

THE FUTURE CLAIMS REPRESENTATIVE IN PREPACKAGED ASBESTOS BANKRUPTCIES: CONFLICTS OF INTEREST, STRANGE ALLIANCES, AND UNFAMILIAR DUTIES FOR BURDENED BANKRUPTCY COURTS

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Almost ten years ago, the United States Supreme Court observed that the nation was in the midst of an “asbestos-litigation crisis.”¹ The crisis has not abated. Increasing numbers of companies have been drawn into the fray as target defendants.² Many companies face claims numbering in the thousands and can foresee more claims on the horizon.

With § 524(g) of the Bankruptcy Code, Congress established a mechanism by which companies whose existence is threatened by asbestos liabilities can curtail not only current asbestos claims, but also future asbestos claims—the potential claims of unidentified persons who were exposed to asbestos pre-petition but who have not yet developed any asbestos-related condition. Section 524(g) allows the court, in connection with a Chapter 11 plan of reorganization, to enjoin future claimants from proceeding against the company in the tort system. Instead, those future claimants may find recourse for their injuries only by asserting a claim upon a trust established in connection with the bankruptcy, subject to the trust’s rules, procedures, and limitations. The central innovation of § 524(g) is that it provides a means by which a debtor can limit the

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1. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

2. There are now more than 8400 asbestos defendants, up from only 300 in 1982. Deborah R. Hensler, *California Asbestos Litigation: The Big Picture*, COLUMNS-ASBESTOS, Aug. 2004, at 5; JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES, RAND INSTITUTE FOR CIVIL JUSTICE 5 (1984).

rights of persons—the future claimants—who are not present in the court to defend those rights. Central to the constitutionality and efficacy of § 524(g) as a means of limiting the rights of future claimants is the court-appointed “future claimants’ representative” (FCR), charged with vigorously representing their interests in the bankruptcy proceedings.

Whatever Congress may have envisioned in enacting § 524(g), making asbestos claims is no longer principally a matter of very sick individuals seeking compensation for major diseases from companies clearly responsible for causing those diseases.³ Rather, many asbestos claims are initiated by a small number of law firms, each managing what is inelegantly known as an “inventory” of claimants, either uninjured or barely injured by asbestos exposure, whose modest claims can be mustered against various potential defendant companies in vast quantities.⁴ These claims, when asserted in sufficient number, can impose a drag on the economic vitality of even vibrant companies. Section 524(g) arguably provides the *only* current mechanism by which a company can free itself from that drag—including the prospect of future claims—providing even healthy companies with unusual incentives to enter bankruptcy to take advantage of this benefit.

Bankruptcy courts are accustomed to administering a process that depends heavily on consensual resolution of disputes. They rely, like most courts, on the adversary process primarily to let them know when things are awry. As such, they have had difficulty adjusting to the unusual responsibilities that § 524(g) imposes upon them to ensure that the interests of unknown future claimants are protected. Debtors and current asbestos claimants ordinarily become allied in the novel world of asbestos “pre-packaged” bankruptcies, while insurers (who will be asked to bear the cost of the claims) and the parties who are true focus of the proceeding—the future claimants—are effectively excluded from the process.

3. See generally *In re* Joint E. & S. Asbestos Litig., 129 B.R. 710, 739–42 (E.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (1992), *modified*, 993 F.2d 7 (2d Cir. 1993) (discussing significant asbestos-related health hazards as they relate to asbestos manufacturers and distributors).

4. *Id.* at 758 (describing how the Manville Trust’s inability to pay asbestos claimants in full created an “urgency by plaintiffs to assemble huge numbers of claims quickly and push them to early settlement or judgment before the money ran out. The hundreds of millions of dollars in fees received by plaintiffs’ attorneys made assembling large stables of claimants hugely profitable. The result was a frenzied offense by plaintiffs’ bar to dispose of claims by the hundreds and thousands at a time.”).

Under these circumstances, the bankruptcy courts have had difficulty defining and implementing their protective role.

The bankruptcy courts' difficulties have become apparent in connection with the selection and appointment of the FCR. Congress plainly envisioned an FCR who was independent of the other parties in the bankruptcy, aggressively representing future claimants' interests, standing as a bulwark against abuse of those absent parties. But § 524(g) has emerged in this regard as a lesson in unintended legislative consequences. As morphed to fit into the paradigm of a "prepackaged" bankruptcy, the FCR lacks the independence that Congress plainly envisioned for that key player in the § 524(g) bankruptcy process. The practice that has emerged is as follows: before the filing of the bankruptcy case, the prospective debtor and counsel for current claimants—parties whose interests are directly adverse to future claimants—jointly select someone to serve as a stand-in representative of future claimants in their negotiation of a prepackaged plan. After the bankruptcy case is filed, they present their plan and nominate their chosen pre-petition representative to serve as the *court-appointed* FCR required by § 524(g).⁵ Thus far, the bankruptcy courts have rubber-stamped the debtor's choice. Accustomed to a process in which the debtor holds sway over the bankruptcy unless some creditor chooses to object—and here, the current claimants helped choose the FCR, so they are unlikely to object—the bankruptcy courts have found nothing in the Bankruptcy Code that would allow the court to stand in the debtor's way with respect to the choice of the FCR. The result is an FCR that is actually, or at least apparently, beholden to the debtor and current claimants.

In this article, we describe how this paradigm for prepackaged asbestos bankruptcy represents a distortion of the § 524(g) process envisioned by Congress. In allowing debtors and current claimants—parties whose interests are profoundly opposed to those of future claimants—to, in effect, appoint the FCR, the bankruptcy courts have failed in their duty to ensure that future claimants are properly and independently represented in the bankruptcy process. This article demonstrates that the statutory requirement of court appointment leaves no room for appointment by the debtor. Further, the nature of the FCR's duties requires that the FCR's inde-

5. See 11 U.S.C. § 524(g)(4)(B)(i) (2000) (injunctions issued pursuant to § 524(g) "shall be valid and enforceable with respect to [future asbestos claimants] . . . if as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert [future asbestos claims].").

pendence be beyond reproach, akin to the level of independence and freedom from both actual conflict and the appearance of conflict of interest expected of a guardian *ad litem* at common law.

This article begins, in Part I, with the history and evolution of asbestos claims and asbestos bankruptcies. Part I.A. provides a brief history of § 524(g), including its antecedents in the *Johns-Manville* bankruptcy, perhaps the earliest “asbestos bankruptcy.” Part I.B. notes that the appointment of a representative for future claimants reflects a due process necessity, first identified in connection with asbestos class actions. Part I.C. turns to the evolution and current realities of asbestos claiming. This Part discusses how law firms that control large “inventories” of claimants, often with no impairment from their alleged asbestos exposure, dominate current asbestos claiming. These firms file claims *seriatim* against numerous defendant companies. Finally, Part I.D. describes how an innocuous bankruptcy device, the “pre-packaged plan,” has come to be used in asbestos bankruptcies and how its use has undermined the role of the FCR envisioned by Congress.

Part II focuses on the process of appointing a representative for future claimants and the high standards to which such a representative must be held. Part II.A. begins with a discussion of the unfamiliar duties that § 524(g) imposes upon bankruptcy courts, including the duty to appoint a representative for future claimants. Part II.B. examines the role of the FCR. Part II.C. provides a look at the standards the bankruptcy courts have used in judging whether the FCR nominated by the debtor is appropriately independent and suitable as a representative of future claimants, and specifically examines three cases involving FCR appointments, and their outcome. Part II.D. then turns to the standards that, consistent with the role of the FCR as envisioned by Congress, should be applied in judging whether a particular FCR candidate may be appointed by bankruptcy court. This article concludes that the debtor should have no role in the appointment of the FCR; neither should counsel for current claimants. Both these parties have interests adverse to those of the future claimants. The bankruptcy court must appoint an FCR who meets the high standards of independence, and freedom from conflict of interest, akin to the standards associated with the appointment of a fiduciary. In particular, the bankruptcy court should aggressively ensure that the FCR may not, through his involvement with debtors’ counsel and counsel for current claimants, have any short-term or long-term interest in satisfying these constituencies at the expense of those whom he is appointed to represent.

I.
HISTORY AND EVOLUTION OF ASBESTOS CLAIMING AND
ASBESTOS BANKRUPTCIES

A. *The History of § 524(g): A Means of Curtailing Future Liabilities*

Commencing with the Johns-Manville bankruptcy case in 1982,⁶ it became clear that liabilities resulting from asbestos exposures might overwhelm the resources of some companies, making bankruptcy a possibility. Many companies involved in manufacturing asbestos products were faced with claims by thousands of persons alleging that exposure to asbestos caused debilitating diseases, including mesothelioma and other forms of cancer. Johns-Manville was the largest producer of asbestos and an early target of asbestos lawsuits. Its turn to the bankruptcy courts was, at the time, considered something of a bold move because the company was not yet having difficulty paying claims; rather, it projected such difficulties in the future, arising from the claims of persons who had not, as of the date of filing, manifested any symptoms of asbestos disease.⁷ The company looked to the bankruptcy courts for relief, seeking reorganization, not liquidation, of the company. Its argument that some means should be found in bankruptcy law to ensure its continued survival, notwithstanding that its products had apparently caused thousands to suffer from serious illness for which the company should be held liable, meshed neatly with the policies underlying the Bankruptcy Code.⁸

Since the enactment of Chapter XI of the Bankruptcy Act in 1938, bankruptcy practice and policy has reflected a strong preference for reorganization over liquidation as a means of preserving viable economic enterprises and ensuring larger payouts for creditors.⁹ Liquidation of a company to pay creditors is generally not an

6. See *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr.S.D.N.Y.1986), *aff'd*, 78 B.R. 407 (S.D.N.Y.1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir.1988).

7. As the bankruptcy court presiding over the *Johns-Manville* case stated: From the inception of this case, it has been obvious to all concerned that the very purpose of the initiation of these proceedings is to deal in some fashion with claimants exposed to the ravages of asbestos dust who have not as of the filing date manifested symptoms of asbestos disease. Indeed, but for this continually evolving albeit amorphous constituency, it is clear that an otherwise economically robust Manville would not have commenced these reorganization proceedings.

In re Johns-Manville Corp., 36 B.R. 743, 745-46 (Bankr. S.D.N.Y. 1984).

8. *Id.* at 746.

9. See *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (The "two recognized policies underlying Chapter 11 [are]

optimal outcome. In the context of the Johns-Manville bankruptcy in particular, and asbestos bankruptcies generally, liquidation would not likely serve to maximize payments to those who suffer from asbestos-related diseases.¹⁰ Because of the long latency period associated with asbestos diseases, individuals who will later become sick from a company's asbestos may not have ripe claims against the company during its bankruptcy;¹¹ thus, their claims will not be discharged in the ordinary course of the bankruptcy proceedings.¹² While the liquidation of a debtor company might provide some recourse for current claimants, it would leave *future* claimants entirely without recourse. On the other hand, if a company could not address future claims in bankruptcy, meaningful reorganization would be difficult to achieve; the reorganized company could find itself back in bankruptcy repeatedly as new asbestos claims arose against it.¹³ More practically, fear of uncertain future liabilities might limit the company's access to capital and debt markets.¹⁴

preserving going concerns and maximizing property available to satisfy creditors.”).

10. H.R. REP. NO. 103-835 at 40–41 (1994).

11. The circuits disagree as to when a “claim” arises for bankruptcy purposes. *See, e.g., Jones v. Chemetron Corp.*, 212 F.3d 199, 206 (3d Cir. 2000) (collecting cases). One line of cases, exemplified by *Avellino & Bienes v. M. Frenville Co.* (*In re M. Frenville Co.*), 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), holds that a “claim” does not arise until it ripens into a cause of action under non-bankruptcy law. *See id.* at 337 (“While federal law controls which claims are cognizable under the Code, the threshold question of when a right to payment arises, absent overriding federal law, ‘is to be determined by reference to state law.’”).

Other courts have criticized the *Frenville* line of cases on the grounds that it ignores the Bankruptcy Code's broad definition of a “claim,” which includes contingent and unmatured rights to payment. *See* 11 U.S.C. § 101(5) (2000); *Grandy v. A.H. Robins Co.*, 839 F.2d 198, 201 (4th Cir. 1988) (declining to follow *Frenville's* “limiting” definition of a “claim”). Some courts have thus defined “claims” broadly enough to subsume “demands” or future claims as described in 11 U.S.C. § 524(g)(5). *See, e.g., Epstein v. Official Comm. of Unsecured Creditors (In re Piper Aircraft Corp.)*, 58 F.3d 1573, 1577–78 (11th Cir. 1995) (holding that a “claim” requires only conduct giving rise to liability and a relationship between the debtor and the claimant).

12. *See* 11 U.S.C. §§ 101(5), 1141(d)(1)(A) (2000); *In re Eagle-Picher Indus., Inc.*, 144 B.R. 69, 71–72 (Bankr. S.D. Ohio 1992).

13. *See, e.g., Elihu Inselbuch, Some Key Issues in Asbestos Bankruptcies*, 44 S. TEX. L. REV. 1037, 1039 (2003) (“Future asbestos claims represent a huge contingent liability that would gradually become concrete, confronting the reorganized debtor with the same litigation crisis that precipitated its first trip to bankruptcy court. Each reorganization would be followed by another mass of asbestos claims, triggering further reorganizations extending indefinitely into the future.”).

14. *Id.* at 1039–40.

Traditional bankruptcy law provided no apparent means of dealing with future claims. Bankruptcy has historically been available to discharge known or knowable obligations, not future obligations to unidentified persons who cannot, even theoretically, appear in the case to protect their own interest.¹⁵

In 1986, the *Johns-Manville* court “devised a creative solution” to the dilemma.¹⁶ Congress, in examining the *Johns-Manville* approach, summarized it as follows:

[T]o help protect the future asbestos claimants, . . . [the plan in *Johns-Manville* established] a trust into which would be placed stock of the emerging debtor company and a portion of future profits, along with contributions from Johns-Manville’s insurers. Present, as well as future, asbestos personal injury claimants would bring their actions against the trust. In connection with the trust, [a channeling] injunction would be issued barring new asbestos claims against the emerging debtor company.¹⁷

In *Johns-Manville*, the trust mechanism, trust funding, and payment obligations to claimants, present and future, were arrived at through the classic bankruptcy process of negotiation among *all* interested constituencies.¹⁸

The debtor, Manville, participated in the negotiations, ultimately assigning much of its equity to the trust.¹⁹ In exchange, Manville was freed from asbestos liability by an injunction barring asbestos lawsuits and “channeling” all asbestos claims, present and future, exclusively to the trust.²⁰

Manville’s insurers also participated in the negotiations: they reached settlements over disputed amounts of insurance, and ultimately paid insurance proceeds into the trust.²¹ Manville’s insurers were likewise made beneficiaries of the injunction against future claims.²² Manville’s commercial creditors also actively participated

15. See 11 U.S.C. § 101(5) (2000) (defining a “claim” in bankruptcy as a current “right to payment”); 11 U.S.C. § 1141(d)(1)(A) (2000) (“[T]he confirmation of a plan discharges the debtor from any debt that arose before the date of confirmation.”); *Kane v. Johns Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988) (“Claim covers the present claimants . . . who have dischargeable claims,” whereas “future claimants are not given creditor status.”).

16. H.R. REP. NO. 103-835 at 40 (1994).

17. *Id.*

18. *In re Johns-Manville Corp.*, 68 B.R. 618, 621–22 (Bankr. S.D.N.Y. 1986).

19. *Id.*

20. *Id.* at 624.

21. *Id.* at 621.

22. *Id.* at 624.

in the process. Current asbestos claimants against Manville, through their attorneys, negotiated for settlement of their claims, and voted in favor of the plan.²³

Because the plan was to deal with future claims, the bankruptcy court appointed a legal representative to negotiate for future claimants.²⁴ The need for an independent representative of future claimants, loyal only to future claimants, arose from the recognition that the interests of all the other parties, including the debtor and current claimants, were adverse to the interests of the future claimants.²⁵ The *Johns-Manville* bankruptcy judge had little difficulty recognizing that “[current claimants’] stake in maximizing recovery from the reorganizing [debtors] may be antithetical to the expectations of future interests,” and further that *debtors’* “skewed and less than robust advocacy [on behalf of future claimants] is not acceptable.”²⁶ As the court aptly explained: “[I]t is worthwhile to remember who due process will serve in this reorganization. The goal of the Plan and the purpose of the [channeling] Injunction is to preserve the rights and remedies of those parties who by accident of their disease cannot even speak in their own interest.”²⁷

Because the Bankruptcy Code did not expressly authorize this trust/injunction mechanism, the trust established under the Manville plan had difficulty selling its stock in the reorganized company because the market presumably harbored doubts about whether the channeling injunction would survive a future challenge by a dissatisfied future claimant.²⁸ Trust beneficiaries therefore petitioned Congress for *ex post* legislative approval.²⁹ This led to the so-called “Manville amendments,” encapsulating the *Johns-Manville* approach in the Bankruptcy Code.³⁰

The new Code provision, § 524(g), expressly authorizes the issuance of an injunction channeling all asbestos claims against a company, both present and future, to a trust for resolution and pay-

23. *Id.* at 621.

24. *In re Johns-Manville Corp.*, 36 B.R. 743, 759 (Bankr. S.D.N.Y. 1984).

25. *Id.* at 749.

26. *Id.* See also *In re Amatec Corp.*, 755 F.2d 1034, 1042–43 (3d Cir. 1985) (“None of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants.”).

27. *In re Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986).

28. H.R. REP. NO. 103-835 (1994).

29. See Inselbuch, *supra* note 13, at 1040.

30. 11 U.S.C. §§ 524(g)-(h) (2000). See also *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 235 n.47 (3d Cir. 2004) (noting that “§ 524(g) was modeled after” the channeling injunction issued in the *Johns-Manville* bankruptcy).

ment.³¹ The trust is to be funded in part by the debtor's equity.³² Claims against the debtor's insurers may likewise be channeled to the trust.³³ Details of the trust are to be arrived at through the classic Chapter 11 reorganization process; the injunction can only be issued in connection with an order confirming a Chapter 11 reorganization plan.³⁴

While largely geared toward validating the bankruptcy court's approach in *Johns-Manville* (and another large asbestos bankruptcy then in the system, *In re UNR Industries*),³⁵ Congress clearly contemplated that the mechanism it established with the Manville amendments could be applied in other, similar cases.³⁶ Therefore, Congress drafted the amendments to ensure that any § 524(g) injunction barring future claims "meet[s] the same kind of high standards . . . displayed" in *Johns-Manville* and *UNR*.³⁷ Congress was particularly "concerned that full consideration be accorded to the interests of future claimants, who, by definition, do not have their own voice."³⁸

Congress therefore wrote into § 524(g) a range of provisions specifically designed to protect future claimants.³⁹ After all, it was the ability to cut off the rights of future claimant—who, by definition, cannot be present to protect their own interests—that formed the crux of § 524(g)'s novelty and innovation. Accordingly, Congress required that before the bankruptcy court could approve any plan that contemplates a § 524(g) injunction, the court must affirmatively find that the plan is "fair and equitable" to future claimants⁴⁰ and that "present claims and future demands that involve similar claims" will be treated "in substantially the same manner."⁴¹ Congress also required that 75% of each class of current asbestos

31. See 11 U.S.C. § 524(g) (2000).

32. 11 U.S.C. § 524(g)(2)(B)(i)(II), (III) (2000).

33. 11 U.S.C. § 524(g)(4)(A)(ii)(III) (2000).

34. See, e.g., 11 U.S.C. § 524(g)(1)(A) (2000). See generally *Combustion Eng'g*, 391 F.3d at 234 n.45 (describing requirements of §524(g)); *id.* at 234 n.46 ("The injunctive relief available under § 524(g) may only be exercised "in connection with" an "order confirming a plan under Chapter 11.").

35. See *In re UNR Indus., Inc.*, 20 F.3d 766, 767-68 (7th Cir. 1994).

36. H.R. REP. NO. 103-835 (1994).

37. H.R. REP. NO. 103-835 at 41 (1994).

38. *Id.* at 40.

39. See *Combustion Eng'g*, 391 F.3d at 243 n.45 ("Many of these requirements [of § 524(g)] are specifically tailored to protect the due process rights of future claimants.").

40. 11 U.S.C. § 524(g)(4)(B)(ii) (2000).

41. 11 U.S.C. § 524(g)(2)(B)(ii)(V) (2000).

claimants vote in favor of the plan.⁴² In addition, following the lead of *Johns-Manville* and *UNR*, Congress mandated that the bankruptcy court appoint “a legal representative for the purpose of protecting the rights of persons that might subsequently assert” future claims (termed “demands” under the statute).⁴³

These procedural safeguards reflect Congress’ recognition that due process demands extraordinary care from a court contemplating a judgment purporting to bind persons—here, future claimants—who cannot participate in the proceedings to protect their own interests. Thus, “[m]any of” the requirements in §524(g) are “specifically tailored to protect the due process rights of future claimants.”⁴⁴

Congress imposed other requirements as well, again modeled after the approach taken by the *Johns-Manville* court. For example, Congress required that the trust be funded, in part, by the equity of the surviving company, thus providing an “evergreen” source of funds for the benefit of future claimants whose sacrifice was allowing the company to survive.⁴⁵

B. Section 524(g)’s Requirement of an Independent Representative for Future Claimants Is a Due Process Necessity that Comports with Class Action Settlement Precedent

The approach to absent parties fashioned by the *Johns-Manville* and *UNR* bankruptcy courts and ultimately adopted by Congress in § 524(g), while novel to the Bankruptcy Code, is not entirely unfamiliar in the law. It has long been understood that due process limits the ability of courts to adjudge the rights of absent parties.⁴⁶ All parties must be represented and that representation must be free from conflicts of interest.⁴⁷ Specifically, in the class action context, case law addressing future claimants has made emphatically clear that those claimants are not adequately represented, and constitutional due process is not satisfied, when one person or a group of persons attempts to represent claimants, current and future, who

42. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2000).

43. 11 U.S.C. § 524(g)(4)(B)(i); §524(g)(5) (2000).

44. *Combustion Eng’g*, 391 F.3d at 234 n.45.

45. *Id.* at 248.

46. *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).

47. See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff’d by equally divided court in part, vacated on other grounds in part*, 539 U.S. 111 (2003); *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992), *modified on other grounds*, 993 F.2d 7 (2d Cir. 1993).

have conflicting interests in a limited compensation fund.⁴⁸ This was set forth with particular clarity by the U.S. Court of Appeals for the Second Circuit in 1993:⁴⁹

[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among sub-groups requires that the members of each sub-group cannot be bound by a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.⁵⁰

In disapproving a proposed class action asbestos settlement, the Third Circuit, in *Georgine v. Amchem Products*,⁵¹ adopted the Second Circuit's analysis and ruled that certifying a unitary class of asbestos claimants which was fractured in interests between present and future claimants was improper because the conflicts "preclude[d] a finding of adequacy of representation. . . . Absent structural protections to assure that differently situated plaintiffs negotiate for their own unique interests, the fact that plaintiffs of different types were among the named plaintiffs does not rectify the conflict."⁵² This analysis, in turn, was adopted by the Supreme Court in rejecting the *Amchem*⁵³ and *Ortiz*⁵⁴ asbestos settlements, each of which treated current and future asbestos claimants in a single class represented by a single representative or undifferentiated group of representatives.⁵⁵

48. *Amchem Products*, 521 U.S. at 625–26.

49. *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992), *modified on other grounds*, 993 F.2d 7 (2d Cir. 1993).

50. *Id.* at 741, 743.

51. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 631 (3d Cir. 1996), *aff'd sub nom.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

52. *Georgine*, 83 F.3d at 631.

53. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

54. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

55. *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997) ("The class representative must "possess the same interest . . . as the class members In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.") (citations omitted); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857–59 (1999) (finding that conflicting sub-groups within a unitary class precludes finding of adequacy of rep-

The Supreme Court recently approved the Second Circuit's re-affirmation of the general principle that absentee claimants cannot be constitutionally bound to a settlement unless they have adequate representation in the settlement negotiations.⁵⁶ In that case, involving settlement of claims relating to injuries alleged to be caused by exposure to Agent Orange, the Second Circuit permitted certain claimants to pursue litigation against a defendant, notwithstanding a prior class action settlement of claims against that defendant, because "these plaintiffs were inadequately represented in the prior litigation, [so] they were not proper parties and cannot be bound by the settlement."⁵⁷ In so holding, the Second Circuit invoked *Amchem* and *Ortiz* and specifically noted that due process requires adequate representation at all times for a judgment to be binding on absentees.⁵⁸

C. *The Evolution of Asbestos Claiming and Its Impact upon
Asbestos Bankruptcies*

Despite the fact that asbestos manufacturing and use has virtually disappeared in the past few decades, and notwithstanding that the latency period for potential claims related to such manufacturing and use has largely run, the universe of asbestos litigation continues to expand.⁵⁹ The number of claims filed each year

resentation). See also Jeffrey L. Rensberger, *Asbestos and the Limits of Litigation*, 44 S. TEX. L. REV. 1013, 1016 (2003) ("The concern for future claimants, for example, was one of the main factors that concern[ed] the Court in *Amchem*.").

56. See *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd by equally divided court in part, vacated on other grounds in part*, 539 U.S. 111 (2003).

57. *Id.* at 260–61.

58. *Id.* at 260 ("A class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel.").

59. STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION*, RAND INSTITUTE FOR CIVIL JUSTICE 21–22 (2005) [hereinafter CARROLL, RAND].

Although the expansion of asbestos litigation has become a generally-accepted proposition, there appears to be an ongoing contraction in the rate of nonmalignant asbestos claims filings, at least as those claims have been filed against long-established asbestos trusts. See Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 CARDOZO L. REV. at xxii n. 93 (The ratio of nonmalignant to malignant claims filed against the Manville trust declined from 9:1 in 2003 to 3:1 in 2004; the Celotex trust ratio of nonmalignant to malignant claims declined from 9:1 in 2003 to 6.5:1 in 2004; and the Eagle-Picher trust ratio of nonmalignant to malignant claims had fallen to 5.8:1, down from 9:1 in each of the preceding three years.). Professor Brickman attributes the decline in nonmalignant claims filing to the trusts' adop-

continues to increase.⁶⁰ Claimants do not typically focus on recovery from a single company believed responsible for their harm.⁶¹ Instead, each claimant typically asserts claims against many companies; every company with a product to which the claimant may have been exposed, or owning a premises where the claimant may have been exposed, is a potential defendant. Growth in the number of claimants has been accompanied by expansion in the number of defendants. Plaintiffs' attorneys, searching for more—if not always deeper—pockets, have increasingly drawn peripheral players into the web of asbestos litigation. There are more than 8,400 asbestos defendants in this country today.⁶² Although many of these companies have had no more than a marginal connection with asbestos, the impact of the claims against them is significant.⁶³ As claims mount, the attendant uncertainty, based on possibly enormous liability, may cause share price and access to investor capital to decline.

While one might imagine that the “asbestos explosion” involves claims by individuals suffering from disease or significant impairments, that image does not describe the current population of asbestos claimants.⁶⁴ That population is instead composed mainly of individuals who have a debatable blemish on their lung x-ray, indicative of scarring, which could be the product of asbestos exposure. Most will never suffer any disease, and their lung capacity is *not* impaired.⁶⁵

Moreover, for peripheral defendants especially, liability for the asbestos claims is rarely obvious. Many products release little or no asbestos fiber. Litigation often reveals that the claim of exposure to defendants' asbestos product or premises is insupportable.⁶⁶ How-

tion of more stringent medical criteria and exposure requirements and “collars” that limit the trust assets available to pay nonmalignant claims.

60. *Id.* at 72.

61. *Id.* at 78.

62. *Id.* at 79.

63. Rensberger, *supra* note 55, at 1020.

64. See Queena Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6.

65. CARROLL, RAND, *supra* note 59, at 73, 76. See also Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) (“Cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed.”); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 223–24 (3d Cir. 2004).

66. HON. GRIFFIN BELL, ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST 15–16 (2002) [hereinafter BELL]. See generally

ever, litigation against massive numbers of claims, including claims of both serious disease and far higher percentages of unimpaired claimants, is enormously expensive to defend. Companies are tempted to settle these claims for nuisance value rather than bear the cost of attempting to refute each claim on the merits.⁶⁷ Nuisance value, on the other hand, often produces very satisfactory revenues for claimants' attorneys when they are handling and settling thousands of claims, echoing against dozens (or hundreds) of defendants. Moreover, "easy money," obtained via settlement of claims with questionable evidence of injury and causation, may have the perverse effect of drawing additional numbers of unsupportable claims into the system.⁶⁸

Enormous numbers of claimants, predominantly unimpaired claimants, are represented by a relatively small number of law firms.⁶⁹ Each firm is said to possess an "inventory" of claims.⁷⁰ Thus, each firm can muster thousands of claimants from its inventory against many defendants, claiming exposure to the defendants' products or premises, which allegedly contributed to the harm. The sheer numbers of claims that can be rolled out against a target defendant may be staggering—tens to hundreds of thousands. These numbers can overwhelm any defendant, frustrating any effort to mount a cogent defense to individual cases on the merits. So too, the sheer number of cases may frustrate the ability of the

Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33 (2004); Lester Brickman, *What Did Those Asbestos X-Rays Really Show?* WALL ST. J., Nov. 5, 2005, at A9.

67. See, e.g., *In re Babcock & Wilcox Co.*, 274 B.R. 230, 236 (Bankr. E.D. La. 2002); Memorandum of Points and Authorities In Support of W.G. Grace & Co.'s Motion to Approve PI CMO and Questionnaire, Dkt. No. 8395, *In re W.R. Grace & Co.*, No. 01-01139 (JKF) (Bankr. D. Del. May 10, 2005) at Tab 2, Tab 3 at 7.

68. CARROLL, RAND, *supra* note 59, at 47 (By "packaging plaintiff claims [for settlement], lawyers are able to obtain compensation for claimants with weak claims who would have difficulty collecting damages if they were to proceed individually.").

69. *Id.* at 23–24. See Francis E. McGovern, *Asbestos Legislation II: Section 524(g) Without Bankruptcy*, 31 PEPP. L. REV. 233, 247–48 (2003) ("The [asbestos] plaintiffs' bar is represented by approximately twenty-five lawyers who serve on the various asbestos bankruptcy committees. Roughly seven to fifteen of those lawyers can effectively speak for all their peers. If those seven to fifteen lawyers can agree among themselves on the details of a prepackaged bankruptcy, there is a substantial likelihood that there will be no critical opposition from the plaintiffs to an eventual plan of reorganization.").

70. BELL, *supra* note 66, at 12.

courts to deal substantively with the cases. The burden of administration is great on the defendants and the courts.⁷¹

The plaintiffs' law firms in possession of large inventories of claims have economic power by virtue of the weight of their claims. These firms can wield that power simply by threatening to file lawsuits against a company, and often obtain settlements before a lawsuit is ever filed simply by doing so. They assuredly possess that power once their suits are filed. One of the odd consequences of Congress' enactment of § 524(g) has been an enhancement in the economic power of the claimants' attorneys who possess these large inventories of even the weakest claims: Under § 524(g), approval of a plan that includes an injunction cutting off the rights of future claimants requires that 75% of *current* claimants to vote in favor of such plan.⁷² The inventory-holding law firms claim a power of attorney for all of their claimants, which they can vote *en masse*, giving them huge blocks of potential creditor votes for approval of any asbestos bankruptcy plan and, at the other extreme, veto power over any such plan.⁷³ The same plaintiffs' attorneys tend to

71. See Victor E. Schwartz et al., *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 248–50 (2000).

72. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2000). The apparent justification for this requirement was that a super-majority vote of current claimants, coupled with the requirement that similar current and future claims be paid similarly, would ensure that the plan is fair to future claimants. See 11 U.S.C. § 524(g)(2)(B)(ii)(V) (2000). The requirement of a 75% supermajority vote is in addition to the requirement that each class' affirmative vote also meet the general Chapter 11 requirement of two-thirds of the value of allowed claims in that class. See 11 U.S.C. § 1126(c) (2000).

73. Rather than value individual claims and weight them accordingly for voting purposes, it has been the general practice in asbestos bankruptcies to weight all asbestos claims—whether asserted by mesothelioma claimants or unimpaired claimants—the same, at one dollar per claim. This generates enormous power for unimpaired claimants, whose numbers far exceed those of cancer and other impaired claimants. The unimpaired claimants, in essence, can veto any plan that they or their counsel believe will not adequately provide for their interests, even if impaired claimants ultimately suffer from the result. The Third Circuit in *Combustion Engineering* expressed concern over the perceived ability of the unimpaired current claimants to control the vote under § 524(g). *Combustion Eng'g*, 391 F.3d at 244 (stating that the type of voting manipulation which took place in Combustion Engineering “is especially problematic in the asbestos context, where a voting majority can be made to consist of non-malignant claimants whose interests may be adverse to those of claimants with more severe injuries”).

More recently, representatives of asbestos claimants allegedly suffering from mesothelioma or other cancers have argued that their claims should be weighted more heavily than the claims of unimpaired claimants or persons allegedly suffering from less serious diseases. See, e.g., *Objection of the David Law Firm Who Rep-*

participate repeatedly in connection with asbestos bankruptcies.⁷⁴

One further observation will help to establish the framework for understanding the current asbestos bankruptcy model. Most companies subject to asbestos claims have long enjoyed payments from insurers to cover at least a portion of their defense and settlement of claims.⁷⁵ Insurers generally have a contractual—as well as a practical and financial—interest in defending claims which they are asked to pay. Insurance policies typically grant the insurer the right to control or associate in the defense of claims against the policyholder, as well as the right to approve settlements.⁷⁶ There is often litigation between insurers and policyholders regarding insurance for asbestos claims, but these cases do not typically focus on the existence of coverage. Rather, because asbestos liabilities arise over many years, many cases focus on allocation.⁷⁷

The economic principles underlying insurance ordinarily dictate that the policyholder and insurer share a common interest in keeping a policyholder's liability low by working together to pre-

resents Victims of Mesothelioma to the Motion of Quigley Company, etc., Dkt. No. 443, *In re Quigley Co., Inc.*, No. 04-15739 (PCB) (Bankr. S.D.N.Y. Sept. 15, 2005); Reaud, Morgan & Quinn, L.L.P.'s Objection to Motion of Quigley Company, Inc., etc., Dkt. No. 445, *In re Quigley Co., Inc.*, No. 04-15739 (PCB) (Bankr. S.D.N.Y. Sept. 15, 2005); Objection of the Ad Hoc Committee of Tort Victims to the Debtor's First Amended Disclosure Statement, etc., Dkt. No. 450, *In re Quigley Co., Inc.*, No. 04-15739 (PCB) (Bankr. S.D.N.Y. Sept. 15, 2005); Amended Objection of Hissey Kientz, L.L.P. and Hissey, Kientz & Herron P.L.L.C. to the Motion of Quigley Company, Inc. for an Order: (I) Approving Quigley's Disclosure Statement, etc., Dkt. No. 455, *In re Quigley Co., Inc.*, No. 04-15739 (PCB) (Bankr. S.D.N.Y. Sept. 15, 2005). If the cancer claims were weighted more heavily in the voting process, those claimants might be able to control the asbestos claimants' vote because, although far less numerous, they would represent more than two-thirds in amount of asbestos claims in the class. See 11 U.S.C. § 1126(c) (2000). In some cases, there could be two groups of opposing cancer claimants, each able to exercise a veto over confirmation of a plan.

74. See McGovern, *supra* note 69, at 247–48; Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 869 n.148 (2005).

75. See, e.g., *Combustion Eng'g*, 391 F.3d at 203 n.5 (“By the time its bankruptcy petition was filed, Combustion Engineering had exhausted its primary insurance coverage for products liability or settled with its primary insurance carriers.”); Mark D. Plevin et al., *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. TEX. L. REV. 883, 910 (2003) (“In many of the recent large ‘conventional’ asbestos bankruptcies, insurance coverage has not been a core concern of debtors or claimants, because insurance has long since been exhausted or settled.”).

76. See, e.g., *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 38 Cal. Rptr. 3d 716, 722 (Cal. App. 2006).

77. See, e.g., *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515 (D.D.C. 1984).

vent the imposition of liability on the policyholder. As asbestos litigation has grown and evolved, threats to this core principle have emerged. Insurers continue to have a desire to defend their policyholder and pay only meritorious claims. However, the sheer volume of asbestos litigation against a company results in increasing expense, both in the time the company must devote to the litigation and in actual dollars, even when the company's insurers are involved. As suggested above, the company might find that the mere pendency of large numbers of claims of dubious merit impairs its financial prospects. The company may thus seek to rid itself of asbestos liability in a manner that least disrupts its operations and shareholders; the company's objectives may have little relationship to the notion of defeating unmeritorious claims on the merits, particularly where the cost of settlement will be borne by (or can be imposed on) insurers. Recently, the asbestos defendants' "out" has become the pre-packaged asbestos bankruptcy, which as practiced today involves the company's global settlement of claims *without* insurers' participation or approval. Not surprisingly, insurers respond in many cases by arguing that the policyholder breached its duty to cooperate with the insurer, thereby waiving coverage for the resulting settlement.⁷⁸

D. Pre-Packaged Asbestos Bankruptcies Have Undermined the Due Process Protections Congress Envisioned for the Role of an FCR

Congress placed § 524(g) within the larger framework of Chapter 11 reorganization. Thus, relief under § 524(g) is only available through a confirmed Chapter 11 plan.⁷⁹ The Chapter 11 framework contemplates a largely transparent process in which all constituencies resolve their conflicting interests through negotiations held under rules established in the Bankruptcy Code. Any constituency shut out of negotiations may seek relief from the court

78. See, e.g., Objections of the Travelers Indemnity Company and Certain Affiliates and Travelers Casualty and Surety Company to the Debtor's Prepetition Procedures and Disclosure Statement and to Confirmation of the Debtor's Purported "Prepackaged" Plan of Reorganization, Dkt. No. 293, *In re* Combustion Eng'g, Inc., No. 03-10495 (Bankr. D. Del. Mar. 26, 2003) at 13-16; Insurers' Objections to the Plan's Improper Purported Assignment of Insurance Rights, Alteration of Insurance Contracts, and Preclusion of Coverage Defenses, Dkt. No. 2265, *In re* Congoleum Corp., No. 03-51524 (Bankr. D.N.J. Apr. 1, 2005) at 8; Certain Insurers' Brief Describing Why Debtors' Plan is Not "Insurance Neutral" and Suggesting Changes In the Plan and Findings In the Confirmation Order to Limit Prejudice to Insurers In Connection with Coverage Determinations, Dkt. No. 866, *In re* Mid-Valley, Inc., No. 03-35592 (Bankr. W.D. Pa. Mar. 24, 2004) at 2-4.

79. *Combustion Eng'g*, 391 F.3d at 234 n.46 (citing 11 U.S.C. § 524(g)(1)(A)).

(*e.g.*, moving to terminate the debtor's exclusive right to file, and solicit acceptances of, a plan of reorganization under 11 U.S.C. § 1121).

The transparency of ordinary bankruptcies presents problems for certain groups and interests in asbestos bankruptcies, giving rise to an interest in "pre-packaged" plans, or "pre-packs." A pre-pack plan is one that is negotiated and voted on before the commencement of the bankruptcy case.⁸⁰ In a pre-pack, the debtor has solicited and obtained the requisite votes in favor of its plan before commencing its bankruptcy case.⁸¹ Attorneys for current asbestos claimants have actively sought to promote the use of pre-packs or asbestos bankruptcies, following a now-typical model.⁸²

The process leading to the pre-pack may begin with claimants' counsel approaching a company laboring under the yoke of continuing asbestos litigation—or vice versa.⁸³ The proposal that plaintiffs' lawyers typically make is one that can hardly be refused—release of all present and future claims, at minimal company cost.⁸⁴ Indeed, the settlements are set up to be borne primarily by insurers—who are not afforded any role in negotiation of the pre-pack.⁸⁵

As noted, attorneys with large inventories of current claimants have great leverage in negotiation because of their ability to deliver the 75% vote of current claimants needed under §524(g) to cut off *future* claims.⁸⁶ To get those votes, the company will have to settle on favorable terms with current claimants. To render the settlement favorable, payments may come sooner than in the tort system

80. *See id.* at 201 n.4; *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 224 n.5 (3d Cir. 2003) (distinguishing pre-packs from "pre-approved" or "pre-negotiated" bankruptcies and conventional bankruptcy cases); *In re NRG Energy, Inc.*, 294 B.R. 71, 82 (Bankr. D. Minn. 2003) (citing additional cases and articles on pre-packs generally).

81. *See Plevin, supra* note 75, at 888.

82. *Id.* at 889–907; *Century Indemnity Co. v. Congoleum Corp. (In re Congoleum Corp.)*, 426 F.3d 675, 679–80 (3d Cir. 2005) (reciting the genesis of the *Congoleum* prepackaged bankruptcy).

83. *See Congoleum*, 426 F.3d at 680–81.

84. Roger Parloff, *Tort Lawyers: There They Go Again!*, 150 FORTUNE, Sept. 6, 2004, at 187 [hereinafter Parloff].

85. Statement of Prof. Lester Brickman Before Subcommittee on Commercial & Administrative Law of the House Judiciary Committee, July 21, 2004 at 18 (on file with the N.Y.U. Annual Survey of American Law) [hereinafter Brickman Testimony]; Plevin, *supra* note 75, at 889.

86. Brickman Testimony, *supra* note 85, at 25.

or may be higher than in the tort system.⁸⁷ More questionable claims will be paid, since pre-pack settlements typically use reduced standards of proof of both injury and exposure to asbestos in the company's premises or products.⁸⁸ The lawyers who negotiate for current claimants—and who help muster votes—are typically paid a separate fee for their services—\$20 million in one case and \$2 million in another⁸⁹—in addition to the contingency fee they tax on the settlements themselves.

The company, for its part, may cut off the rights of future claimants who do not yet have claims to assert. Moreover, the company gets this benefit at little cost because current claimants agree that payments from the trust should come largely, perhaps almost entirely, from insurance. The company may make modest payments to lighten the settlement and trust, but equity contributions to the trust (contemplated by Congress as a primary source of funding⁹⁰) are typically minimal or non-existent.⁹¹

The current state-of-the-art pre-pack asbestos bankruptcy will be framed something like this:⁹² Before the bankruptcy filing, debtor will settle with certain current claimants, typically by establishing an irrevocable trust designed to pay claimants large percentages of their claims. The pre-petition settlements and related trust arrangements will generally be finalized at least 90 days before bankruptcy so they are not subject to potential avoidance as preferences.⁹³ However, to assure that settled current claimants can provide the 75% vote that allows an injunction to cut off *future* claims, the prospective debtor must “create a ‘creditor’ status” for those

87. Ronald Barliant et al., *From Free Fall to Free-For-All: The Rise of PrePackaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441, 453 (2004); Plevin, *supra* note 75, at 913.

88. Barliant, *supra* note 87, at 453.

89. See *Congoleum*, 426 F.3d at 681 n.9; *In re Combustion Eng'g, Inc.*, 295 B.R. 459, 478 (Bankr. D. Del. 2003). The portion of the *Combustion Engineering* bankruptcy court's ruling that addressed the \$20 million fee to be paid to one of the claimant attorneys involved in negotiating the pre-pack was later reversed by the district court. See Opinion and Order, *In re Combustion Eng'g, Inc.*, Dist. No. 03-755 (AMW) (D. Del. Sept. 15, 2003). This ruling was not part of the appeal that was later decided by the Third Circuit.

For an extended discussion of the \$20 million “fee” in the context of the *Combustion Engineering* case, see Brickman, *supra* note 74, at 886–89.

90. See H.R. REP. NO. 103-835 at 40 (1994); See also *Combustion Eng'g*, 391 F.3d at 134 & n.69.

91. Brickman, *supra* note 74, at 865 n.35; *Congoleum*, 426 F.3d at 680.

92. See generally Plevin, *supra* note 75, at 892–907.

93. But see *Combustion Eng'g*, 391 F.3d at 113 (discussing a pre-petition settlement trust funded 87 days before bankruptcy filing).

who participate in the prebankruptcy settlement so that [those claimants] will retain the right to vote on the bankruptcy plan.”⁹⁴ Thus, the prospective debtor will leave settling current claimants some continuing interest in the estate (dubbed a “stub claim” in one case)⁹⁵ to allow them to vote on the plan.⁹⁶ Current claimants under such a structure would receive far more than future claimants with similar claims, because the current claimants receive both a large pre-petition payment from the trust and a small post-petition settlement through the bankruptcy, whereas similarly situated future claimants receive only the small post-petition payment.⁹⁷

Potential future claimants—persons who presumably have been exposed to asbestos but are presently unaware that they may in the future suffer from asbestos disease—do not fit comfortably into this pre-pack schematic. In a “traditional” asbestos bankruptcy, the court appoints an FCR to represent future claimants soon after the petition is filed.⁹⁸ The FCR is thus involved in plan negotiations from the outset; all of debtors’ assets are on the negotiating table.⁹⁹ And rightly so, given Congress’ stated concern regarding the constitutionality of any scheme that cuts off the rights of future claimants who otherwise have no voice in the proceedings.¹⁰⁰

In a pre-pack, however, negotiations precede the filing of the bankruptcy proceeding. As a result, the bankruptcy court cannot be called upon to appoint an FCR to represent the interests of the future claimants during the pre-petition negotiations. The prospective debtor and the current claimants thus have two basic choices.

First, they may negotiate pre-petition without someone purporting to serve the role of FCR. The future claimants—more precisely, someone purporting to act on the future claimants’ behalf—have no role in the pre-petition negotiations and no input concerning their treatment under the pre-packaged plan. Once the bankruptcy petition has been filed, the bankruptcy court appoints an

94. Parloff, *supra* note 84, at 10 (quoting memorandum by an asbestos plaintiffs’ attorney).

95. *Combustion Eng’g*, 391 F.3d at 201.

96. Parloff, *supra* note 84, at 190.

97. *See Combustion Eng’g*, 391 F.3d at 244, 242 (“Privileged” current claimants with both pre-petition settlements and “stub claims” “appear to receive a demonstrably unequal share” of debtor’s assets compared with, *inter alia*, future claimants.). *See also id.* at 245 (“A disfavored group of asbestos claimants, including the future claimants . . . were not involved in the first phase of this integrated settlement.”).

98. 11 U.S.C. § 524(g)(4)(iii)(B)(i) (2000).

99. Plevin, *supra* note 75, at 916–17.

100. H.R. REP. NO. 103-835 (1994).

FCR, and the debtor and current claimants hope that the FCR will approve the plan they have negotiated without the FCR's involvement.

Second, the prospective debtor and current claimants may hire someone pre-petition to try to fill the role of FCR, purporting to represent future claimants in the negotiations. The prospective debtor and the current claimants would negotiate with, and ultimately reach agreement with, the person they selected. They would do so with the hope and expectation that once the bankruptcy case is filed, the bankruptcy court will appoint the pre-petition "FCR" under § 524(g)(4)(B)(i) as the post-petition FCR, to ensure that the pre-petition deal will not be scrutinized by someone else.¹⁰¹

The first scenario provides the maximum protection for future claimants, but also creates maximum risk for the debtor and the deal it negotiated with the current claimants because the person appointed by the bankruptcy court to serve as the FCR post-petition may conclude that the plan is not fair to future claimants. The second scenario, in contrast, minimizes the risk that the pre-petition deal will be upset post-petition by an FCR scrutinizing the terms of the deal on behalf of future claimants, provided that the bankruptcy court can be persuaded to appoint the person who purported to serve the role of FCR pre-petition—the "pseudo FCR"—as the post-petition FCR. However, it also minimizes the chance that future claimants' interests will be adequately represented throughout the process, because the pseudo "FCR"—selected and paid by the debtor pre-petition—is not likely to criticize the deal he has already negotiated and agreed to support.

101. There are, to be sure, variations on these scenarios. For example, as in *Combustion Engineering*, the debtor and current claimants can negotiate the terms of the deal and then, once portions of that deal have been irrevocably implemented (such that large portions of the debtor's assets were off-limits to future claimants), select someone to act as pre-petition FCR to negotiate other terms. *Combustion Eng'g*, 391 F.3d at 245; Plevin, *supra* note 75, at 917 & nn. 147–49. This does not offer adequate representation to future claimants "throughout the process," as required by the Third Circuit. *See Combustion Eng'g*, 391 F.3d at 245. In addition, the debtor could select someone to negotiate the deal pre-petition on behalf of future claimants, then—to maximize independent review of the plan—ask the bankruptcy court to select and appoint a different person to serve as the post-petition FCR. As long as that second FCR had the unrestricted ability to scrutinize the pre-petition deal in its entirety and negotiate such additional terms as he or she deemed necessary to protect the interests of the future claimants, this use of a pre-petition FCR in the pre-pack context would not be problematic. As discussed herein, however, problems arise because pre-pack debtors have without exception asked bankruptcy judges to appoint their chosen pre-petition "FCR" as the real FCR after the bankruptcy case has been commenced.

In practice, since the debtor and current claimants control the process, they have, in each instance, unsurprisingly chosen the second scenario—the one that minimizes their risk. The prospective debtor and current claimants select and hire a pseudo FCR purportedly to engage in the pre-bankruptcy negotiations on behalf of the future claimants.¹⁰² In choosing this pseudo FCR, prospective debtors and current claimants are unlikely to choose the most formidable adversary against whom to negotiate. Instead, they are likely to seek someone more pliant and cooperative. Their chosen pseudo FCR then purports to negotiate on behalf of future claimants. In addition to being well-compensated, the pseudo FCR is indemnified by the prospective debtor or one of its affiliates, such as a parent company that is not contemplated to be part of the bankruptcy filing, so he has no fear of personal liability to future claimants who later find themselves dissatisfied with his efforts on their behalf.

The prospective debtor (or its corporate affiliate) pays the pseudo FCR's pre-petition fees, making the pseudo FCR in effect an employee of the prospective debtor. Moreover, the pseudo FCR is subject to more practical pressures to come to an agreement with the prospective debtor and the current claimants. If the pseudo FCR agrees on behalf of the future claimants to a settlement the prospective debtor likes, the prospective debtor will proceed into bankruptcy and nominate him to serve as the "real" FCR, providing continued employment during the bankruptcy and, later, in administering the trust. If, however, the pseudo FCR is too vigorous an advocate for future claimants, such as if he were to oppose the plan on the ground that the future claimants would actually fare better *outside* of bankruptcy,¹⁰³ a prospective debtor intent on cutting off future claims through a § 524(g) bankruptcy plan could fire or replace him, cutting off his existing and future employment. Thus, the pseudo FCR faces structural pressures to agree to a plan that is acceptable to the prospective debtor.¹⁰⁴

Further compromising the pseudo FCR's independence, prospective debtors have tended to choose the pseudo FCRs from a

102. Brickman Testimony, *supra* note 85, at 43.

103. For example, a fully independent FCR might decide that future claimants will fare better outside of bankruptcy when the prospective debtor is financially healthy and able to pay all of its current and future liabilities in full, whereas the future claimants' chances for recovery are more limited in a bankruptcy. *See, e.g., Combustion Eng'g*, 391 F.3d at 238 (recognizing that future claimants "might prefer having recourse to solvent entities rather than being limited to proceeding against . . . a limited fund").

104. *See* Brickman, *supra* note 74, at 879; Barliant, *supra* note 87, at 461.

small stable of repeat FCRs.¹⁰⁵ Such persons are most likely to be chosen repeatedly if they are viewed by prospective debtors and claimants as reliable negotiating partners who can be counted on to not “rock the boat.”

The structure of the typical pre-packaged asbestos bankruptcy process is skewed in many further respects, three of which bear noting here. First, instead of allowing the FCR to be involved in the negotiation of the plan from the outset, the prospective debtor and current claimants’ counsel often settle first, taking a substantial portion of the debtor’s assets off the table. They *then* appoint the pseudo FCR, who is only able to negotiate for what remains.¹⁰⁶ Second, unlike the case during bankruptcy,¹⁰⁷ the pseudo FCR has no ability to compel the prospective debtor to provide information that he or she may need to negotiate effectively. Instead, the pseudo FCR is wholly dependent on such information as the prospective debtor chooses to provide. Finally, the pseudo FCR is *not* a court-appointed fiduciary, but rather an employee of the prospective debtor, when conducting pre-petition negotiations.¹⁰⁸

105. See *infra* note 191 (discussing FCR pool).

106. For example, in the pre-packaged asbestos bankruptcy cases of *J.T. Thorpe* and *Combustion Engineering*, debtors did not appoint their pseudo FCR until after large portions of those debtors’ assets had been irrevocably committed to pre-petition trusts to pay current claims. See Transcript of Proceedings at 166:20–25, *In re J.T. Thorpe Co.*, No. 02-41487-H5-11 (Bankr. S.D. Tex. Dec. 18, 2002); Transcript of Proceedings at 345:20-346:25, *In re Combustion Eng’g, Inc.*, No. 03-10495 (JKF) (Bankr. D. Del. May 1, 2003). One of the principal grounds underlying the Third Circuit’s reversal of the order confirming Combustion Engineering’s plan was its conviction that the “two-trust structure” of the plan in that case—in which roughly half of the company’s value was set aside pre-petition for settlements with “privileged” current claimants in contemplation of the bankruptcy filing—may have unlawfully discriminated against future claimants. *Combustion Eng’g*, 391 F.3d at 241–42. The transfer of half the company’s value to a trust for the benefit of a subgroup of current claimants took place before the pseudo FCR in that case was appointed.

107. See Fed. R. Bankr. P. 2004.

108. This article suggests that a system in which protection of the rights and interests of future claimants is largely left to someone effectively selected by the debtor and current claimants is a broken system. Although the problems with that system appear to be most pronounced in connection with pre-packs, many of the same issues can arise in “traditional” (that is, non-pre-packaged) asbestos bankruptcy cases as well. Debtors and current claimants have an inordinate role in selection of the FCR, drawing upon a narrow pool of candidates in case after case. Although experience can certainly be a benefit, the selection process and the known track records of these repeat candidates—routines they have developed, viewpoints they are known to hold—themselves dampen the independence and strength of advocacy that is necessary for the FCR to help guard the interest of future claimants in the bankruptcy process. Moreover, the more often someone is

II.
THE STANDARD TO BE APPLIED IN APPOINTING A FUTURE
CLAIMANTS REPRESENTATIVE MUST ASSURE
COMPLETE INDEPENDENCE

A. *Section 524(g) Imposes Unfamiliar Duties upon Bankruptcy Courts,
Including the Duty to Appoint a Representative to Protect the
Interests of Future Claimants*

Asbestos bankruptcies under § 524(g) impose a number of unfamiliar obligations and burdens upon the bankruptcy court. Bankruptcy, particularly Chapter 11 bankruptcy, is often seen as a process within which interested parties hammer out agreements under the rules established by the Bankruptcy Code, bringing appropriate concerns and legal conflicts to the court's attention for resolution only as necessary. Consensual resolution is at the core of modern bankruptcy practice. Overburdened bankruptcy judges are happy when all the interested parties have reached agreement.

Section 524(g) does not fit comfortably within this traditional bankruptcy model. Because future claimants are not present to represent their own interests, they cannot enter into agreements to give up a right or to trade a right for some other benefit. Section 524(g) bankruptcy cases thus thrust the bankruptcy court into the unfamiliar role of *protecting* from the bench, but without participating itself in the negotiation process, a largely inchoate constituency—a constituency that is unable, in traditional bankruptcy terms, to protect itself within the bankruptcy process. Indeed, because the § 524(g) injunction barring future claims is the singular feature of asbestos bankruptcies, affording protection to future claimants may fairly be described as the bankruptcy court's central duty in asbestos bankruptcies. For bankruptcy court judges accustomed to moderating disputes and believing that they have succeeded in their assigned statutory tasks if all of the parties have been duly informed and reached agreement, this new role may not come easily. Nor should it come easily. As this article suggests, the task of protecting an inchoate, undefined group of future claimants with diverse claims, in a changing legal environment, in an atmosphere charged with odd alliances and competing objectives, presents any number of difficult problems. Nonetheless, one circuit court has recently had occasion to admonish bankruptcy

selected by debtors and current claimants to serve as an FCR, the more likely that person will be subject to undue influence by these other constituencies.

judges to be vigilant in performing their duties under § 524(g) in connection with a pre-packaged plan.¹⁰⁹

Within the § 524(g) framework enacted by Congress, the FCR can and should make the bankruptcy court's job much easier by ferreting out the facts and giving voice to the interests of the absent parties in a nearly traditional way. The FCR was plainly intended to participate in all aspects of the proceedings and negotiations potentially affecting future claimants. But the FCR's function of "protecting the rights of" future claimants¹¹⁰ is *not* served unless the FCR can truly and fairly be seen as an independent voice for the future claimants.

B. The Role of the FCR and the FCR's Fiduciary Obligations to Future Claimants

Section 524(g) does not specify any standards for the appointment of an FCR, providing only that an FCR must be appointed. However, from the *Johns-Manville* model, it is clear that the FCR is meant to serve as a fiduciary to future claimants, both in connection with the negotiation of a possible plan and in representing future claimants' interests in connection with adversarial processes during the course of the bankruptcy case.¹¹¹ In this fiduciary role, the FCR represents interests in conflict with every other major constituency in the bankruptcy process, and faces a series of basic choices.

The FCR's position is central to the § 524(g) process.¹¹² Although the bankruptcy judge is charged with ensuring that the plan

109. See *Century Indemnity Co. v. Congoleum Corp.* (*In re Congoleum Corp.*), 426 F.3d 675, 692–93 (3d Cir. 2005) ("We do not approve of a bankruptcy court applying less than careful scrutiny to pre-petition procedures in prepackaged plans. The parties here seek the court's *imprimatur* of a reorganization that will free the debtor of all current and future asbestos liability. The legitimacy of such a transaction is dependent on the stature of the court. . . . Leaving the procedures for allocation of resources predominantly in the hands of private, conflicting interests has led to problems of fair and equal resolution. The need for counsel with undivided loyalties is more pressing in cases of this nature than in more familiar conventional litigation. Correspondingly, the level of court supervision must be of a high order.").

110. 11 U.S.C. § 524(g)(4)(B)(i) (2000).

111. See *Combustion Eng'g*, 391 F.3d at 237 (stating that the FCR must "act as fiduciary for the interests of future claimants").

112. Under similar circumstances to an asbestos class action settlement, the Supreme Court has ruled that "structural assurance of fair and adequate representation" must be achieved through the "obvious" need for separate representation for present and future claimants. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999).

is “fair and equitable”¹¹³ to future claimants, he or she operates only from the bench. The judge cannot participate as a party in the bankruptcy process or serve as an advocate for the future claimants; that is the job of the FCR, and the viability of the plan turns on the FCR’s participation. If the FCR’s representation of future claimants does not meet constitutional standards, the plan could later be subject to collateral attack by future claimants dissatisfied with the deal that the FCR has struck on their behalf.¹¹⁴ Disentangling a plan long after it has been implemented is difficult to imagine, but could be the logical consequence of a successful collateral attack. Even in connection with direct review, however, it is important that the FCR participate effectively throughout the bankruptcy. The influence of the FCR as the active advocate that Congress envisioned should have pervasive effects as a plan is (or is not) developed, and as the bankruptcy proceeds.

A full description of the range of issues for the FCR to consider in the course of his or her service is beyond the scope of this article. But it is fair to observe that the FCR must fundamentally address whether § 524(g) will provide any benefit to future claimants at

113. 11 U.S.C. § 524(g)(4)(B)(ii) (2000).

114. See *Stephenson*, 273 F.3d at 261 (A “prior Agent Orange [class action] settlement does not preclude [claimants whose injuries had not manifested until after the settlement fund was depleted] from asserting their claims alleging injury due to Agent Orange exposure. Because these plaintiffs were inadequately represented in the prior litigation, based on the Supreme Court’s teaching in *Amchem* and *Ortiz*, they were not proper parties to the litigation.”).

At least one commentator has argued that even with the FCR, § 524(g) does not meet due process standards. See Katherine M. Anand, *Demanding Due Process: The Constitutionality of the § 524(g) Channeling Injunction and Trust Mechanisms That Effectively Discharge Asbestos Claims in Chapter 11 Reorganization*, 80 NOTRE DAME L. REV. 1187, 1206–08 (2005) (“Section 524(g) is inherently flawed because a future claims representative, by nature and situation, can never be “adequate.” None of the other parties involved in reorganization have an incentive to support future claimants, including the court, which is the only monitor of the representative’s behavior. The court’s incentive is ‘less to ensure that future claimants receive the maximum possible or even a fair share, than it is to ensure that the parties reach some agreement.’ The court is probably more interested in clearing its docket and may appoint an ‘accommodating’ legal representative. In practice . . . the court controls the legal representative’s duties. The other parties in the case are not going to support the legal representative or the future claimants against the interests of the court. The present claimants, other creditors, and equity holders all have an interest in undervaluing future claims; the less future claimants get, the more money the other parties get . . . There is also a psychological factor involved in that the people who have present claims are visible and many (although not all) have tangible injuries; it is easy to get all the parties to focus on the present claimants, rather than the future claimants.”).

all.¹¹⁵ If the company is not under threat of insolvency, present or future, that would impair the ability of deserving future claimants to obtain appropriate compensation in the tort system from the debtor or an affiliate, then there should be no reason for an FCR to acquiesce in a § 524(g) outcome which will eliminate future claimants' access to the debtors' full market capitalization, substituting instead a potentially less-valuable right to share in a limited fund. This basic choice has seemingly not always been apparent to judges presiding over asbestos bankruptcies or to FCRs appointed to represent future claimants.

For example, several subsidiaries of Halliburton Company, the modern day poster-child of the profitable company, recently took a trip through bankruptcy to wash themselves and Halliburton clean of present and future asbestos litigation, all the while proclaiming that they were in no danger of present or even *future* insolvency on account of asbestos claims.¹¹⁶ Rather, these companies were seeking absolution from, and liquidation of, their potential asbestos liability in order to, boost Halliburton's attractiveness to investors and

115. See, e.g., *Combustion Eng'g*, 391 F.3d at 238 ("The interests of the future [non-debtor CE affiliates] Basic and Lummus asbestos claimants are not necessarily aligned with those of future Combustion Engineering asbestos claimants. The future asbestos claimants of the non-debtors might prefer having recourse against solvent entities rather than being limited to proceeding against the Asbestos PI Trust, a limited fund subject to depletion by current and future Combustion Engineering asbestos claimants.")

116. The Halliburton-related debtors, presumably with one eye on the Wall Street reaction to their bankruptcy filings, repeatedly advised the bankruptcy court that they were solvent notwithstanding their asbestos liabilities. See, e.g., Affidavit of Bruce A. Stanski In Support Of Debtor's Chapter 11 Petitions And First Day Motions And In Support Of Confirmation Of The Debtor's Plan Of Reorganization, Dkt. No. 5, ¶ 4, *In re Mid-Valley Inc.*, No. 03-35592 (JKF) (Bankr. W.D. Pa. Dec. 16, 2003) ("[T]his is not a typical chapter 11 case and *does not involve debtors in financial distress.*"); Affidavit of Albert O. Cornelison In Support Of Debtors' Chapter 11 Petitions And First Day Motions And Applications, Dkt. No. 4, ¶ 30, *In re Mid-Valley Inc., et al.*, No. 03-35592 (JKF) (Bankr. W.D. Pa. Dec. 16, 2003) ("Debtors are filing the Plan to avail themselves of the protections available under sections 105 and 524(g) of the Bankruptcy Code and *not due to any financial difficulties.*"); Motion for Entry of an Interim Order Pursuant to 11 U.S.C. Sections 364 and Rule 4001 of the Federal Rules of Bankruptcy Procedure (i) Authorizing Debtors to Obtain Interim Post-petition Financing, Granting Super-Priority Administrative Expense Status, and Authorizing the Debtors to Enter into Agreements with HESI and Halliburton, and (ii) Prescribing Form and Manner of Notice and Time for Final Hearing Under Federal Rule of Bankruptcy Procedure 4001(c), Dkt. No. 37, ¶ 11, *In re Mid-Valley, Inc.*, No. 03-35592 (JKF) (Bankr. W.D. Pa. Dec. 16, 2003) ("Each of the Debtors is a solvent entity and it is projected that the filing of the Reorganization Cases will not adversely affect the financial viability of the Debtors.") (emphases added).

improve its access to credit markets. Although the joint plan of the Halliburton-related debtors precluded future claimants from asserting claims against these companies, instead relegating them to a limited trust fund established under § 524(g), the FCR in that case supported the plan.¹¹⁷

There is, of course, far more for the FCR to do in most bankruptcies than determine whether there is a future danger of insolvency. Even if the trust is acceptable in theory, the FCR must still determine whether it is acceptable to the future claimants on the terms that the debtor is willing to offer. And assuming limited funds are available to pay claims, as is often the case, the future claimants are competing for those funds against current claimants and other creditors.

In conceiving the statutory FCR, Congress undoubtedly had in mind the need to offer recourse to future claimants with serious diseases, such as mesothelioma, and meritorious claims against the debtor. The FCR certainly represents those interests. Those interests will not only pit him generally against all current claimants in competing for limited funds, but should pit him most forcefully against those current claimants with weak or deficient claims who are also competing for those limited funds.¹¹⁸ Deficient claims may take various forms and be deficient in varying ways: they may involve fraudulent claims, the claims of the unimpaired (i.e., persons who may have been exposed to asbestos in debtor's products but who have not yet suffered an asbestos-related disease),¹¹⁹ or those

117. How did these profitable, solvent companies successfully pass through the bankruptcy portal? The short answer is that since all pre-petition non-asbestos creditors were paid in full in cash—and during the bankruptcy case itself, to boot—and no one objected, including the FCR, the bankruptcy court approved the proposed plan. Early on, certain of the debtors' insurers moved to dismiss the bankruptcy cases under 11 U.S.C. § 1112(b) on the grounds that bankruptcy filings by companies that were admittedly not in financial distress were not in good faith; the bankruptcy court denied the insurers' motion based on a finding that the insurers lacked standing, and the case sailed on from there. *See generally In re Mid-Valley, Inc.*, 305 B.R. 425 (Bankr. W.D. Pa. 2004).

118. *See Combustion Eng'g*, 391 F.3d at 242 ("There are two considerations here that are absent in the ordinary commercial bankruptcy: the Plan's treatment of current asbestos claimants relative to future asbestos claimants, and its treatment of malignant asbestos claimants relative to non-malignant asbestos claimants.") (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 854–55 (1999), and emphasizing that a limited-fund asbestos settlement must provide for "equity among members of the class" and "fairness of the distribution of the fund among class members").

119. Claims that do not meet certain minimal criteria are unenforceable under the law of some states, and as a practical matter have been rendered unenforceable in others. *See generally* Mark A. Behrens & Manuel Lopez, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 THE REV. OF LITIG. 253 (2005); Victor E.

who simply did not have sufficient contact with the debtor's products to have a bona fide claim.

Not all claims, present or future, are equal. However, it cannot fairly be suggested that the FCR is supposed to represent the interests of future claimants with false, fictitious, or fanciful claims.¹²⁰ Rather, the FCR actually represents some abstraction or idealization of the future claimants—i.e., those who are, in some meaningful sense, legally deserving of compensation from the debtor (albeit, while ensuring that unreasonable requirements do not unduly restrict recovery for the deserving).¹²¹ In championing their

Schwartz et al., *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. BANKR. L. & PRAC. 61 (2005). For a discussion of whether the claims of unimpaired or "asymptomatic" asbestos claimants are properly deemed "claims" in bankruptcy, see William Shelley & Jacob Cohn, *Unraveling the Gordian Knot of Asymptomatic Asbestos Claimants: Statutory, Precedential, and Policy Reasons Why Unimpaired Asbestos Claimants Cannot Recover In Bankruptcy*, MEALEY'S ASBESTOS BANKR. REP. (May 2004).

120. In this respect, the interests of the FCR and those of the debtor's insurers should tend to coincide in asbestos bankruptcies, since each presumably would favor restricting payments to claimants who are suffering from an actual injury caused by demonstrable exposure to debtor's products or premises. In contrast, the attorneys typically representing large numbers of claimants, as well as the debtor—which hopes to foist almost all the remaining liability on its insurers—tend to be more liberal in their view of what constitutes a bona fide claim.

121. The class of future claimants presumably includes different levels of injury and different degrees of merit in the claim. Moreover, some claimants may have viable recourse only against the debtor, while others may be able to obtain compensation from some other liable party in the tort system. Professor McGovern has recognized the "conflict between malignancies and non-malignancies." McGovern, *supra* note 69, at 249. The conflicts among the inchoate class of future claimants seem very real, but thus far it appears that all FCRs have believed themselves able to reconcile these conflicting claims in establishing a scheme of future compensation through the trust.

Arguments have thus far unsuccessfully been made that a single FCR cannot adequately represent the interests of conflicting groups of future asbestos claimants, such as unimpaired future claimants versus future mesothelioma claimants, because it is in the interest of each group of future claimants to obtain as much as possible from the limited fund for themselves, and an unconflicted representative on behalf of each group would argue that the plan must allocate more for the payment of his particular group and thus limit the claims of, and payments to, the other groups of future claimants. See, e.g., Memorandum in Support of Motion for Structural Relief Required to Eradicate the Legal Ethical Conflicts of Asbestos Law Firms (filed by Official Committee of Unsecured Creditors), Dkt. No. 9915, *In re Owens Corning*, No. 00-03837 (Bankr. D. Del. Oct. 24, 2003), at 59–60. See also Anand, *supra* note 114, at 1204 ("It is not clear that all the future claimants can be lumped into one single class of victims for which one legal representative is sufficient. Amchem Products, Inc. v. Windsor, which also involved a class action and is relevant by analogy, requires that the members of the class have predominately the same interests. Thus, mesothelioma victims, whose disease is fatal, should not have

interests, the FCR should be expected to vigorously oppose plans and proposals that would allow the undeserving to deplete the

the same representative as [those] who are usually medically unimpaired. . . . The demand-holders are (presumably) a very diverse group—they will contract diseases of varying degrees of seriousness (or contract no diseases at all), require different amounts in damages as compensation, and contract their diseases at different times (thus, some may have no interest in a highly-funded trust if their injuries will manifest early on). Therefore, it is not clear that all the future claimants can be fairly represented as one bulging group.”); Brickman, *supra* note 74, at 877–78 (“It is doubtful that a single person, the futures representative, can adequately represent the conflicting interests of unimpaired asbestosis and pleural plaque claimants, impaired asbestosis claimants, asbestosis claimants with an ILO grade of 2/1 or higher, mesothelioma claimants, lung cancer claimants who were smokers and those that were nonsmokers and other future cancer claimants. To comply with the thrust of the Supreme Court’s holding in *Ortiz*, each significant subgroup of future claimants would have to have separate representation.”).

Does the FCR represent the interests of unimpaired claimants whose only claim to compensation is the existence of a blemish on their x-ray? If the claim is legally sustainable, the answer is presumably yes, in some sense. But if one were to ask anyone—including anyone even potentially represented by the FCR—whether they would think that paying such claimants is appropriate if it means *not* paying the seriously injured what they deserve, few would be expected to say yes.

In some asbestos bankruptcy cases in which the debtor is seeking to also obtain protection from long-tail tort claims involving other substances such as silica, courts have appointed separate FCRs for asbestos and silica. *See, e.g.*, Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the First Amended Joint Plan of Reorganization of Kaiser Aluminum Corporation, Kaiser Aluminum & Chemical Corporation and Certain of Their Debtor Affiliates, Dkt. No. 7258, *In re* Kaiser Aluminum Corp., No. 02-10429 (JKF) (Bankr. D. Del. Aug. 24, 2005) at 39–40 (discussing appointment of (i) future asbestos claimants’ representative and (ii) future silica and coal tar pitch claimants’ representative). In other cases, however, a single FCR has purported to represent the interests of both asbestos and silica future claimants. *See* Disclosure Statement for the Proposed Joint Prepackaged Plan of Reorganization for Mid-Valley, Inc., DII Industries, LLC, Kellogg Brown & Root, Inc., . . . Under Chapter 11 of the United States Bankruptcy Code, Dkt. No. 48, *In re* Mid-Valley, Inc., No. 03-35592 (Bankr. W.D. Pa. Dec. 16, 2003) at 44 (discussing the Debtors’ intent to request that the bankruptcy court approve their selection of a single FCR for “future and unknown holders of asbestos-related and silica-related personal injury demands”). It is worth noting that in *Mid-Valley*, the debtors recognized that “[i]t may be necessary for certain persons to have multiple representatives,” and accordingly “reserve[d] their right to request additional representatives, and to restrict the scope of the first appointed representative, if necessary to satisfy due process requirements.” *See* Application for an Order Appointing a Legal Representative for Purposes of Section 105(a) and 524(g) of the Bankruptcy Code, Dkt. No. 12, *In re* Mid-Valley, Inc., No. 03-35592 (Bankr. W.D. Pa. Dec. 16, 2003). However, no additional representative was ever requested or appointed in that case.

debtor's limited resources.¹²² All this is undoubtedly more easily said than evaluated.

As described below in Part II.C., for the FCR to properly address these issues, the FCR cannot be selected by the debtor, the current claimants, or any other party in interest to a bankruptcy case.¹²³ Rather, the FCR may only be properly selected and appointed by the court, and the court must take care that its selection will ensure the staunch independence that the job demands. In focusing on the FCR here, it is important not to lose sight of the fact that the protection of future claimants is ultimately the responsibility of the court. While the FCR can provide vital assistance, the court has its own obligations to future claimants under the Code and the Constitution.

C. *The Current Approach of the Bankruptcy Courts to the Appointment of Future Claimants' Representatives*

In almost every asbestos bankruptcy case to date, the bankruptcy court has granted the debtor a presumptive right to select the FCR, often approving the appointment of an FCR who has already been selected by the debtor and pre-determined to be acceptable to the current claimants.¹²⁴ In so doing, the bankruptcy courts

122. So too, the bankruptcy court must presumably protect the interests of deserving future claimants, not undeserving ones.

123. This article is not the first to make essentially this argument. See Alan Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2080–81 (2000) (“Among the essential characteristics of a legal representative acting on behalf of future mass tort claimants are independence and a lack of conflicts of interest . . . the legal representative should be selected by the United States Trustee with court approval, rather than by the debtor, parties in interest, or attorneys purporting to represent future claimants when the bankruptcy petition is filed.

Caution should be exercised to assure that shortcuts are not taken regarding the selection of the legal representative. . . . A new, independent legal representative appointed after the filing of the bankruptcy case, with sufficient time to review any proposed estimation or settlement and an opportunity to vote on the proposed plan on behalf of future claimants, should be required.”) (emphasis added). Since Professor Resnick's article, however, we now have experienced the problems that arise when a debtor is permitted to select the FCR.

124. See, e.g., Order Appointing Legal Representative For Future Claimants, Dkt. No. 2096, *In re Armstrong World Indus., Inc.*, No. 01-04471 (Bankr. D. Del. Mar. 1, 2002); Application of Armstrong World Industries, Inc. Pursuant to 11 U.S.C. §§ 105(a), 524(g)(4)(B)(i), and 1109 For The Appointment Of Dean M. Trafelet As Legal Representative For Future Claimants, Nunc Pro Tunc To December 17, 2001, Dkt. No. 1879, *In re Armstrong World Indus., Inc.*, No. 01-04471 (Bankr. D. Del. Jan. 24, 2002) (“The Creditors' Committee, the Asbestos [Personal Injury Claimants'] Committee, [Debtors], and their respective advisors have evalu-

ated and/or interviewed several potential candidates to serve as Future Claimants' Representative. Following careful consideration of the potential candidates . . . the Debtors have determined, in their sound business judgment, that Dean M. Trafelet is well qualified to serve the interests of the Future Claimants and, therefore, should be appointed as the Future Representative for the Future Claimants. Both the Creditors Committee and the Asbestos PI Committee fully support the instant application . . . Mr. Trafelet is 'disinterested' as such term is defined in Section 101(14) of the Bankruptcy Code.").

Debtors' Motion For Entry Of An Order Approving And Authorizing The Appointment Of David Austern As the Legal Representative For Future Claimants, Dkt. No. 22, *In re Combustion Eng'g., Inc.*, No. 03-10495 (Bankr. D. Del. Feb. 13, 2003) ("Debtor appointed Mr. Austern to act [in the FCR] role pursuant to an engagement agreement . . . [and] paid Mr. Austern advance retainers"); Affidavit of David Austern in Support of Debtors' Motion For Entry Of An Order Approving And Authorizing The Appointment Of David Austern As the Legal Representative For Future Claimants, Dkt. No. 22, *In re Combustion Eng'g., Inc.*, No. 03-10495 (Bankr. D. Del. Feb. 13, 2003) ("I am a 'disinterested person' as that term is defined in section 101(14) of the Bankruptcy Code and modified by section 1107(b) of the Bankruptcy Code"); Interim Order Appointing Future Claimants' Representative, Dkt. No. 227, *In re Combustion Eng'g., Inc.*, No. 03-10495 (Bankr. D. Del. Mar. 17, 2003).

Final Order Granting Debtors' Application to Appoint Legal Representative for Purposes of Section 105(a) and 524(g) of the Bankruptcy Code, Dkt. No. 610, *In re Mid-Valley, Inc.*, No. 03-35592 (Bankr. W.D. Pa. Feb. 18, 2004); *see also In re Mid-Valley, Inc.*, 305 B.R. 425 (Bankr. W.D. Pa. 2004); Application for an Order Appointing a Legal Representative for Purposes of Section 105(a) and 524(g) of the Bankruptcy Code, Dkt. No. 12, *In re Mid-Valley, Inc.*, No. 03-35592 (Bankr. W.D. Pa. Dec. 16, 2003) ("In September 2002 [over one year prior to filing the bankruptcy petition], after reviewing numerous suggestions, considering resumes from highly-qualified candidates, and careful deliberation, the Debtors, with the concurrence of the members of the Asbestos Committee, asked Professor Eric D. Green to serve as Legal Representative. . . . Pursuant to the [pre-petition] Engagement Agreement, Professor Green's representation will terminate immediately prior to the filing of the Reorganization Cases, and thereafter the Bankruptcy Court approval sought herein is required for Professor Green to continue to represent future asbestos and silica personal injury claimants in these bankruptcy cases. . . . Debtors believe that Professor Green is disinterested, as that term is defined in section 101(14) of the Bankruptcy Code, and otherwise qualifies to serve as Legal Representative.").

Order Authorizing the Appointment of R. Scott Williams as Futures Representative, Dkt. No. 355, *In re Congoleum Corp.*, No. 03-51524 (KCF) (Bankr. D.N.J. Feb. 18, 2004); Order, *First State Ins. Co. v. Congoleum Corp.* (*In re Congoleum Corp.*), No. 04-1517 (SRC) (D.N.J. Aug. 9, 2004); Debtors' Motion for Entry of an Order Approving and Authorizing the Appointment of R. Scott Williams as the Legal Representative for Future Asbestos Personal Injury Claimants, Dkt. No. 108, *In re Congoleum Corp.*, No. 03-51524 (KCF) (Bankr. D.N.J. Jan 13, 2004) ("After considering the qualifications of various candidates, the Debtors have selected Mr. Williams and recommend him to the court as the most qualified candidate to serve as the Futures Representative in these Chapter 11 cases . . . prior to the Petition Date, the Debtors requested that Mr. Williams serve as the Futures Representative [and] appointed Mr. Williams to act in such a role . . . the Debtors believe that Mr.

have followed a familiar model in which the debtor-in-possession is given a series of presumptive rights in bankruptcy, and consensus is the key. Though some parties have occasionally objected—typically insurers, although asbestos claimants and other creditors have objected in certain cases—the bankruptcy courts have judged the “independence” of the nominees under relatively lax standards, including those standards adapted from other bankruptcy contexts but which were never intended to evaluate the appointment of an FCR.

Specifically, when appointing an FCR, bankruptcy courts have applied the Bankruptcy Code standards used when a debtor or a committee seeks to employ counsel or another professional, thus seeking to ensure that the proposed FCR is “disinterested” as that term is defined in the Bankruptcy Code, and that he suffers from no actual conflict.¹²⁵ To date, only two district courts have spoken on appeals of bankruptcy court orders appointing an FCR vetted and selected by the debtors.¹²⁶ Each of these courts approved the bankruptcy court’s appointment of an FCR pursuant to the Bankruptcy Code’s standards applicable to a debtor’s or committee’s retention of a lawyer or other professional.¹²⁷

Williams does not hold or represent any interest adverse to the Debtors, and that Mr. Williams is a “disinterested person” within the meaning of section 101(14) of the Bankruptcy Code.”)

125. Order, First State Ins. Co. v. Congoleum Corp. (*In re Congoleum Corp.*), No. 04-1517 (SRC) (D.N.J. Aug. 9, 2004).

126. See Fed. Ins. Co. v. W.R. Grace (*In re W.R. Grace Co.*), Dkt. No. 18, No. 04-844 (RLB) (D. Del. Nov. 24, 2004); First State Ins. Co. v. Congoleum Corp. (*In re Congoleum Corp.*), Dkt. No. 41, No. 04-1517 (SRC) (D.N.J. Aug. 9, 2004).

127. Recognizing that bankruptcy courts have “applied different conflict of interest disqualification standards in their appointments,” the *W.R. Grace* district court held first that the “adverse interest” disqualification standard of Section 1103 of the Bankruptcy Code, applicable to an official committee’s employment of professionals, cannot be used to appoint an FCR because “the legal representative [is] not a committee,” and second that the disqualification standard of § 327(a) of the Bankruptcy Code, applicable to debtor’s employment of professionals, cannot be used because that standard “explicitly disallows appointment of those whom hold an interest adverse to the estate” and the FCR “will, because of his constituents, have an inherent interest against the estate.” The *W.R. Grace* district court ultimately held that the “disinterested” person standard set forth in Section 101(14) of the Bankruptcy Code provides “the correct disqualification standard.”

The *Congoleum* district court held that the bankruptcy court “made the correct decision in the absence of any statutory direction provided by Congress, and in the absence of any binding or, indeed, nonbinding persuasive authority with regard to this issue, [in concluding] that the stringent standards provided by Section 327(a) [of the Bankruptcy Code, prohibiting only actual conflicts] were appropriate.” See Transcript of District Court Bench Opinion Affirming Bankruptcy Court Order Appointing R. Scott Williams (August 2, 2004), Dkt. No. 44, First State Ins. Co. v.

Three examples will add some perspective on the shortcomings in the current approach to FCR independence.

1. Combustion Engineering

Combustion Engineering was a pre-packaged bankruptcy that largely followed the pre-pack paradigm described above.¹²⁸ The prospective debtor settled with the current claimants, agreeing to fund a trust that would pay the claims of those claimants in large part but leave those claimants with a residual “stub” claim that would allow them to vote on the plan so as to provide the 75% approval required by § 524(g).¹²⁹ The prospective debtor, with the consensus of representatives for the current claimants, appointed a pseudo FCR after that settlement was largely in place.¹³⁰ Because the pre-petition settlement trust had already been established via an “irrevocable” transfer, the assets conveyed to the trust—representing approximately half of the company’s assets—were not available to the pseudo FCR and his constituency after his appointment.¹³¹ The pseudo FCR then agreed to a plan and trust distribution procedures.¹³² When the bankruptcy case was filed, the debtor nominated the pseudo FCR to become the statutory FCR under § 524(g), and the bankruptcy court made the appointment.¹³³

Combustion Engineering was a case in which, by the time the pseudo FCR accepted the pre-petition appointment, the pseudo FCR’s hands were tied by the terms of the deal already struck—and

Congoleum Corp. (*In re Congoleum Corp.*), No. 04-1517 (SRC) (D.N.J. Aug. 9, 2004) at 73:7–17. The *Congoleum* district court ultimately ruled that an “appearance standard [for conflicts of interest] is too high a standard in [the FCR] context.” *Id.* at 74:12–13. The court appeared to have come to this conclusion because it was “not prepared to conclude that prepackaged bankruptcies in the context of asbestos litigation must be barred,” which the court believed would be the “practical effect of the appellant’s argument” if the court were to prevent the pre-petition pseudo FCR from later being appointed by the court as the *statutory* FCR. *Id.* at 75:16–19. The district court apparently did not consider the possibility that the pre-petition FCR could stand in for future claimants, for whatever that is worth, in pre-petition negotiations, and the court could then appoint a different FCR on its own, after the petition was filed, precisely as the Code contemplates.

128. See *Combustion Eng’g*, 391 F.3d at 203–13; Plevin, *supra* note 75, at 898–907.

129. *Combustion Eng’g*, 391 F.3d at 204–08.

130. *Id.* at 244–45.

131. Transcript of Proceedings at 68:12–21, Dkt. No. 859, *In re Combustion Eng’g, Inc.*, No. 03-10495 (JKF) (Bankr. D. Del. May 1, 2003); Pre-Petition Comm. of Select Asbestos Claimants v. Combustion Eng’g, Inc. (*In re Combustion Eng’g, Inc.*), 292 B.R. 515, 519 (Bankr. D. Del. 2003).

132. *Combustion Eng’g*, 391 F.3d at 204.

133. *Id.* at 204 n.8.

largely implemented—by the debtor and representatives of certain current claimants. Debtor and the current claimants' representative did not select and “appoint” the pseudo FCR until after the pre-petition trust had already been established and funded with half the company's available assets.¹³⁴ Thus, approximately one half of the prospective debtor's total assets was already irrevocably committed to payment of a sub-group of current claims (those asserted by what the Third Circuit called “privileged” current claimants); the pre-petition FCR could only negotiate for what was left.¹³⁵ Can this truly be an acceptable state of affairs for an FCR with undivided loyalty to the future claimants? Is not the proper response of someone representing future claimants to demand that the settlement be reopened so that the future claimants have a seat at the negotiating table throughout the process when important decisions are being made about the disposition of debtors' assets—as is the case in the “traditional” bankruptcy context?

Further, the FCR's pre-petition role was limited insofar as he received and relied upon only the information his employer and adversaries chose to give him. Although the pseudo FCR spent more than \$1 million pre-petition performing “due diligence,” he was not aware, until after the bankruptcy case was filed, that certain insurer indemnity claims threatened to consume the entirety of the trust assets that would be made available under the plan for payment of future claims.¹³⁶ He testified at the confirmation hearing that if he had been told of that fact during the pre-petition plan negotiations, it might have caused him to reconsider his publicly-announced support for the plan.¹³⁷

These are not the only issues arising from the FCR's pre-petition service. In connection with confirmation, the FCR testified that certain avoidance actions against the debtor's corporate parent were not worth pursuing, and proposed no avoidance actions with respect to the more than \$400 million Combustion Engineering transferred to the pre-petition settlement trust for the payment of current claims 87 days before commencing its Chapter 11 case.¹³⁸ Only *after* the Third Circuit issued its opinion reversing confirma-

134. See Transcript of Proceedings, at 345:20–346:25, Dkt. No. 859, *In re Combustion Eng'g, Inc.* (Bankr. D. Del. May 1, 2003) (No. 03-10495 (JKF)).

135. Transcript of Proceedings at 68:12–21, Dkt. No. 859, *In re Combustion Eng'g, Inc.*, No. 03-10495 (JKF) (Bankr. D. Del. May 1, 2003); *Combustion Eng'g*, 292 B.R. 515, 519 (Bankr. D. Del. 2003).

136. Transcript of Proceedings, at 339:18–23, 340:17–341:2, Dkt. No. 859, *In re Combustion Eng'g, Inc.*, No. 03-10495 (JKF) (Bankr. D. Del. May 1, 2003).

137. *Id.* at 341:7–9.

138. *Combustion Eng'g*, 391 F.3d at 240.

tion of the plan and suggesting that the transfers were avoidable preferences¹³⁹ did the FCR move into action and either obtain tolling agreements from, or file suit against, debtor's corporate parent and law firms who had received payments from the pre-petition trust. In filing such lawsuits, the FCR and his lawyers surely were satisfied that the claims he was *now* asserting, two years after debtor filed its bankruptcy petition, and only after a plan had been confirmed and then vacated, were proper under the Federal Rules of Bankruptcy Procedure ("Fed. R. Bank. P."), rule 9011 (the bankruptcy equivalent of the Federal Rules of Civil Procedure, rule 11). The FCR's lawsuits beg the question of why he waited two years to bring such lawsuits, and only did so after the Third Circuit spoke to its belief that the debtor's pre-petition transfers were likely avoidable.¹⁴⁰

Though the Third Circuit did not address the FCR appointment directly, the Third Circuit's decision clearly reflects an instance in which it had found that the plan, agreed upon by an FCR appointed under the debtor-deferential approach described above, was not sufficiently protective of future claimants' interests.

2. Congoleum

In the *Congoleum* bankruptcy, issues concerning the FCR appointment were litigated in both the bankruptcy court and on appeal to the district court. Debtor had retained the pseudo FCR, with the approval of certain counsel for current claimants, two months *after* the substance of Congoleum's pre-packaged plan (a "Claimant Agreement" and a "collateral trust") had already been completed.¹⁴¹ Congoleum employed its pseudo FCR on a limited

139. *Id.* at 240 ("Based on the record, we believe the pre-petition payments to the CE Settlement Trust may constitute voidable preferences."); *see also id.* 241 (The district court's rejection of an argument that the transfer was a voidable preference was "incorrect as a matter of law.").

140. The FCR in *Combustion Engineering* was subsequently nominated by the debtor and appointed to serve as FCR in the *W.R. Grace* asbestos bankruptcy case, and was hired as the pseudo FCR during the negotiations of a potential pre-packaged asbestos bankruptcy case to be filed by the Crane Company. *See* Order Granting Application of Debtor Pursuant to 11 U.S.C 105, 327 and 524(g)(4)(B)(i) for the Appointment of a Legal Representative for Future Asbestos Claimants, Dkt. No. 5645, *In re* W.R. Grace & Co., No. 01-01139 (JKF) (Bankr. D. Del. May 25, 2004); Reorganization Term Sheet attached to Crane Co. SEC Form 8-K, Oct. 21, 2004, at D-3.

141. *See* Declaration of Vincent J. Sullivan in Support of First Day Motions, Dkt. No. 22, *In re* Congoleum Corp., No. 03-51524 (Bankr. D.N.J. Dec. 31, 2004) at 8; Debtors' Motion for Entry of an Order Approving and Authorizing the Appointment of R. Scott Williams As the Legal Representative for Future Asbestos Personal

budget because “much of the work had been done at that point.”¹⁴² The pseudo FCR accordingly limited his role to preventing the current claimants from taking “all the money in this case”¹⁴³—the only role he reasonably could have undertaken, given his belated “appointment” and his narrow view of his duties.

The Congoleum FCR had a pre-existing relationship with counsel negotiating for current claimants based on his employment in another pre-packaged asbestos bankruptcy in which those counsel participated.¹⁴⁴ In the pre-petition period, he was subject to termination by Congoleum at any time.¹⁴⁵ Congoleum agreed to indemnify him for his pre-petition actions as pseudo FCR,¹⁴⁶ and to request that such indemnification continue once the bankruptcy case was commenced.¹⁴⁷ He was to be nominated by debtor as the actual post-petition statutory FCR when the plan was filed; the initial plan provided that the FCR would, at confirmation, become the

Injury Claimants, Dkt. No. 108, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Jan. 13, 2004) at 8; Declaration of R. Scott Williams in Support of Debtors’ Motion for Entry of an Order Approving and Authorizing the Appointment of R. Scott Williams As the Legal Representative for Future Asbestos Personal Injury Claimants, Dkt. No. 108 at 2 and Exhibit 1 thereto, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Jan. 13, 2004).

142. See Deposition Transcript of S. Feist dated June 30, 2004, *In re Congoleum Corp.*, No. 03-51524, at 349:14–350:17, 350:23–351:4 (on file with the authors).

143. See Deposition Transcript of R. Scott Williams dated July 15, 2004, *In re Congoleum Corp.*, No. 03-51524, at 122:1–5 (on file with the authors).

144. Notice of Errata filed by Debtor In Possession Congoleum Corporation, attaching Declaration of R. Scott Williams in Support of Debtors’ Motion for Entry of an Order Approving and Authorizing the Appointment of R. Scott Williams As the Legal Representative for Future Asbestos Personal Injury Claimants, Dkt. No. 188, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Jan. 13, 2004), at Exhibit B.

145. *Id.* at Exhibit A.

146. *Id.*; Debtors’ Motion for Entry of an Order Approving and Authorizing the Appointment of R. Scott Williams As the Legal Representative for Future Asbestos Personal Injury Claimants, Dkt. No. 108, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Jan. 13, 2004) at 10.

147. Notice of Errata filed by Debtor In Possession Congoleum Corporation, attaching Declaration of R. Scott Williams in Support of Debtors’ Motion for Entry of an Order Approving and Authorizing the Appointment of R. Scott Williams As the Legal Representative for Future Asbestos Personal Injury Claimants, Dkt. No. 188, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Jan. 13, 2004), at Exhibit A.

FCR for the post-confirmation § 524(g) trust, and serve in that position indefinitely.¹⁴⁸

Sure enough, Congoleum nominated the pseudo FCR as the § 524(g) FCR shortly after the bankruptcy commenced.¹⁴⁹ The bankruptcy court made the appointment, as Congoleum requested, notwithstanding objections by certain insurers.¹⁵⁰ The bankruptcy court did not request, or suggest that it would consider, alternative nominees for the FCR post—effectively allowing the debtor to make the appointment.

In measuring the FCR's independence, the bankruptcy court acknowledged that the legislative history of § 524(g) "indicates that a higher standard may be a possibility," but the court was unwilling, "in the absence of clear direction from either the statute or the Circuit," to apply the high standards of independence and undivided loyalty associated with, for example, a guardian *ad litem*—including disqualification for an "appearance" of partiality.

Instead, the bankruptcy court adopted the standards of § 327 of the Bankruptcy Code, which pertain to a debtor's hiring of professionals to aid in administration of the estate.¹⁵¹ Having adopted that standard, the court noted that § 327 does not allow disqualification based on either "appearance of conflict" or prior employment, but instead required proof of an actual conflict.¹⁵² Because the FCR's original selection, employment, and payment by Congoleum occurred *pre-petition*, the court held that they were not relevant to whether he had a current conflict that would affect his ability to open-mindedly critique the plan he himself had participated in developing while laboring under a conflict of interest.¹⁵³

148. See Joint Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code of Congoleum Corporation et al., Dkt No. 176, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Jan. 22, 2004) at 48.

149. See Debtors' Motion for Entry of an Order Approving and Authorizing the Appointment of R. Scott Williams as the Legal Representative for Future Asbestos Personal Injury Claimants, Dkt. No. 108, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Jan. 13, 2004).

150. Order Granting Application Authorizing The Appointment of R. Scott Williams As Futures Representative, Dkt. No. 355, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Feb. 18, 2004).

151. See 11 U.S.C. § 1107(a) (2000) (providing that a Chapter 11 debtor-in-possession has the powers of a Chapter 11 trustee).

152. See Transcript of Motion Decision Before the Honorable Kathryn C. Ferguson United States Bankruptcy Judge, Dkt. No. 376, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Feb. 24, 2004) at 6, 9.

153. The Third Circuit rejected precisely this argument in a recent decision in the *Congoleum* case, holding in the context of an alleged conflict of interest on the part of debtors' special insurance counsel that "it was not a proper exercise of

The court also held that plan provisions stating the FCR would serve after confirmation in administering the trust did not create a disqualifying incentive for him to approve a plan because he had “no vested right” to “be employed after confirmation;” it was possible that someone else might be appointed to that position.¹⁵⁴

The district court affirmed the bankruptcy court, stating that: “in the absence of any statutory direction provided by Congress and in the absence of any binding or, indeed, nonbinding persuasive authority with regard to this issue,” it too was unwilling to employ the rigorous standards of independence applied to a guardian *ad litem*.¹⁵⁵

Thus, notwithstanding the FCR pre-petition involvement in the negotiations, and the FCR’s selection by the debtor and current claimants, the bankruptcy court and district court applied a stan-

the bankruptcy court’s discretion to fail to consider and appraise the conduct of the parties and counsel prepetition.” *Congoleum*, 426 F.3d at 693. If the same holding were applied to the appointment of the pseudo FCR as to the statutory § 524(g) FCR, the bankruptcy court would have been required to consider the conflict resulting from the debtor’s pre-petition employment of the pseudo FCR.

154. See Transcript of Motion Decision Before the Honorable Kathryn C. Ferguson United States Bankruptcy Judge, Dkt. No. 376, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Feb. 24, 2004) at 7.

155. See Transcript of District Court Bench Opinion Affirming Bankruptcy Court Order Appointing R. Scott Williams (August 2, 2004), Dkt. No. 44, First State Ins. Co. v. Congoleum Corp. (*In re Congoleum Corp.*), No. 04-1517 (SRC) (D.N.J. Aug. 9, 2004) at 73:11–17. In opposing insurers’ appeal of the bankruptcy court’s order to the district court, Congoleum raised the issue of the insurers’ standing to object to the FCR’s appointment. The district court in that case assumed for purposes of its decision that the insurers had standing. *Id.* at 74:18–25. The Third Circuit’s recent *Congoleum* opinion, finding that the insurers had standing to appeal the bankruptcy court’s appointment of Congoleum’s special insurance counsel, puts the standing issue to rest. The Third Circuit held:

Retention of special insurance counsel is an important preliminary matter that will profoundly affect the determination of the validity of a proposed plan *ab initio*. It is an issue based on procedural due process concerns that implicate the integrity of the bankruptcy court proceeding as a whole. The retention of . . . special insurance counsel will affect the resolution of issues that may directly affect the rights of insurers and fairness to the asbestos claimants. *Congoleum*, 426 F.3d at 685.

Similarly, the appointment of an FCR will profoundly affect the entirety of any asbestos bankruptcy case and any plan that results from it. Who is appointed to serve as FCR will, of course, affect the resolution of issues that may affect all parties involved, including insurers, debtors, other creditors, and current and future claimants. It will likewise affect the constitutionality of the plan and of any resulting § 524(g) injunction—an injunction that will presumably encompass claims against insurers. 11 U.S.C. § 524(g)(4)(A)(ii)(III) (2000). Thus, insurers’ standing to raise issues regarding the FCR appointment in the bankruptcy court and on appeal should not be in doubt.

dard in judging the FCR's appointment that effectively required them to ratify the debtor's choice. As we explain below, that approach, which insists on seeking guidance from inapposite provisions of the Bankruptcy Code, is fundamentally misconceived.

3. ACandS

Although negotiated as a pre-packaged plan, *ACandS* was filed as a "traditional" bankruptcy based on unstated "circumstances" which "led Debtor to determine that it can best finalize its substantially pre-negotiated plan of reorganization under the protection of the Bankruptcy Court."¹⁵⁶ The case mirrored a pre-packaged bankruptcy in many respects, including a pre-petition settlement of current asbestos claims to be paid from insurance proceeds¹⁵⁷ and the establishment of a pre-petition trust to grant settling claimants security interests in those insurance proceeds and to pay certain settling claimants from insurance proceeds contributed to the trust.¹⁵⁸ The pre-petition trust agreements set forth the agreement that had been reached by the pre-petition committee: asbestos claimants were divided into five classes, to be paid in order of priority.¹⁵⁹ Certain settling claimants were paid, in part or in full, pre-petition, while others were not.¹⁶⁰ Certain settling claimants were fully secured, while others received security interests in up to 50% of ACandS's insurance recovery, to the extent of 75% of their claims—the remaining 50% of ACandS's ultimate insurance recovery was segregated for future claimants.¹⁶¹ Current claimants who were not permitted to participate in the pre-petition settlement, future claimants who by definition could not participate in the pre-petition settlement, and claimants whose claims were only partially secured under the pre-petition settlement agreement would be treated as unsecured claimants under the plan.¹⁶²

156. See Affidavit of James Hipolit In Support of First Day Motion at ¶ 34, Dkt. No. 2, *In re ACandS, Inc.*, No. 02-12687 (Bankr. D. Del. Sept. 16, 2002).

157. *Id.*, ¶ 29.

158. *Id.*, ¶¶ 29, 30.

159. See Proposed Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code Relating to ACandS's Plan of Reorganization at 28–30, Dkt. No. 281, *In re ACandS, Inc.*, No. 02-12687 (Bankr. D. Del. Jan. 24, 2003).

160. *Id.* at 28–29.

161. *In re ACandS, Inc.*, 311 B.R. 36, 39–40 (Bankr. D. Del. 2003).

162. *Id.* at 40 ("Anyone who did not fall into one of these five categories would be treated as an unsecured claimant."). In denying confirmation of ACandS's plan, the bankruptcy court found that "[u]nless the trust realizes a resounding victory in its coverage dispute with Travelers it is unlikely that claimants in the unsecured category [including future claimants] will receive anything." *Id.*

Before filing its bankruptcy petition, ACandS “contacted [its pseudo FCR] about the possibility of serving as the [pseudo FCR] in conjunction with the negotiations regarding the treatment to be accorded to future asbestos personal injury claimants in the Debtor’s plan of reorganization.”¹⁶³ To “cover the costs associated [with] preparing for this potential engagement,” ACandS paid the pseudo FCR an “engagement fee of \$20,000, agreed to compensate [the pseudo FCR] for services rendered at \$260.00 per hour, and gave [the pseudo FCR] a cash retainer of \$75,000 as security for the payment of fees and expenses incurred in connection with his appointment.”¹⁶⁴ At “no time” did the pseudo FCR have “any plan related or substantive negotiations with the Debtor prepetition.”¹⁶⁵

Thus, although ACandS selected and “retained” its pseudo FCR pre-petition, and paid the pseudo FCR for his services, ACandS negotiated the entire pre-petition settlement without his participation. After the FCR was brought into the case, he could only negotiate for what remained of the debtor’s assets—at best, a 50% interest in the company’s ultimate insurance recovery, if any. Indeed, debtor did not bother to move for court approval of the pseudo FCR until three months into its bankruptcy case,¹⁶⁶ and only one month before filing its proposed plan of reorganization,¹⁶⁷ suggesting that much of the plan negotiation process had occurred without any input on behalf of future claimants.

Once the debtors’ pseudo FCR was appointed by the bankruptcy court as the statutory FCR, he twice objected to the proposed disclosure statement to accompany debtors’ plan.¹⁶⁸ The FCR

163. Debtor’s Motion for Entry of an Order Approving and Authorizing the Appointment of Lawrence Fitzpatrick As the Legal Representative to Future Asbestos Claimants at ¶ 26, Dkt. No. 238, *In re ACandS, Inc.*, No. 02-12687 (Bankr. D. Del. Dec. 24, 2002).

164. *Id.*, ¶ 27.

165. *Id.*

166. ACandS’ bankruptcy petition was filed on September 16, 2002. *See* Voluntary Petition of ACandS, Inc., Dkt. No. 1, *In re ACandS, Inc.*, No. 02-12687 (Bankr. D. Del. Sept. 16, 2002). ACandS moved to appoint the pseudo FCR as the statutory § 524(g) FCR on December 24, 2002. *See* Debtor’s Motion for Entry of an Order Approving and Authorizing the Appointment of Lawrence Fitzpatrick As the Legal Representative to Future Asbestos Claimants at ¶ 26, Dkt. No. 238, *In re ACandS, Inc.*, No. 02-12687 (Bankr. D. Del. Dec. 24, 2002).

167. *See* Plan of Reorganization of ACandS Inc. Under Chapter 11 of the United States Bankruptcy Code, Exhibit A, Dkt. No. 281, *In re ACandS, Inc.*, No. 02-12687 (Bankr. D. Del. Jan. 24, 2003).

168. *See* Objection of Lawrence Fitzpatrick, the Legal Representative to Future Claimants, to the Proposed Amended Disclosure Statement with Respect to ACandS’s Plan of Reorganization Dated June 19, 2003, Dkt. No. 493, *In re ACandS,*

never objected, however, to any aspect of the debtor's plan, which, although amended throughout the course of the bankruptcy proceedings, reflected the substance of debtor's pre-petition settlement with current claimants and provided for the treatment of current and future claimants accordingly. Rather, the FCR and his professionals "reviewed the settlement, and vouch[ed] for its fairness."¹⁶⁹ Notwithstanding the FCR's belief that the plan was "fair" and apparently not objectionable despite its embodiment of a pre-petition settlement structure in which the FCR had no part, the bankruptcy court denied confirmation of debtor's plan, finding that "nothing could be further from what the drafters of § 524(g) intended." Specifically, the bankruptcy court held that the plan did not satisfy the requirements of § 524(g) because it "discriminate[s] between present and future claims" and "pays similar claims in a totally disparate manner by giving preferential treatment to certain claimants who are secured by insurance proceeds."¹⁷⁰ The bankruptcy court further held that the plan "falls short of [the good faith requirement for confirmation set forth in § 1129(a)(3) of the Bankruptcy Code] in nearly every respect" because it was "largely drafted by and for the benefit of the prepetition committee of current claimants," and that it was "fundamentally unfair that one claimant with non-symptomatic pleural plaques will be paid in full, while someone with mesothelioma runs the substantial risk of receiving nothing."¹⁷¹

Inc., No. 02-12687 (RJN) (Bankr. D. Del. Jul. 16, 2003) (reserving rights to file future objections to the disclosure statement based on, among other things, the adequacy of disclosures regarding the proposed treatment of asbestos claims in the event such objections could not be resolved with the debtor); Objection of the Legal Representative to Future Claimants to the Proposed Second Amended Disclosure Statement with Respect to ACandS's Plan of Reorganization Dated August 15, 2003, Dkt. No. 584, *In re ACandS, Inc.*, No. 02-12687 (RJN) (Bankr. D. Del. Aug. 22, 2003) (arguing that a hearing on the adequacy of the amended disclosure statement should be adjourned to provide parties in interest adequate time to analyze the amended disclosure statement and plan).

169. *In re ACandS, Inc.*, 311 B.R. 36, 41 (Bankr. D. Del. 2003).

170. *Id.* at 42.

171. *Id.* at 43. The FCR, along with debtor and the Official Committee of Asbestos Claimants, appealed the bankruptcy court's order denying confirmation. See ACandS Notice of Appeal, Dkt. No. 1003, *In re ACandS, Inc.*, No. 02-12687 (RJN) (Bankr. D. Del. Feb. 3, 2004); Official Committee of Asbestos Personal Injury Claimants Notice of Appeal, Dkt. No. 1007, *In re ACandS, Inc.*, No. 02-12687 (RJN) (Bankr. D. Del. Feb. 4, 2004); Future Claimants' Representative Notice of Appeal, Dkt. No. 1012, *In re ACandS, Inc.*, No. 02-12687 (RJN) (Bankr. D. Del. Feb. 5, 2004). That appeal remains pending.

The FCR subsequently objected to the bankruptcy court's proposed findings of fact and conclusions of law with respect to debtor's failed plan, arguing that the bankruptcy court did not adequately consider the FCR's position that, under the "unique circumstances" of the case, the plan provided the best chance of any recovery for future claimants.¹⁷² In particular, the FCR asserted that the security interests in insurance proceeds granted to current claimants who settled pre-petition would consume the entirety of debtor's estate, leaving nothing for the future claimants outside of the plan.¹⁷³ The FCR apparently believed his hands were tied by debtor's pre-petition settlement with current claimants and negotiated what he believed to be the best deal for future claimants under those circumstances.¹⁷⁴

This case highlights again the dangers of allowing the debtor to choose the FCR and to limit the FCR's role. While the debtor-selected FCR, the supposed representative of future claimants, was well satisfied with the plan's treatment of future claimants, the court—largely on its own initiative—found that the plan was not fair to future claimants. The court's finding that the plan did not properly address the interests of future claimants certainly raises

172. See *Objections of the Future Claimants' Representative Pursuant to Bankruptcy Rule 9033 to the Proposed Findings of Fact and Conclusions of Law Re: Chapter 11 Plan Confirmation*, Dkt. No. 1015, *In re ACandS, Inc.*, No. 02-12687 (RJN) (Bankr. D. Del. Feb. 5, 2004) (The FCR argued that the bankruptcy court's finding should be rejected because it "did not take into account the uncontroverted testimony of the [FCR] on the impact of . . . the security interests in insurance proceeds held by claimants who settled pre-petition," which the FCR believed "severely limit[ed] the possibility of preserving any part of the estate for future claimants, absent confirmation of the plan as proposed.").

173. *Id.*

174. This raises one of the myriad troubling issues that arise with respect to a pre-petition pseudo FCR in the pre-packaged asbestos bankruptcy context. Even if that pseudo FCR negotiates the best deal he can, in no case to date has the FCR been brought in at the front end, before the settlement of current claims. Consequently, the statutory FCR can only negotiate for what remains. Doing the "best job under the circumstances" for future claimants does not, however, mean that the subsequent plan of reorganization should be approved by the FCR as fair to those claimants. Under the recent *Congoleum* and *Combustion Engineering* opinions, the bankruptcy court must examine both pre- and post-petition activity as an "integrated whole." *Combustion Eng'g.*, 391 F.3d at 241 ("We consider the bankruptcy scheme as an integrated whole in order to evaluate whether Plan confirmation is warranted."); *Congoleum*, 426 F.3d at 692 ("We do not approve of a bankruptcy court applying less than careful scrutiny to pre-petition procedures in pre-packaged plans. The parties here seek the court's *imprimatur* of a reorganization that will free the debtor of all current and future asbestos liability. The legitimacy of such a transaction is dependent on the stature of the court."). So too should the FCR.

questions about the efficacy of the advocacy for future claimants by the debtor-selected FCR.

D. An FCR Must be Held to the Highest Standards of Independence

1. Future Claimants Must be Protected from Debtors and Current Claimants

As described above, the *Manville* amendments focus on future claims. Current claims could have been easily addressed within existing bankruptcy law. Section 524(g), in contrast, gives participants in the bankruptcy process, notably debtors and current claimants, a means of limiting the rights of future claimants.¹⁷⁵ In determining the proper mechanism and the appropriate standards for the appointment of an FCR, that central attribute of § 524(g)—that it allows for an injunction against persons, future claimants, who cannot appear in court to protect their interests—must be front and center.

The constitutional rule has always been that a person cannot be bound by a judgment to which “‘he has not been made a party by service of process,’ it being ‘our deep-rooted historical tradition that everyone should have his own day in court.’”¹⁷⁶ The one exception to the rule requiring an actual day in court is a virtual one, through appointment of a proxy for the absent or incompetent party—i.e., a legal representative or guardian *ad litem*. The representative is a fiduciary charged with providing the best protection possible for persons who stand to be affected by a judicial proceeding but who cannot protect their own interests. Guardians *ad litem*, of course, have long been appointed to stand in for persons incompetent to represent themselves. However, courts rarely appoint such legal representatives, and always with caution,¹⁷⁷ as the adequacy of the appointment is necessarily tested under constitutional standards.¹⁷⁸

175. Brickman Testimony, *supra* note 85, at 25; *Combustion Eng'g*, 391 F.3d at 237.

176. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (citations omitted).

177. *See id.* at 832–33 (stating that “Representative” due process has traditionally been limited to class actions, matters requiring resolution before the absent party could protect its own interests, or where absent party would never be able to protect its own interests); *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987) (stating that the “doctrine must cautiously be applied in order to avoid infringing on principles of due process”).

178. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627–28 (1997) (“We recognize the gravity of the question whether notice sufficient under the Constitution . . . could ever be given to legions so unselfconscious and amorphous [referring to exposure-only asbestos claimants who “may not even know of their exposure, or realize the extent of the harm they may incur.”]); *Ortiz*, 527 U.S. at

The FCR is *necessary* in an asbestos bankruptcy case precisely because other participants in the case have interests hostile to future claimants.¹⁷⁹ Debtors' interests directly oppose those of future claimants: Debtors seek to cut off future claims and channel them to a trust. Current claimants' interests are likewise adverse to those of the future claimants. In fact, the Supreme Court has twice recognized that current claimants cannot protect future claimants. "[F]or the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future."¹⁸⁰ The result should be no different simply because a claims settlement occurs in the bankruptcy context.

With the FCR, Congress has set forth a statutory mandate intended to give future claimants a voice *independent* of debtors and current claimants, as is constitutionally required. As the Third Circuit stated in *Combustion Engineering*, "[i]n the resolution of future asbestos liability, under bankruptcy or otherwise, future claimants must be adequately represented throughout the process."¹⁸¹

The statute requires that the "*court* appoint[] a legal representative for the purpose of protecting the rights of [future claimants]."¹⁸² Unlike various other persons who participate in the bankruptcy, and who may be paid for their services by the estate as part of the bankruptcy process, this appointment may not be made by any of the other parties in the bankruptcy. Instead, Congress invoked the process that would be customary for a guardian *ad litem*—i.e., court appointment. The requirement of *court* appoint-

857–59 (conflicting sub-groups within a unitary class precludes finding of adequacy of representation); *Stephenson*, 273 F.3d at 260 (“[Constitutional] due process requires adequate representation ‘at all times’ throughout the litigation.”).

179. See *In re Johns-Manville Corp.*, 36 B.R. 743, 749 (Bankr. S.D.N.Y. 1984); *In re Amatex*, 755 F.2d 1034, 1042–43 (3d Cir. 1985); *Combustion Eng'g*, 391 F.3d at 124–27 (explaining how in that case the debtor and current claimants negotiated an “integrated, global settlement” giving certain current claimants “preferential treatment” at the expense of, *inter alia*, future claimants who lacked adequate representation).

180. *Amchem*, 521 U.S. at 626; *Ortiz*, 527 U.S. at 856. The Third Circuit recognized: “As rational actors, those who are not yet injured would want reduced current payouts . . . [and] protection against inflation. . . . In contrast, those who are currently injured would rationally want to maximize current payouts . . . [and] would care little about inflation-protection.” *Georgine v. Amchem Prods.*, 83 F.3d 610, 630–31 (3d Cir. 1996), *aff'd sub nom.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

181. *Combustion Eng'g*, 391 F.3d at 245.

182. 11 U.S.C. § 524(g)(4)(B)(i) (2000).

ment reinforces Congress' intention to protect future claimants from the undue influence of debtors and current claimants.¹⁸³

Indeed, Congress' words convey an insistence upon the highest standards of independence. In addition to requiring court appointment, Congress also used the term "legal representative," a term that refers to persons "'in a position tantamount to that of a party or whose legal rights were otherwise so intimately bound up with the parties that their rights [are] directly affected by [a] final judgment.'"¹⁸⁴ These words suggest loyalty even stricter than that which an attorney owes a client.¹⁸⁵ The history of the FCR function—known to Congress when it enacted §524(g)—highlights that the FCR is to serve the role of a guardian *ad litem* for the future claimants and not, as it has lately evolved in practice, as a party retained by the debtor with the consent of current claimants.¹⁸⁶

2. The Standards and Procedures for Appointing an FCR Must Ensure Independence from the Debtor and Other Parties in Interest

While § 524(g) does not itself prescribe specific standards of independence required of an FCR, Congress' purpose in creating the FCR position makes two points clear.

a. The Debtor May Not, De Facto or De Jure, Select the FCR; FCR Selection Is the Duty of the Bankruptcy Court

Because the central objectives of appointing an FCR include protecting future claimants from overreaching by debtors and current claimants,¹⁸⁷ the bankruptcy court should be skeptical of *any* procedure, practice, or standard that would allow debtors or current claimants a significant role in, or influence upon, the choice of an FCR. Nothing in the Bankruptcy Code suggests that debtors,

183. See *Amatex*, 755 F.2d at 1036, 1040 (likening FCR to guardian *ad litem*).

184. *In re El Paso Refinery, LP*, 37 F.3d 230, 234 (5th Cir. 1994).

185. *Id.* ("Legal representative" means one who stands in the place and stead of another, such as an heir at law," and "does not include counsel" because counsel is not "in a position 'tantamount'" to that of the client.)

186. See *Amatex*, 755 F.2d at 1040 (describing FCR as a guardian *ad litem*); *In re Johns-Manville Corp.*, 36 B.R. 743, 758–59 (Bankr. S.D.N.Y. 1984) (FCR would have "form and function" of legal representatives and guardians *ad litem*).

187. *In re Johns-Manville Corp.*, 36 B.R. 743, 759 (Bankr. S.D.N.Y. 1984) ("[Current claimants'] stake in maximizing recovery from the reorganizing [debtors] may be antithetical to the expectations of future interests," and debtors' "skewed and less than robust advocacy [on behalf of future claimants] is not acceptable."); see also *Amatex*, 755 F.2d at 1042–43 ("None of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants.").

current claimants, or any other party should have the right to nominate, let alone effectively choose, the FCR.

The Bankruptcy Code expressly mandates that the *court* appoint the FCR.¹⁸⁸ It has long been accepted that when a court is directed to make an appointment—of a fiduciary, mediator, or referee—the court may select from its own slate of candidates, or seek independent outside assistance. It may presumably consider the parties' views. However, the fact that one of the parties, representing an adverse interest, strongly prefers a particular person ought to be understood as more of a negative than a positive for that person's candidacy.

There is no reason a bankruptcy judge should defer to a debtor's preference in choosing an FCR. Debtor is not likely to alert the court to subtle issues of allegiance that might make a candidate attractive to debtor, but a poor choice to vigorously represent future claimants. Even holding allegiance aside, debtor's idea of a good candidate is unlikely to be a good candidate from the perspective of the statutory objectives. Traits that future claimants would want their representative to possess—tenacity, loyalty, independence—are likely to render a particular candidate having those traits unattractive to debtor.¹⁸⁹ As one highly-involved observer bluntly put it, "having a weak futures representative is in the interests of both the debtor and the current claimants."¹⁹⁰

Indeed, now that it has become common practice for debtors and current claimants' counsel to exercise a *de facto* power to ap-

188. 11 U.S.C. § 524(g)(4)(B)(i) (2000) (A channeling injunction will be "valid and enforceable" if, *inter alia*, "as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of" future claimants.). *Cf.* 11 U.S.C. § 327(a) (2000) ("The trustee, with the court's approval, may employ" professionals.).

189. See Alan Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2080 (2000) ("Among the essential characteristics of a legal representative acting on behalf of future mass tort claimants are independence and a lack of conflicts of interest.").

190. McGovern, *supra* note 69, at 248. See also Subcommittee of Mass Torts of the U.S. Judicial Conference at 15 ("Mass tort future claimants representative [might] collud[e] with, or simply be overruled by, counsel for present claimants and debtors.").

Professor McGovern goes on to state that "[y]et, under the bankruptcy code, they [debtor and current claimants' counsel] are precisely the parties who select the futures representative (subject to court approval)." McGovern, *supra* note 69, at 248. While it is certainly true that in asbestos bankruptcies to date, debtors and current claimants have usurped the bankruptcy court's mandated role of selecting the FCR, there is *nothing* in the Bankruptcy Code that authorizes any party but the bankruptcy court to select and appoint the FCR.

point, the potential for undue influence is even greater. The FCR can hardly help but understand that by pleasing debtors and current claimants' counsel in one case, he may enhance his chances of being selected as the FCR in the next case.¹⁹¹ Requiring that the

191. FCRs have assuredly not been averse to repeat business. For example, Professor Eric Green has been nominated and appointed as the FCR in the *Mid-Valley*, *Federal-Mogul*, *Babcock & Wilcox*, and *Fuller-Austin* cases, and continues to serve as the FCR for the Fuller-Austin Settlement Trust. See Application for An Order Appointing a Legal Representative for Purposes of Sections 105 and 524(g) of the Bankruptcy Code, Dkt. No. 12, *In re Mid-Valley, Inc.*, No. 03-35592 (Bankr. W.D. Pa. Dec. 16, 2003) at 9-10; Final Order Appointing a Legal Representative for Purposes of Sections 105 and 524(g) of the Bankruptcy Code, Dkt. No. 610, *In re Mid-Valley, Inc.*, No. 03-35592 (Bankr. W.D. Pa. Feb. 18, 2004). In *Mid-Valley*, Professor Green was paid \$9000 per day, plus expenses, for his pre-petition activity as the pseudo FCR, and received his "regular" rate of \$600 per hour once appointed by the bankruptcy court as the FCR. See Application for An Order Appointing a Legal Representative for Purposes of Sections 105 and 524(g) of the Bankruptcy Code, Dkt. No. 12, *In re Mid-Valley, Inc.*, No. 03-35592 (Bankr. W.D. Pa. Dec. 16, 2003) at Exhibit B.

Lawrence Fitzpatrick has been nominated and appointed as FCR in the *AC&S*, *Global Industrial Technologies*, *North American Refractories Co.*, and *Pittsburgh Corning* cases. See Motion of the Debtors A.P. Green Indus., et al., for the Appointment of Lawrence Fitzpatrick as Legal Representative for Future Asbestos Personal Injury Claimants, *Nunc Pro Tunc*, Dkt. No. 1226, *In re Global Indus. Tech. Inc.*, No. 02-21626 (Bankr. W.D. Pa. Mar. 18, 2003) ("Mr. Fitzpatrick has also been appointed by this Court to serve in a similar capacity as Future Representative for both the Pittsburgh Corning Corporation (Case No. 00-22876) and North American Refractories Company ("NARCO," Case No. 02-20198)"); Order Granting Application Appointing Lawrence Fitzpatrick as Legal Representative for Future Asbestos Personal Injury Claimants of A.P. Green Industries Inc. et al., Dkt. No. 1288, *In re Global Indus. Tech. Inc.*, No. 02-21626 (Bankr. W.D. Pa. Apr. 16, 2003); Debtors' Motion for Entry of an Order Approving and Authorizing the Appointment of Lawrence Fitzpatrick as the Legal Representative to Future Asbestos Claimants, Dkt. No. 238, *In re ACandS, Inc.*, No. 02-12687 (Bankr. D. Del. Dec. 24, 2002); Order Appointing Futures Representative, Dkt. No. 314, *In re ACandS, Inc.*, No. 02-12687 (Bankr. D. Del. Feb. 25, 2003).

Richard Schiro has been nominated and appointed as FCR in the *JT Thorpe*, *Utex*, *Swan Transportation*, and *ABB Lummus Global* bankruptcy cases. See Application for an Order Appointing Richard B. Schiro as Future Claimants' Representative for Purposes of Sections 105 and 524(g) of the Bankruptcy Code, *Nunc Pro Tunc* to the Petition Date, Dkt. No. 5, *In re ABB Lummus Global, Inc.*, No. 06-10401 (Bankr. D. Del. Apr. 21, 2006) at 9; Order Appointing Richard B. Schiro as Legal Representative, *Nunc Pro Tunc* to the Petition Date, Dkt. No. 138, *In re ABB Lummus Global, Inc.*, No. 06-10401 (Bankr. D. Del. May 16, 2006).

R. Scott Williams has been nominated and appointed as FCR in the *Shook & Fletcher* and *Congoleum* bankruptcy cases. Debtors' Motion for Entry of an Order Approving and Authorizing the Appointment of R. Scott Williams as the Legal Representative for Future Asbestos Personal Injury Claimants, Dkt. No. 108, *In re Congoleum Corp.*, No. 03-51524 (KCF) (Bankr. D.N.J. Jan 13, 2004) at Exh. A; Order Authorizing the Appointment of R. Scott Williams as Futures Representa-

bankruptcy court exercise its appointment power completely independent of debtors' wishes vitiates that particular source of bias promoted by the bankruptcy courts' current approach.¹⁹²

tive, Dkt. No. 355, *In re Congoleum Corp.*, No. 03-51524 (KCF) (Bankr. D.N.J. Feb. 18, 2004).

David Austern has been nominated and appointed as FCR in the *Combustion Engineering* and *W.R. Grace* bankruptcy cases and served as the pseudo FCR in the negotiations of the aborted Crane Company pre-packaged bankruptcy. See Application of Debtor Pursuant to 11 U.S.C 105, 327 and 524(g)(4)(B)(i) for the Appointment of a Legal Representative for Future Asbestos Claimants, Dkt. No. 5460, *In re W.R. Grace & Co.*, No. 01-01139 (JKF) (Bankr. D. Del. Apr. 19, 2004) at 4; Order Granting Application of Debtor Pursuant to 11 U.S.C 105, 327 and 524(g)(4)(B)(i) for the Appointment of a Legal Representative for Future Asbestos Claimants, Dkt. No. 5645, *In re W.R. Grace & Co.*, No. 01-01139 (JKF) (Bankr. D. Del. May 25, 2004); Reorganization Term Sheet attached to Crane Co. SEC Form 8-K, Oct. 21, 2004 at D-3.

Dean Trafelet has been nominated and appointed as FCR in the *Armstrong World Industries*, *Plibrico*, and *USG* bankruptcy cases. See Application of Debtors and Debtors in Possession for an Order Appointing Dean M. Trafelet as Legal Representative for Future Claimants, Nunc Pro Tunc to June 6, 2002, Dkt. No. 2492, *In re USG Corp.*, No. 01-02094 (Bankr. D. Del. June 28, 2002) at 5; Order Appointing Dean M. Trafelet as Legal Representative for Future Claimants, Nunc Pro Tunc to June 6, 2002, Dkt. No. 2538, *In re USG Corp.*, No. 01-02094 (Bankr. D. Del. July 14, 2002); Order Appointing Future Claims Representative, Dkt. No. 167, *In re Plibrico Co.*, No. 02-09952 (Bankr. N.D. Ill. June 6, 2002).

FCRs are not likely to be supported by debtors and current claimants for appointment in additional cases if, in negotiations in previous cases, the FCR proved too difficult to make a deal.

As Professor Tung recognized:

[L]awyers and other professionals who regularly appear as the key players in the reorganization of large, publicly held companies form a fairly small community. Members of this group can expect to be repeat players in the large cases. . . . As with any culture, this group has shared understandings—norms about how cases are conducted and disputes resolved. . . . If lawyers with “real” clients will compromise in obeisance to group norms, how much worse off will future claimants be with the FCR? From which classes will the value come that is necessary to achieve consensus in the mass tort bankruptcy? The most ready source is the class of future claims, which are the most abstract and conceptual of legal entitlements. . . . All bargaining agents in Chapter 11 enjoy some degree of independence from their constituents. None, however, is quite so free as the FCR. Given the small community of lawyers involved in the large cases, the FCR will have some stake in maintaining good standing with the group. Professional reputation and opportunities for future work in the megacases may turn to some extent on other group members' opinion of the quality of the FCR's representation.

Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 73–76 (2000).

192. To ensure future appointments in other cases, an FCR must presumably refrain from antagonizing his or her litigation adversaries—current claimants' counsel who exercise influence in the selection process—or the FCR may not be

b. The FCR Must Be Completely Independent and Free Both of Conflicts of Interest and Any Appearance of Conflict or Impropriety

In judging the independence of a prospective FCR, the court should employ the strict standards customarily applied to court officers and fiduciaries acting on behalf of an absent party. The FCR acts as a guardian *ad litem* for future claimants.¹⁹³ Guardians *ad litem* are independent of the court, but “[i]t is well recognized that the guardian ad litem serves essentially as an officer of the court.”¹⁹⁴ Officers of the court “must avoid even the appearance of professional impropriety . . . [to maintain] public confidence in the integrity of our system of justice, [because] ‘the appearance of conduct associated with institutions of the law [is] as important as the conduct itself.’”¹⁹⁵

The “appearance of impropriety” standard serves as a prophylactic. Looser standards for judging bias always increase the possibility that some cases of actual bias will pass unnoticed. Because the

hired again. As noted by Professor Brickman, “it is no surprise, therefore, that FCRs rarely take positions inconsistent with the interests of the plaintiff attorneys that control the bankruptcy process.” Brickman Testimony, *supra* note 85, at 43–44. This problem has been recognized by critics of the class-action settlement schemes rejected by the Supreme Court in *Amchem*, 521 U.S. 591 (1997), and *Ortiz*, 527 U.S. 815 (1999):

Special masters appointed by the court to review class settlements, or guardians appointed by the court to protect absent class members’ interests, suffer from . . . their own self-interest in cultivating a reputation for not scuttling deals. Anyone who gained that reputation might never work as a class guardian again. The next pair of settling parties would vigorously protest the appointment of such a person and a court would be unlikely to insist in the face of that protest. Moreover, we can report without attribution, for whatever it may be worth, that the guardians we have talked to understand their job is to approve the deal that the settling parties have constructed, after suggesting a few minor changes, not to recommend that the settlement be chucked.

Susan Koniak & George Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1110–1111 (1996).

193. *In re Amatex Corp.*, 755 F.2d 1034, 1043 (3d Cir. 1985).

194. *Kollsman v. Cohen*, 996 F.2d 702, 706 (4th Cir. 1993) (citing *Hull* by *Hull v. United States*, 971 F.2d 1499, 1510 (10th Cir. 1992)) (“Guardian *ad litem* acts as an officer of the court, looking after the interests of the minor.”); *DuPont v. Southern Nat. Bank of Houston*, 771 F.2d 874, 882 (5th Cir. 1985) (“Guardian *ad litem* is . . . an officer of the court. ‘[He] is not simply counsel to one party in the litigation.’”).

195. *In re E. Sugar Antitrust Litig.*, 697 F.2d 524, 530 (3d Cir. 1982) (citation omitted). *See also In re Estate of Hawley*, 538 N.E.2d 1220, 1222 (Ill. App. 1989) (A trustee cannot suffer “the remotest possibility of a conflict of interest, nor the faintest appearance of impropriety.”).

constitutional due process interests of absent parties deserve the utmost protection, it is appropriate to subject the FCR appointment to the highest standards of independence—erring on the side of more, rather than less, protection. The Supreme Court admonished in *Ortiz* that in considering exceptions to the fundamental rule that every person is entitled to his own day in court, “the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse.”¹⁹⁶ There is no reason why the court should appoint anyone whose independence is not entirely free from doubt.

The requirement for independence of class representatives in class actions is instructive. It is a bedrock principle that neither class representatives nor class counsel have even the appearance of a conflict. “The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.”¹⁹⁷

Moreover, the “appearance of impropriety” standard serves a broader public function by supporting the perception of integrity in the judicial process. Certain conduct, even if within the letter of ethical rules, “may appear to laymen to be unethical.”¹⁹⁸ As a result, an officer of the court must “strive to avoid not only professional impropriety but also the appearance of impropriety.”¹⁹⁹ Because the judgment of the bankruptcy court will undoubtedly be subjected to scrutiny by, at the very least, future claimants who may later learn that they are suffering from a debilitating disease, but whose recourse against the company that harmed them has been limited, a reorganization plan must not only be just, but appear just.²⁰⁰

196. *Ortiz*, 527 U.S. at 842.

197. See *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995) (citation omitted); *In re Discovery Zone Sec. Litig.*, 169 F.R.D. 104, 109 (N.D. Ill. 1996) (disqualifying counsel where “relationship between [class representatives] and class counsel is inherently riddled with the appearance of and potential for impropriety.”).

198. *Richardson v. Hamilton Int’l Corp.*, 469 F.2d 1382, 1386 n.12 (3d Cir. 1972).

199. *Id.*

200. As noted, the Third Circuit in its recent decision in the *Congoleum* bankruptcy case emphasized the need for proceedings in asbestos bankruptcies to have the appearance of justice. The Third Circuit stated:

We do not approve of a bankruptcy court applying less than careful scrutiny to pre-petition procedures in prepackaged plans. The parties here seek the court’s *imprimatur* of a reorganization that will free the debtor of all current and future asbestos liability. The legitimacy of such a transaction is dependent on the stature of the court. . . . Leaving the procedures for allocation of

Longstanding precedent imposes the highest standards of independence upon those serving as legal representatives for absent parties, yet bankruptcy courts have essentially ignored or overlooked those standards when appointing an FCR, particularly (but not exclusively) in the pre-pack context.

3. The Bankruptcy Courts' Efforts to Find Guidance in the Bankruptcy Code and Customary Bankruptcy Procedure Fails to Reflect the Unique Role of the FCR

Finding no specific direction in the Code about how to proceed with the FCR's appointment, bankruptcy courts have reflexively invoked traditional practices. They have assumed that the debtor has the presumptive right to make the appointment, and then tested the propriety of the appointment under conflicts of interest standards specified for other types of appointment under the Code. The current approach, based on traditional bankruptcy practices, is misguided because the role of the FCR is unique. The bankruptcy courts can, and must, look beyond the Code in determining whether to ratify a debtor-selected FCR.

4. The Proper Standard to Be Used in Judging An FCR

In seeking analogous standards to judge the FCR's independence, the courts have generally looked to Bankruptcy Code provisions and have landed on § 327 or some derivation thereof, which governs a debtor's prerogative to hire professionals,²⁰¹ and/or the "disinterestedness" standard set forth in § 101(14).²⁰²

resources predominantly in the hands of private, conflicting interests has led to problems of fair and equal resolution. The need for counsel with undivided loyalties is more pressing in cases of this nature than in more familiar conventional litigation. Correspondingly, the level of court supervision must be of a high order.

Century Indem. Co. v. Congoleum Corp. (*In re Congoleum Corp.*), 426 F.3d 675, 692–93 (3d Cir. 2005).

201. *See, e.g.*, Order Granting Application of Debtor Pursuant to 11 U.S.C. §§ 105, 327 and 524(g)(4)(B)(i) for the Appointment of a Legal Representative for Future Asbestos Claimants, Dkt. No. 5645, *In re W.R. Grace Co.*, No. 01-01139 (JKF) (Bankr. D. Del. May 24, 2004); Order Authorizing the Appointment of R. Scott Williams as Futures Representative, Dkt. No. 355, *In re Congoleum Corp.*, No. 03-51524 (KCF) (Bankr. D.N.J. Feb. 18, 2004).

202. *See, e.g.*, Order Granting Application of Debtor Pursuant to 11 U.S.C. §§ 105, 327 and 524(g)(4)(B)(i) for the Appointment of a Legal Representative for Future Asbestos Claimants, Dkt. No. 5645, *In re W.R. Grace Co.*, No. 01-01139 (JKF) (Bankr. D. Del. May 24, 2004); Order Authorizing the Appointment of R. Scott Williams as Futures Representative, Dkt. No. 355, *In re Congoleum Corp.*, No. 03-51524 (KCF) (Bankr. D.N.J. Feb. 18, 2004) (Each order appointing the FCR pursuant to debtors' representations that, among other things, the FCR was "disin-

Section 327 is not an appropriate standard by which to appoint an FCR. Specifically, § 327(a) permits a *debtor*, with court approval, to “employ one or more attorneys, accountants . . . or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons.”²⁰³ Section 327 states that prior employment is *not* itself a disabling conflict.²⁰⁴

Restrictions on the hiring of professionals are narrowly construed because they deal only with professionals chosen by a party to assist that party, not the appointment of a “representative party” (like an FCR) by the court itself. The choice of a debtor’s professionals rightly rests with the debtor in the first instance, and thus great deference is due to the debtor’s choice. The court’s role is merely to approve or disapprove the debtor’s selection.²⁰⁵ Accordingly, the cases hold, the court may not reject the choice based on appearance of conflict.²⁰⁶ On a similar theory, conflicts of interest in a committee’s selection of counsel are balanced against the “fact that parties should be free to choose attorneys and accountants of

terested” as defined in § 101(14) of the Bankruptcy Code.); *see also* Application of Armstrong World Industries, Inc. Pursuant to 11 U.S.C. §§ 105(a), 524(g)(4)(B)(i), and 1109 For The Appointment of Dean M. Trafelet as Legal Representative for Future Claimants, Nunc Pro Tunc to December 17, 2001, Dkt. No. 1879, *In re* Armstrong World Indus., Inc., No. 01-04471 (Bankr. D. Del. Jan. 24, 2002) (“Mr. Trafelet is ‘disinterested’ as such term is defined in Section 101(14) of the Bankruptcy Code.”); Order Appointing Legal Representative For Future Claimants, Dkt. No. 2096, *In re* Armstrong World Indus., Inc., No. 01-04471 (Bankr. D. Del. Mar. 1, 2002); Affidavit of David Austern in Support of Debtors’ Motion for Entry of an Order Approving and Authorizing the Appointment of David Austern as the Legal Representative For Future Claimants, Dkt. No. 22, *In re* Combustion Eng’g, Inc., No. 03-10495 (Bankr. D. Del. Feb. 13, 2003) (“I am a ‘disinterested person’ as that term is defined in section 101(14) of the Bankruptcy Code and modified by section 1107(b) of the Bankruptcy Code.”); Interim Order Appointing Future Claimants’ Representative, Dkt. No. 227, *In re* Combustion Eng’g, Inc., No. 03-10495 (Bankr. D. Del. Mar. 17, 2003); Application for an Order Appointing a Legal Representative for Purposes of Section 105(a) and 524(g) of the Bankruptcy Code, Dkt. No. 12, *In re* Mid-Valley, Inc., No. 03-35592 (Bankr. W.D. Pa. Dec. 16, 2003) (“Debtors believe that Professor Green is disinterested, as that term is defined in section 101(14) of the Bankruptcy Code, and otherwise qualifies to serve as Legal Representative.”); Final Order Granting Debtors’ Application to Appoint Legal Representative for Purposes of Section 105(a) and 524(g) of the Bankruptcy Code, Dkt. No. 610, *In re* Mid-Valley, Inc., No. 03-35592 (Bankr. W.D. Pa. Feb. 18, 2004).

203. 11 U.S.C. § 327(a) (2000).

204. 11 U.S.C. § 327(c) (2000).

205. *See* 3 COLLIER ON BANKRUPTCY ¶ 327.04[1], at 327–29 & n.6 (15th rev. ed. 1996 & Supp. 2003).

206. *See In re Pillowtex, Inc.*, 304 F.3d 246, 251 (3d Cir. 2002); *In re Marvel Entm’t*, 140 F.3d 463, 476 (3d Cir. 1998).

their choice.”²⁰⁷ Significantly, in connection with these hires, the hiring party (debtor or committee) can monitor the performance of its chosen professionals and remove them if dissatisfied.

An FCR is not comparable to counsel hired to assist a party. An FCR is not merely an assistant, and assuredly not an assistant to anyone else appearing in the bankruptcy. There is no occasion for deference: The court cannot defer to future claimants’ choice of a representative because future claimants are *not* choosing the FCR. To the contrary, the choice is being made for them, and it ought not be made by the very parties whom the future claimants are supposed to be protected from. Neither can future claimants supervise the FCR, replacing him during the bankruptcy case if they doubt the vigor of his advocacy. Future claimants will be able to judge only later. However, it is precisely such challenges to the efficacy of the channeling injunction, based upon constitutional deficiencies in the character and quality of the FCR’s representation, that the FCR requirement seeks to avoid.

More fundamentally, the FCR does not act as an advisor to some party in interest that itself retains the power to determine what positions to assert or which strategies to employ. To the contrary, once appointed, the FCR becomes, in effect, the party in interest, acting as committee for the idealization of future claimants. He or she is afforded the status of a party and granted the power of a committee to sit independently, at arm’s length, across the table from every other constituency.²⁰⁸

Neither is the “disinterestedness” standard of § 101(14) appropriate. A “disinterested person” is someone who, *inter alia*, “is not a creditor, an equity security holder, or an insider” of the debtor and “does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders.”²⁰⁹ This clearly cannot be the standard by which an FCR is appointed, because the interests of the future claimants are indeed “adverse to the interest of the estate.” The *Johns-Manville* court recognized that

207. *In re Oliver’s Stores, Inc.*, 79 B.R. 588, 596 (Bankr. D.N.J. 1987). *See also In re Muma Servs., Inc.*, 286 B.R. 583, 590 (Bankr. D. Del. 2002) (finding that committees have wide latitude to hire counsel, precluding only retention of persons with actual or potential conflicts).

208. *In re UNR Indus.*, 71 B.R. 467, 479 (Bankr. N.D. Ill. 1987) (The “Legal Representative . . . has been granted the powers and responsibilities of a committee.”). *See also In re Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986) (“The Legal Representative was endowed upon his appointment with the full panoply of statutory rights and duties of representation available to an official committee under the Code.”).

209. 11 U.S.C. § 101(14)(A), (E) (2000).

no party's interests were aligned to those of the future claimants when it appointed an FCR, and Congress subsumed precisely that theory into § 524(g) by requiring court appointment of an FCR to protect the future claimants.²¹⁰ Under the § 101(14) “disinterestedness” standard, no FCR could ever properly be appointed because his or her interests as the representative of future creditors of the debtor, who seek distribution from debtor’s assets, are meant to be adverse to the interests of the estate. Conversely, appointing an FCR pursuant to the § 101(14) standard guarantees that the FCR cannot properly serve the future claimants because the FCR must have aligned his or her interests with those of the debtor so as not to make them “adverse.”

As suggested above, the FCR is closer to a guardian *ad litem* or court officer than a bankruptcy professional. The standards that should apply in judging the independence of an FCR are the highest that the law contemplates. There should be complete independence from the future claimants’ adversaries; there should be not even a whiff, let alone an appearance, of allegiance to or alliance with any of the adversaries. The FCR must continue to conduct his or her affairs in a way that such whiff of impropriety will not arise.

In allowing a debtor to nominate an FCR, or in deferring to a debtor’s preference, the bankruptcy court makes a fundamental mistake. As demonstrated above, the statute does *not* contemplate debtor appointment of the FCR, but rather *court* appointment. And the debtor’s (or current claimants’) preferences ought be viewed with suspicion. The court may draw on its own resources in seeking out suitable candidates. It may accept nominations from the parties, subject to careful scrutiny. It may ask the United States Trustee to provide assistance. It may appoint someone to assist in the search. In each instance, however, the court must ultimately assure itself that the person it decides to appoint as FCR is not only competent to perform the job, but will do so with the vigor, and the full measure of independence from other parties in interest, that the delicate task requires.

210. See *Johns-Manville*, 36 B.R. at 749 (The court recognized that if future claimants were “denied standing as parties in interest, they will be denied all opportunity either to help design the ship that sails away from these reorganization proceedings with their cargo on board or to assert their interests during a pre-launching distribution,” because “none of the existing committees of unsecured creditors and present asbestos claimants represents this key group.” . . . The current claimants’ “stake in maximizing recovery from the reorganizing [debtors] may be antithetical to the expectations of future interests,” and debtors’ “skewed and less than robust advocacy [on behalf of future claimants] is not acceptable.”).

5. The Debtor's Pre-Petition Pseudo FCR Cannot Be Appointed as Statutory FCR Post-Petition

Not only is there no room for debtor's choice to hold sway within a statutory framework requiring court appointment of the FCR, but the fact that someone was hired pre-petition by the debtor and current claimants to serve as pseudo FCR in connection with a pre-packaged asbestos bankruptcy should be sufficient to *disqualify* the pseudo FCR from court appointment as the statutory FCR. Whatever service or utility the pseudo FCR might provide in developing a plan pre-petition, that service cannot be used as the springboard for appointment as the statutory FCR, post-petition. The conflicts of interest are simply too great.

Over the course of his or her pre-petition participation, the pseudo FCR receives substantial, unsupervised payments from the prospective debtor in exchange for cooperative efforts in negotiating, and ultimately agreeing to, the plan the debtors wish to bring to the bankruptcy court. Having initially appointed their pseudo FCR to engage in negotiations purportedly on behalf of future claimants, the prospective debtors also have the ability to terminate the pseudo FCR during the pre-petition negotiations if he or she proves too troublesome a negotiator.

Later, in nominating their pseudo FCR as the statutory FCR, debtors are surely aware that pre-petition habits of gratitude and deference ingrained as pseudo FCR—for selecting him, paying his fees, keeping him on, and promising him lucrative post-petition and post-confirmation employment—likely would not end when the pseudo FCR becomes the statutory FCR.

More important than the pseudo FCR's gratitude is the fact that the prospective debtor's control over the pseudo FCR's compensation and continued appointment would unavoidably limit his zealous advocacy for future claimants.²¹¹ The pseudo FCR cannot be "difficult" in the pre-pack negotiations to the point of risking his job.²¹² Nonetheless, an FCR, once officially appointed by the bankruptcy court upon debtor's nomination, will most likely not criticize or scrutinize the very plan to which he agreed while acting as pseudo FCR.²¹³

211. See Brickman, *supra* note 74, at 879.

212. See Barliant, *supra* note 87, at 467.

213. This is so even where a prospective debtor failed during the pre-petition negotiations of a pre-pack to disclose to the pseudo FCR material facts that could affect an independent FCR's evaluation of the proposed bankruptcy deal. See, e.g., *supra* notes 136, 137 (concerning Combustion Engineering's failure to disclose insurer indemnity claims to the pseudo FCR in that case). Few statutory FCRs who

Indeed, the pseudo FCR has been given *every* incentive pre-petition to arrive at a plan that debtors will find acceptable, rather than be obstreperous. His or her appointment by the bankruptcy court as the FCR for purposes of the bankruptcy proceeding, and afterwards for administration of the trust, could only come about if negotiations succeed to the debtor's satisfaction.²¹⁴ And, even if the pseudo FCR were to fail to agree upon a plan, the debtor could simply find another, more accommodating person, to serve in that post, so there is no point in maintaining the fight. Thus, the structure of the pseudo FCR appointment in a pre-packaged case militates strongly against one of the central options available to the FCR contemplated by Congress: to declare that there is no real need for a trust limiting the recovery of future claimants, at least not on terms acceptable to the debtor, because deserving future claimants will have ready recourse against the debtor, and the debtor's full enterprise value, absent the trust and the § 524(g) injunction.²¹⁵

The pseudo FCR's participation in the pre-pack process thus constitutes an actual, patent conflict that should prevent such pseudo FCR from later being appointed as statutory FCR in the bankruptcy case. The party against whom the pseudo FCR was negotiating pre-petition had the unilateral right during the negotiations to hire him, fire him, pay his salary, and provide a conditional promise of future employment—as FCR of the post-confirmation § 524(g) trust—as long as the pseudo FCR agreed to a plan of debtor's liking. Having agreed upon a plan in those circumstances, a pseudo FCR, subsequently appointed to serve as the statutory FCR, is unlikely to look at the same plan post-petition with new, objective, and vigorously independent eyes. Neither is he or she likely to be ungracious to his former "adversary." No objective observer would fail to see the appearance of conflict and bias (in favor of the plan and in favor of debtors and counsel for current claimants) inherent in this situation. A court-appointed FCR cannot be asked to objectively evaluate the product he helped produce as the patently-conflicted pre-petition pseudo FCR. Dispositions formed at the pre-pack negotiation stage do not evaporate at the bankruptcy court door.

have already announced their support for debtor's prepack plan would want to admit publicly that they were duped by the debtor while acting as pseudo FCR.

214. See Brickman, *supra* note 74, at 879–80.

215. See *Combustion Eng'g*, 391 F.3d at 238 ("The future asbestos claimants . . . might prefer having recourse against solvent entities rather than being limited to proceeding against the [post-petition] trust, a limited fund subject to depletion by current and future . . . asbestos claimants.").

III. CONCLUSION

Adequately protecting future claimants is central to the provisions of § 524(g) and is required by due process considerations.²¹⁶ To properly fulfill his statutory purpose of protecting the interests of future claimants, an FCR must be held to the law's highest standards of independence. Failing to hold the FCR to those standards will have a direct impact on any resulting plan and may undermine the validity of any injunction entered under § 524(g). The standards and procedures that the bankruptcy courts have applied to date in appointing FCRs, particularly (but not exclusively) in pre-packs, have not reflected the important and unique role that the FCR plays in the asbestos bankruptcy process and the degree of independence that the FCR must have if that role, as envisioned by Congress and required by the Constitution, is to be properly played. Complete independence, past and future, from other bankruptcy constituencies, without even the appearance of impropriety, is required. Section 524(g) requires court appointment and, if the objectives of the appointment are to be fulfilled, the debtor and counsel for current claimants are entitled to no deference in the court's choice of a representative for their adversary, the future claimants. This requires that a person who was selected by debtor and counsel for current claimants to serve as the pseudo FCR during pre-petition negotiations of a pre-packaged asbestos bankruptcy plan should be disqualified from subsequent court appointment as the statutory § 524(g) FCR.

216. *Combustion Eng'g*, 391 F.3d at 234 n.45 ("Many of" the requirements in §524(g) are "specifically tailored to protect the due process rights of future claimants."); *In re Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986) ("[I]t is worthwhile to remember who due process will serve in this reorganization. The goal of the Plan and the purpose of the [channeling] Injunction is to preserve the rights and remedies of those parties who by accident of their disease cannot even speak in their own interest.").