

**THE CASE FOR BROAD ACCESS TO
11 U.S.C. § 524(g) IN LIGHT OF THE THIRD
CIRCUIT’S ONGOING BUSINESS
REQUIREMENT DICTA IN
*COMBUSTION ENGINEERING***

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ABSTRACT

11 U.S.C. § 524(g) allows a company to resolve its asbestos liabilities by channeling present and future claims to a trust funded by the debtor and other appropriate parties. The Third Circuit, in recent dicta, raised a concern over whether this portion of the Chapter 11 Bankruptcy Code might require that a reorganizing debtor retain a substantial ongoing business post-reorganization.¹

This paper argues that there has not been and should not be an ongoing business requirement for two reasons. First, the absence of such a requirement broadens the availability of relief and maximizes creditor recovery in a manner consistent with the Bankruptcy Code. Second, the absence of such a requirement provides a greater sense of clarity and certainty concerning the availability of § 524(g) to companies facing asbestos liability.

I.
INTRODUCTION

In early 2003, Combustion Engineering, Inc. (“Combustion Engineering”), a defendant in a multitude of asbestos lawsuits, filed for protection under Chapter 11 of the Bankruptcy Code. Combustion

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1. *In re Combustion Eng’g, Inc.*, 391 F.3d 190 (3d Cir. 2004).

tion Engineering filed a “prepackaged”² Plan of Reorganization invoking § 524(g), a specialized provision of the Bankruptcy Code designed specifically to assist the smooth reorganization of corporate entities swamped by massive asbestos liability. The plan called for the channeling of all of Combustion Engineering’s asbestos liabilities to a trust created under the authority of § 524(g), which would be funded from various sources, including assets of Combustion Engineering, contributions from Combustion Engineering’s parent companies, and the eventual proceeds of litigation against Combustion Engineering’s insurers. After a fiercely contested confirmation hearing, confirmation of the plan was recommended by the Bankruptcy Court and approved by the District Court.³

In December 2004, the United States Court of Appeals for the Third Circuit handed down a decision upon consolidated appeals taken by several groups of liability insurers that had issued policies to Combustion Engineering and a group of asbestos claimants who felt they had been treated unfavorably under the plan.⁴ The order confirming the plan was reversed on several grounds not germane to the discussion in this article, and the case sent back to the bankruptcy court for further proceedings. In dicta, the Third Circuit raised, but declined to fully address, a contention by certain insurers who had opposed the plan and had appealed the confirmation order that the issuance of a channeling injunction was impermissible on the ground that the reorganized debtors would not engage in a sufficient level of business activity to avail itself of the protections of § 524(g).⁵ The Third Circuit stated that it was “debatable” whether Combustion Engineering could satisfy § 524(g) on account of the slender nature of its business activities post-reorganization, but that the issue was not properly before the court (as it had

2. “‘Prenegotiated’ bankruptcies have plans of reorganization and disclosure statements filed shortly after the cases themselves file, usually before the committee of unsecured creditors is formed. This contrasts with typical Chapter 11 cases, where a plan and disclosure statement are filed many months (sometimes years) after the cases are filed, and ‘prepackaged bankruptcies’ (or ‘prepacks’), where the plan and disclosure statement are filed, and sufficient favorable votes on the plan are solicited and obtained, before the Chapter 11 case begins, leading to a prompt plan confirmation.” *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 224 n.5 (3d Cir. 2003) (citations omitted).

3. See *In re Combustion Eng’g, Inc.*, 295 B.R. 459, 489–90, 495, 497 (Bankr. D. Del. 2003).

4. *In re Combustion Eng’g, Inc.*, 391 F.3d 190.

5. *Id.* at 248.

been raised by a party that lacked standing) and the court would therefore not render an opinion.⁶

This dicta has raised a specter of doubt over the viability and legitimacy of future reorganizations in situations where a debtor will not, in a conventional sense, have meaningful post-reorganization business activities. This article examines the nature of the problem and offers the conclusion that Courts should continue to allow such reorganizations to proceed, as they inevitably provide the best guarantee of a significant pool of funding for the payment of present and future claims. Part II of this article briefly surveys the origins and scope of the § 524(g) mechanism used in asbestos bankruptcy cases. Part III examines the Third Circuit's decision in *Combustion Engineering* and its pronouncements on the topic at hand. Part IV surveys arguments advanced by appellants in the *Combustion Engineering* case in favor of a restriction on the use of § 524(g) to preclude debtors without substantial business activities from seeking § 524(g) relief. Part V counters these arguments with a more compelling case against such a restriction. Part VI examines two ways in which courts that have considered the issue have side-stepped the question of whether substantial ongoing business is required for § 524(g), either by granting relief under 11 U.S.C. § 105(a) as a supplement to another debtor's reorganization or by viewing the orderly collection of funds and their transfer to the trust for the payment of creditors as sufficient ongoing business in and of itself. Part VII considers whether ensuring that debtors retain a modest amount of post-reorganization business is a sound strategy for satisfying any ongoing business requirement. Finally, part VIII will offer some conclusions on the continued viability of reorganizations under §524(g) in cases where the reorganized debtor will not undertake substantial post-reorganization business activities.

II.

ORIGIN AND OPERATION OF 11 U.S.C. § 524(g)

Underlying the plan of reorganization in *Combustion Engineering* is an innovative provision of the Bankruptcy Code, § 524(g). Reduced to its bare essence, § 524(g):

in effect says that if a plan of reorganization creates a trust, and if in the course of the bankruptcy a fiduciary is appointed to represent the interests of future claimants, and if at least 75% in number of present claimants vote in favor of the plan, then

6. *Id.*

all asbestos claims—present and future—will be channeled in to the post-bankruptcy trust.⁷

Prior to 1994, the Bankruptcy Code contained no explicit statutory authorization for this scheme and injunctions were issued under the bankruptcy courts' general equitable powers.⁸

A. *The Manville Case and the Manville Amendments*

Amid the frenzy of mass tort litigation (and, of course, before Congress enacted § 524(g) in order to authorize the techniques pioneered in the case) the Johns-Manville Corporation decided to file bankruptcy to facilitate dealing with the tort claims that were already mounting against it and the unpredictable number of future claims that would most certainly be brought in the future.⁹ After four years of negotiations, a plan of reorganization emerged that contained the then novel mechanism for handling the company's present and future asbestos liabilities, while at the same time allowing it to emerge from bankruptcy with no future liabilities for asbestos personal injury claims.¹⁰ The plan developed a trust that was funded by "the proceeds from Manville's settlements with its insurers; certain cash, receivables, and stock of the reorganized Manville Corporation; long term notes; and the right to receive up to 20% of Manville's yearly profits for as long as it takes to satisfy all health claims."¹¹ The stated purpose of the trust was "to provide a means of satisfying Manville's ongoing personal injury liability while allowing Manville to maximize its value by continuing as an ongoing concern."¹² In connection with the confirmation of the plan and the trust mechanism, the Bankruptcy Court issued "an injunction channeling all asbestos-related personal injury claims to the [t]rust."¹³ Had the court not issued the channeling injunction and approved the trust mechanism, Manville and its operating entities would have had no protection from future tort lawsuits and its "entire reorganization effort" would have been threatened.¹⁴

7. Elihu Inselbuch, Transcript, *Some Key Issues in Asbestos Bankruptcies*, 44 S. TEX. L. REV. 1037, 1040 (2003).

8. 11 U.S.C. § 105(a) (2000) (allowing bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]").

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

10. *Id.* at 640.

11. *Id.*

12. *Id.*

13. *Id.* at 640–41.

14. *See id.* at 640.

After confirmation of the Johns-Manville plan, a number of other asbestos companies began filing for bankruptcy with the intent of using a similar trust and channeling injunction mechanism.¹⁵ There were intense debates in both the courts and in Congress over whether the bankruptcy courts had the power to issue such a powerful injunction.¹⁶ This uncertainty led to a series of appeals of the Manville injunction and created great concern as to whether Manville was effectively protected from future lawsuits.¹⁷ The result was a depression of the value of the Manville stock and, consequently, the value of the trust's assets.¹⁸ This created a multiplicity of problems for Manville. Not only was the company unable to increase the value of its stock, but it also had trouble financing its operations, which meant that it was unable to maximize its future earnings.¹⁹ As Manville stock and future earnings were principle assets of the trust, Manville's inability to increase market confidence resulted in an inability to increase the value of either of these assets for the trust.²⁰

Congress took steps to stabilize the situation and passed § 524(g) of the Bankruptcy Code. Section 524(g) was modeled after the Manville trust and injunction mechanism and was enacted specifically to confirm that it was entirely within the power of the Bankruptcy Courts to confirm a plan containing such a trust and issue a channeling injunction.²¹ The House stated that § 524(g) was meant to "strengthen the Manville and UNR trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards

15. See H. R. REP. NO. 103-835, § 111 (1994).

16. See Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 610–12, 617 (1996); *Injunctions in Mass Tort Cases in Bankruptcy: Hearing Before the Subcomm. on Econ. and Commercial Law of the H. Comm. on the Judiciary*, 102nd Cong. 7–8 (1992) [hereinafter *Hearing*] (statement of W.T. Stephens, Chairman of the Board & CEO of Manville Corp.).

17. *Id.* at 7–8.

18. *Id.*

19. *Id.*

20. See *id.*

21. See Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 487, 498–99 (1995) (offering a description of the Manville Amendments). The injunction applies to all actions, direct or indirect, aimed at collecting on a present or future claim against a debtor or a related third party subject to the protections of the injunction. See 4 COLLIER ON BANKRUPTCY § 524.07[1] (Alan N. Resnick & Henry J. Somme eds., 15th ed. rev. 2005).

with respect to regard for the rights of claimants.”²² Once a channeling injunction is issued, all present claims and future demands covered by its terms must be directed towards the trust and the debtor (or its successors) will be allowed to reorganize and conduct its business free from present or future asbestos tort liabilities.

B. The Requirements of 11 U.S.C. § 524(g)

§ 524(g) authorizes bankruptcy courts, in tandem with district courts,²³ to issue injunctions barring any actions, claims, or “demands”²⁴ that are to be paid out of a trust established as part of a Chapter 11 reorganization.²⁵ Certain enumerated requirements are imposed upon a plan of reorganization seeking the issuance of an § 524(g) injunction. For such a plan to be confirmed: i) the trust must assume the debtor’s asbestos liabilities;²⁶ ii) the trust

22. 140 CONG. REC. 20, 27,692 (1994), *reprinted in* E-1 COLLIER ON BANKRUPTCY App. Pt. 9(b), § 111 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005).

23. In a case implicating an 11 U.S.C. § 524(g) injunction, the district court must issue or affirm the order confirming a plan for the injunction to be binding. *See* 11 U.S.C. § 524(g)(3)(A) (2000). In the *Combustion Engineering* case, and in other cases decided by the same bankruptcy court, this issuance or affirmance was achieved by a hearing before the bankruptcy court which issued findings of fact and conclusions of law upon matters principally within the province of the bankruptcy court (unless the district court “withdraws the reference” and takes matters into its own hands with respect to an issue, which it may, but need not, do) and a recommendation as to the ultimate confirmation of the Plan and issuance of the channeling injunction, followed by a separate hearing before the District Court which may adopt or reject the recommendation and findings. Other courts have adopted different and more efficient procedures whereby the Bankruptcy Judge and District Judge presiding over a given case will sit in tandem and hear evidence together before rendering a decision either jointly or in swift succession. *See In re J T Thorpe Co.*, 308 B.R. 782, 783 (Bankr. S.D. Tex. 2003) (District Judge Vanessa Gilmore and Bankruptcy Judge Karen Brown); *In re Clemtex*, No. 01-21794 (Bankr. S.D. Tex. 2003) (Chief District Judge Hayden W. Head, Jr., and Bankruptcy Judge Richard Schmidt). *In re Clemtex* involved mass tort claims arising from exposure to silica as opposed to asbestos, and therefore did not implicate 11 U.S.C. § 524(g), but utilized the procedure anyway in a similar remedy crafted under the auspices of 11 U.S.C. § 105(a). *Id.* at 18–19.

24. Demands are potential future claims that have not ripened to the extent necessary to permit a plaintiff to effectively assert a claim in the bankruptcy proceeding, but work to provide a source of future anxiety to the debtor as and when they are transformed into cognizable claims.

25. *See Mabey & Zisser*, *supra* note 21, at 498–99 (providing a lucid description of the requirements for 11 U.S.C. § 524(g) relief).

26. 11 U.S.C. 524(g)(2)(B)(i)(I) (2000) (dictating that the debtor’s liabilities allegedly arising from the presence of, or exposure to, asbestos or asbestos containing products must be assumed by a trust).

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must be funded, in part, by securities of a debtor;²⁷ iii) the trust must use its assets to pay asbestos claims;²⁸ iv) the court must find that the debtor will be subject to substantial future demands post-reorganization;²⁹ v) the court must find that the actual amounts, numbers, and timing of future asbestos demands are indeterminable;³⁰ vi) the court must find that the pursuit of asbestos claims outside of the plan will threaten its purpose;³¹ vii) the injunctive provisions must be set forth in the plan and disclosure statement;³² viii) a super-majority of separately classified asbestos claims must

27. *Id.* § 524(g)(2)(B)(i)(II) (requiring that the trust “be funded in whole or in part by the securities of 1 or more debtors” and by the obligations of the debtors to make future payments, including dividends). Nothing in the Code or its legislative history mandates that the phrase “including dividends” be construed to require the payment of dividends. As will be discussed *infra*, the plain meaning of the phrase in the context presented is that if dividends are paid, they must be available to the trust.

28. *Id.* § 524(g)(2)(B)(i)(IV) (requiring that the trust use its assets to pay asbestos claims and demands).

29. *Id.* § 524(g)(2)(B)(ii)(I) (requiring a finding that, with respect to asbestos-related personal injury claims, the debtor will be subject to substantial future demands for payment arising from its asbestos-related activities for injunctive relief to be proper). As a general rule, this is not a difficult case to make. Usually, based on a debtor’s recent claims history and the burgeoning numbers of asbestos claims asserted prior to bankruptcy, it is irrefutable that the Debtor would be subject to substantial future demands for payment arising from its asbestos-related products and activities. Given the latent nature of asbestos claims and the upward trends in asbestos litigation, there is usually scant reason to believe that asbestos claims will suddenly stop altogether.

30. *Id.* § 524(g)(2)(B)(ii)(II) (requiring a finding that “the actual amounts, numbers, and timing of such future demands cannot be determined”). This is also an easy case to make. Given the history of asbestos litigation, the lengthy latency periods associated with various asbestos diseases, and evolving medical technology, it is difficult to predict with even a modicum of certainty the timing or extent of future demands that may be asserted against the Debtor.

31. *Id.* § 524(g)(2)(B)(ii)(III) (requiring a finding that the “pursuit of asbestos claims outside the procedures prescribed by such plan is likely to threaten the plan’s purpose to deal equitably with asbestos claims and future demands”). Asbestos litigation outside of bankruptcy tends to involve a frantic race to the courthouse with eyes fixed firmly upon a dwindling pot of available funds. The orderly liquidation and payment of asbestos claims pursuant to the 11 U.S.C. § 524(g) trust depends on all claimants being subject to the same rules and procedures, thereby eliminating the possibility of unfair advantage.

32. *Id.* § 524(g)(2)(B)(ii)(IV)(aa) (requiring a finding that the terms of the proposed 11 U.S.C. § 524(g) channeling injunction, “including any provisions barring actions against third parties . . . are set out in such plan and in any disclosure statement”). These precautions ensure that no interested party may be caught unaware by the relief contained in an 11 U.S.C. § 524(g) injunction.

vote to accept the plan;³³ ix) the trust must be set up to operate in a specific way;³⁴ x) a legal representative must be appointed to safeguard the interests of future asbestos claimants;³⁵ and xi) the inclusion in the § 524(g) injunction of protected parties other than the debtor must be fair and equitable in light of trust contributions by the same.³⁶ In *Combustion Engineering*, the bankruptcy court and the district court both found that the Plan employing the trust and channeling mechanism set forth above satisfied the requirements of § 524(g) and confirmed it.³⁷

III.

THIRD CIRCUIT OPINION IN *COMBUSTION ENGINEERING*: IMPLICATIONS FOR 11 U.S.C. § 524(g)

A. *Combustion Engineering's Decline into Bankruptcy*

The story of Combustion Engineering is not an uncommon one in the world of asbestos. From the 1930s to the 1960s, the com-

33. *Id.* § 524(g)(2)(B)(ii)(IV)(bb) (requiring a finding that separately classified asbestos claimants whose claims are to be addressed by the 11 U.S.C. § 524(g) trust voted in favor of the plan by a supermajority; at least 75% of those voting must have voted in favor of the plan). It is common for virtually all claimants voting upon a plan to vote in favor. Indeed, in *Combustion Engineering* itself, only a small, disgruntled subset of claimants did not support confirmation.

34. *Id.* § 524(g)(2)(B)(ii)(V) (requiring a finding that the 11 U.S.C. § 524(g) “trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner”).

35. *Id.* § 524(g)(4)(B)(i) (requiring the appointment, as part of the reorganization proceedings, of a representative of future demands for the purpose of protecting their rights).

36. *Id.* § 524(g)(4)(B)(ii) (requiring a finding that the inclusion of protected parties within the injunction’s ambit is fair and equitable to future demand holders in light of contributions made by those protected parties to the trust to which demand holders will be channeled).

37. See *In re Combustion Eng’g, Inc.*, 295 B.R. 459, 489–90, 495, 497 (Bankr. D. Del. 2003); *In re Combustion Eng’g, Inc.*, No. 03-10495, 8–9 (Bankr. D. Del. 2003) (Supplemental and Amendatory Order Making Additional Findings and Recommending Confirmation of Plan of Reorganization); *In re Combustion Eng’g, Inc.*, No. 03-10495, 1, 9, 11, 14 (Bankr. D. Del. 2003) (Revised Proposed Confirmation Order) (all entered on the docket of the U.S. Bankr. Ct., Del. Case No. 03-10495).

pany manufactured steam boilers containing asbestos insulation.³⁸ Starting in the 1960s, its asbestos-related liability and the obligation to pay claims arising from its use of asbestos increased steadily.³⁹ By 2002, the financial strains caused by the asbestos liabilities had reached breaking point. Combustion Engineering's asbestos obligations began to threaten not only its own financial viability, but the financial viability of its parent company, ABB Limited, as well.⁴⁰ In October of 2002, Combustion Engineering and ABB began to formulate a voluntary Chapter 11 pre-packaged bankruptcy reorganization to protect not only Combustion Engineering and its parents, but also two other ABB affiliates—ABB Lummus Global, Inc. ("Lummus") and Basic, Inc. ("Basic")—of their asbestos liability.⁴¹ The plan of reorganization sought the creation of a trust pursuant to § 524(g) and the issuance of a channeling injunction to protect the debtor and affiliates from future asbestos liability.⁴²

*B. Combustion Engineering's Reorganization Plan Under
11 U.S.C. § 524(g)*

Combustion Engineering's pre-packaged plan involved an injunction in favor of Combustion Engineering, Lummus, and Basic, channeling all asbestos-related claims against the companies to an § 524(g) trust (the "Asbestos Trust") and prohibiting claims other than against the Asbestos Trust.⁴³ The trust was to be funded by contributions from, inter alia, Combustion Engineering, ABB Limited, Lummus, and Basic.⁴⁴ Combustion Engineering's contribution to the Asbestos Trust consisted of an assignment of its rights to proceeds under certain insurance policies and settlement agreements, all of its cash (approximately \$51 million), future excess cash flows, and a \$20 million secured note convertible into 80% of the equity⁴⁵ of the reorganized Combustion Engineering.⁴⁶ The

38. See Disclosure Statement: Solicitation of Votes With Respect to the Prepackaged Plan of Reorganization of Combustion Engineering, Inc., § 2.4(a) (Jan. 19, 2003) [hereinafter Disclosure Statement] (on file with the *NYU Annual Survey of American Law*).

39. *Id.*

40. See *id.* § 3.1(a).

41. See *id.* The Third Circuit ultimately ruled that Basic and Lummus could not be granted § 524(g) protection under Combustion Engineering's reorganization. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 238 (3d Cir. 2004).

42. Disclosure Statement, *supra* note 38, § 3.1(a).

43. See *id.* § 6.7.

44. *Id.* § 8.3.

45. Funding the trust with a note convertible into equity was in support of the requirements of 11 U.S.C. § 524(g) that the trust must be funded "in whole or in

plan contemplated that Combustion Engineering's post-confirmation business operations would be relatively minimal and that it would emerge from its bankruptcy "with no employees, no products or services, and in a cash neutral position."⁴⁷ It would, however, continue to engage in some business activities through its ownership of certain environmentally tainted yet commercially active real estate in Connecticut and related lease activities.⁴⁸ Combustion Engineering had been the target of asbestos lawsuits for many years,⁴⁹ had ceased manufacturing operations, and no longer maintained an active business save for this small real estate holding.⁵⁰

C. Third Circuit Dicta Regarding 11 U.S.C. § 524(g)(2)(B)(i)(II)

Towards the tail-end of a lengthy opinion decided on questions of standing, good faith, and equal treatment of creditors, the Third Circuit entertained a brief discussion, unnecessary to the resolution of the case, concerning a matter of first impression: whether § 524(g)(2)(B)(i)(II) imposed a requirement that a reorganizing debtor have substantial ongoing business post-reorganization. No other court of appeals has addressed this issue, and few other courts of any nature have explicitly considered the applicability of § 524(g)(2)(B)(i)(II) to a reorganization in which the debtor would have no substantial ongoing business in a conventional sense. As will be explored at greater length in succeeding portions of this article, the United States Bankruptcy Court for the Northern District of California had found it problematic for a debtor without substantial post-reorganization business activity to reorganize under § 524(g) but granted identical relief under 11 U.S.C. § 105(a) ancillary to the reorganization of related debtors with conventional post-reorganization business outlooks.⁵¹ Additionally, a determination that § 524(g) did not impose such a requirement was implicit in the confirmation of a number of plans of reorganization that expressly

part by the securities of 1 or more debtors" and that the trust "is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of voting shares of . . . the debtor." 11 U.S.C. §§ 524(g)(2)(B)(i)(II)–(III) (2000).

46. Disclosure Statement, *supra* note 38, § 8.3. Combustion Engineering's parents were to contribute stock, promissory notes, and executed insurance assignment agreements. *Id.*

47. *In re Combustion Eng'g*, 391 F.3d at 248.

48. *Id.*

49. *Id.* at 203.

50. *Id.* at 248.

51. See *infra* Part VI.A., for discussion of *In re W. Asbestos Co.*, 313 B.R. 832 (Bankr. N.D. Cal. 2003).

allowed a reorganized debtor to do nothing more than prosecute insurance coverage actions, liquidate assets, and make transfers to a Section 524(g) trust for the processing and payment of claims.⁵²

In considering the effect of § 524(g)(2)(B)(i)(II) on Combustion Engineering's Plan, the Third Circuit first explained that the statute requires:

that the asbestos personal injury trust must be "funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends." The implication of this requirement is that the reorganized debtor must be a going concern, such that it is able to make future payments into the trust to provide an "evergreen" funding source for future asbestos claimants.⁵³

After reviewing the post-confirmation business activities contemplated by Combustion Engineering's Plan, the court observed that "it is debatable whether Combustion Engineering could satisfy § 524(g)(2)(B)(i)(II)."⁵⁴ The court did not specifically address whether a failure to satisfy that subsection would be, by itself, fatal to confirmation of the Plan. The Third Circuit did indicate that such a failure would be a factor in that determination, but noted that:

[T]here are additional factors here. One is the significant financial contributions to the Asbestos PI Trust by non-debtors ABB Limited, Basic and Lummus. From the claimants' perspective, it may make little economic difference whether the source of future funds comes from the debtor or a third-party, so long as a sufficient and reliable pool of assets remains available to pay their claims.

Counterposed against this is the fact that the Asbestos PI Trust is a closed fund, raising a possible concern should it hold insufficient funds to pay all allowed claims against it.⁵⁵

This abridged discussion was the extent of the Third Circuit's commentary upon the effect of § 524(g)(2)(B)(i)(II) on Combustion Engineering's Plan. The only participants to raise this issue before the courts were the insurers. However, because the insurers lacked standing, the issue was not properly before the court and,

52. See *infra* Part VI.B., for discussion of three such cases.

53. In re *Combustion Eng'g*, 391 F.3d at 248.

54. *Id.*

55. *Id.* at 248 n.70.

therefore, moot.⁵⁶ The confirmation of the plan was ultimately overturned on other grounds.⁵⁷

On this particular issue, the *Combustion Engineering* opinion is defined more by what it does not state than by what it does. The Third Circuit did not state whether or not the extent of the company's post-confirmation business activity constituted substantial ongoing business activities, making Combustion Engineering a going concern. Nor did the Court state whether a failure by Combustion Engineering to conduct substantial ongoing business activities post-confirmation would prevent it from receiving the injunctive relief contemplated by § 524(g). Indeed, the Third Circuit did not even venture to state, without equivocation, whether § 524(g)(2)(B)(i)(II) requires that a reorganized debtor be a going concern to receive injunctive relief under § 524(g).

Thus, the Third Circuit's opinion in *Combustion Engineering* raises more questions than it provides answers. The remainder of this article discusses these questions, examining the arguments for and against restricting the scope of § 524(g) to those debtors who will emerge from bankruptcy with a substantial ongoing business in a conventional sense, and concludes that courts should continue to allow such reorganizations, thereby broadening the availability of relief that serves to maximize creditor recovery in a manner consistent with the general purpose of the Bankruptcy Code. The better view of the law is that the Bankruptcy Code imposes no explicit ongoing business requirement upon a debtor seeking to reorganize under § 524(g). To the extent that courts have perceived the existence of such a requirement, they have developed several doctrinal constructs to allow its satisfaction by a debtor with no substantial conventional ongoing business. Henceforth, courts should hold that no substantial ongoing business requirement exists, and widen the relief available under § 524(g). This approach offers a greater sense of clarity and certainty than a strict ongoing business requirement.

56. *Id.* at 248.

57. *Id.* at 238, 242, 245. The Third Circuit overruled the confirmation of the plan on the grounds that it impermissibly included Basic and Lummus in the coverage of the channeling injunction and remanded for further findings on the equality of treatment of asbestos claims in light of the creation of "stub claims" (claimants who received a pre-petition settlement from another trust were left a small claim unpaid to enable them to vote on the plan of reorganization). *Id.*

IV.
ARGUMENTS FOR REQUIRING SUBSTANTIAL
ONGOING BUSINESS ACTIVITIES UNDER
11 U.S.C. § 524(g)

It is not uncommon for a company with crippling asbestos liabilities, but lacking the financial wherewithal to reorganize and emerge from bankruptcy as a viable going concern, to seek to use § 524(g) to make provision for asbestos claimants by attracting contributions from parents, affiliates, and insurers with the promise of § 524(g) protection.⁵⁸ In so doing, the company may bring an end to its asbestos liabilities and protect its parent, while retaining, with the reorganized debtor now owned by the trust, the potential recoveries under its insurance policies. This combination can provide its creditors a larger recovery than they would have received had the debtor liquidated. This effort can be met with opposition from participants in the bankruptcy case—almost invariably including a debtor’s insurers—who assert, among other claims, that a reorganized debtor must maintain substantial ongoing business activities to obtain the injunctive relief provided under § 524(g). These parties have advocated three principal arguments in support of their position.⁵⁹

A. No Discharge Under 11 U.S.C. § 1141(d)(3)? No Injunctive Relief Under 11 U.S.C. § 524(g)!

The appellants in *In re Combustion Engineering* maintained that a reorganized debtor not continuing ongoing business activities is not entitled to a discharge under § 1141(d)(3), and extrapolated that such a reorganized debtor is likewise not entitled to § 524(g) injunctive relief.⁶⁰

This argument first proposes that a reorganized corporate debtor, which has liquidated its estate and will engage in no post-confirmation business, does not receive a discharge under 11 U.S.C. § 1141(d)(3).⁶¹ A discharge effectively wipes the slate clean, and allows a debtor who has undergone the rigors of the bankruptcy process to emerge, cleansed of most debts. The 11 U.S.C. § 1141(d)(3) requirement of engaging in business ensures that this

58. See *infra* Part VI.A.

59. Brief of Appellants First State Insurance Co. and Hartford Accident and Indemnity Co. at 30-35, *In re Combustion Eng'g*, 391 F.3d 190 (3d Cir. 2004) (Nos. 09-3392, 03-3414, 03-3415, 03-3425, 03-3436, 03-3437, 03-3445, 03-3446, 03-3450, 03-3451, 03-3452, 03-3558, 03-3468, 03-3492) [hereinafter Brief of Appellants].

60. See *id.* at 32-33.

61. 11 U.S.C. § 1141(d)(3) (2000).

relief is not available to a corporate debtor that will not emerge to conduct any business post-reorganization, and that has taken advantage of Chapter 11 features with no intention of retaining any meaningful existence after bankruptcy. Section 1141(d)(3) provides as follows:

- (3) The confirmation of a plan does not discharge a debtor if—
 - (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
 - (B) the debtor *does not engage in business after consummation of the plan*; and
 - (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.⁶²

As Collier notes:

[i]f the chapter 11 plan provides for the liquidation of all or substantially all of the property of the estate and the debtor does not continue in business after consummation of the plan, an individual, partnership or corporation debtor is subject to the limitations of section 727(a) . . . [which] bars a discharge in a liquidation case if the debtor is not an individual.⁶³

Section 1141(d)(3) provides no definition of “engag[ing] in business” nor does it specify any threshold level of business activity.⁶⁴ Section 1143(d)(3) effectively withholds a discharge from any corporate debtor if (1) the debtor will be substantially liquidated and (2) the debtor will not engage in any post-confirmation business activities.⁶⁵

62. *Id.* (emphasis added). Section 727(a)(1) of the Bankruptcy Code provides that the court shall not grant a debtor a discharge if the debtor is not an “individual.” 11 U.S.C. § 728(a)(1) (2000). The definition of “individual” for purposes of the Bankruptcy Code does not encompass corporations or other business entities.

63. 8 COLLIER ON BANKRUPTCY § 1141.05[4] (Alan N. Resnick & Henry J. Somme eds., 15th ed. rev. 2005).

64. 11 U.S.C. § 1141(d)(3) (2000).

65. *Id.*

Paragraph (3) specifies that the debtor is not discharged by the confirmation of a plan if the plan is a liquidating plan and if the debtor would be denied discharge in a liquidation case under section 727. Specifically, if all or substantially all of the distribution under the plan is of all or substantially all of the property of the estate or the proceeds of it, if the business, if any, of the debtor does not continue, and if the debtor would be denied a discharge under section 727 (such as if the debtor were not an individual or if he had committed an act that would lead to a denial of discharge), the chapter 11

Next, the appellant's argument cites § 524(g)(1)(A), which provides that "a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section."⁶⁶ It is therefore contended that a reorganized debtor ineligible to receive a discharge may not benefit from an § 524(g) injunction meant to supplement a discharge, because no discharge exists to be supplemented. Thus, under this view, the combination of § 524(g)(1)(A) and § 1143(d)(3) requires any reorganized debtor seeking the benefit of an § 524(g) injunction to continue to engage in meaningful business after confirmation of its plan. Of course, this argument contemplates that the debtor will not liquidate all or substantially all of the property of its estate and use the resulting limited pot of funds for the satisfaction of creditors' claims.

*B. 11 U.S.C. § 524(g) Requires a Reorganized Debtor to Be a "Goose that Lays the Golden Egg"*⁶⁷

The insurers in *Combustion Engineering* also argue that § 524(g)(2)(B)(i)(II) explicitly requires substantial ongoing business and payment of dividends by a reorganized debtor.⁶⁸ This argument is predicated on language in § 524(g)(2)(B)(i)(II) indicating that a trust established under the provision is to be funded "by the obligation of such debtor or debtors to make future payments, including dividends."⁶⁹ This language is interpreted to require a reorganized debtor to provide future payments to the § 524(g) trust, which payments must consist, at least in part, of dividends.⁷⁰ The legislative history of § 524(g) is often cited to support this interpretation. In particular, the following statement made by Senator Brown during congressional proceedings relating to the Bankruptcy Amendment Act of 1993 is a favorite quotation for those advocating this position:

Mr. President, the proposed amendment would codify a court's existing authority to issue a permanent injunction to

discharge is not granted. 11 U.S.C.A. § 1141 (West 2004) (historical and statutory notes).

66. 11 U.S.C. § 524(g)(1)(A) (2000) (emphasis added).

67. 140 CONG. REC. 6, 8,021 (1994) (statement of Senator Brown).

68. Brief of Appellants, *supra* note 59, at 30–31.

69. *Id.*; 11 U.S.C. § 524(g)(2)(B)(i)(II) (2000).

70. *Id.* at 31. This requirement is meant to give the personal injury creditors a stake in the future of the reorganized debtor and to provide a continuing source of funds for the trust.

channel claims to an independent trust funded by the securities and future earnings of the debtor. In plain English, this means that when an asbestos-producing company goes into bankruptcy and is faced with present and future asbestos-related claims, the bankruptcy court can set up a trust to pay the victims. The underlying company funds the trust with securities and the company remains viable. Thus, the company continues to generate assets to pay claims today and into the future. In essence, the reorganized company becomes the goose that lays the golden egg by remaining a viable operation and maximizing the trust's assets to pay claims.⁷¹

The contention is that a reorganized debtor not engaged in substantial business will be unable to make future payments or pay dividends to an asbestos trust and is, therefore, ineligible to benefit from an § 524(g) injunction. Clearly, a reorganized debtor will be unable to generate dividends without engaging in substantial conventional business activities after confirmation of its plan. If dividends are specifically required by § 524(g), then a reorganized debtor that no longer conducts substantial business would fail to satisfy the statute and would therefore not be entitled to injunctive relief under that provision. Moreover, the insurers argued that allowing a debtor to reorganize without the potential for future meaningful business activities would frustrate the spirit of § 524(g) and impose upon future trust claimants the risk that they may not be compensated for their tort claims.⁷²

*C. The Best Interests of Creditors Requires Substantial
Ongoing Business*

The appellants further argued that the best interests test of 11 U.S.C. § 1129(a)(7) requires a reorganized debtor to conduct substantial ongoing business to obtain injunctive relief under § 524(g).⁷³ The best interests test imposes a requirement that an impaired class of creditors receive no less under a plan of reorganization than they would receive in a Chapter 7 liquidation. 11 U.S.C. § 1129(a)(7) provides as follows:

- (a) The court shall confirm a plan only if all of the following requirements are met:
 - (7) With respect to each impaired class of claims or interests—

71. 140 CONG. REC. 6, 8,021 (1994) (statement of Senator Brown).

72. See Brief of Appellants, *supra* note 59, at 30–33.

73. *Id.* at 33–35.

- (A) each holder of a claim or interest of such class—
 - (i) has accepted the plan; or
 - (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date⁷⁴

Thus, § 1129(a)(7) states that a plan cannot be confirmed unless every dissenting creditor will receive an amount that is no less than the amount that the dissenting creditor would have received had the debtor liquidated under Chapter 7 of the Bankruptcy Code.⁷⁵ As Collier notes, “Section 1129(a)(7) is one of the cornerstones of chapter 11 practice. It is an individual guaranty to each creditor or interest holder that it will receive at least as much in reorganization as it would in liquidation.”⁷⁶ The provision acts as a brake on behavior by debtors that might short-change creditors by forcing a debtor to offer more than liquidation value if a plan is to be confirmed. The best interests test under § 1129(a)(7) does not consider the claims of future claimants, who are by definition not “creditors” in a bankruptcy case because they do not have claims that “arose at the time of or before the order for relief concerning the debtor.”⁷⁷ Under Chapter 7, only current claims are paid from the bankruptcy estate, while in an § 524(g) bankruptcy, both present claims and future demands are paid from the bankruptcy estate through the mechanism of the § 524(g) trust.⁷⁸ Therefore, the appellants suggested, a § 524(g) plan where future claimants are paid from the trust will always provide less to the current claimants than a Chapter 7 liquidation plan would provide, unless the reorganized debtor continues to conduct substantial business activities, presumably to ensure the reorganized debtor may be a future source of trust income.

74. 11 U.S.C. § 1129(a)(7) (2000).

75. 7 COLLIER ON BANKRUPTCY, *supra* note 63, § 1129.03[7][b].

76. *Id.* § 1129.03[7].

77. 11 U.S.C. § 101(10) (2000).

78. *Compare* 11 U.S.C. § 726(a) (2000) *with* 11 U.S.C. § 524(g)(2)(B)(ii)(I) (2000) (showing that the § 524(g) trust takes into account future demands while Chapter 7 only deals with current claims).

V.
ARGUMENTS AGAINST REQUIRING SUBSTANTIAL
ONGOING BUSINESS ACTIVITIES UNDER
11 U.S.C. § 524(g)

While the foregoing arguments in favor of restricting the availability of § 524(g) for debtors without substantial conventional business activity post-reorganization have some surface plausibility, the better arguments lie on the other side of the issue. Parties in support of § 524(g) plans for debtors lacking substantial post-reorganization business activity—who by the time of confirmation usually include commercial creditors, current asbestos claimants, and the legal representatives for future claimants—have developed counterarguments to those outlined in Part IV above.⁷⁹ These arguments make a compelling case for allowing a business to reorganize under § 524(g) even in the absence of substantial post-reorganization operations of a conventional nature.

The plain language of 11 U.S.C. § 1141(d)(3) requires that a debtor continue in business post-reorganization, but does not specify any threshold level of business, nor does it confine the acceptable modes of business endeavor. Indeed, parent and affiliate companies as well as insurance companies are often protected by an § 524(g) injunction, notwithstanding the fact that these entities do not receive a discharge in a debtor's bankruptcy.⁸⁰ 11 U.S.C. § 1141(d)(3) was drafted to prevent trafficking in corporate shells and in bankrupt partnerships,⁸¹ but was hardly intended to frustrate efforts of debtors to utilize the mechanism provided by § 524(g) to protect its affiliates and ensure the best possible recovery for a debtor's creditors—both current and future. The language of § 524(g)(1)(A) specifies that a § 524(g) injunction is intended to supplement the effects of a discharge under § 1141(d)(3), but does not require that any entity seeking protection under a § 524(g) injunction actually receive a discharge, or set forth any particularized requirements for a discharge over and above those set forth in 11 U.S.C. § 1141.

In response to the “golden egg” theory, plan proponents can counter that the language of § 524(g) does not support the notion that the statutory scheme of § 524(g) makes sense only if the debtor

79. Brief of Appellees Combustion Engineering, Inc. and Asea Brown Boveri Inc. at 84, *In re Combustion Eng'g*, 391 F.3d 190 (3d Cir. 2004) (Nos. 03-3392, 03-3414, 03-3415, 03-3425, 03-3436, 03-3437, 03-3445, 03-3446, 03-3450, 03-3451, 03-3452, 03-3558, 03-3468, 03-3492) [hereinafter Brief of Appellees].

80. *In re W. Asbestos Co.*, 313 B.R. 832, 854 (Bankr. N.D. Cal. 2003).

81. See 11 U.S.C.A. § 1141(d)(3) (2004) (historical and statutory notes).

emerges from the reorganization proceeding as a viable entity that continues to operate and pay dividends. § 524(g) does not *require* a reorganized debtor to continue to contribute to the trust after confirmation (other than those contributions contemplated in the plan) and the debtor certainly need not contribute to the trust specifically by means of a dividend payment.

The argument in favor of a substantial ongoing business activities requirement echoes an argument made in the early 1990s that an individual debtor could not seek to reorganize under Chapter 11 if he lacked ongoing business activity. In *Toibb v. Radloff*, the Supreme Court reversed the Eighth Circuit and held that an individual debtor not engaged in business was eligible to reorganize under Chapter 11.⁸² The Court rejected the argument that the legislative history of Chapter 11 justified an inference of congressional intent contrary to the plain language of the operative statute.⁸³ Conceding in *Toibb* that “the structure and legislative history of Chapter 11 indicate that this Chapter was intended primarily for the use of business debtors,” the Court found the absence of a statutory requirement that a Chapter 11 debtor be an “ongoing business” dispositive.⁸⁴

Any argument based upon this false premise—that either Chapter 11 as a whole or § 524(g) in particular requires substantial post-reorganization business activities—must pass over the statutory language that Congress actually enacted, and focus on what a few members of Congress may have meant. Those suggesting the vitality of an ongoing business requirement inevitably invoke selective excerpts of the legislative record as a means of contradicting Congress’s unambiguous statutory language—an approach the Supreme Court has repeatedly denounced:

[T]his Court has repeated with some frequency: “Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history *if the statutory language is unclear*.” *Blum v. Stenson*, 465 U.S. 886, 896 (1984) [A]lthough a court appropriately may refer to a statute’s legislative history to resolve statutory ambiguity, there is no need to do so [where there is no such ambiguity].⁸⁵

82. *Toibb v. Radloff*, 501 U.S. 157, 160–61 (1991).

83. *Id.* at 161–62.

84. *Id.* at 166.

85. *Id.* at 162 (emphasis added); accord *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (“[A]ppeals to statutory history are well taken only to resolve ‘statutory ambiguity.’”) (quoting *Toibb*, 501 U.S. at 162). As if to underscore its insistence that

While discrete legislative comments taken from the debates surrounding the passage of § 524(g) arguably suggest an *expectation* on the part of some legislators that most debtors availing themselves of § 524(g) would emerge from bankruptcy as ongoing business enterprises, Congress articulated no such statutory requirement. It easily could have done so.⁸⁶ Ultimately, the legislative history viewed as a whole—unlike the plain statutory language—is inconclusive. For example, the following comment attributed to Representative Fish is consistent with the view that Congress intended § 524(g) relief to be available for debtors with no traditional business:

We clarify judicial authority to issue injunctions in certain circumstances where trusts are created to pay asbestos claims—because *we recognize that by removing uncertainty over the validity of such injunctions, the value of trust assets available to fund recoveries by victims can increase.*⁸⁷

The reply to the assertion that § 524(g)(2)(B)(i)(II) requires a reorganized debtor to pay dividends to the trust rests on a common sense assessment of the statutory language. The language of § 524(g)(2)(B)(i)(II)—stating that a trust established under the provision is to be funded “by the obligation of such debtor or debtors to make future payments, including dividends”—does not explicitly require the payment of dividends. The provision merely

courts apply plain statutory language as written, even “[t]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [the title is] of use only when [it] shed[s] light on some ambiguous word or phrase.” Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (citing Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528–29 (1947)).

86. Senator Heflin declared that the codification of a court’s authority to issue a supplemental injunction was “carefully limited to bankruptcy orders where certain *specified* conditions are satisfied.” 140 CONG. REC. 20, 28,358 (1994), *reprinted in* E-1 COLLIER ON BANKRUPTCY, *supra* note 63, at App. Pt. 9(b)-118 (emphasis added). It would undoubtedly come as a surprise to the late Senator Heflin, the bill manager in the Senate, if this “carefully limited” legislation were construed to also embody the limitation contemplated by the Third Circuit’s dicta in *Combustion Engineering* (*i.e.*, only debtors with ongoing, traditional businesses need apply). *See In re Combustion Eng’g, Inc.*, 391 F.3d 190, 248 (3d Cir. 2004).

87. 140 CONG. REC. 20, 27,699 (1994), *reprinted in* E-1 COLLIER ON BANKRUPTCY, *supra* note 63, at App. Pt. 9(b) 118 (emphasis added). Judicial warnings of the dangers in using legislative history to such effect are plentiful. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2626 (2005) (“[L]egislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in ‘looking over a crowd and picking out your friends.’”) (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

requires that any dividends that are paid be included in future payments that the reorganized debtor shall make to the trust. The plan proponents in *Combustion Engineering* argued that, properly understood, this provision was not meant to frustrate the efforts of an ailing company seeking to pay its creditors by means of an injunction under § 524(g), but was intended to prevent reorganized debtors from escaping their liabilities by reorganizing and then cheating their creditors by paying their shareholders dividends.⁸⁸ Thus, the statutory requirement that a reorganized debtor contribute securities to the trust works hand in glove with the requirement that a reorganized debtor pay dividends to the trust if it pays them at all.

Any other interpretation of § 524(g)(2)(B)(i)(II) would be counterintuitive, because there is no way to guarantee in advance that a reorganized debtor will be able to pay dividends into the trust.⁸⁹ Any reorganized debtor's future survival, much less its ability to turn a profit and/or pay dividends, is necessarily uncertain. If confirmation of a plan required a debtor to prove that it would turn a profit and pay dividends every year after reorganization, then no plan could ever be confirmed.

The purpose of § 524(g) is to ensure that funds are available to compensate both those claimants with present claims as well as those with future claims against the debtor for asbestos-related illnesses. Nothing in the statute specifies that the reorganized debtor must be a going concern and provide periodic injections of funding to the trust. The statutory language cited in support of the notion that a reorganized debtor must remain a going concern—namely that the reorganized debtor would pay dividends and such into the trust⁹⁰ as it became a viable business—is intended to spare the company the burden of providing the entire corpus of the trust up front. Thus, securities such as notes, stocks, and future dividends are earmarked for the trust to ensure that the trust has sufficient funds to pay all the present and future claims. There is no bar to equivalent provision being made by way of insurance policy rights and the recoveries therefrom, or contributions of cash, notes, or stocks of parents and affiliates.

To be in the best interest of creditors, a reorganized debtor need hardly conduct substantial business activities. In fact, if a

88. Brief of Appellees, *supra* note 79, at 84-85.

89. *Id.*

90. See 11 U.S.C. § 524(g)(1)(B)(i)(II) (2000) (“[F]unded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligations of such debtor or debtors to make future payments, including dividends”).

debtor enters bankruptcy crippled by asbestos litigation, driven to the brink (or beyond the brink) of insolvency, depleted of assets, and with no hope of realizing even a fraction of the value of the claims arrayed against it, liquidation would stand *diametrically opposed* to the best interests of creditors. The claim that a reorganization plan, as compared to a liquidation, cannot be in the best interests of creditors unless the debtor is reorganized in a way that creates sufficient going-concern surplus overlooks an important factor: contributions by insurers and affiliate companies. These contributions ensure that current asbestos creditors will receive more from a § 524(g) trust than if the debtor liquidated—even though a portion of the trust will be preserved for future demands. Creditors *could* attempt to rely on litigation in the tort system against any available parent or affiliate on some form of vicarious or successor liability theory, but this path would lack the certainty that a guaranteed level of funding for a § 524(g) trust would provide. With the litigation option, creditors face a far greater risk of walking away with less than they would otherwise receive through a successful plan and only then after speculative and costly litigation.

No court has specifically held that a traditional ongoing business is a requirement under § 524(g). Although courts have touched upon the issue, it has yet to be squarely decided. Indeed, the Third Circuit, in *Combustion Engineering*, raised the question and noted only that it was “debatable” whether the minimal business to be conducted by Combustion Engineering post-petition would be sufficient.⁹¹ The Court acknowledged that this debate had already been addressed in both the bankruptcy and district courts below, with both holding that the level of business activity—ownership of some environmentally tainted commercial real estate and various lease activities associated therewith—was sufficient.⁹² All of which raises the question of whether *any* conventional business activity is required. As discussed in more detail below,⁹³ courts have confirmed plans of reorganization where the *only* post-reorganization business for the debtor is the collection of insurance proceeds and the payment of funds to an § 524(g) trust. It would be extremely difficult for a court to enunciate in advance what business activities are substantial or otherwise satisfy § 524(g) and which business activities are not. A court would either have to adopt a bright-line standard for what activity is significant enough to qualify as substantial (e.g., a minimum net annual profit or some such objective indi-

91. In re *Combustion Eng'g.*, 391 F.3d at 248.

92. *Id.*

93. See *infra* Part VI.B.

cator, a minimum staffing level or the requirement of a dividend paid at year's end) or set forth a test that would allow an element of discretion in determining what would qualify. The former would be impractical, clumsy and underinclusive, while the latter would lack any meaningful guidance for companies embarking on a bankruptcy case. No court has yet ventured to set forth a threshold for such activities—indeed such a threshold would be extremely difficult to elucidate.⁹⁴

VI.

ALTERNATIVE DOCTRINAL CONSTRUCTIONS

As explored in the preceding section, advocates of permitting debtors without substantial ongoing business activities to reorganize under § 524(g) put forward the more compelling legal argument. While few courts have directly considered this question, what *can* be gleaned from the limited case law is that courts will approve reorganizations where a plan proponent convinces a court (and the voting creditors) that such a plan is the best prospect for fair compensation for injured tort claimants. Some such courts have operated under the assumption that post-reorganization business activity of a conventional nature is a requirement of relief under § 524(g).⁹⁵ Such courts have employed two distinct doctrinal constructions to give effect to the underlying purpose of Chapter 11 and maximize recovery for creditors even in cases where little or no conventional business activity remains post-reorganization.

A. *Judicial Response to Lack of Substantial Ongoing Business by One of Several Affiliated Debtors*

In *In re Western Asbestos*, the United States Bankruptcy Court for the Northern District of California held that a debtor could channel asbestos liability to an § 524(g) trust, by virtue of an injunction issued under 11 U.S.C. § 105(a), the section of the Bankruptcy Code conferring general equitable powers upon the bankruptcy

94. See, e.g., *In re Global Water Techs., Inc.*, 311 B.R. 896, 900 (Bankr. D. Co. 2004) (confirming a plan and finding that the debtor will engage in business post-confirmation while acknowledging that the plan provides for liquidation of substantially all of the debtor's assets); *In re Mahoney Hawkes, LLP*, 289 B.R. 285, 303–04 (Bankr. D. Mass. 2002) (declining to discuss a standard for what business activities post confirmation are sufficient); *In re T-H New Orleans Ltd. P'ship*, 188 B.R. 799, 804 (E.D. La. 1995) (discussing business activities post confirmation without a standard); *In re Grausz*, No. 02-1499, 2003 WL 1904417 (4th Cir. 2003) (discussion of post confirmation business without reference to a standard).

95. See, e.g., *In re W. Asbestos Co.*, 313 B.R. 832, 853 (Bankr. N.D. Cal. 2003).

courts even in the absence of any business activity.⁹⁶ This holding came at the end of a multistep analysis that relied at every turn on the presence of related debtors with significant post-reorganization assets.

The case involved three debtors: (1) MacArthur Co., “the parent of Western MacArthur Co.,” (2) Western MacArthur Co., “a distributor and installer of building materials,” and (3) Western Asbestos Company (“Western Asbestos”), “a defunct company whose assets were acquired by Western MacArthur after it had been operated by MacArthur [the parent] for two years.”⁹⁷ The debtors’ plan of reorganization included the creation of an § 524(g) trust and channeling injunction which would cover two of the three debtors.⁹⁸ However, a number of the debtors’ liability insurers objected to the plan, arguing that Western Asbestos could not receive an § 524(g) channeling injunction because it was a defunct company and could not satisfy the purported requirements of § 524(g)(2)(B)(i)(II).⁹⁹ The insurers contended that Western Asbestos did not meet these requirements because it had no operations and could not satisfy the obligation to make future payments to the trust.¹⁰⁰ The Bankruptcy Court held that Western Asbestos, viewed in isolation, did not satisfy the requirements of § 524(g)(2)(B)(i)(II).¹⁰¹ But when contributions from MacArthur and Western MacArthur, were taken into consideration, the court found that the funding arrangements for the trust were in full compliance with § 524(g)(2)(B)(i)(II).¹⁰² Under the plan, MacArthur

96. *See id.* at 855.

97. *Id.* at 835.

98. *Id.* at 836–37. Additionally, USF&G, an insurer of the debtor who had settled coverage litigation, would be protected by a supplemental injunction under § 524(g)(4)(A)(ii). *Id.* at 858.

99. *See id.* at 851.

100. *See id.*

101. *See id.*

102. *Id.* The bankruptcy court explained:

11 U.S.C. § 524(g)(2)(B)(i)(II) requires the Trust to be funded in whole or in part by the securities of one or more debtor involved in the Plan and by the obligation of such debtor or debtors to make future payments, including dividends. The Objecting Insurers contend that the Plan does not comply with this requirement.

The Plan provides that Western Asbestos will contribute all of its stock to the Trust. However, it does not obligate Western Asbestos to make any future payments to the Trust. In any event, since Western Asbestos is defunct, it is in no position to make future payments to the Trust. Therefore, this provision does not satisfy 11 U.S.C. § 524(g)(2)(B)(i)(II).

However, the Plan also provides that MacArthur will contribute to the Trust a promissory note for \$500,000, payable over five years. The Plan Propo-

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(the parent company) was to contribute a \$500,000 promissory note to the trust, which would be payable over five years. The court held that MacArthur's obligation to make future payments into the trust satisfied the requirements of the statute for all three debtors.¹⁰³

The objecting insurers further asserted that because it would not be engaged in business post-reorganization, Western Asbestos was ineligible to receive a discharge from bankruptcy under 11 U.S.C. § 1141(d)(3) and, as a result, could not receive the § 524(g) supplemental injunction.¹⁰⁴ The court agreed that Western Asbestos would not be entitled to "a discharge or to the protection of a discharge injunction" because of its lack of post-reorganization business operations.¹⁰⁵ However, the court was not convinced that Western Asbestos' inability to get a discharge would preclude it from benefiting from the supplemental injunction channeling asbestos claims to the trust.¹⁰⁶ Rather, the court stated that it "does not believe that an entity must receive a discharge to be entitled to the protection of the supplemental injunction. All that is necessary is that some debtor receive a discharge."¹⁰⁷ As the two debtors *with* ongoing business were clearly entitled to receive a discharge, Western Asbestos needed only to prove that it was entitled to a supplemental injunction. Under § 524(g)(4)(A)(i), a supplemental injunction can be granted in favor of one of four classes: 1) parents of the debtor, 2) entities or individuals involved in the management (or a director, officer, or employee), 3) the debtor's insurers, and 4) those involved in certain transactions that change the corporate structure or affect the financial position of the debtor.¹⁰⁸ If Western Asbestos could "fit" into one of these groups, it was entitled to

nents note that the definition of a "security" in 11 U.S.C. § 101(49) expressly includes a note. The Plan also requires MacArthur to make payments to the Trust pursuant to the note. The Court concludes that these provisions are sufficient to satisfy 11 U.S.C. § 524(g)(2)(B)(i)(II).

Id.

103. *Id.*

104. *Id.* at 854 (arguing that an injunction to "supplement" the discharge injunction could not issue where there was no discharge injunction to supplement).

105. *Id.* at 853. The Court noted: "There would be no substance left to 11 U.S.C. § 1141(d)(3) if the level of assets and business activity retained by Western Asbestos entitled it to a discharge." *Id.* This is by no means an inevitable conclusion to reach: see Part VI.B. below for a discussion of several cases where the activity of liquidating and paying asbestos claims was considered sufficient business activity to qualify for 11 U.S.C. § 524(g) protection.

106. *Id.* at 854.

107. *Id.*

108. 11 U.S.C. § 524(g)(4)(A)(ii)(I)–(IV) (2000). The statute provides that:

supplemental injunctive relief regardless of whether it was entitled to a discharge.¹⁰⁹ The bankruptcy court concluded that Western Asbestos could not satisfy the requirements of this section and was not, therefore, entitled to the protection of a channeling injunction issued under § 524(g).¹¹⁰

Help was, however, at hand from another source: the bankruptcy court's general equitable powers under 11 U.S.C. § 105(a). The Court ultimately held that "even if 11 U.S.C. § 524(g) does not authorize a supplemental injunction protecting Western Asbestos, the [c]ourt may and should issue such an injunction under 11 U.S.C. § 105(a)."¹¹¹ If the "Plan Proponents [could] establish that such an injunction is necessary to the effectiveness of the Plan,"

such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction . . . and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

- (I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
- (II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
- (III) the third party's provision of insurance to the debtor or a related party; or
- (IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—
 - (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
 - (bb) acquiring or selling a financial interest in an entity as part of such a transaction.

Id.

109. *In re W. Asbestos Co.*, 313 B.R. at 854–55.

110. *Id.* at 855.

111. *Id.* 11 U.S.C. § 105(a) (2000) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Id. The *Combustion Engineering* case did question the extent to which a bankruptcy court could use 11 U.S.C. § 105(a) to extend the jurisdictional reach of 11 U.S.C. § 524(g), but the cases are in different circuits and involve very different factual scenarios. Therefore, the *Western Asbestos* case still stands as good law for this proposition.

then the court would issue such an injunction under 11 U.S.C. § 105(a).¹¹²

Ultimately, the Plan Proponents prevailed, and the confirmation order entered the following year held that, although Western Asbestos was not entitled to a discharge, Western Asbestos was named as “a ‘Released Party’ under the terms of the Plan” and the confirmation order, and a channeling injunction was entered in respect of all three debtors.¹¹³ Through the general equitable power of 11 U.S.C. § 105(a), Western Asbestos received the protection of the channeling injunction enjoyed by its fellow debtors, with the claims channeled to the same trust and paid out of the same pot of funds.¹¹⁴

In light of its statements on the necessity for post-reorganization business of a more traditional nature, the *Western Asbestos* Court would have struggled to justify confirmation of a plan dealing with Western Asbestos alone. However, taking Western Asbestos in tandem with two related debtors that would have significant post-reorganization business activities, the Court was willing to grant relief to the company on an ancillary basis.

B. Judicial Response to 524(g) Trusts Funded by Affiliated Companies and Litigation Against Insurers

The parent corporations and affiliates of asbestos debtors are sometimes willing to make substantial financial contributions to the reorganization to attain the protection of § 524(g). Almost inevitably, significant insurance assets exist to pay claims, and the continued survival of the debtor is essential to keep this income stream flowing to fund payments to present claimants and the holders of future demands. These two factors, present in many § 524(g) bankruptcy cases, provide compelling reasons to utilize § 524(g) even in the absence of substantial ongoing business activities on the part of the reorganized debtor. In a very real sense, the “business” of the reorganized debtor becomes the orderly collection of insurance re-

112. *In re W. Asbestos Co.*, 313 B.R. at 855.

113. *In re W. Asbestos Co.*, 313 B.R. 456, 463 (Bankr. N.D. Cal. 2004).

114. *Id.* at 464. The confirmation order provided, in relevant part, that: [t]o preserve and promote the property of the Estates and the settlements contemplated by and provided for in the Plan and agreements approved by the Bankruptcy Court, and in the exercise of the equitable jurisdiction and power of the Bankruptcy Court, and under sections 524(g) and 105(a) of the Bankruptcy Code, Asbestos Related Claims shall be channeled to, and paid solely from, the Trust.

Id.

coveries, liquidation of assets, and payment of asbestos claims channeled to a § 524(g) trust. Several such situations have resulted in confirmed plans of reorganization and active trusts paying both claims of present claimants and future demands. Three examples are briefly discussed below.

1. The Swan Transportation Co. Bankruptcy¹¹⁵

Swan Transportation Co., a wholly owned subsidiary of Tyler Technologies, Inc.,¹¹⁶ filed a prepackaged Chapter 11 Plan in 2001, seeking the creation of a § 524(g) trust and the imposition of a channeling injunction in favor of Swan Transportation, Tyler Technologies and various affiliated entities,¹¹⁷ and certain insurers that had settled coverage litigation with Swan Transportation.¹¹⁸ Swan Transportation had been the corporate parent of Tyler Pipe Industries, Inc. between 1973 and 1992. In the years between this period of corporate ownership and the bankruptcy filing, many claimants filed suit against Swan Transportation, alleging significant exposure to asbestos, silica, and assorted industrial dusts while under the employ of Tyler Pipe. Since 1995, Swan Transportation had conducted no ongoing business of any sort¹¹⁹ except litigation defense and the collection of insurance proceeds.¹²⁰

115. *In re Swan Transp., Co.*, No. 01-11690 (Bankr. D. Del. May 30, 2003) [hereinafter Order Confirming Swan Reorganization] (order confirming the plan of reorganization for Swan Transportation Co.).

116. *In re Swan Transp., Co.*, Disclosure Statement with Respect to Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code For Swan Transportation Company, No. 01-11690, § 1.1(a) (Bankr. D. Del. Feb. 22, 2002) [hereinafter Swan Disclosure Statement]. Tyler Pipe Industries, Inc., then owned and operated by Tyler Technologies, Inc. began operations in 1935 in the city of Tyler, Texas. *Id.*; *In re Swan Transp. Co.*, Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for Swan Transportation Company, No. 01-11690, 10 (Bankr. D. Del. Feb. 22, 2002) [hereinafter Swan Reorganization Plan]. Swan Transportation, a wholly owned subsidiary of Tyler Technologies became Tyler Pipe's corporate parent in 1973 as part of an internal corporate reorganization. Swan Disclosure Statement, *supra*, § 1.1(b). In 1992, another corporate reorganization left Tyler Pipe and Swan as sibling corporations, both wholly owned subsidiaries of Tyler Technologies. *Id.* § 1.1(c). In 1995, Tyler Pipe was sold by Tyler Technologies. *Id.* at § 1.1(d).

117. Swan Reorganization Plan, *supra* note 116, § 9.3.

118. *See id.* § 9.3(b).

119. Swan Disclosure Statement, *supra* note 116, § 1.1(d) (Bankr. D. Del. Feb. 22, 2002) (“[S]ince December 1995, Swan has not conducted any ongoing operations or owned any tangible or intangible assets, other than various insurance policies issued to Swan and other related entities.”); *see id.* § 1.2(g) (“Swan ceased all operations in December 1995 and has been insolvent for some period of time.”).

120. *Id.* § 1.2(a).

During the negotiations leading up to the prepackaged plan of reorganization, various insurers settled coverage claims in the aggregate amount of \$89.3 million.¹²¹ Tyler Technologies agreed to make a substantial contribution to the § 524(g) trust.¹²² The United States Bankruptcy Court for the District of Delaware confirmed the plan by order signed in 2003.¹²³ Since confirmation, Swan Transportation has conducted no conventional business and has existed for the sole purpose of maximizing insurance recoveries and funneling the proceeds to the trust for distribution to asbestos claimants.¹²⁴ The trust is effective and is paying claims according to the plan terms.

2. The National Gypsum Company / Asbestos Claims Management Corporation Bankruptcies

For more than 50 years, ending around 1981, National Gypsum Company (“NGC”) mined, manufactured, distributed, and sold asbestos or products containing asbestos. Crippled by its asbestos liabilities, in tandem with other financial burdens, NGC sought relief under Chapter 11 of the Bankruptcy Code in October 1990.¹²⁵ The United States Bankruptcy Court confirmed a plan of reorganization in 1993.¹²⁶ Under the terms of the Plan, the reorganized NGC was renamed the Asbestos Claims Management Corporation

121. *Id.* § 1.5 (calculating the aggregate amount as of the date of the disclosure statement).

122. *Id.* §1.8. Tyler Technologies agreed to contribute \$1.5 million in cash, 100% of the stock and assets of Swan Transportation and any and all insurance policy rights. *Id.* The corporation also agreed to cancel any inter-company indebtedness and make sure Swan Transportation had \$1 million in cash. *Id.*

123. Order Confirming Swan Reorganization, *supra* note 115 (signed by the Bankruptcy Court on May 30, 2003 and the District Court on July 21, 2003).

124. *See, e.g., In re Swan Transp., Co.*, Order Granting Motion For Approval of Settlement Between Tyler, The Swan Asbestos and Silica Settlement Trust, Reorganized Swan and Federal Insurance Company, And To Partially Withdraw the Reference to Afford Federal Insurance Company the Protections of the Channeling Injunction (Settling Insurers) (Docket No. 622) (Bankr. D. Del. Sept. 1, 2005).

125. Letter from Peter C. Browning, Chairman and Chief Executive Officer, Nat'l Gypsum Co., to the Creditors of Nat'l Gypsum Co., § 2.4 (Sept. 23, 1992) (materials relating to the First Amended and Restated Joint Plan of Reorganization). Aancor Holding Company, Inc. (“Aancor”), was formed in 1985 for the purpose of effecting a leveraged buyout of NGC, which was completed in April 1986. *Id.* § 2.3.

126. *In re Asbestos Claims Management Corp.*, No. 02-37124-SAF-11, § 2.4 (Bankr. N.D. Tex. Dec. 12, 2002) [hereinafter Asbestos Claims Disclosure Statement] (Disclosure Statement with Respect to Third Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Asbestos Claims Management Corporation).

("ACMC"), and was settled with various assets of NGC. Its primary purpose was the payment of asbestos claims out of these assets which included insurance policies and the rights of recovery thereunder.¹²⁷ As suggested by its new name, ACMC had no conventional business and existed solely to pursue insurance recoveries and use these and other assets to fund the trust to which claims were channeled.¹²⁸ This trust, the NGC Settlement Trust, was funded by ACMC and given a mandate to satisfy the claims of all asbestos claimants, including future demand holders.¹²⁹ The plan

127. *In re Nat'l Gypsum Co.*, No. 390-37213-SAF/11, Annex 1, § 5.4(a) (Bankr. N.D. Tex. Sept. 4, 1992) [hereinafter NGC & Aancor Joint Plan] (First Amended and Restated Joint Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for National Gypsum Company and Aancor Holdings, Inc.) (Aancor contemporaneously sought Chapter 11 relief, and its bankruptcy case was jointly administered with NGC's).

The primary purposes of Reorganized NGC will be: (1) to hold and manage the Reorganized NGC Assets; (2) to remit to the NGC Asbestos Settlement Fund the net profits, if any, attributable to the Reorganized NGC Assets; (3) to prosecute the Asbestos Insurance Debtor Actions and the Retained Debtor Actions; (4) to remit to the NGC Asbestos Settlement Fund the Asbestos Insurance Debtor Action Recoveries; (5) to liquidate, when economically desirable, the Reorganized NGC Assets and remit the proceeds thereof to the NGC Asbestos Settlement Fund; and (6) subject to the provisions of *Section 5.1(m)(2)* of this Plan, to continue or terminate the membership of Reorganized NGC in the CCR in accordance with the terms and conditions of the NGC Asbestos Settlement Fund Documents and the Plan.

Id. Reorganized NGC Assets were defined to include the Insurance Policies, legal actions instituted against NGC's liability insurers and certain others, and the Existing Austin Common Stock (shares in a wholly owned subsidiary of NGC), "together with the income, dividends, and proceeds, if any, derived from the assets, properties, interests, and rights vested in Reorganized NGC." *Id.* § 1.177.

128. Asbestos Claims Disclosure Statement, *supra* note 126, § 2.4 ("Since the time of the confirmation of the 1993 Reorganization Plan, the principal business of ACMC has been to maximize the value of its insurance assets for the benefit of asbestos claimants."). ACMC and the NGC Settlement Trust were closely aligned in interest, if not identical, and shared administrative services and costs, bank accounts, and the services of the same professionals paid out of trust funds. *Id.*

129. This was prior to the addition of 11 U.S.C. § 524(g) to the bankruptcy code, and consisted of a permanent channeling injunction applying to current asbestos claimants, and a less definitive temporary injunction of more uncertain durability dealing with future claimants. Asbestos claims against NGC, channeled to the NGC Settlement Trust, were defended initially by the Center for Claims Resolution, Inc. ("CCR"), a confederation of asbestos defendants which operated in the tort system and served as a central clearing house for asbestos litigation. NGC & Aancor Joint Plan, *supra* note 127, Annex 1 §§ 1.46, 5.4.

created an entity called New NGC to take over Old NGC's primary ongoing business.¹³⁰

ACMC encountered a larger number of filed claims than it had expected.¹³¹ It ultimately ran into difficulty paying these claims, and filed a second Chapter 11 in 2002.¹³² New NGC, concerned that it would become a target for claimants seeking recovery under theories of successor liability, agreed to pay a substantial amount to fund a new trust created under § 524(g), to which all claims against NGC, present and future, would be channeled.¹³³ The new trust was funded by this financial contribution from new NGC, the stock of ACMC, and a transfer of the assets from the old NGC Settlement Trust. This plan of reorganization was confirmed in 2003, and the § 524(g) trust created under the ACMC plan is active and paying claims.¹³⁴

3. The Fuller-Austin Bankruptcy¹³⁵

Fuller-Austin Insulation Company ("Fuller-Austin") was an insulation material installer originally formed under Texas partnership law but subsequently acquired by a company called DynCorp.¹³⁶ Fuller-Austin's business ceased in 1987 when it stopped bidding on installation projects.¹³⁷ By 1994, it was a "separate, inactive subsidiary of DynCorp with no employees" and had merged into another corporation.¹³⁸ Thus, Fuller-Austin was not engaged in a traditional business when, due to mounting asbestos liabilities, it sought Chapter 11 protection. In fact, the Fuller-Austin Insulation Company had not maintained a traditional business since that late 1980s, and, post-reorganization, would be engaged in the "business" of paying its asbestos liabilities under a Chapter 11 plan.¹³⁹

130. *Id.* Annex 1 § 5.3(b) ("The primary purpose of New NGC is to acquire, hold, and manage the NGC Sale Assets and to continue the basic business activities and operations of Gold Bond and any other lawful business activity.").

131. Asbestos Claims Disclosure Statement, *supra* note 126, § 2.12.

132. *Id.* § 3.1.

133. *Id.* §§ 1.4, 2.13, 4.7(a)(4)(i).

134. *In re* Asbestos Claims Mgmt. Corp., Order Confirming The Third Amended Plan Of Reorganization, No. 02-37124-SAF-11 (N.D. Tex. June 5, 2003).

135. *In re* Fuller-Austin Insulation, No. 98-2038-JJF, 1998 U.S. Dist. LEXIS 18340, at *4 (D. Del. Nov. 10, 1998).

136. Disclosure Statement with Respect to Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for the Fuller-Austin Insulation Company 11 (July 8, 1998).

137. *Id.*

138. *Id.* at 14.

139. *Id.* at 11.

As part of Fuller-Austin's plan of reorganization, DynCorp agreed to a settlement in which, inter alia, it transferred stock in reorganized Fuller-Austin and other assets, including a substantial sum of cash, to a trust.¹⁴⁰ In return, Fuller-Austin agreed to insulate DynCorp from future asbestos liabilities via a supplemental injunction under § 524(g).¹⁴¹ United States District Court approved this arrangement over the objections of Fuller-Austin's insurers, implicitly rejecting the argument that a debtor without substantial business activities could not seek and obtain an § 524(g) injunction.¹⁴²

In each of the above cases, courts confirmed plans of reorganization that relied heavily upon the relief provided in § 524(g) and each case concerned a debtor with no prospect of any conventional business activity post-reorganization. Implicitly or explicitly, the courts confirming these plans found that the claims-related activities of the debtors post-reorganization satisfied any ongoing business requirement that might be inherent in § 524(g). This illustrates the willingness of bankruptcy courts to confirm plans that maximize the value for creditors and employ legitimate tools available in the Bankruptcy Code. All three cases involve a debtor without any appreciable conventional business post-reorganization, and each case stands, unchallenged, as a confirmed plan that resulted in a trust paying claimants, in a similar position to that which gave the Third Circuit pause in *Combustion Engineering*.

C. *The Benefit of Alternative Doctrinal Constructions*

If efforts at reorganization fail and the debtor is forced into a Chapter 7 liquidation, present claimants will be reduced to picking over the scraps of a company already crippled by tort liabilities. The three cases discussed in the preceding section throw the plight facing such claimants into sharp relief. Swan Transportation had conducted no business since 1995 and was basically insolvent. Fuller-Austin had likewise not operated as a commercial enterprise for over a decade and was solely engaged in the litigation and payment of asbestos claims. APMC, a self-proclaimed Asbestos Claims Management Company dedicated to resolving asbestos claims, had encountered a massive gap between claimants seeking compensation and available funding. The *Western Asbestos* case provides an

140. *Id.* at 26–27.

141. *In re Fuller-Austin Insulation Co.*, No. 98-2038-JJF (D. Del. 1998) (Order Approving the Disclosure Statement and Confirming the Plan of Reorganization for Fuller-Austin Insulation Company).

142. *Id.*; see also *In re Fuller-Austin Insulation*, 1998 U.S. Dist. LEXIS 18340, at *13.

equally stark illustration. Denial of access to the benefits of § 524(g) to those with claims against Western Asbestos would have deprived creditors of meaningful compensation while creditors with claims against the two closely related entities would have recovered handsomely. Without the ability to reorganize under § 524(g) and draw in contributions from insurers, parents, and affiliates, the claimants seeking compensation from the debtors would have been left with the slimmest of pickings and significantly reduced recovery.

Senator Heflin spoke of the reorganized debtor becoming “the goose that lays the golden egg by remaining a viable operation and maximizing the trust’s assets to pay claims.”¹⁴³ Unquestionably, § 524(g) serves a valuable purpose when it shields financially viable and commercially active corporations from being overrun by asbestos litigation. Yet that is not its only salutary benefit. By virtue of the provisions authorizing supplemental injunctions in favor of other “geese” that may have “eggs” of their own to provide to the trust, additional funds can be drawn into the trust to pay asbestos claims. If there is no bar to extending relief to the parents, affiliates, or insurers of a debtor without conventional post-reorganization activities, then a denial of relief on the basis that the debtor itself will not provide sustained levels of post-reorganization economic activity is short-sighted. Indeed, Senator Heflin himself spoke approvingly of “maximizing the trusts assets to pay claims.”¹⁴⁴ The inescapable fact is that allowing a debtor with no prospect of ongoing business to reorganize into a corporate form dedicated to collecting insurance payments, augmented by contributions from parents and affiliates, may be the *only* way to provide *any* assets to the trust for the payment of asbestos claimants.¹⁴⁵

143. 140 CONG. REC. 6, 8,022 (1994) (statement of Senator Heflin).

144. *See id.*

145. As noted by the Third Circuit itself, as a counterpoint to the panel’s concerns about the possible “going concern” requirement:

there are additional factors here. One is the significant financial contributions to the Asbestos PI Trust by non-debtors ABB Limited, Basic and Lummus. From the claimants’ perspective, it may make little economic difference whether the source of future funds comes from the debtor or a third-party, so long as a sufficient and reliable pool of assets remains available to pay their claims.

In re Combustion Eng’g, Inc., 391 F.3d 190, 248 n.70 (3d Cir. 2004). The 524(g) Trust route guarantees a source of funding for present and future claims, and removes the risks inherent in seeking recovery from a third party, in the tort system, based on various theories of imputed liability.

VII. CRITIQUE OF A POTENTIAL RESOLUTION

At first blush, there is a readily available and facially attractive solution to a putative requirement for conventional ongoing business post-reorganization: ensure that a debtor retains a modicum of post-reorganization business. If the availability of § 524(g) relief were to turn upon the existence or the degree of post-reorganization activity by the debtor, then it should be possible for the debtor and its corporate parents to leave just enough business with the reorganized debtor to pass the threshold requirement. Perhaps the level of activity evidenced in *Combustion Engineering*—the “ownership of an environmentally contaminated piece of real estate” and “related lease activities”—would be sufficient. As the Third Circuit noted:

Both the Bankruptcy Court and the District Court found the reorganized Combustion Engineering would engage in business operations after consummation of the Plan. The Bankruptcy Court found Combustion Engineering “had a continuing real estate business . . . [and] is continuing in business post-confirmation.” The District Court likewise overruled a challenge to the § 524(g) channeling injunction after concluding “the reorganized Combustion Engineering will have a real estate business in which it will own and lease properties.”¹⁴⁶

It would not be particularly difficult to ensure that a debtor retained some low level of post-reorganization activity.¹⁴⁷ A debtor could maintain, as in the *Combustion Engineering* case, ownership interests in real estate and activities as lessor of such property. An industrial debtor could be left with a single, small output factory. All manner of such contrivances could be designed to effect a reorganization that retains a small measure of post-reorganization activity.

This is a far from optimal solution, however. It does not address the arguments of those who claim that a higher level of business activity is required to constitute a sufficiently substantial ongoing concern that can contribute funds in the form of dividends to the § 524(g) trust. It also lacks the doctrinal clarity that the contrary approach to the problem displays. Allowing a debtor

146. *Id.* at 248 (citation omitted).

147. This “business” would, of course, be dwarfed by the real “business” of the debtor: providing a mechanism for the effective maximization of the value of the estate through insurance collections and other financial contributions.

that lacks traditional business activities but can obtain funds from insurers and corporate relatives furthers the underlying goal of the Chapter 11 process: the maximization of estate assets and creditor recovery. Allowing debtors who will not have conventional business activities to reorganize under § 524(g) also encourages transparency and acknowledges economic reality. If the primary business of the reorganized debtor is the collection of judgments from insurers, payments from parents, the liquidation of assets, and the orderly provision of those assets to a trust, then no real purpose is served by insisting that the debtor undertake more conventional business activities.

VIII. CONCLUSION

Asbestos claims have plagued hundreds of companies over the years, driving many to bankruptcy. The asbestos liabilities were often generated by subsidiary companies that ceased the active conduct of traditional business enterprises some time before the bankruptcy filing. In most cases, these companies have been devoted to managing claims, insurance assets and litigation. For the majority of these companies, the payment of any meaningful dividend is simply not a viable or realistic option. For the purposes of 11 U.S.C. § 524(g), courts have considered these litigation and payment activities alone to constitute the conduct of business.

These referenced companies, their corporate parents, and even their insurers in many cases desire to cleanse the entities of present asbestos claims and future asbestos demands through a bankruptcy proceeding which utilizes 11 U.S.C. § 524(g). Although the Third Circuit has recently questioned whether these companies comply with certain of the statutory requirements, the better reasoned argument, in light of the statutory language, court decisions, and the legislative history when taken as a whole, permits companies with no conventional business activities to avail themselves of 11 U.S.C. § 524(g). There is no explicit post-reorganization ongoing business requirement set forth in 11 U.S.C. § 524(g), and courts should not imply the existence of an unavoidably burdensome and ultimately restrictive rule. If the courts deprive such debtors of 11 U.S.C. § 524(g) relief, the business of paying creditors will be harmed in a manner that belies the clear intent of the statute.

An appellate court will surely consider and definitively rule upon this issue at some future point. If the courts follow the better path, companies will be allowed to successfully reorganize and rid themselves, and those who may make substantial contributions to

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the plan and resulting trust, of any current and future asbestos liability. The value of bankruptcy estates will thereby be maximized, and the best interests of creditors will be served.