcy trust system's compensation of victims fairer and more rigorous. Absent meaningful oversight, however, the trust system would still be plagued by incentives counter to the interests of deserving claimants. One congressionally-proposed improvement involves permitting the U.S. Trustee Program, a Department of Justice division responsible for oversight of private trusteeships and bankruptcy cases,[48] to investigate any claims it has reasonable grounds to believe may be false.[49] In furtherance of such an investigation, the U.S. Trustee would be authorized to obtain information relating to claims submitted to trusts.[50] The PROTECT Asbestos Victims Act of 2021, which proposes these reforms, also includes criminal penalties for anyone knowingly making a false representation to a bankruptcy trust.[51]

Together, more stringent claims processing procedures, changes to payment allocations, and oversight could mend some of the broken aspects of the trust system. With meritorious claims obtaining a greater share of trust funds, defendants gaining meaningful and final resolution of mass torts, and the judicial system burdened less by overwhelming mass tort case volumes, a reformed bankruptcy trust system presents an opportunity for all stakeholders in U.S. mass torts to benefit.

Together, more stringent claims processing procedures, changes to payment allocations, and oversight could mend some of the broken aspects of the trust system.

Conclusion

Chapter

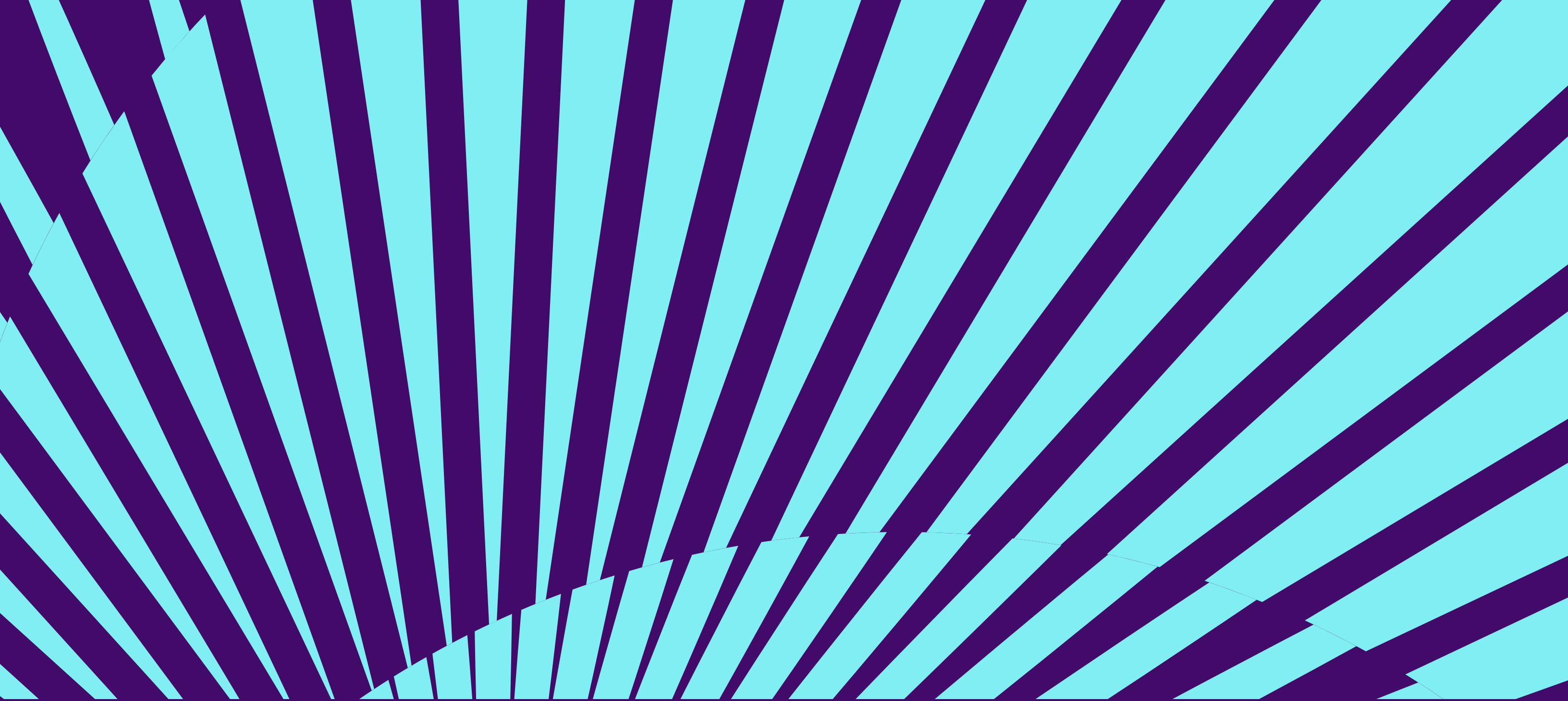
05

Resolving mass tort claims in the tort system can be an uncertain and costly endeavor for all litigants, with no guarantee that injured claimants are compensated, that the parties' and courts' resources are managed efficiently, or that individual or global resolution is achieved.

Although class actions and MDLs can be effective at aggregating individual claims, they have limited utility in providing effective, timely, and final global resolution, especially in product liability and other cases involving latent injuries and an unknown class of potential future claimants. Given the tort system's deficiencies, it is paramount that bankruptcy remains an option for parties to resolve mass tort litigation.

Specifically, it will be important to respond to attacks on the bankruptcy process and the protections it currently provides, including for claimants. A motion in 2022 to dismiss the LTL bankruptcy case by claimants and other parties that alleges improper use of the Texas divisive merger law is pending before the Third Circuit U.S. Court of Appeals.[52] In the Purdue Pharma opioid bankruptcy case, parties appealed the 2021 confirmation of Purdue's reorganization plan to the Second Circuit U.S. Court of Appeals, arguing that the non-debtor releases incorporated in the plan are unconstitutional.[53] If these appeals are successful, debtors could be unable to use third-party releases to effectuate bankruptcy settlements and pool necessary assets. This would result in all litigants losing bankruptcy as an option for reorganization and aggregation of claims into one forum for global resolution.

An end to the availability of bankruptcy to resolve mass tort claims would not serve the interests of justice, equity, and efficiency. As the Garlock Trust demonstrates, the U.S. Bankruptcy Code can be an efficient and equitable way to pool assets and claims into one setting so mass tort liabilities can be appropriately resolved. Bankruptcy courts, U.S. trustees, and other interested parties should provide the necessary transparency and oversight to ensure that bankruptcy assets are equitably distributed to current and future claimants. With this oversight, with meaningful claim requirements like those employed in the Garlock Trust, and with additional reforms to payment allocations and caps on contingency fees proportionate to the reduced risk of non-recovery in the trust system, the deficiencies that currently exist in the distribution of assets can be cured and the system made fairer and more sustainable. As long as litigation continues to be lengthy, costly, and uncertain, bankruptcy must remain a viable option for the resolution of mass tort claims.



Endnotes

1. Examples include litigation related to Bendectin, L-Tryptophan, and Albuterol.
2. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 470 (5th Cir. 1986) (citation omitted).
3. Summary of the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2 (Mar. 1991).
4. Judge M. Casey Rodgers, *Vetting the Wether: One Shepherd's View*, 89 UMKC L. Rev. 873, 873-74 (2021); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).
5. 11 U.S.C. § 524(g).
6. *Boy Scouts of America*, No. 1:20-bk-10343, D. Del. Bkcy.; *In re: Aearo Technologies LLC,* No. 22-02890, S.D. Indiana Bkcy.
7. *In re: LTL Management, LLC*, No. 21-30589 (MBK), Memorandum Opinion, Feb. 25, 2022.
8. KCIC, *Asbestos Litigation: 2020 Year in Review*, kcic_asbestos2020report.pdf.
9. *See*, S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 Cleveland State L. Rev. 391 (2013).
10. Fed. R. Civ. Pro. 23.
11. *Amchem Products Inc. v. Windsor*, No. 96-270, U.S. Supreme Ct., June 25, 1997.
12. In 1999, the Court reaffirmed its *Amchem* ruling with a decision declining to allow another proposed asbestos class action in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815.
13. 28 U.S.C. § 1407.
14. 28 U.S.C. § 1407. Although the federal MDL judge generally does not exercise power over state class actions involving similar claims unless those claims are transferred to the MDL court, the MDL judge does have the power to certify a class that involves all common mass tort claims, both state and federal. *See, e.g.*, Memorandum Opinion on Class Certification in *In re: Marriott Int'l Inc. Customer Data Security Breach Litig.*, MDL No. 19-md-2879 (D. MD. May 3, 2022).
15. Mass Tort Deals Website, *The Data Behind the Deals*, https://www.elizabethchambleeburch.com/mdl-data (showing that approximately 77% of MDLs end through settlement).
16. *Id.* at Appendix Table A.1., https://www.elizabethchambleeburch.com/_files/ugd/884328_057251ae6c454189a8d8277049b680dc.pdf?index=true.
17. *Id.* (showing 205 MDLs pending in 2019).
18. Bolch Judicial Institute, Guidelines and Best Practices for Large and Mass-Tort MDLs (Duke Law School, 2d ed. 2018) ("Not only is the overall number of actions in MDLs growing, these actions are becoming more concentrated in a small number of mass-tort MDLs, primarily products liability, and particularly pharmaceutical and health-care cases. Of the MDLs pending in August 2018, 90% of them were consolidated in only 24 MDLs—predominately products liability."); Benjamin Halperin, *ILR Briefly: Twisted Blackjack: How MDLs Distort and Extort*, U.S. Chamber of Commerce Institute for Legal Reform, https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-Briefly-MDL-FINAL.pdf.
19. Press Release, *Bayer announces agreements to resolve major legacy Monsanto litigation* (June 24, 2020), https://www.businesswire.com/news/home/20200624005706/en/Bayer-announces-agreements-resolve-major-legacy-Monsanto.
20. *In re: Roundup Products Liability Litigation*, MDL 2471, N.D. Calif. Ct., May 26, 2021.
21. *In re: Aearo Technologies, LLC*, No. 22-02890, S.D. Indiana, Bkcy.
22. *In re: LTL Management, LLC*, No. 21-30589 (MBK), Memorandum Opinion, Feb. 25, 2022.
23. Plevin, Mark D., "Where Are They Now, Part 8: An Update on Developments in Asbestos Bankruptcy Cases," Mealey's Asbestos Bankruptcy Report, Sept. 2016; *Boy Scouts of America*, No. 1:20-bk-10343, D. Del. Bkcy.; *In re: Aearo Technologies LLC,* No. 22-02890, S.D. Indiana Bkcy.; *In re: Tronox Inc.*, No. 09-10156, S.D. N.Y. Bkcy.
24. *See Figure* 1.
25. Bates, Charles and Mullin, Charles, "Having Your Tort and Eating It Too," Mealey's Asbestos Bankruptcy Report, November 2006; Jon Campisi, *Asbestos bankruptcy estimation hearing highlights major disparities*, Legal Newsline (Oct. 17, 2022), https://legalnewsline.com/stories/510514471-asbestos-bankruptcy-estimation-hearing-highlights-major-disparities.
26. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591.
27. Texas Bus. Orgs. Code §§ 10.003(1), 10.008.
28. *In re: LTL Management LLC*, No. 21-30589, W.D. N.C. Bkcy., Oct. 15, 2021; The LTL bankruptcy case was subsequently transferred to the District of New Jersey Bankruptcy Court on Nov. 10, 2021.
29. Currently, claimant and other groups in the LTL bankruptcy case have appealed the legitimacy of the Texas divisive merger statute, colloquially called the "Texas two-step," and J&J's creation of LTL, to the U.S. Third Circuit Court of Appeals.
30. *See In re: Bestwall LLC,* No. 17-31795, W.D. N.C. Bkcy.; *In re: Aldrich Pump*, No. 20-30608, W.D. N.C. Bkcy.; *In re: DBMP LLC*, No. 20-30080, W.D. N.C. Bkcy.
31. Data compiled from individual trust annual report disclosures.
32. *Id.*

[33] *Id.*

[34] Scarcella, Marc C. and Peter R. Kelso. "A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System," Mealey's Asbestos Bankruptcy Report 14, no. 7 (2015).

[35] Trust payment percentages are weighted based on the gross valuation of each trust.

[36] Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust; Celotex Asbestos Settlement Trust; Combustion Engineering 524(g) Asbestos PI Trust; DII Industries, LLC Asbestos PI Trust; Eagle-Picher Industries Personal Injury Settlement Trust; H.K. Porter Asbestos Trust; J.T. Thorpe Settlement Trust; Kaiser Asbestos Personal Injury Trust; Keene Creditors Trust; Lummus 524(g) Asbestos PI Trust; Manville Personal Injury Settlement Trust; NGC Bodily Injury Trust; Owens Corning Fibreboard Asbestos Personal Injury Trust - FB Subfund; Owens Corning Fibreboard Asbestos Personal Injury Trust - OC Subfund; Plibrico Asbestos Trust; United States Gypsum Asbestos Personal Injury Settlement Trust.

[37] A-Best Asbestos Settlement Trust; API, Inc. Asbestos Settlement Trust; Armstrong World Industries Asbestos Personal Injury Settlement Trust; C. E. Thurston & Sons Asbestos Trust; JT Thorpe Company Successor Trust; United States Mineral Products Company Asbestos Personal Injury Settlement Trust; Western MacArthur-Western Asbestos Trust.

[38] The Swan Asbestos and Silica Settlement Trust is the only trust of the 24 that appears to be paying claims in 2020 at the same Payment Percentage as in 2007.

[39] According to the American Bar Association, most contingent fee arrangements range from 33.33% (or one-third of the settlement) to 40% of the total.; *What Are the Costs of Hiring a Mesothelioma Lawyer?*, https://www.mesotheliomahub.com/legal-help/mesothelioma-attorney/costs-of-hiring-a-mesothelioma-lawyer/.

[40] *Barbara Jensen-Carpenter, Executrix of the Estate of Henry F. Carpenter v. AstenJohnson, Inc.,* No. 00182, Pennsylvania Court of Common Pleas, Philadelphia County, June 19, 2015, Order disbursing payments to Barbara Jensen-Carpenter and Simmons Browder Gianaris Angelides and Barnerd, LLC a/k/a Simmons Hanly Conroy LLC. ; April 21, 2015, Petition to Authorize the Partial Settlement of a Survival Action and to Authorize Distribution of Settlement Proceeds – Exhibit D, Simmons Browder Gianaris Angelides & Barnerd LLC Contract of Representation (note that the 40% contingency fee arrangement by Carpenter was made with the Simmons firm and Sokolove Law. Under the law firms' arrangement, 78% of the contingency fees are allocated to the Simmons firm and 22% are allocated to Sokolove).

[41] *See, e.g.*, Scott Horsley, Johnson & Johnson wins a key court battle in baby powder case, NPR News, https://www.npr.org/2022/02/25/1083061992/johnson-johnson-wins-court-battle-bankruptcy-baby-powder (quoting John Ruckdeschel); Hearing Testimony, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, *Hearing: Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy*, held Feb. 8, 2022.

[42] *In re Aearo Techs. LLC*, Case No. 22-02890 (accusing 3M of seeking "additional leverage" in the MDL through its bankruptcy filing).

[43] From 2004 through 2020, trusts spent $2.87 billion in operational and administrative expenses while distributing nearly $33.7 billion in claim payments.

[44] Garlock Trust Deposition Review Policy, http://garlocksettlementfacility.com/assets/documents/resources/GST-Deposition-Review-Policy.pdf.

[45] Garlock Trust CRP, Section 6.8.

[46] Garlock Trust CRP, Section 6.7.

[47] Currently, laws enacted in 16 states require plaintiffs to submit and disclose bankruptcy trust claims during the pendency of tort litigation. In response, plaintiffs' firms have begun filing asbestos lawsuits in jurisdictions that do not require such disclosures, and have adopted other tactics designed to frustrate efforts to ensure transparent, parallel operation of the trust and tort systems.

[48] United States Department of Justice, U.S. Trustee Program – About the U.S. Trustee Program, https://www.justice.gov/ust.

[49] PROTECT Asbestos Victims Act of 2021 (S.B. 574, 117th Congress) (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/574/text.

[50] *Id.* at § (a)(2)(9)(a).

[51] *Id.* at § (3)(3)(10).

[52] *In re: LTL Management LLC*, No. 22-8015, 3rd Circuit U.S. Court of Appeals.

[53] *In re: Purdue Pharma LP*, No. 22-85, 2nd Circuit U.S. Court of Appeals.

[54] Once established, the settlement trust funds are managed by a board of trustees and advised by both the FCR and ACC representatives or the Trust Advisor Committee (TAC), as they are typically referred to. In addition to the TAC and FCR, the trustees will retain professional services from legal, accounting, investment, and other consulting firms to help advise and execute the operational and administrative management of the trust assets and related claim distributions.

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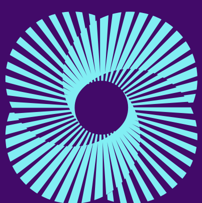

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