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NOTES

DEMANDING DUE PROCESS: THE CONSTITUTIONALITY OF THE § 524 CHANNELING INJUNCTION AND TRUST MECHANISMS THAT EFFECTIVELY DISCHARGE ASBESTOS CLAIMS IN CHAPTER 11 REORGANIZATION

Katherine M. Anand*

INTRODUCTION

In 1982, the actions of one corporation dramatically changed both tort and bankruptcy law. In that year, the Johns-Manville Corporation (Manville) was facing an onslaught of asbestos-related injury suits and saw no traditional legal device to both defend against all the tort claims and keep the company afloat. Manville had creative lawyers who persuaded the company to make an unprecedented move: file for Chapter 11 bankruptcy. Manville’s decision “sent shock waves though the legal community” both because Manville was solvent at the time it filed and because all the asbestos claims against the company were consolidated into one proceeding, including both those that had already been filed and those that had yet to arise.¹


Part of the shock resulted from the fact that Johns-Manville was still solvent. The other part resulted from the way in which Johns-Manville proposed to use bankruptcy: to consolidate both present and future asbestos claims...
More than twenty years later, Manville’s solution remains an important subject of study because corporations continue to struggle to deal with asbestos claims and remain profit-making entities. Also, companies are turning to a new tool, the “pre-packaged” plan of reorganization, which is modeled after Manville’s trust solution but negotiated and settled before bankruptcy is filed. A 2002 RAND Institute for Civil Justice report estimated that since Manville’s bankruptcy, more than sixty asbestos companies have declared bankruptcy, and over twenty of those occurred between 2000 and 2002. That the problem is not lessening can be seen in the rise in the number of claims against the Manville Trust. In 2001, over 90,000 claims were filed, “more than in any prior year and nearly six times the total number of claims pending against Manville when it declared bankruptcy twenty years before.” Also, more asbestos claims are being filed in courts. One proposed asbestos reform bill in the Senate notes among its findings that “the extraordinary volume of nonmalignant asbestos cases continues to strain Federal and State courts, with over 200,000 cases pending and over 50,000 new cases filed each year.” The number of new claims filed may not decrease for many years to come; past exposures will “result in significant death and disability from mesothelioma and other cancers well into the 21st century.” This onslaught of claims explains why so many companies have opted to follow Manville’s example and file bankruptcy. Manville’s mark on asbestos litigation has been profound and continues to be of interest today.

The purpose of Chapter 11 reorganization is to allow a failing company to resolve its debts and emerge with equity and a clean slate. Although Manville was solvent when it filed, it knew with relative certainty it could not survive prolonged litigation and paying out all the

within the proceeding, and to emerge from the Chapter 11 reorganization intact, healthy, and claim-free.

Id.


4 Id. at 9.


6 Id. § 2(a)(5).
asbestos claims. After reorganization, pre-petition creditors, including asbestos-related tort claimants, can no longer bring claims against a company, because “[u]nless [the tort] claims can be discharged . . . corporate defendants would emerge at the other end of reorganization with another crushing queue of claims, and would have no incentive to seek bankruptcy protection.” A company has no reason to go through bankruptcy unless it will reemerge with some equity and a reasonable probability of success as a profit-making entity.

Since Manville’s historic bankruptcy filing, many other companies facing asbestos claims have followed Manville’s example. The companies and the courts saw that Manville had finally found a way to manage the thousands of asbestos claims clogging the legal system. In 2001, the RAND Institute for Civil Justice estimated that 500,000 asbestos claims had been filed against numerous defendants and that the value of each claim ranged between $500,000 and $2.5 million. The RAND Institute also predicted the total economic cost of asbestos claims may eventually reach $265 billion, “more than cost estimates for all Superfund cleanup sites combined, Hurricane Andrew, or the September 11th terrorist attacks.” Faced with these grim realities, more companies facing asbestos claims—such as North American Refractories Company (NARCO), Kaiser Aluminum, A.P. Green, Harbison-Walker, and Shook & Fletcher in 2002—have opted for bankruptcy.

Reorganization does not solely benefit the corporation as a way to continue as a going concern; asbestos victims themselves also benefit when their claims are dealt with in a manner more efficient than the alternatives the current legal system can provide. A United States Judicial Conference Ad Hoc Committee on Asbestos (Ad Hoc Committee) appointed by Chief Justice Rehnquist in 1991 reported that the asbestos tort crisis is a “disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-

7 JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE 194 (2002).
8 Griffin B. Bell, Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis, BRIEFLY . . . PERSP. ON LEGIS., REG., AND LITIG., June 2002, at 1, 7 (citing DEBORAH HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE 12 (2001)).
10 Bell, supra note 8, at 8.
11 Id.
equipped to meet effectively.\textsuperscript{12} The courts cannot aggregate all the asbestos claims and render judgments efficiently; each case takes too long to litigate and there are too many cases. Furthermore, the costs of litigating for both the plaintiffs and defendants are prohibitive. The Ad Hoc Committee argued that “[j]ustice is denied because claims cannot be evaluated and either dismissed, paid, or litigated in a reasonable time frame. Unfairness results because of the excessive transaction costs and the finite resources available to pay meritorious claims.”\textsuperscript{13} The Ad Hoc Committee also pointed out that with thousands of asbestos claims clogging the system, the rest of the courts’ dockets were also delayed.\textsuperscript{14} Giving each asbestos plaintiff his own “day in court” contributed to the judicial crisis. Thus, reorganization has been accepted as a mechanism to provide more plaintiffs with some compensation more quickly and reduce the overall drain on the judicial system.

One might reasonably ask at this point why a company that may be responsible for the injuries and deaths of thousands of people should be allowed to continue as a going concern. First, most of the asbestos manufacturers responsible are already bankrupt; those companies currently facing lawsuits are part of a “second wave” of asbestos claims targeted at those who innocently distributed or used asbestos unaware of the danger involved.\textsuperscript{15} Second, even if a company did know asbestos was harmful, the policy behind Chapter 11 bankruptcy is to “prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”\textsuperscript{16} Company liquidation is also costly to society because it results in “increased unemployment insurance payments, increased use of other social welfare programs, and decreased tax revenues.”\textsuperscript{17} The ABA discusses a report commissioned by the American Insurance Association that estimates


\textsuperscript{13} Id. at 14.

\textsuperscript{14} Id. at 26 (stating that the asbestos claims are “imped[ing] the resolution of other cases in the justice system”).

\textsuperscript{15} Bell, supra note 8, at 29 (listing examples of those involved in the “new wave” of litigation, including “distributors who sold the products as middlemen between manufacturers and contractors . . . , automobile manufacturers, telephone companies, computer makers, . . . consumer product retailers and even food and wine makers”); see also Asbestos Claim Criteria and Compensation Act of 2003, S. 413, 108th Cong. § 2(a)(8) (stating that the current asbestos litigation involves “defendant companies that were never involved in the production of asbestos”).


\textsuperscript{17} Mark S. Scarberry et al., Business Reorganization in Bankruptcy 2 (2d ed. 2001).
that as of 2003, approximately 60,000 workers have lost their jobs as a result of corporate bankruptcies due to asbestos litigation. The ABA notes that the RAND Institute’s estimate is twice that at 128,000. Further, “[e]ach displaced worker ... will lose, on average, an estimated $25,000 to $50,000 in wages over his or her career” and will suffer “roughly $8,300 in pension losses, which represent[s], on average, a roughly twenty-five percent reduction in the value of the 401(k) account.” Each employee, creditor, and owner loses either her job or the money rightly due to her, or both. The workers may be able to find other employment, if jobs have not gone overseas, but probably not quickly or without cost (both economic and emotional). Thus, reorganization under Chapter 11 is socially desirable because it benefits the company, the employees, and the economy and does not bleed a company dry.

Congress endorsed Manville’s creative approach to the asbestos tort problem by amending the Bankruptcy Code (Code) in 1994 and adding § 524(g) and (h), which includes the channeling injunction and trust mechanisms Manville employed to effectively discharge the asbestos claims during the reorganization. Although all of the players—including the victims, companies, and society in general—involved in reorganization receive tangible benefits in terms of efficiency, § 524 (g) and (h) must still pass constitutional muster. Part I of this Note presents the particular difficulties with including “future claimants” in the reorganization. Part II describes the solution Manville introduced and how the revised Code incorporates Manville’s procedures. Part III then asks whether § 524(g) and (h) is constitutionally sound, focusing primarily on procedural due process as fundamentally problematic. Part IV shifts the analysis from an examination of the due process rights of asbestos victims to the inadequate protection of the due process rights of the companies. An argument in support of more stringent medical criteria to prove injury is made in Part V. This Note concludes that § 524(g) and (h) is unconstitutional under the Fifth Amendment, and Congress must find another solution to the mass asbestos tort problem.


19 Id.


21 SCARBERRY ET AL., supra note 17, at 2.

22 Id.
I. Future Claimants in Reorganization

Asbestos litigation presents a unique problem for companies because of the nature of the injuries caused by exposure to asbestos and the popularity of the product. These two factors have generated a constant stream of thousands of asbestos claims brought in courts across the country. Working with or around asbestos causes a variety of respiratory ailments and some forms of lung cancer that may have an extremely long latency period, sometimes up to forty years after exposure.\(^2\) Those who have tort claims against companies may not know it for many years. Because asbestos was an extremely useful and popular product, millions of people have been exposed—asbestos was widely used in buildings from power plants to schools. Even through the late 1970s and early 1980s companies continued to use asbestos products. Manville found a unique way to deal with all of these claims and remain a viable company: reorganization through Chapter 11, resulting in the discharge of all the creditor claims against it, including those of present and future asbestos victims.

Chapter 11 bankruptcy discharges all the claims against the debtor, allowing the debtor to emerge free and clear. As indicated earlier, “[t]o be a completely effective aggregation device, bankruptcy must be able to aggregate the claims of all potential plaintiffs.”\(^2\) The “typical” creditor against a debtor is easy to identify—the creditor may be a company owed money for goods or services or a bank with a lien on a company building. Even in most mass torts, such as an airplane crash, the victims are readily identifiable because the debtor knows exactly how many victims are involved and the victims have visible injuries or have died. However, in “latent-injury toxic tort cases,” such as those involving asbestos, the victims may not know immediately that they have been injured and have a claim to make against the debtor.\(^2\) The problem is that the Code “was not drafted with persons holding later-occurring debts in mind, and there is no easy textual way for the court sitting in bankruptcy to bring these persons into the proceeding or to discharge these later-occurring debts.”\(^2\) Therefore, before § 524(g) and (h) was added in 1994, courts had to creatively find ways to include future claimants in the bankruptcy proceeding and discharge their claims against the debtor.

Several steps in Chapter 11 reorganization are problematic for future claimants. The highlights of the reorganization process are as

\(^{23}\) Kane v. Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988).
\(^{24}\) TIDMARSH & TRANGSRUD, supra note 1, at 752 (emphasis added).
\(^{25}\) Id.
\(^{26}\) Id.
follows. The first step in Chapter 11 bankruptcy is to file a plan of reorganization.\textsuperscript{27} Under § 1122, the creditors are then organized within classes of those who have substantially similar claims.\textsuperscript{28} The reorganization plan requires acceptance by only the "impaired classes."\textsuperscript{29} Acceptance is acknowledged by the court when "at least two-thirds in amount and more than one-half in number" of the creditors vote to accept the plan.\textsuperscript{30} Those who do not have claims but instead have "interests" are also placed into classes, but acceptance only requires two-thirds in dollar amount of their interest in the company.\textsuperscript{31}

If the plan of reorganization is approved and then confirmed by the court, the plan binds all the creditors, whether they voted for the plan or not.\textsuperscript{32} The debtor is also vested with all of "the property [of the estate] . . . free and clear of all claims and interests of creditors" except as otherwise provided for by the plan.\textsuperscript{33} Most importantly for future claimants, "the confirmation of a plan discharges the debtor from any debt that arose" before the confirmation.\textsuperscript{34}

Troublesome procedural due process issues become apparent when future claimants are incorporated into the Chapter 11 reorganization process. How does the debtor notify those that do not know they have an injury related to the bankruptcy? Should the court put the future claimants in the same class as the present claimants? How will the interests of future claimants be represented during reorganization? How does the court ensure future claimants' participation in the voting process so they are not disadvantaged compared to the present claimants and other creditors?

The procedures used in other non-latent injury tort situations such as airline crashes or other disasters where the victims are identifiable and their injuries are immediately apparent do not lend themselves easily to application in the asbestos context. For example, to deal with the uncertain value of the claims in cases where there are only a few tort victims, "it is usually easiest to try these claims as part of the bankruptcy proceedings; then their value is established to a cer-

\begin{footnotesize}
\footnote{28} Id. § 1122.
\footnote{29} Id. § 1124 (defining impaired claims and interests as belonging to those holders whose legal, equitable, or contractual rights have been altered or who have not received compensation).
\footnote{30} Id. § 1126(c).
\footnote{31} Id. § 1126(d).
\footnote{32} Id. § 1141(a).
\footnote{33} Id. § 1141(c).
\footnote{34} Id. § 1141(d)(1)(A).
\end{footnotesize}
However, with asbestos litigation, even if the identity of future claimants is known, it is impossible for the court to try each of their cases individually to determine the value of their damages claims given that literally thousands and thousands, perhaps even millions, of individuals might be claimants. To deal with this situation, the Code states that the total number and value of claims will be estimated. However, in the context of asbestos, an accurate estimation of the liability of a given debtor is impossible given the temporal and geographic dispersion of the victims, as well as the uncertainty as to which injuries, if any, manifest. As will be discussed more fully below, the remedies the Code provides are inadequate to deal with the unique problems mass asbestos tort claims present.

II. Manville's Solution and Its Adoption by the Code

Judge Jon O. Newman of the Second Circuit summarized the conditions that led Manville to file under Chapter 11. Manville was the largest miner and manufacturer of asbestos. During the 1960s to 1970s the products liability suits began mounting against Manville so that by the early 1980s approximately 16,000 claimants had filed 12,500 suits. The suits were coming in at a rate of 425 per month, and studies suggested that a total of 50,000 to 100,000 suits could still be filed. The bankruptcy court noted that "[o]n the basis of these studies and the costs Manville had already experienced in disposing of prior claims, Manville estimated its potential liability at approximately $2 billion." Although Manville was not currently insolvent, it faced interminable litigation and knew its resources would not survive. Chapter 11 provided a viable way to deal with the claims and still continue as a company. During its reorganization, Manville employed a three-part method to effectively deal with the future claims: catego-

35 Tidmarsh & Trangsrud, supra note 1, at 715.
36 Id. ("In complex mass torts, however, trying each case to establish a precise value for each tort claim would take decades, would deprive everyone of a remedy until the last case was tried, and might consume all of the resources of the debtor.").
39 Id.
40 Id.
41 Id.
42 Id.
43 See David L. Buchbinder, Fundamentals of Bankruptcy: A Lawyer's Guide 457–58 (1991) ("The goal of a Chapter 11 proceeding is to obtain confirmation of a Chapter 11 reorganization plan that will satisfy creditors while retaining assets or continuing the debtor's business.").
rizing the future claims more appropriately as "interests," issuing a channeling injunction effectively discharging the interests against the reorganized Manville, and creating a trust that would take care of all the asbestos claims as they arose post-petition.

The first problem the bankruptcy court faced in Manville's reorganization was deciding whether the future claimants really had "claims" at all. The court resolved the problem by characterizing their claims as "interests," which meant that they should be involved in the reorganization process but did not have an actual "claim" as defined under the Code.\(^4\) This definitional problem is significant because only "claims" can be discharged with Chapter 11 reorganization. Although the term "claim" is defined broadly by the Code,\(^5\) the bankruptcy court determined that those who have yet to manifest an injury really only have "interests" in the litigation.\(^6\)

The second and third steps in the process were the creation of the channeling injunction and trust. Because only claims can be discharged, Manville had to find a way to effectively accomplish the same result for the interests to make reorganization worthwhile. The channeling injunction and trust worked in tandem to accomplish this goal. The injunction essentially required all future claims be brought not against Manville, but against a trust established under the plan.\(^7\) The Second Circuit emphasized "the Injunction applies to all health claimants, both present and future, regardless of whether they technically have dischargeable 'claims' under the Code."\(^8\) By ensuring Manville as a going concern, the trust was the cornerstone of the plan and was

\(^4\) Kane, 843 F.2d at 639 ("The Bankruptcy Court . . . reason[ed] that regardless of whether the future claimants technically had 'claims' cognizable in bankruptcy proceedings . . . they were at least 'parties in interest' under section 1109(b) of the Code and were therefore entitled to a voice in the proceedings.").

\(^5\) See 11 U.S.C. § 101(5) (2000) ("[A] 'claim' means—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 . . . .")


Both the Third Circuit in [In re] Amatex Corp., 755 F.2d 1034 (3d Cir. 1985), and the bankruptcy court in [In re] UNR Indus., 46 B.R. 671 (Bankr. N.D. Ill. 1985), held that future claimants are 'parties in interest' who deserve to be heard in the reorganization process regardless of whether they are creditors with dischargeable claims.

\(^7\) Id.

\(^8\) Kane, 843 F.2d at 640 ("The Injunction provides that asbestos health claimants may proceed only against the Trust to satisfy their claims and may not sue Manville, its other operating entities, and certain other specified parties, including Manville's insurers.").
designed to resolve all present and future asbestos claims.\textsuperscript{49} Manville’s three-part solution to the problem of future claimants became the model that was later adopted in the Code and used by many other companies that found themselves in similar predicaments.\textsuperscript{50}

In 1994, amendments to the Code implicitly endorsed Manville’s use of the trust and channeling injunction as mechanisms to deal with the problem of future claimants. The Bankruptcy Reform Act added § 524(g) and (h) as the “Manville Amendments” to the Code to narrowly address the problems associated with asbestos claims in reorganization.\textsuperscript{51} The amendments refer to the future claims as “demands,” although the way the Code defines the term also includes present claims if they were not made during the proceedings.\textsuperscript{52} Thus, the Code avoids the problem that arises in the initial question of whether future claims are really claims at all. The 1994 amendments created special rules regarding “demands” that instruct courts on precisely how to deal with those claimants that possess latent injuries.

The amendments require the debtor’s channeling injunction and trust to meet certain criteria. First, § 524(g)(1)(A) requires notice and a hearing before a court can issue the injunction in connection with the confirmation of the plan.\textsuperscript{53} Second, regarding the demands themselves, the court must determine that the number of future claims the debtor will face without the injunction is “substantial” and that all arise out of the same conduct or events; that the precise number and amount of the claims are indeterminable and temporally dispersed; and that the litigation that would arise from dealing with these claims would “likely threaten” the ability of the debtor to deal equitably with both present and future claimants.\textsuperscript{54} Finally, as part of the proceedings leading to the issuance of the injunction, the court must appoint a representative for those that might assert demands, and the injunction itself must deal fairly and equitably with the funds and benefits that will be provided to the trust.\textsuperscript{55} If all of these requirements are met, those making demands will be barred from ever instituting

\textsuperscript{49} Id.
\textsuperscript{50} Fourteen of the approximately seventy companies that have filed for bankruptcy since Manville have established trusts. Hearing, supra note 2, at 19 (written statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo Sch. of Law of Yeshiva Univ.).
\textsuperscript{51} Dean M. Trafelet et al., Section 524(g) and the Futures Representative, in COMM. ON CONTINUING EDUC., ALI-ABA, ASBESTOS LITIGATION IN THE 21ST CENTURY 53, 53 (2002).
\textsuperscript{53} Id. § 524(g)(1)(A).
\textsuperscript{54} Id. § 524(g)(2)(B)(ii).
\textsuperscript{55} Id. § 524(g)(4)(B).
proceedings against the debtor's successor, and the debtor is indemni-
ified from any future claims.\(^56\) Section 524(h) extends the legitimacy
of such injunctions to those that have previously been issued, refer-
ing to Manville's injunction, provided the legal representative of the
future claimants did not object to the formation of the trust and issu-
ance of the channeling injunction.\(^57\)

III. THE UNCONSTITUTIONALITY OF § 524(g) AND (h)

Many practical and constitutional problems are implicated by the
channeling injunction and trust mechanisms. The strongest argu-
ment against constitutionality arises under the Fifth Amendment's re-
quirement of procedural due process. Due process is an amorphous
concept, taking on different meanings depending on the context.\(^58\)
The fuzzy definitions of due process result from the fact that the Fifth
Amendment does not define the term.\(^59\) However, the heart of due
process seems to be notice of a proceeding and the opportunity to be
heard—to have one's day in court so to speak—before one's property,
or in the context of a criminal case, one's liberty or life, can be af-
ected or taken away.\(^60\) Therefore, due process usually requires that
only those party to a case can be bound by the decision in that case.\(^61\)
There are two exceptions to this rule: class actions and bankruptcy.\(^62\)
However, the constitutionally-guaranteed right to due process must
still be met, and thus the inquiry focuses on the adequacy of notice
and representation for claimants.

Other issues may be problematic as well, either practically or con-
stitutionally. These arise more generally in mass tort litigation and
would equally apply in the discharge of demands during bankruptcy.
For example, an argument could be made that future claimants do

\(^{56}\) Id. § 524(g)(3)(A).

\(^{57}\) Id. § 524(h).

\(^{58}\) TIDMARSH & TRANSGRUD, supra note 7, at 2.

\(^{59}\) U.S. CONST. amend. V (stating generally that "[n]o person shall be ... de-
prived of life, liberty, or property without due process of law").

elementary and fundamental requirement of due process in any proceeding which is
to be accorded finality is notice reasonably calculated ... to apprise interested parties
of the pendency of the action and afford them an opportunity to present their
objections.").

\(^{61}\) Martin v. Wilks, 490 U.S. 755, 759 (1989) ("[T]he general rule [is] that a per-
son cannot be deprived of his legal rights in a proceeding to which he is not a
party."); Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judg-
ment in personam in a litigation in which he is not designated as a party or to which
he has not been made a party by service of process.").

\(^{62}\) Wilks, 490 U.S. at 762 n.2.
not have standing because they do not yet have a case or controversy. The argument ultimately fails by analogizing to the standing recognized for a person afraid of injury who seeks a remedy in the form of an injunction. Likewise, a future claimant has a legitimate claim and must be provided an opportunity to meaningfully participate in plan formation. Also, Jay Tidmarsh and Roger H. Trangsrud list, among other issues, the requirement for adversarial procedure, "the guarantee that the adjudicator will use reason . . . to arrive at judgments," and a "preference for the use of procedures that minimize the sum of litigation costs and error costs." The Seventh Amendment right to a jury trial, the Fifth Amendment's Takings Clause, and substantive due process rights may also be implicated by the discharge of demands. Ralph R. Mabey and Jamie Andra Gavrin satisfactorily argue § 524(g) and (h) is constitutional under the Takings Clause as well under the substantive requirements of due process. However, Mabey and Gavrin's argument on procedural due process is not persuasive, as will be discussed below. And while the Seventh Amendment jury trial right and the issues Tidmarsh and Trangsrud raise are important and interesting arguments, in dealing specifically with demands as opposed to both present and future claimants, the real constitutional problem seems to be with notice and adequate representation (which incorporates their point about the need to follow adversarial procedure). Therefore, this Note will focus on the procedural due process issues.

Because a Chapter 11 filing discharges all debts owed to creditors whether they are party to the proceeding or not, due process requires (1) that the debtor provide reasonable notice to the potential claimants of the bankruptcy and the bar date for filing claims against the debtor's estate and (2) that the claimants participate in the proceedings by voting for the plan of reorganization and having adequate representation. These procedural due process requirements are also the first statutory requirements under § 524(g), as discussed above. At

63 TIDMARSH & TRANGSRUD, supra note 7, at 2-3 (citing Hansberry, 311 U.S. at 40).
64 Id. (citing In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980)).
65 Id. (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).
66 Ralph R. Mabey & Jamie Andra Gavrin, Constitutional Limitations on the Discharge of Future Claims in Bankruptcy, 44 S.C. L. REV. 745, 762-75 (1993) (arguing that future claims are not property under the Takings Clause and that future claims are not fundamental rights that qualify for heightened constitutional protection).
67 See discussion infra Part III.A-B.
69 See supra note 53 and accompanying text.
first glance, the inclusion of these requirements seems to make the 1994 amendments pass muster under the Fifth Amendment. However, the procedural requirements are fundamentally unconstitutional because they fail to protect the rights of demand-holders who cannot receive adequate notice, vote, or otherwise have a meaningful opportunity to participate through a representative. For demand-holders, due process is essential because of the draconian result of reorganization for them in particular: complete discharge of their claims, even though they do not yet know they have claims to make.

A. Notice

Section 524(g) requires the debtor provide "adequate notice" of the event of filing Chapter 11 to everyone who may have a pre-petition claim; creditors must have a fair opportunity to file a claim and provide input in the reorganization process. The notice requirement gives rise to a glaring problem with regard to demand-holders who by definition are unaware of their latent injury. Although demand-holders were exposed to the asbestos pre-petition, the debtor cannot possibly know who all of them might be, nor do the victims themselves know they have an injury. In contrast, notice is fairly easy to give to trade creditors—the debtor knows from whom it has borrowed money, entered a lease with, bought capital from, etc. A debtor has no way to provide adequate notice to those who will make demands post-petition.

The argument made in support of the adequacy of the section’s notice requirement focuses on the fact that "publication notice" (which has been permitted outside the mass tort context), when used in connection with a future claims representative, should be sufficient if there is no feasible notice substitute. Mabey and Gavrin argue that “[t]he procedural process owed to unknown or unidentifiable future claimants does not include actual notice under all circumstances.” Mabey and Gavrin acknowledge due process in respect to future claimants requires more than publication notice, because the “future claims as a group are usually in some general sense known and foreseeable to the debtor.” Thus, they argue a legal representative is

70 Mabey & Gavrin, supra note 66, at 779 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), which allowed publication in a newspaper to serve as notice to unknown trust beneficiaries).

71 Id.

72 Id. at 780.
required, acknowledging that "publication notice to [future claimants] is largely futile." 73

The problem with Mabey and Gavrin's argument is two-fold. First, they focus too little on the fact that notice is inherently insufficient specifically in the context of latent-injury mass tort cases, which is the subject of § 524(g) and (h). Second, they fail to separate out the Code's requirements of both notice and a legal representative. Under the Due Process Clause both requirements must individually be met for a channeling injunction to bind demand-holders. 74 Mabey and Gavrin do not cite any authority for the proposition that a legal representative is adequate to make up for deficiencies in notice. Given the problems discussed below regarding the legal representative, their argument is especially troublesome and ultimately unpersuasive.

The fundamental difference between latent-injury and non-latent-injury mass torts is that in non-latent-injury cases, although the debtor may not know who all the potential claimants are, the victims themselves would know who they are, given they are presently injured, and could respond to a publication notice. In latent-injury cases the victims have no reason to pay attention to such notices—they may not know that they have been exposed to asbestos, and, if they do, they currently think they were not injured by it. Even by using scientific studies, a debtor can do little to determine who the future claimants might be. Although epidemiologists may be able to predict within a particular group that a certain number of people will contract a disease, it is impossible to identify who in the group will be the ones to contract the disease. 75 Even if a debtor can identify those who will most likely have asbestos-related injuries, a scientific study would not be able to reveal which particular disease of many an individual might later contract or if an individual will ever show symptoms. 76 Thus, the notice requirement does little to further the policy underlying the Due Process Clause—ensuring the opportunity to be heard before one's rights are impaired by a legal proceeding.

73 Id. at 781.
74 See supra notes 60–62 and accompanying text.

Epidemiologists often are able to predict with reasonable scientific certainty that some number of individuals within a specified group will contract a disease because of a previous exposure to a product or substance. We do not know with certainty which individuals will contract the disease and how many of those individuals will sue when their injuries become manifest.

Id.
76 Id.
B. Participation in the Process of Reorganization

The Due Process Clause normally mandates that only those made party to a judicial proceeding can be bound by the outcome. But as explained above, due process does allow persons to be bound when notice and a meaningful opportunity to participate are provided. Demand-holders are unable to meaningfully participate in reorganization through the process established by § 524(g) and therefore they cannot constitutionally be bound to a channeling injunction and trust created by a plan.

1. Voting on the Plan

Approving a plan normally requires the vote of a majority in number and two-thirds of the value of the claims of each class of impaired claimants. Under §§ 1124 and 524(g), present claimants vote on and approve the plan under similar rules; however, the Code does not contain corresponding voting provisions for demand-holders because it is impossible to know who they are. The difficulty with the voting rules is that the demand-holders are in the end disadvantaged as compared to the present claimants because (1) the demand-holders are bound to a plan they did not vote on and (2) the present claimants have more of an opportunity to ensure their interests are protected under the plan. This inequity is inherent in the nature of demands and could not be remedied by the Code.

Involving a class of demand-holders in the voting process is problematic for two reasons. First, in latent-injury mass tort cases, knowing or even estimating the size of the class of demand-holders is difficult. The debtor simply does not know with certainty how many people have been exposed to its asbestos. Thus, for a judge to determine whether a majority of an indeterminate number of those in the demand class have approved the proposed plan is inherently impossible. Second, it is similarly impossible for a judge to determine whether those with two-thirds of the dollar amounts of the demands have approved the plan. If the court does not know who the victim is, the court cannot know the value of each victim’s demand. Even if the court did know the identity of all the victims, the nature of future claimants is that their injuries, and therefore the value of their injuries, are unknown at the time of voting.

The procedures applied by the courts to estimate the value of present claims are inapplicable to demand-holders. To solve the prac-

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77 See discussion supra Part III.A.
tical approval problems mentioned above that are also applicable to present claimants, courts arbitrarily assign a dollar value to each claim.79 Courts then apply the majority and two-thirds rules. The courts refrain from deciding whether each person has a valid claim and determining the value of each claim on an individual basis. This process has generally not been challenged because courts believe the outcome would be the same if "really good" notice and an accurate examination into the validity of the claimants were given. For example, the Second Circuit noted in Kane v. Johns-Manville Corp.80 that because "95.8% of those Class-4 [present claimant] members who voted approved the Plan, the result would not have been different unless more than 90% of those who voted in favor had invalid claims, an improbable circumstance."81 Thus, if one were a betting person, one would put money on the future claimants approving the plan if it were possible. The pressure on courts to approve a reorganization plan seems to encourage them to be lenient in applying the voting rules.

Leaving aside the question of whether these procedures are prudent for present claimants, the fundamental problem is that this altered voting process, even if wise, could never work for future claimants. An arbitrary assignment of one dollar to each demand-holder is meaningless because the number of demand-holders is unknown. And even if the number were known, the demand-holders simply do not exist and the court cannot know whether they would use their one dollar value to vote for or against the plan. Thus, the fundamental due process problem is that those with latent injuries do not have the same meaningful opportunity to participate in the plan approval process as do all the other creditors, and yet the demand-holders are ultimately bound by the plan, resulting in the discharge of their claims. The victims are precluded from ever bringing a suit against the debtor seeking compensation for their injuries.

2. The Future Claims Representative

The second part of the "opportunity to be heard and participate" requirement of procedural due process is the right to participate in the proceedings or, if impossible, such as in the context of a class action or bankruptcy, to have a zealous advocate to represent one's

79 Stuart M. Bernstein, Mass Torts and Bankruptcy, Litig., Fall 1997, at 5, 66 (discussing the problems inherent with resolving future claims during reorganization, including the difficulty in estimating the value of claims).
80 843 F.2d 636 (2d Cir. 1988).
81 Id. at 647.
interests as a minimal protection during the reorganization process. As discussed above, Manville recognized that future claimants did not have "claims" per se, but they did have interests that required the appointment of a "future claims representative" (or "legal representative") to negotiate on their behalf during the creation of the plan. Accordingly, the bankruptcy judge empowered the legal representative "‘to exercise the powers and perform the duties of a Committee under Section 1103 of the Bankruptcy Code subject to the reduction or enlargement of such powers and duties by order of this court.” Thus, the legal representative could meet with the trustee or debtor about the case, investigate the financial situation of the debtor and any other business matters relevant to formulating a plan, actively participate in the creation of the plan, request the appointment of a trustee, and perform any other such services as required by the interests represented. Theoretically, the legal representative was endowed with sufficient power to vigorously represent the future claimants' interests.

Following Manville's lead, § 524(g) requires not only notice but that the demand-holders have "adequate" representation during the reorganization process. Although promising in theory, § 524(g) cannot provide the constitutionally-mandated opportunity to meaningfully participate in the proceedings. A legal representative is by nature unable to provide the adequate protection that parties in interest require in an adversarial system. The qualitative examples seen in Manville during the negotiation of the plan and, most troublesome, after the plan was implemented, together with normative arguments, illustrate that § 524(g) does not provide adequate procedural safeguards through the representative vehicle.

To be constitutional, the Code would have to more specifically detail the "adequacy of representation" requirement stated in Hansberry v. Lee, which dealt with the representation of classes in class action law suits. Hansberry held that the Due Process Clause does not allow an individual member of a class to be bound to the decision of

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83 Id. at 942 (quoting an unpublished order by Judge Lifland appointing Leon Silverman as a representative for future claimants).
85 Id. § 1103(c)(2).
86 Id. § 1103(c)(3).
87 Id. § 1103(c)(4).
88 Id. § 1103(c)(5).
89 311 U.S. 32 (1940).
the case unless his or her interests are adequately represented.90 The Court carved out an exception and stated that “members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present.”91 However, the exception is limited to situations where the representative has the same or “substantially the same” interests as those he represents.92 The future claims representative in Manville was not exposed to asbestos and had no interest in ensuring that the future claimants received the highest damages award possible, as will be discussed more fully below. Thus, applying the Hansberry class action representative “adequate representation” test to the context of the future claimants, § 524(g) does not protect demand-holders’ due process rights.

Furthermore, even if the Hansberry hurdle could be overcome, it is not clear that all the future claimants can be lumped into one single class of victims for which one legal representative is sufficient. Amchem Products, Inc. v. Windsor, which also involved a class action and is relevant by analogy, requires that the members of the class have predominately the same interests.93 Thus, mesothelioma victims, whose disease is fatal, should not have the same representative as asbestosis victims, who are usually medically unimpaired. Although this is a specific requirement of Rule 2394 for class actions, the members of a class for purposes of reorganization should also have predominately the same interests. The purpose behind Rule 23 is to recognize the importance of each individual’s interest in controlling and directing his or her own litigation and in not being bound by the litigation decisions of those with different interests.95 The demand-holders are (presumably) a very diverse group—they will contract diseases of varying degrees of seriousness (or contract no diseases at all), require different amounts in damages as compensation, and contract their diseases at different times (thus, some may have no interest in a highly-funded trust if their injuries will manifest early on). Therefore, it is not clear that all the future claimants can be fairly represented as one bulging group.

90 Id. at 41-42.
91 Id. at 42-43.
92 Id. at 45.
94 FED. R. CIV. P. 23(a) (requiring representatives to have “claims or defenses . . . typical of the claims or defenses of the class . . . and [to] fairly and adequately protect the interests of the class”).
95 Amchem, 521 U.S. at 616.
The empirical evidence in Manville demonstrates the legal representative’s inadequacy in advocating the future claimants’ interests. In Manville, the future claims representative’s job eroded from being a zealous advocate to merely being a “go-between” for the debtor and the other creditors during negotiations about the plan. As Thomas A. Smith describes, the legal representative “adopted the role of shuttle diplomat, selling his proposed plan to the various parties separately. He apparently saw his role not as the intransigent defender of future claimants, but as the honest broker among constituencies.”\(^\text{96}\) The fundamental defect in the appointment of the legal representative is that he or she has no identifiable client to answer to or advocate for; no one meaningfully monitors his or her performance.\(^\text{97}\) In fact, the present claimants in Manville were concerned that the legal representative was selling them out to the equity holders rather than to the future claimants.\(^\text{98}\) In an adversarial system, how can one confidently assert that the future claimants had an opportunity to meaningfully participate through the vehicle of a legal representative who was not even considered a threat by the other parties?

Predictably, the resulting Manville Trust did not adequately provide for the needs of the future claimants. The most troubling evidence of the inadequacy of the representative is the fact that the Manville Trust was grossly underfunded and ran out of money only two years after the reorganization. Smith points out that “[t]he ultimate result . . . was a division of the debtor’s value between present claimants and equity holders that left future claimants almost entirely unprovided for, as the protections of future claimants in the plan proved completely ineffective.”\(^\text{99}\) The Manville Trust settled claims as they came in for their full amount plus a thirty percent contingency fee. The result was a truly inequitable situation in which the present claimants and those future claimants who discovered their injuries early were fully compensated while those who did not manifest injuries until much later did not receive any money.

The legal representative did not ensure adequate estimates were made about how many future claims might be filed or the extent of the damages required to compensate for the injuries. Judge Weinstein noted: “[W]ithin its first two years of operation the Trust faced almost 50% more claims than the highest projection made


\(^{97}\) Id.

\(^{98}\) Id.

\(^{99}\) Id. at 391.
at the time of confirmation for the total number of claims to be filed during the entire life of the Trust." The average claim was $42,128, much higher than the estimated amount of $25,000 per claim. Judge Weinstein appointed a special master to investigate the matter, and the special master found the Trust's assets were worth "between $2.1 and $2.7 billion" but that the claims were estimated to be about $6.5 billion. In the end, eight years after the confirmation of the plan, Judge Weinstein affirmed the channeling injunction and approved a settlement that had the Trust pay victims ten percent of a settlement value established by standardized "scheduled values" ranging from $12,000 to $200,000 depending on the claimant's disease. The original estimates were probably inaccurate because "[t]he more complex the methodology of estimation, the more opportunities interested parties have to influence the outcome." Those with immediate injuries probably did what they could to ensure more money was reserved to pay their claims. The influences of the present claimants and the debtor were probably easy to disguise in the complex estimations, passing right under the eyes of the legal representative who had no reason to be particularly diligent. Today, the Manville Trust is paying only five cents for every dollar a claim deserves. The estimates were so inaccurate and left the claims so far underpaid that one must conclude the future claims representative was far from an "adequate" zealous advocate. Although the substantive outcome in Manville does not prove that the procedure was unconstitutional, the outcome does indicate that perhaps there was a fundamental problem with the procedures. My argument is that the underlying problems are constitutional in nature.

The future claims representative's inadequacy is not a problem explained away as unique to Manville's reorganization; normative arguments also prove § 524(g) is inherently flawed because a future claims representative, by nature and situation, can never be "adequate." None of the other parties involved in reorganization have an incentive to support future claimants, including the court, which is

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101 *Id.*


104 Smith, *supra* note 96, at 384.

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the only monitor of the representative’s behavior. The court’s incentive is “less to ensure that future claimants receive the maximum possible or even a fair share, than it is to ensure that the parties reach some agreement.” The court is probably more interested in clearing its docket and may appoint an “accommodating” legal representative. In practice, after notice and a hearing, the court appoints the legal representative recommended by the trustee, and the court controls the legal representative’s duties. The other parties in the case are not going to support the legal representative or the future claimants against the interests of the court. The present claimants, other creditors, and equity holders all have an interest in undervaluing future claims; the less future claimants get, the more money the other parties get. Moreover, the legal representative is paid out of the estate and his fees must be approved by the court; thus, there is less economic incentive to push for more money to go into the settlement fund than there would be if the representative were paid on a contingent fee basis. There is also a psychological factor involved in that the people who have present claims are visible and many (although not all) have tangible injuries; it is easy to get all the parties to focus on the present claimants, rather than the future claimants.

All of these normative factors are not unique to Manville, they are involved in any reorganization involving asbestos demands. Together with the added evidence of the outcome of the Manville Trust, one must conclude § 524(g) is inherently flawed and unconstitutional be-

106 Smith, supra note 96, at 385.
107 Id.
108 In re UNR Indus., Inc., 71 B.R. 467, 477 (Bankr. N.D. Ill. 1987) (explaining that the court has “final decision-making authority” over the expansion of the legal representative’s duties, just as it has authority over the representative’s original appointment).
109 Smith, supra note 96, at 385, 387 (specifically noting that strategically, “[t]o induce equity holders to consent to a plan, present claimants can offer to agree on a reorganization plan that divides the value of the firm between present claimants and equity holders, but leaves little or nothing for future claimants”).
110 Id. at 385.
111 Id. at 383–84.

This phenomenon is called the “vividness effect.” The vividness effect makes it difficult for the legal representative of abstract future claimants to persuade the court to leave unsatisfied the needs of present claimants so that future claimants may be treated equally. This psychological factor also disposes a bankruptcy court to underestimate the number and size of future claims so that the bankruptcy plan can award present claimants something closer to adequate compensation.

Id.
cause it cannot provide a meaningful way for demand-holders to be represented and participate in the creation of the plan.

C. Pre-Packaged Reorganization Plans

A more recent phenomenon in bankruptcies resulting from asbestos litigation is the "pre-packaged" plan of reorganization using the channeling injunction and trust mechanisms under § 524(g) and (h).\textsuperscript{112} The constitutional difficulties with these plans are the same as for standard plans of reorganization. But individual treatment of the pre-packaged plans is warranted due to their recent outgrowth and the particularly blatant lack of representation for future claimants during their formation. Procedural due process is denied when future claimants are not given a meaningful opportunity to participate.

Professor Lester Brickman submitted a paper to the House Judiciary Committee which defined such "pre-packs" as plans "negotiated between the attorneys for the asbestos claimants and the debtor-to-be and voted on before the company files its bankruptcy petition."\textsuperscript{113} Pre-packs are intended to "efficiently provide fair compensation . . . in a process which minimizes litigation and transaction costs, expedites payments to claimants and preserves to the maximum extent possible, the debtor's business and goodwill."\textsuperscript{114} The problem is that the future claimants are completely left out of the negotiation process and plans fall very short of providing fair compensation.

As Brickman describes, most of the negotiations for a pre-packaged plan take place in secret among only selected claimants.\textsuperscript{115} A futures representative is not necessarily involved; only those lawyers that know about the negotiations participate.\textsuperscript{116} The problem with

\textsuperscript{112} Companies that have filed pre-packaged plans include "Shook & Fletcher Insulation Co., J.J. Thorpe Company and Combustion Engineering, Inc., . . . ACandS, Western Asbestos Co., Mid-Valley (involving certain Halliburton subsidiaries including DII Industries, LLC, formerly Dresser Industries, and Kellogg, Brown and Root), Utex and the Congoleum Corporation." \textit{Hearing, supra} note 2, at 28 (written statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo Sch. of Law of Yeshiva Univ.).

\textsuperscript{113} \textit{Id.} at 27 (written statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo Sch. of Law of Yeshiva Univ.). Professor Brickman provides a description of such a pre-packaged plan. \textit{Id.} at 29–31 (written statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo Sch. of Law of Yeshiva Univ.).

\textsuperscript{114} \textit{Id.} at 28 (written statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo Sch. of Law of Yeshiva Univ.).

\textsuperscript{115} \textit{Id.} at 32 (written statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo Sch. of Law of Yeshiva Univ.).

\textsuperscript{116} \textit{Id.} (written statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo Sch. of Law of Yeshiva Univ.).
disparate treatment of claimants in pre-packaged plans has not been entirely overlooked. Chief Judge Randall J. Newsome in a 2004 opinion refused to confirm the ACandS pre-packaged plan because of fundamental unfairness in the plan's disparate treatment of similar claimants, i.e., present and future claimants with the same disease who are differentiated only temporally by when their injuries manifest. Judge Newsome noted that ACandS's insurance company was unwilling to provide further coverage unless a pre-packaged plan was created and a § 524 channeling injunction issued. Negotiations were held between the insurance company (although it eventually dropped out), ACandS, and the “prepetition asbestos plaintiffs committee,” which was composed only of asbestos plaintiffs’ attorneys. Although a futures representative was not involved in these negotiations, an attorney later representing the future claimants stated that the settlement reached was fair. Under the settlement, the future claimants were to receive fifty percent of the insurance proceeds recovered from the insurer, which had already stated its refusal to pay.

Judge Newsome did not agree that the treatment of the different categories of claimants was fair. Judge Newsome found that the pre-packaged plan did not meet the requirement under § 524(g), stating that the trust must “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.” The plan did not ensure such equal treatment and thus “discriminate[d] between present and future claims.”

The plan also violated the good faith requirement under § 1129(a)(3), which has been interpreted to require that the plan be “proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected ... with the most important feature being ... the “fundamental fairness” of the plan.”

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118 Id. at 38–39.
119 Id. at 39.
120 Id. at 41 (noting that the futures representative “vouch[ed] for ... [the settlement's] fairness”). The futures representative is not listed among the attorneys said to be involved in the negotiations. Id. at 39.
121 Id. at 39–40.
122 As the Court stated, “[n]otably, members of the prepetition committee appear prominently in all of the secured categories,” which were to receive the bulk of the payments. Id. at 40.
124 Id.
125 Id. at 43 (quoting In re Coram Healthcare Corp., 271 B.R. 228, 234 (Bankr. D. Del. 2001)).
Newsome concluded that "it is fundamentally unfair that one claimant with non-symptomatic pleural plaques will be paid in full, while someone with mesothelioma runs the substantial risk of receiving nothing. Both should be compensated based on the nature of their injuries, not based on the influence and cunning of their lawyers." Judge Newsome should have gone one step further and held that pre-packaged plans using § 524(g) and (h) are not only fundamentally unfair in their unequal treatment of claimants but also unconstitutional under the Due Process Clause.

The Third Circuit in a 2004 decision did recognize the due process problems involved in pre-packaged plans. In In re Combustion Engineering, Inc., Chief Judge Anthony J. Scirica, like Judge Newsome, focused on the fundamental unfairness of the plan but also noted that the disparate treatment between the present and future claimants implicated due process. Chief Judge Scirica stated: "In the resolution of future asbestos liability, under bankruptcy or otherwise, future claimants must be adequately represented throughout the process." Although the opinion did not flesh out the argument sufficiently, Chief Judge Scirica did state that the due process problem was created by the lack of representation and adequate funding of the proposed trust for future claimants.

It is inherently impossible to fully correct corruptions like those exhibited in the ACandS pre-packaged plan, which are evidently run-of-the-mill. Just as in standard bankruptcy plans, a futures representative is unable to adequately represent clients that she will never meet and with whom she does not share the same interests. Also, future claimants have diverse interests that require more than one representative. The futures representative, whether in a pre-pack-
aged plan or a standard plan of reorganization, is unable to protect future claimants' due process rights.

IV. DUE PROCESS FOR THE DEBTOR

One important consideration remains. Thus far the focus has been on the due process owed to the individual demand-holders. However, one should also consider the due process rights of the debtor during the reorganization process. Griffin B. Bell argues on behalf of the debtor in his 2002 article for the National Legal Center for the Public Interest. Ultimately Bell concludes the bankruptcy courts should "not displace the tort system as the primary method for resolving asbestos cases," but he concedes that at present there is not another available method for companies to deal with mass torts.

Bell argues the "most significant casualty of the asbestos litigation crisis is fairness itself." The problem is that plaintiffs' attorneys have aggregated thousands of asbestos claims into large unwieldy masses, making it impossible for companies to adequately defend against their claims by sorting out the sick claimants from those who never manifest an injury. An essential part of due process for defendants is the full and fair opportunity to respond to the claims asserted against them. The gains in efficiency and ease of disposition of claims are not advantages to be valued over due process rights. Preparing an argument requires the chance for discovery and the time "to obtain information about the other side's claims and defenses." During reorganization that opportunity is not given because, as previously explained, there simply is not enough time for the judge to make a valuation as to each claimant; even if there were time, such a valuation would be impossible for demands that have yet to be brought. Although a scientist may be able to estimate how many people will be injured by asbestos in a given population, significant questions of causation remain.

In the aggregate, the asbestos claims may force a defendant to settle for more than it would otherwise be willing to. Defendants will

134 Bell, supra note 8.
135 Id. at 4.
136 Id. at 8.
137 Id. at 8–9.
138 See id. at 16 ("The axiom that every litigant has a right to prepare his or her case adequately seems so basic as to not require any explanation whatsoever.").
139 See id. ("Unfortunately, in many asbestos cases, basic due process rights have been minimized in the name of resolving cases and clearing court dockets.").
140 Id. at 17.
141 Willging, supra note 75, at 338–39.
want to just get rid of the claims. Bell argues lawyers go so far as to advertise for more clients and then use “mass screenings” to determine if the clients have viable claims.\textsuperscript{142} The RAND Institute cites several studies that “have found fractions of unimpaired claimants ranging from two-thirds to up to ninety percent of all current claimants.”\textsuperscript{143} With future claims the problem is multiplied because there is no way to determine if those believed to have been exposed will ever have problems. The combination of inadequate opportunity to research each claim and the tactics of plaintiffs’ attorneys persuades companies to dump money into a trust and wash their hands of the situation.

Bell proposes the company’s due process rights can be adequately protected by appointing a neutral trustee to analyze each claim made against the trust;\textsuperscript{144} however, this protective measure does not seem adequate given that it comes after the creation of the trust. The amount of money that is to be dedicated to the trust is determined during reorganization, and at that stage there is no method to weed out the frivolous claims from the worthy ones. It is impossible to make an accurate prediction of how many valid future claims will be made. Thus, how can the company really protect itself against the creation of large trusts? The company needs to restrain the size of the trust during the reorganization stage to ensure that the company has sufficient equity to continue as a going concern. To meet the requirements of due process, the opportunity for a full and fair defense would have to come before the plan is adopted.

However, as a practical matter, most companies probably prefer to estimate the number of future claims and create the trust, leaving each individual claim to be examined after reorganization. The company’s only current alternative to the § 524(g) channeling injunction and trust mechanisms is to allow future claims to be brought against the successor corporation. When future asbestos claims become present claims, they become much stronger, making the possibility of a very large individual judgment against the company much higher. The jury, as discussed above, is more sympathetic to a victim sitting in front of it than a vague concept of future claimants. Thus, companies

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{142} Bell, \textit{supra} note 8, at 9.
\item \textsuperscript{143} RAND \textit{REPORT}, \textit{supra} note 9, at 20 (emphasis added) (noting, however, that these studies are contested because they “were commissioned by defendants and because the issue of impairment is central to the asbestos litigation controversy”).
\item \textsuperscript{144} Bell, \textit{supra} note 8, at 39 (“The court and trustees are obligated to develop reliable in-take criteria by which claims are assessed and paid. . . . Bankruptcy courts also have the authority to appoint neutral trustees to manage the trust, an important component of ensuring a fair and just distribution of bankruptcy assets.”).
\end{enumerate}
\end{footnotesize}
will avoid the risk of large jury verdicts by using § 524(g) to absolve all claims, as they have since Manville, and will not point out due process problems.

V. IN DEFENSE OF A "MEDICAL CRITERIA" LEGISLATIVE SOLUTION

The asbestos litigation problem may be solved with a congressional solution that would not only take away the channeling injunction and trust mechanisms in § 524(g) and (h), but also impose more stringent medical standards to pare down the number of baseless claims. Such a legislative solution would alleviate the clog of asbestos claims in the court system while preserving the due process rights of future claimants. When future claimants realize that they have been injured, they will be able to have their day in court. Future claimants would find the representation they currently lack in the solution provided by the Code through Congress, just as all citizens do through any legislation that is passed. A legislative "medical criteria" solution is the most feasible solution to the problem.

The Supreme Court has recognized its inability to solve the asbestos litigation problem and has asked Congress for a legislative solution on several occasions. In Amchem Products, Inc. v. Windsor, Justice Ginsburg lamented the lack of a congressional response despite the urging of the Judicial Conference to pass legislation. Justice Ginsburg repeated this need for asbestos legislation in 2003. Justice Souter echoed Justice Ginsburg's view in his oft-quoted opinion in Ortiz v. Fibreboard Corp. that there is an "elephantine mass of asbestos cases, and our discussion in Amchem will suffice to show how this litigation defies customary judicial administration and calls for national legislation." The Chief Justice also supported the call for a legislative remedy when he stated in his concurrence in Ortiz that the problem

145 521 U.S. 591, 627-28 (1997) (affirming a Third Circuit finding that the named plaintiffs did not operate "under a proper understanding of their representational responsibilities" to future claimants under Rule 23).

146 Id. at 597-99.


148 527 U.S. 815, 821 (1999) (holding "that applicants for contested certification ... [on a Rule 23 limited fund theory] must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members").

149 Id. (emphasis added).
“cries out for a legislative solution.”\textsuperscript{150} As of yet, however, Congress has not come to the aid of the courts.

The failure to legislate a solution is not the result of congressional ambivalence to the asbestos litigation problem. On the contrary, several bills have been introduced over the years, but all have failed to gain the needed support.\textsuperscript{151} Even last year, the 108th Congress discussed asbestos reform. Two dominant legislative proposals have emerged. The first is the “medical standards” approach sponsored by Senator Don Nickles, which is the more simple and workable solution.\textsuperscript{152} The second is the “trust fund” approach sponsored by Senators Orrin Hatch and William Frist.\textsuperscript{153} Neither bill passed last year, but both Democrats and Republicans have expressed a willingness to continue negotiations in future legislative sessions.

Senator Nickles’s bill, or the Asbestos Claims Criteria and Compensation Act, effectively limits the number of claims that can be filed by imposing more stringent medical criteria on potential plaintiffs. The goal of the bill is “[t]o provide for the fair and efficient judicial consideration of personal injury and wrongful death claims arising out of asbestos exposure . . . [for] individuals who suffer harm, now or in the future.”\textsuperscript{154} The bill seeks to achieve this goal by paring down the number of claims that can be made to a more manageable number, thereby negating the need for a company to file for bankruptcy and preserving funds for those who have bona fide injuries, whether they arise now or in the future.

The central feature of the “medical criteria” bill is its focus on the need for a claimant to prove a physical impairment as an essential element to making a claim, so that frivolous lawsuits are weeded out. As stated before, studies suggest that as many as ninety percent of new claims are filed by those who have been exposed to asbestos but are unimpaired.\textsuperscript{155} Each claimant must make “a prima facie showing of

\textsuperscript{150} Id. at 865 (Rehnquist, C.J., concurring) (emphasis added).

\textsuperscript{151} See discussion infra this Part and notes 153–154.


\textsuperscript{153} Fairness in Asbestos Resolution Act of 2004, S. 2290, 108th Cong. Likewise, a similar bill has been sponsored in the House by Representative Mark Steven Kirk. Asbestos Compensation Act of 2003, H.R. 1114, 108th Cong.

\textsuperscript{154} S. 413 (emphasis added). The stated purposes of the bill also recognize protection of the rights of future claimants. Id. § 2(b)(2) (stating that one of the purposes is to “fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become sick in the future”).

\textsuperscript{155} See supra note 143 and accompanying text.
physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor." Without getting too far into medical terminology, such a prima facie showing requires that a qualified physician perform a medical examination that finds (1) a permanent respiratory impairment, (2) a diagnosis of "asbestosis or diffuse pleural thickening," and (3) the asbestosis or diffuse pleural thickening "is a substantial contributing factor" to the physical impairment. Once these criteria are met, the injured individual may bring a claim in court but must file with the original complaint the evidence from the medical evaluation that constitutes the prima facie evidence of impairment. Future claimants would not be able to bring a case until their injury manifests itself, but nor would the future claimants be barred from bringing their claims at a later time. The defendant companies would remain viable profit-making entities if they no longer had to defend against thousands of claims, many of which are baseless and brought by an overzealous plaintiffs' bar.

The bill takes other measures to defend against the usual plaintiffs' bar tactics to get more favorable judgments. First, a court may consolidate into a single trial only the claims of those who consent. Attorneys will not be able to bring in claims for those who have only tenable claims and have expressed no real interest in the case. Second, a case "may only be brought in the State of the plaintiff's domicile or a State in which there occurred exposure to asbestos that is a substantial contributing factor to the physical impairment." This provision eliminates "forum shopping" by the plaintiffs' bar, which

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156 The existence of a "physical impairment" will be determined by standards set forth by the American Medical Association. S. 413 § 4(b)-(c).
157 Id. § 4(b)(1).
158 Id. § 4(b)(2).
159 Id. § 5(c). Requiring such a factual showing with the original complaint at first glance seems to erode the "notice pleading" characteristic of the Federal Rules of Civil Procedure, but the plaintiff is not required to present evidence that would normally be discovered later in the litigation. Rather, the plaintiff is presenting only the evidence that he has in his possession at this early stage—his own health. Thus, the policy behind "notice pleading," allowing the plaintiff to bring a case without having all the necessary facts to prove the case but rather only putting the defendant on notice as to what the claim is, remains intact.
160 See generally Michelle J. White, Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle, 70 U. CIN. L. REV. 1319, 1330–32 (2002) (arguing that the number of asbestos claims continues to grow despite the bankruptcy provisions in large part because asbestos litigation is profitable for the plaintiffs' bar).
161 S. 413 § 5(a).
162 Id. § 5(b)(1). The only exceptions to the venue provisions are for claims based upon cancer or fatal mesothelioma. Id. § 5(b)(2)(A)-(B).
knows which states are more plaintiff-friendly than others.\textsuperscript{163} Third, the bill is self-enforcing in that it allows any party to remove a case to federal court if a state court “refuses or fails to apply” the rules under the bill. Thus, the bill ensures that claimants will receive the promised protections no matter where the case is filed.

There are other advantages to the medical criteria approach. For example, the bill protects future claimants with a statute of limitations, which tolls “until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that the exposed person is physically impaired by an asbestos-related nonmalignant condition.”\textsuperscript{164} Also, the bill protects companies from excessive liability by the “two-disease rule,” which states that a claim “arising out of a nonmalignant condition” is a distinct cause of action only when the same individual makes a claim arising out of asbestos-related cancer.\textsuperscript{165} No damages are allowed for the “fear or risk” of cancer.\textsuperscript{166} Finally, the bill bans settlements for nonmalignant claims that require releasing the defendant from future liability arising from a claim for asbestos-related cancer.\textsuperscript{167}

John W. Ames and Andrew D. Stosberg point out three criticisms against the medical criteria approach, but ultimately these are not persuasive.\textsuperscript{168} One potential argument is the medical criteria is not entirely objective and could be open to fraudulent and coached plaintiffs who feign poor lung capacity in breathing tests.\textsuperscript{169} Any medical examination is subject to this criticism, and such fraud is part of the reason behind this reform. Raising the bar for what must be proven will at the very least lessen the fraud that occurs in asbestos cases. Another criticism is that more litigation will result from arguments about

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\textsuperscript{163} See RAND REPORT, supra note 9, at 6 (stating that five states—Mississippi, New York, West Virginia, Ohio, and Texas—handled sixty-six percent of all asbestos filings between 1998 and 2000).
\textsuperscript{164} S. 413 § 6(a).
\textsuperscript{165} Id. § 6(b).
\textsuperscript{166} Id. The ban against “fear or risk” of cancer eliminates the concern that there will be a new wave of asbestos claims arising out of a recent Supreme Court case that held plaintiffs could seek compensation for fear of contracting cancer in the future. Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 157–59 (2003) (finding for six retired railroad employees who sued under the Federal Employers’ Liability Act, which governs suits against railroads, for “fear of cancer”); see John W. Ames & Andrew D. Stosberg, Toxins Are Us: The Latest of Reform Efforts to Curtail Asbestos Tort Litigation, Am. Bankr. Inst. J., Apr. 2003, at 18, 60.
\textsuperscript{167} S. 413 § 6(c).
\textsuperscript{168} Ames & Stosberg, supra note 166, at 58.
\textsuperscript{169} Id.
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whether plaintiffs have met their prima facie burden.\textsuperscript{170} Ames and Stosberg note that "[t]he evidentiary hearing for such a dispute may be lengthy if it involves the analysis of medical tests, plaintiff's exhaustive medical history and/or convoluted expert testimony from multiple doctors."\textsuperscript{171} Although this criticism may be valid, the costs of filing frivolous claims means that the claims are more likely to be meritorious and such disputes are par for the course in injury cases. The bill's placement of the dispute at the pleading stage means that less of the court's time will be wasted because non-meritorious claims will be dismissed earlier. A third criticism of the "medical criteria" approach to reform is that legitimate victims will be excluded from bringing a case.\textsuperscript{172} The argument in support of this criticism is unclear, but raising the bar for the proof that must be shown to bring a claim will protect legitimate victims by ensuring the court system is not clogged with illegitimate claims.

Ohio has already passed "medical criteria" legislation similar to Nickles's bill. Ohio's reform legislation took effect on September 2, 2004, and the Cuyahoga County Common Pleas Court located in Cleveland has "issued an administrative order requiring asbestos cases filed by individuals showing symptoms of illness from exposure to asbestos to be the first cases heard."\textsuperscript{173} The court also temporarily dismissed claims of those not showing signs of illness but who were exposed to asbestos; the claims can be reinstated if illness later develops.\textsuperscript{174} The court was eager to implement the new legislation because of the severe backlog of cases in the county; there were 41,000 pending cases, 150 company defendants, and seven Ohio companies that have declared bankruptcy to date.\textsuperscript{175} The Ohio law is currently facing a state constitutional challenge to its retroactive provision, which requires current claims to meet the established medical criteria.\textsuperscript{176} But such a provision is necessary to reduce the backlog and fix the prob-

\begin{itemize}
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Ohio Court Moves Truly Sick to Head of Asbestos-Lawsuit Line, \textit{Best's Ins. News}, Sept. 24, 2004, \textit{at} 2004 WL 85984435. The new law requires all pending claims to be evaluated according to the new medical criteria. The evaluations are expected to take four to six months. \textit{Id}. This screening period should result in a net gain in terms of waiting times for verdicts for plaintiffs who are truly sick; currently mass asbestos trials can take more than a decade to complete.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id.
\end{itemize}
lem—Senator Nickles’s bill also applies retroactively.177 Although the medical criteria bill failed to get the needed votes to pass the Senate in 2003, the success of the bill in alleviating backlog in Ohio and the failure of other legislative approaches could persuade dissenters that Senator Nickles’s solution is the best.

The second legislative approach, the creation of a national trust fund, has received more attention, but it is most likely too complex and administratively cumbersome to be effective. The Fairness in Asbestos Resolution Act, or FAIR Act, of 2004178 is sponsored by Senator Hatch, and cosponsored primarily by Senator Frist.179 The FAIR Act would channel all asbestos claims to the Asbestos Injury Claims Resolution Fund,180 which would be overseen by a new administrative agency created within the Department of Labor, the Office of Asbestos Disease Compensation (Office).181 The Office would review claims and distribute compensation from the trust on a no-fault basis182 to those who have been injured by asbestos exposure.183 The trust would be funded by asbestos defendants. Although a company’s fund contributions could not normally be excused by an automatic stay in bankruptcy under the bill, a company could still file for bankruptcy and use the trust and channeling mechanisms of § 524(g) and (h) in some circumstances. Namely, a company that has had asbestos expenditures less than one million dollars, or a company with expenditures over that amount if the order granting confirmation of such a plan is made within nine months of the enactment of the FAIR Act, may file for bankruptcy.184 These loopholes perpetuate the unconstitutional treatment of future claimants.

177 Asbestos Claims Criteria and Compensation Act of 2003, S. 413, 108th Cong. § 4(b)(1) ("No person shall bring or maintain a civil action . . . in the absence of a prima facie showing of physical impairment.") (emphasis added).
178 S. 2290, 108th Cong.
179 The FAIR Act was first introduced in 2003 by Senator Hatch. FAIR Act of 2003, S. 1125, 108th Cong.
180 S. 2290 §§ 221–224.
181 Id. § 101.
182 Id. § 112 ("An asbestos claimant shall not be required to demonstrate that the asbestos-related injury . . . resulted from the negligence or other fault of any other person.").
183 Id. § 101(a)(2).
184 Id. § 202(a)(3) (granting permission for companies with "prior asbestos expenditures less than $1,000,000" to file bankruptcy and use § 524(g) and (h)); Id. § 202(c) (granting the same permission for companies with expenditures over $1,000,000 within nine months of enactment of the FAIR Act if the bankruptcy court determines that confirmation of such a plan is necessary for reorganization, fair treatment of all creditors and the company, and for the "balance of the equities").
Negotiations have been ongoing between Senate Republicans and Democrats to achieve bipartisan agreement regarding the trust fund. A letter from Senate Majority Leader Bill Frist to the former Senate Democratic Leader Tom Daschle illustrates the progress that negotiations have made.\textsuperscript{185} The two party leaders have agreed on a total fund amount of $140 billion.\textsuperscript{186} One obvious question regarding whether the fund will meet its stated purpose of protecting the claims of those who have yet to become sick will be whether $140 billion is a sufficient amount. If the Fund becomes unable to pay claims, the Act's sunset provision provides that the Act will terminate and unresolved claims must seek relief in civil court.\textsuperscript{187} The Congressional Budget Office (CBO) estimates that the total cost for the FAIR Act would be $123 billion.\textsuperscript{188} The AFL-CIO is unhappy with the $140 billion amount, however, because the Senate Judiciary Committee had originally agreed on a $153 billion figure.\textsuperscript{189} Senator Diane Feinstein points out that the original cost approved by the Judiciary Committee was in fact $108 billion with a forty-five billion dollar contingency reserve.\textsuperscript{190} Thus, the estimate by the CBO demonstrates that much of the contingency reserve would be required, and perhaps the viability of the Fund is rightly questioned.

The political parties have been unable to agree on two key points identified by Senator Frist in his letter: (1) how the plan will be started up, and (2) how pending claims will be handled.\textsuperscript{191} The first issue regards how long the Fund will be allowed to start up before claims will revert back to the courts. Former Senator Daschle would like a ninety-day limit for the Fund to be operational and able to pay all


\textsuperscript{186} Frist Letter, supra note 185.

\textsuperscript{187} S. 2290 § 405(f)–(g).


\textsuperscript{191} Frist Letter, supra note 185.
claims, a position favored by plaintiffs. Senator Frist believes this deadline is "unworkable." Ninety days does seem like a short time to get regulations implemented and any bureaucracy running. Taking thousands of claims out of the court system only to have them returned after a ninety-day delay or having plaintiffs delay making claims in court thinking they will be resolved by the Fund would create an administrative mess.

Second, Congress must decide whether to take pending claims out of the court system when the new legislation is passed. Senator Frist proposes preserving only those claims in the system that have "received a jury verdict or a full grant of summary judgment, but the case is not yet final." Former Senator Daschle proposes making more exceptions to the legislation and leaving all claims in trial, mesothelioma claims with trial dates already set, and other claims whose trial dates are set within a sixty-day window before or after the legislation is enacted. Senator Frist argues that making so many exceptions will not solve the problem of unclogging the court system because of the large number of currently pending cases and the long duration of large consolidated asbestos cases.

Senator Frist makes a good point that grandfathering so many current claims in the court system will mean that a significant part of the problem as to which the new legislation is aimed will go unsolved. As Senator Frist points out, "[c]laimants that meet our agreed upon medical criteria would certainly find surer and quicker compensation from the Fund before these trials are resolved—and those that do not meet our agreed upon medical criteria should not be paid at all." Further, allowing an exception for claims with trial dates will allow plaintiffs' attorneys an opportunity to "beat the clock" and file claims to avoid "the less lenient but more just medical criteria" that the new legislation will establish. To address the concern that taking claims that are near resolution after many years in court would be unfair, Senator Frist suggests giving those claimants "a preference in the or-

192 Id.
193 Id.
194 Id.
195 Id.
196 Id. Senator Frist cites cases in Maryland and West Virginia as examples of currently pending mass consolidated cases with thousands of claims that will probably be in trial for years to come, arguably over a decade. Id.
197 Id.
198 Id.
demand in which their claims are considered by the Fund (after exigent claims)."

The Senate Majority Leader concludes his letter by indicating his willingness to continue negotiations if a solution was not reached this past legislative period. A final agreement was in fact not reached, and the asbestos reform bill was not on the agenda for the remainder of the 108th Congress's time. As Senator Frist noted, there are many other problems that would have to be resolved, including "the specific funding terms, funding guarantees, claim values, reversion, FELA, subrogation, and medical screening." Also, special interests have applied pressure on the Senate Majority Leader, and no side seems particularly happy with the negotiations. In addition to the AFL-CIO, the Committee to Protect Mesothelioma Victims, the Asbestos Disease Awareness Organization, and the Asbestos Victims Organization have all jointly stated that the $140 billion figure is inadequate. Further, the American Insurance Association has insisted that insurer contributions to the fund should not exceed forty-six billion dollars, but no agreement has been made regarding insurer allocation. Due to the unresolved issues and the big special interests that have not been satisfied by the progress of negotiations, it is unlikely that the trust fund approach is workable. A medical criteria approach is a more simple solution that is more likely to gain the needed support.

199 Id.
200 Id.
201 Susan Cornwell, Outlook Darkens for Asbestos Reform in U.S. Senate, Sept. 27, 2004 (stating that Senator Frist intended to end legislative work by October 8, 2004, to allow time to campaign and listed "intelligence reform, spending bills, and other bills already at the 'conference' level of negotiations between the Senate and House" as priorities over asbestos reform), at http://www.mesothelioma-asbestos-help.com/9BASBESTOS-22MESO-04/News7.jsp.
202 Frist Letter, supra note 185.
205 Id.
206 Frank Nutter, President of the Reinsurance Association of America, expressed the sentiment that other options besides a trust should be explored at this point. Nutter stated that "[a]fter nearly two years of a serious effort by all parties to achieve asbestos reform through the vehicle of a trust fund, it's probably appropriate that we . . . evaluate all options . . . [including, among others,] legislative medical criteria." Mark A. Hofmann, Doubts Emerge as Asbestos Bill Fails, BUS. INS., May 17, 2004, at 1, 54.
CONCLUSION

Because the procedural due process rights of demand-holders are trampled when their future claims are effectively discharged without the opportunity to "have their day in court," § 524(g) and (h) are unconstitutional. Mabey and Gavrin argue that, even if the due process rights of the future claimants are not protected during reorganization, the due process rights of one group cannot trump the substantive rights of the other creditors and interests. The normative argument is that "[u]nder the tests of practicability and balancing, procedural due process protections may not be permitted to defeat the substantive rights of all other parties or substantially to waste the distributable value of the estate through delay or otherwise."\textsuperscript{207} However, Mabey and Gavrin incorrectly assume that the only mechanisms to accomplish reorganization and simultaneously deal with demand-holders are with channeling injunctions and trusts. The other, and more constitutionally sound, option is to pressure Congress to deal with satisfying demands through a legislative solution, such as requiring claimants to establish a prima facie case by meeting more stringent medical criteria.

The future claimants require some way to deal with their claims. Waiting years and years for their cases to wind their way through the courts, once their injuries manifest, is not a viable option because it denies due process through delay. Observation of the procedures and outcome in Manville's reorganization suggests the solution available in § 524(g) and (h) also violates due process. The Manville future claimants were ultimately awarded ten percent of some arbitrary settlement value because the Trust was so grossly under-funded. This inequity resulted from normative problems embedded in the trust and discharge approach. The notice Manville gave and the appointment of the future claims representative were inadequate to ensure a meaningful opportunity to participate. It was also impossible for Manville to estimate the number of claims and provide sufficient funding for the Trust. The current solutions for the problem of how to deal with future claimants are not sufficient to meet the requirements of due process.

The Due Process Clause requires notice and a chance to be heard. Because they are not yet aware of their injuries, future claimants have no interest in present litigation. But future claimants are real people who will discover they have significant and tangible injuries caused by asbestos exposure. These people will have medical bills

\textsuperscript{207} Mabey & Gavrin, supra note 66, at 783.
and may suffer diminished quality of life or have years taken away from them. The present system under the Code cannot guarantee these future claimants their day in court or adequate representation in currently pending cases. Section 524(g) and (h), which requires notice and a legal representative, inherently cannot meet the requirements of the Due Process Clause in regards to future claimants and is therefore unconstitutional. The most simple and viable solution is to devise a system for weeding out the baseless asbestos claims currently clogging the court system. With no remedy available in the Code and the courts flooded with cases, the asbestos litigation crisis will remain unsolved until Congress comes to an agreement and provides a legislative answer.