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Commentary

*Unraveling The Gordian Knot Of Asymptomatic Asbestos Claimants: Statutory, Precedential And Policy Reasons Why Unimpaired Asbestos Claimants Cannot Recover In Bankruptcy**

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1. Introduction

A major issue in the latest wave of asbestos-related bankruptcy proceedings is how to deal with claims asserted by individuals who have been exposed to asbestos, and may have some resulting physiological changes such as "pleural thickening," but do not (and very well may never) manifest any symptoms of an asbestos-related disease.[1] The problem of dealing with asymptomatics in bankruptcy stems from the deluge of claims by asymptomatics in the tort system, with which courts have struggled for years.[2] Indeed, it is generally recognized that the bulk of the asbestos claims that have been asserted in recent years are by such asymptomatics.[3]

How to address the flood of claims by asymptomatics is a continuing bone of contention in asbestos-related bankruptcies. In various of these bankruptcies, efforts have been made to deny or reject the claims of asymptomatics. Some constituencies have argued that state law in almost all jurisdictions does not recognize any cause of action for asymptomatics.[4] While this is true under the laws of some states,[5] courts in other states recognize rights of recovery for fear of contracting an asbestos-related disease,[6] for medical monitoring costs,[7] and for damages as a result of subclinical physiological changes.[8]

As a result, if the ability of an asymptomatic to assert and recover upon a claim in bankruptcy depended on the vagaries of which state's law governed, identically situated asymptomatics would

receive widely disparate treatment in the bankruptcy court. Those from states permitting recovery would be paid (and would be entitled to vote on reorganization plans), while those from states where no right of action is recognized would recover nothing and would not be entitled to vote on plans.

In other cases, debtors have raised *Daubert*-type challenges.[9] They assert that the bulk of the claimants have no reliable scientific evidence that they suffer from an asbestos-related disease, that they are in fact asymptomatic, and have no right of recovery.[10]

Both approaches, however, beg the threshold federal law questions of what constitutes a "claim"[11] under the Bankruptcy Code and what was the point in time when the claim "arose."[12] Depending upon the answer to these questions, asymptomatics may be held to have "claims" that "arose" pre-petition, in which case they would be "creditors" entitled to have their claims liquidated[13] and permitted to vote on proposed reorganization plans. Indeed, depending upon the legal analysis, all persons who have been exposed to a debtor's asbestos might be said to possess valuable "contingent" claims based upon the contingency that they might someday develop an asbestos-related disease.[14]

If, on the other hand, asymptomatics do not have "claims" or if their "claims" have yet to arise, they would not be "creditors" currently entitled to recover from the estate or to vote on plans of reorganization. Yet, in light of the long latency periods between exposure and manifestation of an asbestos-related disease, it is universally accepted that *some* asymptomatics eventually will develop asbestos-related diseases.

In order to preserve the asymptomatics' potential right to eventually recover should they develop an asbestos-related disease in the future, courts in the 1980s began directing that legal representatives be appointed to protect the rights of these unknown future claimants in Chapter 11 reorganization cases.[15] Those pioneering courts, while recognizing future claimants as "parties in interest,"[16] left two other significant questions unanswered: (1) "whether future claimants can or should be considered 'creditors' under the Code,"[17] and (2) "whether future claimants have dischargeable 'claims.'"[18]

Courts, beginning with the Johns-Manville bankruptcy, then began approving reorganization plans that endeavored to make adequate provision for compensation of both current and future asbestos claims by creating trusts intended to pay both present and future asbestos claims equally while at the same time giving the debtor companies a "fresh start," unburdened by future asbestos liability.[19] The trusts were funded in large part by a majority of the equity of the reorganized debtor.[20] The reorganized debtor received a discharge for both present and future asbestos claims, which were then "channeled" by injunction to the trust. Only persons with existing asbestos-related diseases were treated as "creditors" and permitted to vote.[21]

In 1994, Congress ratified the outcome of the Manville (and UNR) bankruptcies,[22] and codified the use of this trust/injunction/discharge approach for future asbestos-related bankruptcies in § 524(g). Congress thus agreed that future claims were dischargeable, provided that sufficient safeguards were in place. Congress required the appointment of a "legal representative" to ensure that the nameless future claimants had an independent voice.[23] The plan had to provide "reasonable assurance" that current and future claims would be treated equally.[24] Significantly, such a plan requires a 75% super-majority approval from current asbestos claimants.[25] As part of these amendments, Congress introduced a new statutory term, "demand," which it defined as being mutually exclusive with anything that was "a claim during the proceedings leading to the confirmation of a plan of reorganization."[26] The "legal representative" is tasked with "protecting the rights of persons that might subsequently assert demands" and such persons therefore do not vote as creditors on the plan of reorganization.[27]

This article explores whether a uniform federal standard governs, or should govern, the determination whether asymptomatics have "claims" and/or the point in time when such claims "arise" for purposes of being treated as presently assertable "claims" as opposed to possible future "demands." Relying upon the weight of bankruptcy precedent recognizing that both the Bankruptcy Code's definition of "claims" and treatment of when they "arose" represent a preemption of state law, this article concludes that federal law should supply the rule of decision under the Bankruptcy Code. This article further argues that the Third Circuit's widely-criticized minority rule that the timing of claims accrual is governed (at least in most cases) by state law[28] would lead to unworkable, and possibly unconstitutional, results if applied in the context of asbestos mass tort bankruptcies.[29]

Having concluded that a federal rule of decision should be applied, there remains to be determined whether there should be a uniform federal rule as opposed to exercise of *ad hoc* federal "equity rules" and, assuming a uniform rule, what that rule should be. This article considers the treatment of asymptomatics in pre-§ 524(g) mass-tort asbestos bankruptcies, especially Johns-Manville, and examines federal common law precedent conditioning asbestos claims under FELA upon actual disease manifestation. This article then examines the interplay of these factors with the legislative policies reflected in the Bankruptcy Code generally and in § 524(g) in particular.

This article concludes that a single, uniform federal rule of actual disease manifestation, as established by the Supreme Court for federal common law asbestos claims under FELA, is most consistent with, and indeed furthers, important bankruptcy policies. This rule should be applied in bankruptcy so that asymptomatics are not permitted to assert claims unless and until they truly become ill from an asbestos-related disease.

Application of such a rule would have a number of salutary effects. First, the limited assets of a debtor (and the finite amount of a debtor's insurance coverage) would not be expended upon the investigation and/or compensation of comparatively dubious or trivial claims. In this respect, the use of *Daubert* challenges to questionable claims, both through disallowance of non-meritorious claims and by establishing scientifically reliable trust distribution procedures ("TDPs") can be helpful in minimizing the costs associated with winnowing true asbestos-related disease claims from asymptomatic cases. This, in turn, would maximize the monies available to compensate the truly sick as well as potentially increasing the recovery of other, non-asbestos creditors.

Second, asymptomatics would not be entitled to vote on plans.[30] Instead, the classes of asbestos claimants for which a 75% super-majority approval of a 524(g) trust plan is required would be limited to current asbestosis and cancer victims. Asbestos Creditors Committees ("ACCs") properly aligned to represent this narrowly-tailored constituency (as opposed to tens of thousands of asymptomatics) presumably would wish to maximize their payments by minimizing the ability of asymptomatics to obtain compensation through the establishment of rigorous TDPs and other safeguards. The putative interests of asymptomatics as potential future claimants, in the event that they eventually become truly ill, would be represented collectively by a legal representative (who would likewise presumably be motivated to seek to eliminate payments to asymptomatics so as to maximize assets available to future sick claimants).

Third, whatever claims those asymptomatics who eventually do become truly sick would then be entitled to assert would be paid years into the future. This may result in a situation where the debtor's ultimate legal liability to all legitimate asbestos claimants eventually will be satisfied in full, or at least more fully, from the growth of the assets of a § 524(g) trust.

2. The Provisions Of The Bankruptcy Code Addressing 'Claims' Displace Underlying State Law

A. Federal Law Preempts State Law Treatment Of Property Rights In Bankruptcy Where Congress Directs Or A Sufficient Federal Justification Otherwise Exists For Displacing State Law

Generally, bankruptcy law operates against the backdrop of state law in the treatment of property rights. In *Butner v. United States*,[31] the Supreme Court enunciated the default rule that state law defines property rights in bankruptcy unless preempted by some articulable countervailing federal policy. While Congress clearly has the constitutional authority to legislate uniform rules in bankruptcy, the *Butner* Court noted, it has "generally left the determination of property rights in the assets of a bankrupt's estate to state law."[32] This "basic federal rule" in bankruptcy nevertheless yields in situations where state law either is expressly displaced by Congress, conflicts with the bankruptcy scheme established by Congress, or "some federal interest requires a different result."[33] In *Butner*, a pre-Code case, the Court resolved a circuit split over whether a mortgagee's rights to rents collected between the mortgagor's bankruptcy and the foreclosure sale were governed by a federal rule of equity or by the law of the State where the property is located. The majority of the circuits applied local state law, while a minority rejected state law in favor of a uniform federal equitable rule. State laws, the Court declared, are "suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress."[34] Thus, "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[35]

In *Raleigh v. Illinois Dept. of Revenue*, the Supreme Court reaffirmed *Butner*, emphasizing that "[b]ankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides."[36]

As explained by the court in *In re Kar Development Assoc., L.P.*,[37] *Butner* represents the application of the doctrine of *Erie R. Co. v. Tomkins*[38] in the bankruptcy context. In the wake of *Erie*'s pronouncement that there is no general federal common law,

> "the source of the power to override state-created substantive rights in bankruptcy must now be found within the limits of the bankruptcy power and not in 'general equitable principles' considered apart from permissible bankruptcy objectives. . . ." It is not the scope of equity but the scope of bankruptcy that must be considered in deciding when the court can override state law.[39]

Butner, the court explained, was an application of this rule, striking down the preemption of state law where no bankruptcy objective for doing so was articulated.[40] "Thus, *Butner* permits federal courts to reject state law as the rule of decision when it conflicts with an 'identifiable federal interest' or 'Congressional command.'"[41]

At bottom, "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress."[42] As next explained, one such instance where Congress affirmatively exercised its power to displace state law in the treatment of property rights is found in those portions of the Bankruptcy Code providing for the definition and treatment of "claims."

B. Ascertaining What Constitutes A 'Claim' And When It 'Arose' Centrally Affects The Treatment Of An Asserted Obligation In Bankruptcy

As shown above, any assertion that state law has been displaced by federal law must rely upon specific provisions in the Bankruptcy Code. One example is the Code's definition of a "claim" and the statutory scheme for addressing claims.

Whether a person has a "claim" and when that claim "arose" are key in determining the person's rights and remedies in the federal scheme of bankruptcy. In relevant part, "claim" is defined to mean a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[43] A "creditor" is defined as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."[44]

In a Chapter 11 case, the filing of a voluntary petition constitutes the "order of relief."[45] Thus, only the holder of a "claim" that "arose" pre-petition is a "creditor" who may file a "proof of claim"[46] which may be "allowed,"[47] thereby permitting the creditor to share in the distribution of the estate (and vote on proposed plans of reorganization). Further, the value of an allowed claim is determined "as of the date of the filing of the petition."[48] In addition, the Code's automatic stay provision only stays proceedings "to recover a claim against the debtor that arose before the commencement of the case under this title."[49]

Whether an asserted obligation is a "claim" and when it "arose" also affect whether it is dischargeable, whether it is an "administrative expense" and whether and how it is treated in a plan of reorganization. Only a "debt," defined as "liability on a claim,"[50] that arose prior to confirmation of a plan, is discharged in a Chapter 11 case.[51]

C. Courts Recognize The Preemptive Effect Of The Code's Definition Of 'Claim' And, With The Limited Exception Of The Third Circuit, Agree That The Timing Of Claim Accrual Likewise Is A Matter Of Federal Law

Courts are in agreement that the term "claim" is, by intention, broadly defined. According to the Supreme Court, "'claim' has 'the broadest available definition.'"[52] As the Third Circuit explained:

> Congress intended the definition of a claim to be very broad; the legislative history states:
>
> > "The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. . . . By this broadest possible definition and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." [53]

This broad concept of claim intended by Congress in 1978 signaled an important departure from prior law. Under the old Bankruptcy Act, only "provable" debts were allowed against the bankrupt's estate and provability was interpreted to exclude most tort claims from consideration in bankruptcy cases.[54]

The courts are in agreement that the definition of "claim" preempts state law. There is a split, however, over whether the question of when a "claim" "arose" is governed by state law or is itself preempted by the Bankruptcy Code.

The Third Circuit was the first to address these issues in *Frenville,* a case that has not been followed, and has been criticized by numerous other courts. In *Frenville,* a bank sued the accountants of a bankrupt corporation asserting liability for negligently preparing false financial statements. The accountants sought relief from the automatic stay to assert indemnity and contribution claims against the corporation's principals, also in bankruptcy, by joining them as third-party defendants in the bank's action. The bankruptcy judge and the district court refused relief from the automatic stay.

On appeal, the Third Circuit reversed, holding that the claims were not subject to the automatic stay in the first place. Instead, the court opined, where "the debtor's acts which form the basis of a suit occurred pre-petition, but the actual cause of action which is being instituted did not arise until after the filing of a bankruptcy petition," the cause of action does not constitute a claim subject to the automatic stay.[55] Despite acknowledging both the breadth of the definition of "claim" under the Bankruptcy Code and that federal law controls the ambit of a cognizable claim, the court declared that the "threshold" (and ultimately dispositive) legal issue was determining whether a "right to payment" existed pre-petition.[56] This question, the court continued, needed to be answered in the affirmative or no "claim" existed that could be characterized as an "unliquidated, contingent, unmatured and disputed claim prepetition."[57] The court then held that whether there existed a pre-petition "right to payment" should be determined by reference to state law:

> We must ascertain when a right to payment for an indemnity or contribution claim arises where there is no specific agreement.[58] Although "claim" is defined by § 101[5], the Code does not define when a right to payment arises. Thus, while federal law controls which claims are cognizable under the Code, the threshold question of when a right to payment arises, absent overriding federal law, "is to be determined by reference to state law."[59]

In other words, *Frenville* acknowledged that the Code's definition of "claim" represents a preemption of state law as to what claims will be entertained by a bankruptcy court. For example, while state law will not permit recovery for presently contingent or unmatured claims, such potential "rights of payment" may be asserted and valued in a bankruptcy court. Nevertheless, even though the court recognized that the accounting firm "had an unmatured, unliquidated, disputed claim" against the debtors, the court held that its claim did not arise "[u]ntil the bank instituted suit."[60] Because the accounting firm's "right to payment" had not arisen pre-petition, as determined by state law, it was not within the ambit of § 362(a)'s automatic stay.

Frenville has been widely criticized[61] "at least in part because it would appear to excise 'contingent' and 'unmatured' claims from § 101(5)(A)'s list."[62] Instead, the approaches of other courts in determining whether an assertion of a right of recovery can be termed a pre-petition "claim" in bankruptcy proceed on the premise that the Code indeed displaces state law by its breadth. As the Sixth Circuit has held, "claim accrual for bankruptcy purposes must be determined in light of bankruptcy law and not state law." [63]

According to the Third Circuit, the approaches to claim recognition and accrual taken by courts in other circuits involve application of "a federal common law of bankruptcy."[64] That court's own aberrational misreading of the Code, however, turns out to be largely a sideshow. Importantly, although the case had nothing to do with asbestos, the Third Circuit went out of its way to suggest that "[a] bankruptcy proceeding stemming from a mass tort — such as exposure to asbestos — may be a case in which the application of federal law is indicated."[65]

3. Courts Recognize That Inherent Limits Exist To What May Be Considered A Pre-Petition Claim And That Resolution Of The Statutory Ambiguities Requires Application Of Interstitial Federal Common Law

Courts outside of the Third Circuit have construed the concept of pre-petition claims expansively with a view toward fostering the policy of affording the broadest possible relief to debtors.[66] In the tort context, these courts have tended to focus on when the underlying conduct of the debtor occurred rather than when the harm manifested. In one early case, for example, a bankruptcy court held that a malpractice claim against a dentist for pre-petition negligence where the harm manifested only post-petition (but while bankruptcy proceedings were ongoing) was a pre-petition "claim" that the plaintiff must assert as a bankruptcy creditor.[67]

Nevertheless, the courts have recognized that this concept indeed has outer limits. As the delay between a debtor's pre-petition negligence and the harm to the victim increases, and the uncertainty of future harm and of the identities of future victims increases, courts have recognized that the speculative nature of such claims as well as the inability to provide adequate notice and opportunity to be heard may make it impossible to treat these future claims as pre-petition claims or to hold them dischargeable.

As one court explained,

> While the statute may appear to be clear and unambiguous on its face, its application to particular situations presents myriad challenges that belie such a conclusion. As the Second Circuit noted in *Chateaugay*, "that language [section 101(5) and the legislative history] surely point us in a direction, but provides little indication of how far we should travel." *United States v. The LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1003 (2d Cir. 1991). At the margins, we encounter the ambiguity inherent in the words of the statute. . . . Testing the limits of what may be defined as a claim for bankruptcy purposes most often has occurred in the context of tort liability, be it in the nature of environmental liability, mass tort or products liability. Indeed, in those arenas courts continue to struggle with the application of the "plain meaning" of section 101(5).[68]

In other words, as the outer edges of the continuum are approached, congressional intent becomes increasingly unclear. Consequently, the Code's provisions must be interpreted by the courts by reference to federal common law. Such "interstitial" federal common law focuses on situations "where federal courts are called upon to pronounce common law to fill in the interstices of a pervasively federal framework."[69] "The scope of this species of lawmaking power lies along a continuum that varies inversely with the completeness of the legislative scheme and the clarity of the congressional intent."[70]

At the outer end of the spectrum are situations where a victim never had pre-bankruptcy contact with the debtor or pre-bankruptcy exposure to the debtor's negligent conduct. This was the scenario presented in *Epstein v. Official Comm. of Unsecured Creditors, (In re Piper Aircraft Corp.)*.[71] There, the court was asked to address claims of individuals who had never encountered the allegedly defective aircraft. There was a statistical probability that airplanes manufactured by the debtor would on various unknowable days in the future fall from the sky and injure or kill various persons whose identities were likewise presently unknowable. Not surprisingly, the court held that such speculative claims were too attenuated to be cognizable within bankruptcy.[72] Instead, the *Piper* Court enunciated a test requiring some pre-petition relationship between the debtor and the future victim:

> An individual has a § 101(5) claim against a debtor manufacturer if (i) events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's prepetition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. The debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct.[73]

A similar result was reached by the Fifth Circuit in *Lemelle v. Universal Mfg. Corp*.[74] *Lemelle* involved a post-confirmation lawsuit brought against the successor to a mobile-home manufacturing company for wrongful death. The deaths, which occurred after the company emerged from bankruptcy, were due to a fire allegedly caused by a defect in a mobile home manufactured pre-petition. After reviewing how courts had addressed the "complex . . . question of how broad the term 'claim' is under the Code," the court concluded that "even the broad definition of 'claim' cannot

be extended to include . . . the decedents as claimants whom the record indicates were completely unknown and unidentified at the time [debtor] filed its petition and whose rights depended entirely on the fortuity of future occurrences."[75]

One step further within the analytical spectrum is the situation where the debtor's negligence and the future victim's exposure occurred pre-bankruptcy, but the manifestation of any future harm in any particular exposed person is uncertain. Several courts, including the Second and Third Circuits, have noted, without deciding, the thorny issue of whether currently asymptomatic, asbestos-exposed individuals who will become sick in the future are "creditors" with "claims."

In *Amatex*, an asbestos bankruptcy, the Third Circuit ruled that unknown future claimants are "parties in interest" and directed the bankruptcy court to appoint a representative to protect their interests.[76] In so directing, the court recognized that it was not then addressing "the ultimate and difficult determination whether future claimants have dischargeable 'claims,'"[77] leaving unresolved "whether future claimants can or should be considered 'creditors' under the Code . . . ."[78]

Likewise, in *In re Chateaugay Corp.*,[79] the Second Circuit observed that "[a]ccepting as claimants those future tort victims whose injuries are caused by pre-petition conduct but do not become manifest until after confirmation arguably puts considerable strain not only on the Code's definition of 'claim,' but also on the definition of 'creditor.'" Since *Chateaugay* was an environmental tort case, the court did not need to "decide how the definition of 'claim' applies to tort victims injured by pre-petition conduct, especially as applied to the difficult case of pre-petition conduct that has not yet resulted in detectable injury, much less the extreme case of pre-petition conduct that has not yet resulted in any tortious consequence to a victim."[80]

In *Grady v. A.H. Robins*, the Fourth Circuit addressed this issue, but only in a limited fashion. *Grady* involved the infamous Dalkon Shield intrauterine device where some, but not all, users would manifest injuries in the future. The Fourth Circuit expressed its view that Congress, in defining "claim" under the Code has "create[d] a contingent tort or like claim, . . ." and held that the implantation of a contraceptive device gave rise to a contingent claim at the time the device was implanted.[81] That court, however, limited its holding to the automatic stay provision and expressly stated that it was not deciding whether the future claims were dischargeable or whether post-petition claims constitute an administrative expense.[82]

Judge Posner[83] explored the conceptual difficulties in holding post-petition torts to constitute pre-petition "claims" in *Fogel v. Zell*.[84] In *Fogel*, the City of Denver sought to bring a claim against a debtor pipe manufacturer, after the deadline for filing proofs of claims had passed, for damage caused by pipes that burst, also after the deadline had passed, due to a pre-petition manufacturing defect.

> A right that can be made the basis of a claim in bankruptcy may be contingent on something happening, such as the signing of a contract, . . . but if the contingency can be the tort itself, this spells trouble, both practical and conceptual. Suppose a manufacturer goes bankrupt after a rash of products-liability suits. And suppose that ten million people own automobiles manufactured by it that may have the same defect that gave rise to those suits but, so far, only a thousand have had an accident caused by the defect. Would it make any sense to hold that all ten million are tort creditors of the manufacturer and are therefore required, on pain of having their claims subordinated to early filers, to file a claim in the bankruptcy proceeding? Does a pedestrian have a contingent claim against the driver of every automobile that might hit him? We are not alone in thinking that the answer to these questions is "no." *See In re Chateaugay Corp.*, 944 F.2d 997, 1003 (2d Cir. 1991). Driving carelessly is not a tort and neither is the sale of a defective product. The products-liability tort occurs when the defect in the design or manufacture of the product causes a harm . . . . It is a fundamental principle of tort law

> that there is no tort without a harm, . . . and so until the harm occurs, the tort hasn't occurred.[85]

Judge Posner recognized the "understandable pressure to expand the concept of a 'claim' in bankruptcy in order to enable a nonarbitrary allocation of limited assets to be made between present and future claimants," specifically citing asbestos bankruptcies.[86] "To recognize a 'contingent' tort claim in these circumstances would complicate bankruptcy proceedings some, and perhaps a good deal, by requiring that provision be made in the allocation of the assets of the debtor's estate for future claims that might be difficult to value, but it might be a price worth paying to eliminate an arbitrary difference in treatment."[87] Judge Posner noted that some courts have appointed future claims representatives and that Congress ratified the terms of settlements reached through this process. He further noted that in other cases "in which mass tort claims had precipitated sellers into bankruptcy, courts, including our own, began allowing products-liability and nuisance claims to be filed in bankruptcy as long as the conduct giving rise to the claim (the manufacture or sale of the defective product, in the case of products liability) had occurred before the petition in bankruptcy had been filed," albeit with limitations.[88]

Ultimately, the Seventh Circuit avoided addressing the issue, ruling that the City of Denver had not been given adequate notice of the bar date. Before leaving the subject, however, Judge Posner suggested that the treatment of such situations must be left to the application of federal common law, properly fashioned to address the realities of any given situation:

> [W]e greatly doubt that the issue is one that lends itself to governance by formula. It may not be possible to say anything more precise than that if it is reasonable to do so, bearing in mind the cost and efficacy of notice to potential future claimants and the feasibility of estimating the value of their claims before, perhaps long before, any harm giving rise to a matured tort claim has occurred, the bankruptcy court can bring those claimants into the bankruptcy proceeding and make provision for them in the final decree.[89]

4. Numerous Federal Interests Implicated In Mass Tort Bankruptcies, Supreme Court Pronouncements Regarding Asbestos Claims Under Federal Common Law, And Congress's Codification Of The Manville Injunction / Trust In § 524(g), All Mandate Application Of A Uniform Federal Rule Disallowing Present Claims Of Asymptomatics

A. The Courts That Pioneered The Settlement Trusts And Channeling Injunctions Ratified And Codified In §§ 524(g-h) Established A Federal Common Law Rule Of Disease Manifestation For Claim Allowability And To Determine The Constituencies Of The Asbestos Creditors Committees And The Future Claimants' Legal Representatives

In the first wave of asbestos bankruptcies in the 1980s, courts struggled to develop a framework within the confines of the Code and due process to balance the competing considerations of providing asbestos manufacturers with a fresh start while fashioning a mechanism for fairly compensating both present and unknown future asbestos claimants. Sidestepping the issue of whether future claimants had pre-petition claims, the courts developed the mechanisms of a future claims representative to speak for the future claimants and the establishment of trusts with procedures designed to compensate both the currently ill and those who become ill in the future in a like manner.

The opinions of the court in the Johns-Manville bankruptcy merit attention since Congress ratified the resolution of that case in § 524(h). In *Johns-Manville*, the court considered, and ultimately granted, a motion to appoint a representative to protect the interests of future asbestos claimants.[90] In its opinion, the court pronounced that it was "clear . . . that state-created statutes

of limitation, which vary widely from state to state, must yield to one nationwide uniform standard for claims allowability in bankruptcy."[91] After a lengthy analysis of precedent, the court concluded that:

> there is great justification for a bankruptcy court to authorize a *uniform standard specifying some form of disease manifestation as the point of health claim allowability*.[92] This will avoid the unfairly inconsistent results which would otherwise eventuate in applying multitudinous statutes of limitations to like claims.[93]

The structural treatment of the competing asbestos interests in the Johns-Manville bankruptcy also warrants attention. In Johns-Manville, the "Asbestos Health Committee . . . took the position that it represented the interests only of 'present claimants,' persons who, prior to the petition date, had been exposed to Manville asbestos and had already developed an asbestos-related disease."[94] Only persons with existing asbestos-related diseases were treated as "creditors" and permitted to vote. Both present and future claimants received identical treatment, however, "by virtue of the Injunction, which channels all claims to the Trust."[95] The court rejected attempts by other conflicted constituencies to speak for future claimants, with the Second Circuit declaring that "we may confidently leave that entire task to" the Legal Representative.[96]

Likewise in the UNR bankruptcy,[97] the court rejected any notion that asymptomatics had any compensable claims. Instead, such individuals "would only be entitled to damages from UNR if and when they contract an asbestos-related disease.[98] Again, a legal representative represented future claimants.[99]

B. Under FELA, Federal Common Law Does Not Recognize A Cause Of Action For Persons Exposed To Asbestos But Not Manifesting Symptoms Of An Asbestos-Related Disease

1. In Metro-North, The Supreme Court Rejected Claims By Asymptomatic Asbestos Claimants As A Matter Of Federal Common Law

The question whether an asymptomatic asbestos exposure claimant has a legally cognizable cause of action under FELA's federal common law of negligence was answered in the negative by the United States Supreme Court in *Metro-North Commuter Railroad Co. v. Buckley*.[100] In that case, a railroad worker who had been exposed by his employer to asbestos sought recovery under the Federal Employers' Liability Act ("FELA")[101] for negligent infliction of emotional distress as well as for medical monitoring costs. The Supreme Court held that the worker "cannot recover unless, and until, he manifests symptoms of a disease."[102]

The Court explained that it was making this determination based upon notions of federal common law. "'[C]ommon law principles,' where not rejected in the text of the statute, 'are entitled to great weight in interpreting the Act.'"[103] In other words, the "Court's duty 'in interpreting FELA . . . is to develop a federal common law of negligence . . . informed by reference to the evolving common law.'"[104]

The operative provision of FELA makes railroads "liable in damages to any person suffering injury while . . . employed" by a railroad if the "injury" results from the railroad's "negligence."[105] As the Court wrote: "The critical question before us in respect to Buckley's 'emotional distress' claim is whether the physical contact with insulation dust that accompanied his emotional distress amounts to a 'physical impact'. . . ."[106] Answering in the negative, the Court emphasized that,

> the words "physical impact" do not encompass every form of "physical contact." And, in particular, they do not include a contact that amounts to no more than

> an exposure — an exposure, such as that before us, to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time.[107]

The Court opined that "common-law precedent does not favor the plaintiff."[108] Instead, "with only a few exceptions, common law courts have denied recovery to those who, like Buckley, are disease and symptom free."[109] Perhaps more importantly, the Court emphasized several reasons why courts have shied away from expanding the parameters of emotional distress claims:

> general policy reasons . . . militate against an expansive definition of "physical impact" here. Those reasons include: (a) special "difficulty for judges and juries" in separating valid, important claims from those that are invalid or "trivial," . . . (b) a threat of "unlimited and unpredictable liability," . . . and (c) the "potential for a flood" of comparatively unimportant, or "trivial," claims.[110]

The Court went on to reject Buckley's claim for medical monitoring expenses for similar and additional reasons while assuming "that an exposed plaintiff can recover related reasonable medical expenses if and when he develops symptoms."[111]

2. Subclinical Physiological Changes Do Not Constitute Actionable Impairment Under Federal Negligence Common Law

The Third Circuit has squarely held that "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law" for purposes of stating a claim under FELA.[112] In so holding, the court expressed concerns quite similar to those enunciated by the Supreme Court in *Metro-North*:

> [W]e are persuaded that a contrary rule would be undesirable as applied in the asbestos-related tort context. If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered. Therefore we hold that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury.[113]

The *Metro-North* court did not expressly address whether physiological changes that do not impair functioning could constitute a "symptom" of an asbestos-related disease,[114] but *dicta* in its most recent FELA case strongly suggests that the Supreme Court, like the Third Circuit, does not view subclinical changes such as pleural thickening as compensable symptoms of disease. In *Norfolk & Western Railway Co. v. Ayers*,[115] the Court held that railroad workers who had developed asbestosis could recover for emotional distress for fear of contracting cancer in the future. In its opinion, the Court equated "exposure-only plaintiffs" as described in *Metro-North*, with "plaintiffs with pleural-thickening," and distinguished them from plaintiffs who "developed asbestosis and thus suffered real physical harm."[116]

C. The Federal Common Law Rule Disallowing Asymptomatic Claims Should Be Applied In Bankruptcy Both Because It Furthers Significant Federal Bankruptcy Policies And Because It Is Necessary To Effectuate Congress's Intentions Expressed Through § 524(g)

1. The Disease Manifestation Rule Complements The System Developed By The Courts And Ratified By Congress For Fostering Reorganization While Treating Creditors And Present And Future Asbestos Claimants Equitably

The same concerns that led the Supreme Court to reject recovery for asymptomatics as a matter of federal common law under FELA (and the Third Circuit as well to reject recovery as "contingent claims" under the former Bankruptcy Act) point to the same result as a matter of federal common law in bankruptcy. Courts have identified numerous federal interests and policies reflected in the Bankruptcy Code that are implicated here:

1. *Fostering Successful Reorganizations.* Chapter 11 of the Code embodies the strong federal statutory "objective of fostering reorganization."[117] Because the preservation of a going concern almost always maximizes the pool of assets available to satisfy the liabilities of the debtor, "[one of] the key aims of Chapter 11 [is] to avoid liquidation at all reasonable costs."[118]

2. *Giving Debtors a Fresh Start*. "There is a strong federal policy favoring the debtor's fresh start in bankruptcy."[119] Accordingly, the purposely-broad definition of "claim" is intended to provide the broadest possible relief in order to further "the overriding goal of the Bankruptcy Code to provide a 'fresh start' for the debtor."[120]

3. *Treating Creditors Fairly and Equitably*: "[O]ne of the primary goals of bankruptcy is to treat all similarly-situated creditors fairly and equally."[121] It is therefore incumbent upon bankruptcy courts to "'sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankrupt estate.'"[122]

4. *Treating Present and Future Claimants Equitably*: A further federal policy is to "enable a nonarbitrary allocation of limited assets to be made between present and future claimants."[123]

In order to foster the maximization of a debtor's assets through a reorganization, the reorganization plan must be feasible. To be feasible, the plan must either address and discharge the debtor's liabilities or, when substantial future liabilities are foreseen, make appropriate allowance for addressing these claims. With respect to future injuries that will arise among a small portion of a population exposed to a hazardous substance, such as asbestos, to permit mere exposure to give rise to a "contingent tort claim," would mean that every exposed person would have an allowable contingent claim. Under the Code, the value of that allowed contingent claim would be determined "as of the date of the filing of the petition,"[124] *i.e.*, on the basis of a fractional chance that they might someday really become sick and/or based upon the speculative value of "fear" of one day becoming ill. As a result, asymptomatics who eventually become sick would be vastly undercompensated while those who never become ill will have been concomitantly overpaid.

No court has endorsed such an outcome. Indeed, as the Third Circuit opined in *Schweitzer*, "if contingent claims were held to include possible future tort claims . . . then every hypothetical chain of events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim . . . [and] every employee who had worked near asbestos and whose address was known would be a known creditor."[125]

Instead, what has developed is a system where, without addressing specifically whether asymptomatics have "claims" or when such claims "arise," courts instead focused on future claimants, *i.e.*, "individuals who have been exposed to asbestos but have not yet manifested symptoms of asbestos-related diseases" (but will in the future get sick).[126] Courts held that this unknown future subset of present asymptomatics are real parties in interest requiring one or more independent fiduciaries to represent them.[127] Courts also recognized that the interests of these future claimants cannot be adequately represented either by Asbestos Creditors Committees ("ACCs") comprised of individuals who already suffer from asbestos-related diseases or by the debtor, due to their conflicting interests *vis a vis* future claimants.[128] The result in the Johns-Manville and UNR bankruptcies was the creation of trusts to pay claims of both present and future claimants, but only those who became sick, not those who were merely exposed.

In effecting a system where only the currently sick were treated as voting creditors and future claimants' interests were safeguarded by a legal representative, the courts drew a line. Asymptomatics were denied present creditor status, but those asymptomatics who eventually developed asbestos-related diseases were included in trust funds designed to compensate all victims equally.[129] As noted above, the *Johns-Manville* Court expressly recognized the need for a single "uniform federal standard specifying some form of disease manifestation as the point of health claim allowability . . . ."[130]

Congress has now ratified, and codified, this policy judgment in § 524(g), which was "modeled on the trust/injunction in the *Johns–Manville* case."[131] These asbestos trust injunction provisions, enacted in 1994, reflect Congress's agreement that asymptomatic asbestos-exposed individuals do not currently have assertable "claims" and are not "creditors" entitled to vote on plans. Congress recognized that "a central element of the [Johns-Manville] case was how to deal with future claimants — those who were not yet before the court because their disease had not yet manifested itself,"[132] and ratified the disease-manifestation trigger for claims allowability established by the *Johns-Manville* court, while expressing concern that "full consideration be accorded to the interests of the future claimants, who, by definition, do not have their own voice."[133]

A trust protected by a § 524(g) injunction must "assume the liabilities of a debtor which . . . has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products."[134] The court must find that "the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction."[135]

Importantly, § 524(g) introduces a new statutory term, "demand," which it distinguishes from "claim:"

> In this subsection, the term "demand" *means a demand for payment, present or future,* that —
>
> (A) *was not a claim during the proceedings leading to the confirmation* of a plan of reorganization;
>
> (B) *arises out of the same or similar conduct or events that gave rise to the claims* addressed by the injunction issued under paragraph (1); and
>
> (C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).[136]

Currently compensable "claims" and "demands" are, by intention, mutually exclusive. Congress, like the courts, recognized that a breaking point exists along the continuum beginning with initial exposure beyond which an individual has a currently assertable claim in bankruptcy. Short of that point, however, that individual has no currently cognizable claim, but may eventually become entitled to assert a "future demand."[137] Moreover, as the Bankruptcy Code's

scheme for handling "claims" displaces state law, these terms should be given a uniform federal law interpretation.

Application of the federal common law test that a claimant must have developed symptoms of an asbestos-related disease before he will be permitted to participate as a present, voting creditor in the reorganization proceedings therefore complements the Code. This is especially so given the stated Congressional intent that the requirements of § 524(g) "simulate those met in the *Manville* case,"[138] which applied a uniform federal standard of disease manifestation to segregate present voting creditors from future claimants whose "voice" was provided by the legal representative.

Moreover such application furthers the important bankruptcy policies mentioned above. The Supreme Court was concerned about the "'special difficulty for judges and juries in separating valid, important claims from those that are invalid or 'trivial.'"[139] These same concerns in bankruptcy translate into layers of inordinate expense that sap the value of the estate available to all creditors. This is contrary both to the policies of maximizing estate value and of fair and equitable treatment of creditors.[140]

Likewise the Supreme Court was concerned that permitting claims by asymptomatics threatens "unlimited and unpredictable liability."[141] In the bankruptcy context, such a condition diminishes the likely viability of any plan of reorganization. Further "the 'potential for a flood' of comparatively unimportant, or 'trivial' claims,"[142] not only saps the value of the estate available to pay non-trivial claims, but threatens plan viability. Moreover, as among the asymptomatics, such an outcome is both unjust and unfair because claimants with unimportant, trivial claims will receive a windfall at the expense of those who eventually become truly ill.

2. Application Of A Uniform Federal Disease Manifestation Rule Further Is Necessary To Ensure That The Interests Of Future Claimants Are Adequately Protected And That Constitutional Due Process Requirements Are Satisfied

Applying the federal common law standard of disease manifestation to define and limit cognizable tort claims in bankruptcy also preserves the integrity of the system that the courts have developed, and Congress has sanctioned through the enactment of § 524(g), for affording due process to future demand holders in asbestos mass tort bankruptcies through the appointment of an independent legal representative under the careful supervision of the Court. "Claimants" are entitled to vote on plans.[143] Thus, a plan including a 524(g) trust must be approved by "a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) . . . by at least 75 percent of those voting."[144]

"Demand" holders, on the other hand, do not vote. Instead, "the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind."[145] Their interests also are protected by the court, which must make statutorily-required fairness findings. Thus, the trust must "operate through mechanisms . . . that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner."[146] Further, the statute requires that, "as part of the proceedings leading to issuance of such injunction, the court must determine that the inclusion of a debtor or third party within the scope of the injunction "is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party."[147]

Fundamentally, it is necessary to distinguish between creditors with allowed claims who are represented by committees and entitled to vote and potential demand-holders whose interests are represented by a legal representative. Unless the legal representative's constituency is clearly defined, it will be impossible for him to adequately represent their interests. Adequate representa-

tion, in turn, is the touchstone of the constitutionality of using the mechanism of a legal representative to safeguard the absent and unknown demand-holders' interests and satisfy the requirement of due process.[148] Satisfaction of due process, of course, is necessary for the effective discharge of future claims upon which the feasibility of a plan including a § 524(g) trust depends.

"It is a cardinal principle of statutory interpretation" that statutes should be read, where possible, to avoid serious constitutional questions.[149] Application of the federal common law rule of disease manifestation permits clear demarcation of the legal representative's scope of representation. This, in turn, furthers Congress's goals of fostering successful reorganization, and giving debtors a "fresh start," and treating present and future asbestos claimants fairly and equitably by satisfying the constitutional requirements of providing due process to future claimants.

Moreover, by clarifying who the legal representative represents, application of the federal common law standard also clarifies who the ACCs represent, and perhaps more importantly, who the ACCs do *not* represent. Enfranchising asymptomatics as voting creditors, skews the system to the detriment of the sick, both present and future. Treating asymptomatics as voting creditors enables them to exert their presumptive veto power to insist upon lenient TDPs which benefit asymptomatics at the expense of the truly ill.[150]

By contrast, if the putative claims of asymptomatics are disallowed without prejudice to future demand assertion upon disease manifestation, the ACC should be comprised of and represent only the currently, demonstrably sick. An ACC composed only of the currently sick will have a strong incentive to negotiate for, and approve, TDPs that deny payment of non-meritorious or trivial claims, avoid the concomitant waste of assets in claims investigation, and maximize the resources available for the truly ill. These same motivations will be shared by the legal representative, who likewise will seek to ensure that resources will remain available for those who become ill in the future.

3. By Contrast, Application Of A State Law Claim-accrual Test In The Mass Tort Arena Would Engender Confusion, Conflict And Expense, All Contrary To The Policies Of The Bankruptcy Code And The Intent Of Congress

In circuits other than the Third Circuit, it is by now clear that the interpretation of "claim" and "arose," and related Code provisions, is a matter of federal law.[151] Even the *Frenville* Court, however, took care to reserve judgement on the issue of whether a uniform federal common law rule might be appropriate in the mass tort context.[152] Instead, the *Frenville* Court expressly suggested that asbestos bankruptcies might well present situations where overriding federal policy calls for application of a uniform federal claim-accrual standard: "A bankruptcy proceeding stemming from a mass tort — such as exposure to asbestos — may be a case in which the application of federal law is indicated."[153]

Whether or not *Frenville* is ripe for reversal, that court's reticence to foreclose the applicability of federal law in a mass tort bankruptcy was well-advised. Important policy considerations militate against extending *Frenville's* piecemeal state-by-state claims accrual standard to mass tort asbestos bankruptcies.

First, the legal representative entrusted to safeguard the interests of future claimants must be independent, and have real power to act on their behalf.[154] But if the state law claim-accrual test were applied, asymptomatics from states which recognize a cause of action for damages at the exposure-only stage or the subclinical pleural thickening stage would be creditors entitled to vote, while identically-situated asymptomatics from disease manifestation-only states would not. Asymptomatics permitted to assert present claims naturally would seek to have their claims liquidated at their value as of the date of the bankruptcy petition on the basis of the remote chance they might get sick in the future (*i.e.*, the same windfall/undercompensation scenario the Third Circuit found to be "undesirable" in *Schweitzer*). On the other hand, for those asymptomatics from

states which provide recovery only for those who manifest an asbestos-related illness, their interest would be to ensure that only the truly sick will be compensated, and compensated as fully as possible. By pitting competing groups of asymptomatics against one another, and giving one group the ability to participate as present, voting creditors, the power and effectiveness of the legal representative is severely undercut. Such an outcome is manifestly inconsistent with Congressional intent and raises serious constitutional doubts as to whether due process can be satisfied for future claimants.

Second, currently sick individuals have interests that are in conflict with the asymptomatics. As both the Second and Third Circuits, in *Kane v. Johns-Manville* and *Amatex*, respectively, have recognized, it is in the interest of currently sick asbestos claimants to limit or eliminate payments to future claimants, just as it is in the interest of future claimants to maximize their future payments by minimizing payments to the currently sick.[155] Allowing a third group consisting of asymptomatic creditors would create a constituency whose interests conflict with both currently sick claimants and with the future claimant subset of those asymptomatics whose state laws require them to wait until they get sick to seek recovery.[156] These conflicts created by applying widely-varying state law accrual standards would further complicate reorganization efforts. Further, such an approach yields results that are skewed in favor of providing recovery to current asymptomatics and against the interests of current and future claimants who are truly sick, contrary to paramount federal bankruptcy objectives. Moreover, permitting asymptomatics to "stuff the ballot boxes" potentially overriding the votes of the truly sick again raises due process issues of a constitutional dimension.

Third, if state law standards were applied, for those asymptomatics who are considered present claimants, their "comparatively unimportant, or 'trivial,'" claims[157] would have to be liquidated. This again would inflict upon the courts, estates and other creditors, and/or the truly sick beneficiaries of any § 524(g) trust, precisely the layers of expense, uncertainty and arbitrariness that the Supreme Court and the Third Circuit refused to countenance as a matter of federal common law under FELA, all contrary to the legitimate federal bankruptcy goals enumerated above. In contrast, uniform application of the federal common-law disease-manifestation standard eliminates both the need to liquidate, or for that matter to estimate, the claims of asymptomatics, eliminating a layer of confusion and expense from the administration of the estates. Instead, the resources of the estate and of the court can be focused upon valuing the claims of the truly ill and estimating the claims of those who will become truly ill in the future.

These problems are inherent in using diverse state rules of decision to determine whether asymptomatics have "claims" or when their claims "arose." These unpalatable and possibly unconstitutional consequences of applying the Third Circuit's discredited state law claims-accrual standard to the asbestos mass-tort bankruptcy context would undercut the role and authority of the court-appointed future claims representative and add needless layers of conflict, complication and expense to the administration of the estate — all in frustration of the congressional intentions manifested in § 524(g). Each of these problems is avoided by application of the federal common law standard of disease manifestation for claims accrual.

5. Conclusion

The flood of asymptomatics asserting claims is overwhelming the tort system, and now confronts bankruptcy courts and debtors. The Bankruptcy Code and judicial precedent, however, provide bankruptcy courts with important tools with which to sensibly manage the problem while remaining true to core bankruptcy policies.

The question of what is a bankruptcy "claim" and when it "arose" are matters of statutory interpretation of federal bankruptcy law. The courts are agreed that defining these terms becomes more difficult as the timing and certainty of any harm and the identity of putative victims become further removed from a debtor's pre-bankruptcy negligence. With the exception of the Third Cir-

cuit in *Frenville* (which reserved judgment in the mass tort context), the courts also agree that establishing the breaking point beyond which a potential future injury becomes too speculative to be treated as an "arisen" "claim" in bankruptcy is a matter of federal common law.

Especially in light of the enactment of § 524(g), "the scheme in question evidences a distinct need for nationwide legal standards" and, therefore, this is a situation where the "court should endeavor to fill the interstices . . . with uniform federal rules . . . ."[158] The rationale for the Supreme Court's interpretation of federal common law to deny FELA claims to asbestos asymptomatics in *Metro-North*, as well as for the Third Circuit's interpretation in *Schweitzer*, is equally applicable, if not more compelling, in the context of interpreting the Bankruptcy Code.

Accordingly, asymptomatics' assertions of liability should be rejected as not constituting "claims" that "arose" pre-petition. Instead, asymptomatics should be considered potential holders of "future demands" whose interests are to be addressed through the mechanisms of future claims representatives and the oversight of the courts pursuant to the requirements of § 524(g).

As a result, asymptomatics are not creditors and their legally deficient claims should be disallowed. Their potential interests as future demand holders should be protected by a legal representative properly informed of his powers and the nature of his constituency. As well, the ACCs should be composed of, and represent the interests of, only the currently ill.

ENDNOTES

1. These individuals are frequently referred to as "unimpaireds." Because "unimpaired" is a term of art in the Bankruptcy Code referring to whether claims or interests are impaired or unimpaired by a proposed plan of reorganization, 11 U.S.C. § 1123(b)(1), in this article such individuals are referred to as "asymptomatics."

2. *See generally, e.g.*, Henderson & Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S. C. L. Rev. 815, 830, 833-34 (2002) ("*Asbestos Litigation Gone Mad")*; Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L. J. 1 (2001).

3. *See*, RAND Institute for Civil Justice, S. Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report*, summary at vi (2002) ("Increasing claims for nonmalignant injuries explain the recent growth in the asbestos caseload" and "there is widespread agreement that a majority of the claimants without cancer are functionally unimpaired, meaning that their asbestos exposure has not so far affected their ability to perform activities of daily life").

4. *See, e.g.*, The Unofficial Committee of Select Asbestos Claimants' Memorandum of Points and Authorities in Response to Debtors' Motion for Case Management Order at 16-19, filed August 6, 2002 in *In re USG Corp., et al.*, Case No. 01-2094 (RJN) (Bankr., D Del.).

5. *E.g., Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (1996).

6. *Norfolk & Western Railway Co. v. Ayers,* 538 U.S. 135, __, 123 S.Ct. 1210, 1219 and n.10 (majority opinion) and 1232 (Kennedy, J., dissenting in part) (2003).

7. *E.g., Id*.

8. *See generally*, *Asbestos Litigation Gone Mad*, 53 S. C. L. Rev. 815, 830, 833-34 (2002). As the Third Circuit noted in *Georgine v. Amchem Products, Inc.*, 83 F. 3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Products, Inc. v. Winsoret*, 521 U.S. 591 (1997), "[t]he states have different rules governing the whole range of issues raised by the plaintiffs' claims [including] viability of futures claims; availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury. . . ."

9. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

10. *See, e.g.*, W.R. Grace's Supplemental Brief Regarding Procedures For The Litigation Of The Common Personal Injury Liability Issues, filed June 21, 2002 in *In re: W. R. Grace & Co., et al.*, Case No. 01-01139 (JKF) (Bankr., D. Del.); Road Map to B&W's Defenses to Asbestos Personal Injury Claims, filed October 18, 2001 in *In re: The Babcock & Wilcox Co., et al.*, Civil Action No. 00-0558, Bankruptcy Case No. 00-10992 (Bankr., E.D. La.).

11. 11 U.S.C. § 101(5)(A).

12. 11 U.S.C. § 101(10)(A). Indeed, it seems that most courts and commentators up to this point simply have assumed the applicability of state law to asymptomatics in bankruptcy. *See, e.g.*, McGovern, *Asbestos Legislation II: Section 524(g) Without Bankruptcy*, 31 Pepperdine L. Rev. 233, 242 (2004) ("*Section 524(g) Without Bankruptcy")* (asserting "applicability of state substantive law to the personal injury claims"). As will be demonstrated below, however, not only is this conclusion premature, but an in-depth analysis of pertinent statutory, precedential and bankruptcy policies leads to the quite different conclusion that a uniform federal common law standard of disease manifestation is properly applied to measure asbestos claim cognizability in bankruptcy.

13. 11 U.S.C. § 502(b).

14. As explained *infra*, the idea that mere exposure to a manufacturer's asbestos, without more, gives rise to a compensable claim in bankruptcy has been soundly rejected by the courts.

15. *See, e.g.*, *In re Amatex Corp.* 755 F.2d 1034 (3d Cir. 1985) ("*Amatex*"); *In re: Johns-Manville Corp.*, 36 B.R. 743, 751 n. 4 (S.D.N.Y.), *appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984) ("*Johns-Manville"*); *In re: UNR Industries, Inc.*, 46 B.R. 671 (Bankr. N.D. Ill. 1985).

16. 11 U.S.C. § 1109(b).

17. *Amatex*, 755 F.2d at 1043.

18. *Id.* at 1040.

19. Conceptually, a plan of reorganization could provide for liquidation and payment of only existing claims, leaving unaddressed, and undischarged, future claims. Historically, and practically, however, companies facing mass asbestos claims that file for bankruptcy do so precisely because of the specter of overwhelming future liability. If future asbestos claims are not addressed and discharged, that same uncertainty continues to exist, effectively driving away the potential investors and financiers needed for any such plan to be feasible.

20. It was intended that the trusts' equity stakes in the reorganized debtors would provide a renewable "ever-green" source of funding to pay claimants. Lingering uncertainty over the validity of the channeling injunctions and discharges in the Johns-Manville and UNR cases, however, had a depressing effect on the stock price of these companies. The desire to eliminate this uncertainty, removing the "asbestos overhang," and maximizing share value and therefore monies available to the trust was a major impetus behind Congress's enactment of §§ 524(g-h) (popularly referred to as the "Manville Amendments") in 1994. 140 Cong. Record S14464 (1993) (Statement of Senator Helfin).

21. *Kane v. Johns-Manville*, 843 F.2d 636, 639 (2d Cir. 1988).

22. 11 U.S.C. § 524(h).

23. § 524(g)(4)(B)(i).

24. § 524(g)(2)(B)(ii)(V).

25. § 524(g)(2)(B)(i)(IV)(BB).

26. § 524(g)(5).

27. § 524(g)(4)(B)(i).

28. *In re: M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984*), cert. denied*, 469 U.S. 1160 (1985) (*"Frenville"*).

29. Significantly, the *Frenville* Court itself took care not to foreclose an argument that a uniform federal common law standard might be appropriate in the mass tort context. Indeed, the Third Circuit expressly suggested in *Frenville* that asbestos bankruptcies might well present situations where overriding federal policy calls for application of federal law: "A bankruptcy proceeding stemming from a mass tort — such as exposure to asbestos — may be a case in which the application of federal law is indicated." *Frenville*, 744 F.2d at 337 n.8 (citing, *inter alia, Johns-Manville*, 36 B.R. at 751 n.4).

30. A number of bankruptcy courts have simply allowed all claimants to vote as creditors on plans, irrespective of whether they are asymptomatic or whether applicable state law permits them to recover. As explored more fully *infra*, the net result of such an approach is to permit the hordes of asymptomatics to dominate the bankruptcy, effectively blocking any reorganization plan until they are assured of recovery (at the expense of the truly ill) through imposition of extremely lenient TDPs.

31. 440 U.S. 48 (1979).

32. *Id*. at 54.

33. *Id*. at 55, 57.

34. *Id*.

35. *Id*. at 55. The Court noted that:

> The minority of courts which have rejected state law have not done so because of any congressional command, or because their approach serves any identifiable federal interest. Rather, they have adopted a uniform federal approach to the question of the mortgagee's interest in rents and profits because of their perception of the demands of equity. The equity powers of the bankruptcy court play an important part in the administration of bankrupt estates in countless situations in which the judge is required to deal with particular, individualized problems. But undefined considerations of equity provide no basis for adoption of a uniform federal rule affording mortgagees an automatic interest in the rents as soon as the mortgagor is declared bankrupt.

Id. at 55-56.

36. 530 U.S. 15, 24-25 (2000). *See also, Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code").

37. 180 B.R. 597 (Bankr. D. Kan. 1994), *aff'd*, 180 B.R. 629 (D. Kan. 1995).

38. 304 U.S. 64 (1938).

39. *In re Kar Development*, 180 B.R. at 614 (quoting Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013 (1953)). *Cf., City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) ("*Erie* recognized . . . that a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress").

40. *Id.*

41. *Id.* at 615.

42. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966).

43. 11 U.S.C. § 101(5)(A).

44. 11 U.S.C § 101(10).

45. 11 U.S.C. § 301.

46. 11 U.S.C. § 501(a).

47. 11 U.S.C. § 502.

48. 11 U.S.C. § 502(b).

49. 11 U.S.C. § 362(a).

50. 11 U.S.C. § 101(12).

51. 11 U.S.C. § 1141(d)(1). For a more complete analysis of this topic, *see* Kathryn R. Heidt, *Environmental Obligations in Bankruptcy*, Chapter 3, "The Environmental Claim and When It Arose," ¶ 3.02[1][a-b] (1993 and 2000 Supp.).

52. *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (quoting *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991)).

53. *Frenville*, 744 F.2d at 336 (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 209, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6266).

54. *In re Edge*, 60 B.R. 690, 694 (Bankr. M.D. Tenn. 1986) (citing 3A J. Moore, *Collier on Bankruptcy* ¶ 63.25[1] (14th ed. 1975)).

55. *Frenville*, 744 F.2d at 334-35. The court reasoned that where "the harm is separated [in time] from the underlying conduct, at least for purposes of § 362(a), Congress has focused on the harm rather than the act." *Id*.

56. *Id.* at 336.

57. *Id.*

58. Apparently had the indemnity claim been based upon an indemnity agreement executed pre-petition, the Third Circuit would have been satisfied that the indemnity claim was a pre-petition "claim" and within the ambit of the automatic stay provision.

59. *Id.*, (quoting *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946)).

60. *Id.* at 337.

61. *Jones v. Chemetron Corp.*, 212 F.3d 199, 206 (3d Cir. 2000) (acknowledging "the criticism the *Frenville* decision has engendered" and collecting cases and commentary). In 2002, the Tenth Circuit became the latest circuit court to expressly reject *Frenville's* state law claims-accrual test in favor of a conduct-based test. *In re Parker*, 313 F.3d 1267 (10th Cir. 2002).

62. *California Dep't of Health Servs. v. Jensen (In re Jensen)*, 995 F.2d 925, 927-28 (9th Cir. 1993).

63. *Grady v. A.H. Robins*, 839 F.2d 198, 202 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988).

64. *Jones v. Chemetron Corp.*, 212 F.3d at 205.

65. *Frenville,* 744 F.2d at 337, n.8.

66. As aptly noted by Professor Heidt, many of these courts have conflated the statutorily (and logically) distinct concepts of "claim" and "arose." *Environmental Obligations in Bankruptcy,* ¶ 3.02[1][c]. Irrespective of their lack of clarity, however, these courts have treated the issue of claims accrual as a matter of federal law in bankruptcy. The real issue is not whether a future claim is a "claim" under the Bankruptcy Code, but rather whether it "arose" prepetition (or pre-confirmation), and if it did not, whether and how the Bankruptcy Code and the Constitution permit such post-petition/post-confirmation "claims" to be addressed and discharged as part of the bankruptcy proceedings.

67. *In re Edge,* 60 B.R. 690.

68. *In re Beeter,* 173 B.R. 108 (Bankr., W.D. Tex. 1994).

69. *In re Kar Development,* 180 B.R. at 616, (quoting Wright et al., *Federal Practice and Procedure* § 4514 (1982)).

70. *Id.*

71. 58 F.3d 1573 (11th Cir. 1995).

72. *Id.* at 1578.

73. *Id.* at 1577.

74. 18 F.3d 1268 (5th Cir. 1994).

75. *Id.* at 1277.

76. 755 F.2d 1034. Before the bankruptcy court, the *Amatex* ACC made an offer of proof "that in no jurisdiction of the United States does a cause of action arise from an asbestos-related ailment until the symptoms have manifested themselves." *In re Amatex Corp.,* 30 B.R. 309, 311 (Bankr. E.D. Pa. 1983), *approved, remanded,* 37 B.R. 613 (E.D. Pa. 1983), *rev'd* by *Amatex.*

77. *Id.* at 1040.

78. *Id.* at 1043.

79. 944 F.2d at 1004.

80. *Id.* at 1005.

81. 839 F.2d at 202-03.

82. *Id.*

83. Judge Posner also authored the opinion in *In re UNR Industries, Inc.,* 725 F.2d 1111 (7th Cir. 1984), one of the earliest appellate opinions to begin wrestling with the treatment of future asbestos claims, dismissing as premature efforts to overturn the district judge's refusal to appoint a legal representative for future asbestos claimants.

84. 221 F.3d 955 (7th Cir. 2000).

85. *Id.* at 960 (citations omitted).

86. *Id.* at 961.

87. *Id.,* (citing *In re UNR Industries, Inc.,* 725 F.2d at 1118-20).

88. *Id.*

89. *Id.*

90. Notably, the Third Circuit expressly cited *Johns-Manville* as an example of the type of case where an "overriding federal policy" might empower a court "to develop federal law." *Frenville*, 744 F.2d 337 n.8.

91. *Johns-Manville*, 36 B.R. at 750 n.4.

92. The *Johns-Manville* court recognized three asbestos-related diseases, "asbestosis, a chronic disease of the lungs causing shortness of breath similar to emphysema; mesothelioma, a fatal cancer of the lining of the chest, abdomen or lung, and lung or other cancers," but did not recognize subclinical physiological changes such as pleural thickening as a compensable "disease." *Id.* at 745

93. *Id.* (emphasis added).

94. *Kane v. Johns-Manville*, 843 F.2d 636, 639 (2d Cir. 1988). It was the intention of the Manville Trust "to satisfy the claims of all victims, whenever their disease manifests." *In re: Johns-Manville Corp.*, 68 B.R. 618, 628 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom.*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636. Despite the best intentions of the court to ensure that only the sick were paid and were compensated as completely as possible, the mechanisms established for paying claims by the Manville Trust were woefully inadequate in weeding out claims of asymptomatics and others of questionable validity and, indeed, have been blamed for spawning a massive outbreak of dubious, if not fraudulent, claims submitted by hundreds of thousands of individuals — all to the grievous detriment of true asbestos victims, both present and future. That the process broke down in the details in Manville, however, does not mean that asymptomatics and other doubtful claimants should be compensated in other asbestos bankruptcies. To the contrary, it simply points up the need for implementation of stringent checks and balances, and their active enforcement by the courts.

95. *Id.* at 640.

96. *Id.* at 644.

97. Johns-Manville and UNR were the first two major asbestos manufacturers to file for bankruptcy protection, filing within one month of each other in 1982, and their bankruptcies were the first to utilize the types of asbestos settlement trusts and channeling injunctions ratified by Congress in 1994 in 11 U.S.C. § 524(h).

98. *In re: UNR Industries, Inc.*, 71 B.R. 467, 479 (Bankr., N.D. Ill. 1987).

99. *In re: UNR Industries, Inc.*, 46 B.R. 671 (Bankr. N.D. Ill. 1985).

100. 521 U.S. 424 (1997) ("*Metro-North*").

101. 45 U.S.C. § 1, *et seq.*

102. *Metro-North*, 521 U.S. at 427.

103. *Id.* at 429 (quoting *Consolidated Rail Corp v. Gottshall*, 512 U.S. 532, 544 (1994)). *See also*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 n.15 (1997) (referencing *Metro-North* as standing for proposition that FELA, "interpreted in light of common-law principles, does not permit 'exposure-only' railworker to recover for negligent infliction of emotional distress or lump-sum damages for costs of medical monitoring").

104. *Id.* (quoting *Gottshall*, 512 U.S. at 557 (Souter, J., concurring) (ellipses in original)). If anything, the *Metro North* Court took an expansive view of the parameters of legal liability under FELA, noting that the Court "has interpreted the Act's language 'liberally' in light of its humanitarian purposes." *Id.* at 429.

105. 45 U.S.C. § 1.

106. *Metro-North*, 521 U.S. at 432.

107. *Id.*

108. *Id.*

109. *Id.* (string citation omitted). Litigants in asbestos bankruptcies have disputed just how many jurisdictions currently permit recovery of some sort by asymptomatics and what type of damages may be available in such jurisdictions. There has been no suggestion, however, that the Supreme Court has come to doubt the strong policy reasons that led to its decision in *Metro-North.* Indeed, in 2003, it reaffirmed that holding *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 123 S. Ct. 1210 (2003). Moreover, as noted in n. 129, *infra*, numerous courts and commentators, realizing (perhaps belatedly) the folly of permitting tort recovery to asymptomatics, have instituted, or urged the institution, of docket management programs that effectively deny recovery to asymptomatics unless and until they become sick.

110. *Id.* (citations omitted).

111. *Id.* at 438.

112. *Consolidated Rail Corp. v. Schweitzer*, 758 F.2d 936, 942 (3d Cir. 1985). Perhaps not coincidentally, the author of the opinion in *Schweitzer*, Judge Seitz, was a member of the Third Circuit panels in both *Amatex* and *Frenville* (both of which were authored by Judge Adams). Additionally, it bears noting that the *Schweitzer* Court was deciding this case in the context of whether, under the old Bankruptcy Act, such claims were within the scope of assertable claims.

113. *Id.*

114. Although *Schweitzer* was not expressly mentioned by the Supreme Court in *Metro-North* (which instead relied on its own intervening precedent in *Gottshall*), the Second Circuit opinion that was reversed had itself expressly refused to follow the Third Circuit's *Schweitzer* precedent. *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337, 1344 (2d Cir. 1996), *rev'd, Metro-North*, 521 U.S. 424 (1997).

115. 538 U.S. 135, 123 S. Ct. 1210 (2003). The majority opinion was authored by Justice Ginsberg, who was among the dissenters in *Metro-North* who would have permitted recovery by asymptomatic plaintiffs for emotional distress.

116. *Id.* at 156, 123 S. Ct. at 1223 (citing *Asbestos Litigation Gone Mad*, 53 S. C. L. Rev. at 830, 833-34).

117. *In re Kar Development*, 180 B.R. at 616.

118. *Johns-Manville*, 36 B.R. at 746. *See also, e.g., In re Lyons Transportation Lines, Inc.*, 123 B.R. 526, 534 (Bankr. W.D. Pa. 1991) (primary purpose of Chapter 11 is to promote restructuring of debt and preservation of economic units rather than dismantling estate).

119. *Edge*, 60 B.R. at 699.

120. *In re Jensen*, 995 F.2d at 928.

121. *In re Dow Corning Corp.*, 211 B.R. 545, 565 (Bankr., E.D. Mich. 1997).

122. *In re A.H. Robins Co., Inc.*, 89 B.R. 555, 561 (E.D. Va. 1988) (quoting *Pepper v. Litton*, 308 U.S. 295 (1939)).

123. *Fogel v. Zell*, 221 F.3d at 961. *See also*, 11 U.S.C. § 524(g)(2)(B)(II)(iii) (referencing threats to "plan's purpose to deal equitably with claims and future demands" as prerequisite for § 524(g) channeling injunction).

124. 11 U.S.C. § 502(b).

125. *Schweitzer*, 758 F.2d at 944 (interpreting § 77(b) of the former Bankruptcy Act).

126. *Amatex*, 755 F.2d at 1035. *See also*, *Johns-Manville*, 36 B.R. at 753 ("those who have been exposed to asbestos prepetition and have manifested or will manifest disease post-petition" are real parties in interest).

127. The *Amatex* court also raised, but did not decide, the issue of "whether future claimants may have interests that call for the appointment of more than one representative." *Amatex*, 755 F.2d at 1043, n.8.

128. *Id.* at 1043. *See also, Kane v. Johns-Manville Corp.*, 843 F.2d at 644; *Johns-Manville*, 36 B.R. at 749, n.3 ("an independent representative for future claimants is essential").

129. Indeed, this trend to compensate the truly ill while preserving and deferring the claims of the currently asymptomatic has been growing steadily outside of the bankruptcy context. Under docket control plans in effect in many states throughout the country, asymptomatic claimants are placed on suspense dockets, preserving the claims against statute of limitations challenges, but precluding the claims from coming to trial until the claimants actually have some functional impairment. *See* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001); Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, (June 2002); *In re New York City Asbestos Litig.*, Order Amending Prior Case Mgmt. Orders (S. Ct. N.Y. Cty, N.Y. Dec. 19, 2002). Notably, Judge Weiner, who manages the federal MDL asbestos litigation, ordered the administrative dismissal of all asymptomatic plaintiffs whose cases were filed on the basis of mass litigation screenings, subject to reinstatement upon a showing that a plaintiff is suffering from an asbestos-related disease. *See* Administrative Order No. 8, *In re Asbestos Prods. Liab. Litig.*, MDL 875 (E.D. Pa. Jan. 14, 2002).

130. 36 B.R. at 750, n.4. *Cf.*, *UNR*, 71 B.R. at 479.

131. 140 Cong. Record H10,765 (October 4, 1994).

132. *Id.*

133. *Id.* The House Committee expressed the intention that future asbestos injunction/trust bankruptcy proceedings "meet the same kind of high standards with respect for the rights of claimants, present and future, as displayed by the two pioneering cases [Johns-Manville and UNR]." *Id*.

134. 11 U.S.C. § 524(g)(2)(b)(i)(I).

135. § 524(g)(2)(b)(ii)(I).

136. § 524(g)(5) (emphasis added).

137. A "present" "demand" is a deficient claim asserted by an asbestos-exposed individual who does not yet have a claim cognizable and compensable in bankruptcy, *e.g.*, an asymptomatic. That person's claim is disallowed, and therefore is "not a claim during the proceedings leading to the confirmation," without prejudice to the assertion of a future demand should that individual eventually become sick.

138. 140 Cong. Record H10,765.

139. *Metro-North*, 521 U.S. at 433. *Accord, Schweitzer*, 758 F.2d at 942.

140. There is, to be sure, expense involved in winnowing the asymptomatics from the pool of present creditors, but that expense is inherent in the unanimous consensus of the courts and Congress that a line must be drawn beyond mere exposure separating current creditors from potential future claimants. Once that line is drawn, whatever the standard to be applied might be, it must be enforced. The alternative is to permit anyone who shows up asserting an asbestos claim to participate as a voting creditor, thereby tainting the entire process in flagrant disregard of Congressional intent and denying due process to future claimants. Unfortunately, it seems that courts as a

practical matter frequently do just that and allow anyone who purports to have a claim to vote, leaving it to the trust to sort out which of them should be paid. The problem with this, as discussed *infra*, is that it permits asymptomatics to hijack the entire process, holding the reorganization process hostage by their overwhelming numbers until the vastly outnumbered truly sick claimants and the beleaguered legal representative of future claimants cave in to the asymptomatics' demands for lenient TDPs that all but assure that the asymptomatics will recover from the trust.

141. *Metro-North*, 521 U.S. at 433.

142. *Id.*

143. Although "claimant" is not a defined term in § 524, there is no suggestion in that section, or in the legislative history, that Congress meant to override the existing provisions of the Bankruptcy Code that permit only "creditors" with allowed claims to participate in voting upon proposed plans.

144. § 524(g)(2)(B)(i)(IV)(BB).

145. § 524(g)(4)(B)(i).

146. § 524(g)(2)(B)(ii)(V).

147. § 524(g)(4)(B)(ii). The court must also find that "pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands." § 524(g)(2)(B)(ii)(III).

148. *Cf. Amchem Products*, 521 U.S. at 627 (asbestos settlement class properly rejected, *inter alia*, because there was "no assurance . . . — either in terms of the proper settlement or in the structure of the negotiations — that the named plaintiffs operated under a proper understanding of their representational responsibilities").

149 *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal quotation marks and citations omitted); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (a court should read a "statute to eliminate [constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress"); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

150. *Cf.* McGovern, *Section 524(g) Without Bankruptcy*, 31 Pepperdine L. Rev. at 242 ("de facto veto power" wielded by "claimants with less serious injuries" and "reinforced by applica[tion] of state substantive law to the personal injury claims" has resulted in a "phenomenal increase in tort claimants' bargaining power").

151. *Chemetron*, 212 F.3d at 205.

152 As discussed above, the Third Circuit's approach of applying state law in most situations to determine when a "right to payment" accrues has been vociferously criticized by courts and commentators alike over the past 19 years, as the Third Circuit acknowledges. *Chemetron*, 212 F.3d at 206. Indeed, in *Chemetron* the Third Circuit applied its holding solely because "*Frenville* is the law of this circuit," but made no attempt to defend its rationale.

153. *Frenville*, 744 F.2d at 337 n.8, (citing, *inter alia*, *Johns-Manville.*, 36 B.R. at 751 n.4). Moreover, the Third Circuit has never had the opportunity to address this issue in the wake of the enactment of § 524(g) or the Supreme Court's decision in *Metro-North*.

154. Professor McGovern has observed that "[t]he selection of the futures representative is problematic because having a weak futures representative is in the interest of both the debtor and the current claimants." *Section 524(g) Without Bankruptcy*, 31 Pepperdine L. Rev. at 248. Professor McGovern continues: "Yet, under the bankruptcy code, they are precisely the parties who select the futures representative (subject to court approval)." *Id*. But nowhere does the Code suggest, much less provide, that these conflicted parties may "select" the requisite legal representative, and the history of the Johns-Manville and UNR Bankruptcies is to the contrary. In Johns-Manville, the legal representative was selected by the Court over the vociferous objection of the ACC. *In re Johns-Manville*, 52 B.R. 940, 942 (S.D.N.Y. 1985). In the UNR bankruptcy, the United States Trustee, exclusively,

was "granted leave to suggest a disinterested party to serve as Legal Representative for putative asbestos disease victims, within 20 days . . . ." *In re UNR Indus., Inc.*, 46 B.R. 671, 677 (Bankr. N.D. Ill. 1985). *See also*, Plevin, Ebert & Epley, *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 So. Texas. L. Rev. 883, 901-02, 914-18 (2003). Indeed, permitting these inherently conflicted constituencies to "select" the legal representative raises serious doubts as to the constitutional adequacy of such a presumptively "weak" legal representative to satisfy due process.

155. *Cf.*, *Georgine v. Amchem Products, Inc.*, 83 F. 3d at 632-33 ("most salient conflict in [mandatory asbestos] class action is between the presently injured and futures plaintiffs").

156. Similarly, Professor McGovern has noted "a conflict between malignancies and non-malignancies. . . ." *Section 524 Without Bankruptcy*, 31 Pepperdine L. Rev. at 249. He writes that "[a]mong plaintiffs, the lawyers who represent principally clients suffering from malignancies understand that current non-malignancy claimants must be paid in order to achieve the requisite vote, but they do not want to see less serious cases dilute payments to the malignancies in the future." *Id*. Professor McGovern, however, concedes "the applicability of state substantive law to the personal injury claims." *Id*. at 242. While Professor McGovern's concession on this score is erroneous for the reasons explained in this article, his observations do serve to illuminate some of the evils that are ameliorated by application of a uniform federal rule of actual disease manifestation as the threshold for allowance of asbestos personal injury claims.

157. *Metro-North*, 521 U.S. at 433.

158. *Kamen v. Kemper Fin. Services, Inc.*, 500 U.S. 90, 98 (1991) (citation omitted). ■

