MASS-TORT TRUSTS AND THE FAUSTIAN BARGAIN

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In bankruptcy, establishing a mass-tort trust is the final piece in structuring resolution of protracted aggregate litigation faced by a corporate debtor. As seen in cases like Purdue Pharma and Boy Scouts of America, the multibillion-dollar aggregate settlement figure captures all the headlines. But the trust distribution provisions—which actually provide the details of how individual claimants will be treated and what they will receive—are an afterthought. This odd dynamic has allowed antiquated trust provisions that create short-term benefits and often significant long-term costs to proliferate. The Faustian Bargain is especially pernicious in mass torts because many key trust features appear harmless or marginally threatening when initially identified. Unfortunately, the confluence of these provisions can wildly distort the assumptions underlying settlement. In fact, they alter the deal.

This Article explores the details of modern mass-tort trusts resolved through federal bankruptcy with the objective of highlighting structural and procedural anomalies. We begin by assessing the foundational trusts created decades ago and use this data as the basis for comparative analysis of modern trusts. Eleven representative trusts originating in bankruptcy cases filed over the last four decades inform our assessment. Our research reveals various pathologies that heighten the risk of disparate recoveries for similarly situated claimants. Future claimants—those who file claims many years after trust inception—are the most affected.

This Article proposes modified distribution protocols and a reconceptualization of how these trusts are negotiated, structured, and backstopped to improve the likelihood of comparable recoveries for similarly situated claimants across the life

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of the trust. Our ultimate goal is to inject additional integrity into the trust formulation process and improve outcomes for the next wave of mass-tort cases.

INTRODUCTION

Johns-Manville is the fountainhead. Over the course of over 100 years, the company became one of the world's largest manufacturers and suppliers of asbestos products.[1] During that time, asbestos was regarded as a miracle mineral that could withstand fire and acid and offered myriad commercial uses.[2] But by the late 1970s, Dr. Irving Selikoff had

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1 *See* LLOYD DIXON, GEOFFREY MCGOVERN & AMY COOMBE, RAND CORP., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 5 (2010) [hereinafter RAND REPORT], https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf [https://perma.cc/SV65-SCJN].

2 Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 387 (1993).

substantiated the harmful effects of asbestos inhalation.[3] The consequences of inhaling asbestos fibers are severe, and the manifestation of harm can develop over decades. It is this latency dimension that amplified the resolution complexity the company faced. Individuals exposed to asbestos began filing suit against Johns-Manville in the 1960s.[4] By the 1980s, the company faced over 16,500 suits, with over 400 new cases being filed every month.[5] Traditional means of resolution were inadequate for resolving the multi-billion-dollar dispute. Some victims were already suffering, but others were in good health and would not manifest harm for years.

Johns-Manville filed for bankruptcy in 1982.[6] The case was characterized by chaos. The U.S. Bankruptcy Code (the "Bankruptcy Code") did not have provisions that offered "guidance on how to address the billions of dollars in [varied] claims against the company."[7] Consequently, the case languished for six years before stakeholders formulated an innovative solution:[8] "Pursuant to the debtors' plan of reorganization, all asbestos claims—including those held by future victims—were channeled to a $2.5 billion trust [(the "Manville Trust")] funded by [various financial assets, insurance policies, and common stock in the reorganized debtor]."[9] In return, the reorganized debtor and other key parties received releases; asbestos claims—whether held by current victims or future victims—could not be brought against these entities.[10] This resolution structure was seen as revolutionary, offering rapid settlement for victims and finality for the debtor and its stakeholders. The celebration was short-lived.

The Manville Trust was expected to pay claimants close to 100% of the settlement value of their claims.[11] The debtor anticipated the trust resolving approximately 83,000 to 100,000

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3 *See* STEPHEN J. CARROLL ET AL., RAND CORP., ASBESTOS LITIGATION 12–14 (2005).

4 Marianna S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53 LAW & CONTEMP. PROBS. 27, 29 (1990).

5 *See id.*

6 *See* Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 482 (2022) (citing RAND REPORT, *supra* note 1, at 5–7).

7 *Id.*

8 *Id.* (citing RAND REPORT, *supra* note 1, at 5).

9 *Id.* (citing *In re* Johns-Manville Corp., 68 B.R. 618, 621–27 (Bankr. S.D.N.Y. 1986).

10 *Id.* (citing *Johns-Manville*, 68 B.R. at 638).

11 *See* RAND REPORT, *supra* note 1, at 6.

claims, with a per claim value around $25,000.[12] The projections were unfathomably wrong. Claims devoured the trust's corpus at an unexpected rate, fueling fear that the trust would fail prematurely. In response, claimants holding contingent claims began filing. A type of bank run ensued. "By January 1992, more than 190,000 claimants were seeking compensation from the [t]rust."[13] The trust was deemed insolvent just a few years after its inception.[14] To salvage the deal, key parties were forced to return to court to resolve the financial deficiency. The reorganized debtor contributed additional funds, and a revised settlement was implemented with various new measures that insulated the trust from insolvency.[15] These measures did not improve claimant distributions or protections. The primary dissonance was that the new directives allowed the trust administrator to pay claimants a fraction of the liquidated value of their claims based on a percentage set by the trust.[16] The percentage was set at a woefully inadequate 10% in 1995 and reduced to 5.1% by 2022.[17]

Despite its systemic flaws, the Manville Trust has been regarded as a relative success. In 1994, Congress undertook a wholesale codification by adding Section 524(g) to the Bankruptcy Code. The section copies the key features of the Manville Trust.[18] The legion of asbestos cases that would follow eventually solidified *Johns-Manville*'s payment matrix that is ubiquitous today. The Manville Trust continues to pay out claims,[19] and this endurance has been equated with efficacy. The narrative surrounding the trust, however, is apocryphal. The trust is arguably a failure when assessed through customary metrics, including recovery size, recovery uniformity, and

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12 *See id.* (citing Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1925, 1932 (2002)).

13 *History*, MANVILLE PERSONAL INJURY SETTLEMENT TRUST, https://mantrust.claimsres.com/history/ [https://perma.cc/4CJM-ZBYW].

14 *See* RAND REPORT, *supra* note 1, at 6.

15 *See* Parikh, *supra* note 6, at 483.

16 *See id.* at 483 n.280.

17 *See* Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 352 n.187 (2022) (citing MANVILLE PERSONAL INJURY TRUST, 2002 TRUST DISTRIBUTION PROCESS: MAY 2021 REVISION (2021), https://www.claimsres.com/wp-content/uploads/2016/11/2002-TDP-May-2021-Revision-1.pdf [https://perma.cc/3VQ5-QUL2]).

18 *See* Parikh, *supra* note 6, at 482–84.

19 *See* Jacqueline Marcus, *Manville Channeling Order Still Effective After More than 30 Years*, WEIL RESTRUCTURING (Mar. 5, 2021), https://restructuring.weil.com/claims/manville-channeling-order-still-effective-after-more-than-30-years/ [https://perma.cc/G4TR-3QB6].

preservation of litigation rights,[20] but, as asserted herein, it has served as a template for almost all mass-tort trusts that have followed.

The Manville Trust's model promises to address various intractable problems. First, it provides the long-sought recovery for claimants through an apparently efficient distribution scheme. The creation of this settlement trust allows the corporate defendant, its affiliates, insurance companies, and various other parties to walk away from the dispute. When implemented through bankruptcy, the process can eliminate all legacy liability against these parties. The trust framework also presumably solves the "future-victim"[21] problem by allowing the court to appoint a future-claimants' representative ("FCR") to bind these claimants. Due process is also seemingly addressed because claimants—future claimants and those who voted against the settlement, in particular—are permitted to opt out of the settlement and pursue their claim in court. Finally, the trust offers the one thing that no other platform can: filtering nonmeritorious claims that threaten to deprive meritorious claimants of the recovery they deserve.

The Manville Trust is the result of a Faustian Bargain—one that endures in many of the mass-tort trusts created over the last thirty years. These deals offer key stakeholders the allure of finality and the promise of justice. The argument is enticing. A protracted litigation that has for years been eviscerating resources and depriving victims of compensation finally approaches some sort of settlement. The complex issues presented by the mass-tort case have been resolved, and what remains—the argument goes—are the simple protocols necessary for claimants to receive the distribution they had been promised as part of the settlement.[22] Long-suffering victims can finally be compensated and move on with their lives. A corporate defendant can address its transgressions and refocus on producing valuable products and services. And the judiciary can move an "elephantine mass" off its docket.[23] These

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20 *See* Stephen Labaton, *The Bitter Fight over the Manville Trust*, N.Y. TIMES (July 8, 1990), https://www.nytimes.com/1990/07/08/business/the-bitter-fight-over-the-manville-trust.html [https://perma.cc/BQ3N-T8DY].

21 *See* Parikh, *supra* note 6, at 451–52.

22 *See* Interviews with Mass-Tort Insiders (June 2–11, 2025) (on file with authors) (describing the trust as an "afterthought" and merely the "plumbing" that delivers claimants a recovery). For this Article, I interviewed a number of insiders—including practitioners and jurists—intimately involved in mass-tort cases.

23 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

promises can create a mirage for Weary Travelers. The general framework appears to be sound, but the devil is truly in the details. The bargain's long-term consequences are rationalized and, in many cases, ignored entirely.

The grim realities of the distribution process are ultimately realized over the years that follow. In order to avoid insolvency, distribution procedures allow for wildly disparate recoveries by victims separated only by the time they sought recovery. By most reasonable metrics, many of these trusts actually fail—a label we reach by assessing the financial status of the trust and the recoveries received by claimants. Further, claimants are promised the option of accessing the courts and pursuing their claims, but this is just another illusion. Verdicts received by claimants who opt out are capped at the amount that the claimant otherwise would have received from the trust distribution process, and a claimant who opts-out will receive distribution only after other claimants are compensated.[24] Future victims face the most dire outcomes. They bear the cost of long-term infirmities and insolvency.[25]

This Article explores the details of modern mass-tort trusts resolved through federal bankruptcy with the objective of highlighting structural and procedural anomalies. We begin by assessing the foundational trusts created decades ago and use this data as the basis for comparative analysis of modern trusts. By analyzing eleven representative trusts (the "Subject Trusts")[26] originating in bankruptcy cases filed over

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24 *See infra* subpart II.C.

25 Professor Langston explains that future claimants in traditional mass-tort cases involve a disproportionate number of individuals from historically marginalized groups, adding another dimension to the problems explored in this Article. *See* Nicole Langston, *Discriminatory Trusts* (unpublished manuscript) (on file with authors).

26 We reviewed the following trusts: Combat Arms Settlement Agreement, *In re* 3M Combat Arms Earplug Products Liab. Litig., No. 3:19-md-02885 (N.D. Fla. Aug. 29, 2023) [hereinafter 3M Trust Agreement] (earplugs); Fifth Amended Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and its Affiliated Debtors, *In re* TK Holdings, Inc., No. 17-11375 (BLS) (Bankr. D. Del. Feb. 20, 2018) [hereinafter Takata Trust Agreement] (airbags); Trust Agreement Pursuant to Chapter 11 Plan of Reorganization for the Diocese of Rockville Centre, *In re* Roman Catholic Diocese of Rockville Ctr., No. 20-12345 (MG) (Bankr. S.D.N.Y. Nov. 4, 2024) [hereinafter Diocese Trust Agreement] (sexual abuse); Third Amended Prenegotiated Plan of Reorganization for Duro Dyne National Corp., *In re* Duro Dyne, No. 18-27963 (MBK) (Bankr. D.N.J. June 6, 2019) [hereinafter Duro Dyne Trust Agreement] (asbestos); BSA Settlement Trust Agreement, *In re* Boy Scouts of Am. and Del. BSA, LLC, No. 20-10343 (Bankr. D. Del. Apr. 19, 2023) [hereinafter BSA Trust Agreement] (sexual abuse); Second Amended and Restated Depository Trust Agreement, *In re* Dow Corning Corp. No. 95-20512 (Bankr. E.D.

the last thirty years, we hope to assess the long-term consequences of the diabolical contract. Our assessment reveals various pathologies that create unreasonable risk of disparate recoveries for similarly situated claimants. We hope our analysis will be particularly meaningful going forward as litigation surrounding "forever chemicals" and other transformative torts creates the next wave of mass-tort cases.[27]

Part I provides an overview of the role trusts play in the resolution process and the genesis of the features we see today. We use this discussion to explore our "Weary Traveler" theory, which proposes that the extraordinarily protracted resolution timeline of these cases nudge stakeholders and courts to accept compromised deals when settlement is in sight. Part II presents our review of the Subject Trusts with a focus on governance, distribution scheme, and opt-out rights. We discovered that key trust provisions have a surprising degree of stickiness, enduring through different eras and contexts. This Part questions the equity and efficacy of these entrenched provisions. Part III explains that though the trust features delineated in Part II appear harmless or marginally threatening, the confluence of key terms can distort claimant recoveries in unexpected ways. This Part attempts to spotlight the compromised pillars in the trust construct. The attendant consequences externalize harm onto one claimant group: future claimants—a silent stakeholder unable to protect itself in this process. Finally, Part IV offers various means to improve the

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Mich. Feb. 4, 1999) [hereinafter Dow Corning Trust Agreement] (breast implants); Sixth Amended & Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, *In re* A. H. Robins Co., No. 85-01307-R (Bankr. E.D. Va. Mar. 28, 1988) [hereinafter Dalkon Shield Trust Agreement] (birth control product); 1995 Trust Distribution Process, *In re* Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986) (No. 82 B 11656/76) [hereinafter Manville Trust Agreement] (asbestos); Ivory America/Cyprus Personal Injury Trust Distribution Procedures, *In re* Imerys Talc Am., No. 19-10289 (LSS) (Bankr. D. Del. Jan. 31, 2024) [hereinafter Imerys Trust Agreement] (talc); Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust Agreement, *In re* Kaiser Aluminum Corp., No. 02–10429 (JKF) (Bankr. D. Del July 6, 2006) [hereinafter Kaiser Aluminum Trust Agreement] (asbestos). We also included the trust proposed in Johnson & Johnson's Red River Talc bankruptcy case filed in the Southern District of Texas. *See* Red River Talc Personal Injury Trust Agreement, *In re* Red River Talc LLC, 670 B.R. 251 (Bankr. S.D. Tex. 2025) (No. 24-90505) [hereinafter Red River Trust Agreement]. That last case was ultimately dismissed but the framework of the trust is still a meaningful data point. *See Red River Talc*, 670 B.R. at 251.

27 *See, e.g.*, Alex Wolf, *Trillions in PFAS Liabilities Threaten Corporate Bankruptcy Wave*, Bloomberg L. (Oct. 24, 2023), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XAM20A6K000000#jcite [https://perma.cc/S4MH-QV8E].

likelihood that trusts will fulfill their stated purpose of providing full distributions and afford similarly situated claimants substantially comparable recoveries. We focus on corporate defendants, the FCR, and the judiciary as the key actors capable of evolving the entrenched model.

Mass-tort cases are plagued by intractable problems and astonishing scale. Settlements in private disputes will always be characterized by fractional payments and significant curtailment of seemingly basic rights. This Article accepts the inveterate flaws. We, however, reject the premise that radical distribution disparities are unavoidable. We suspect that some parties are being exploited by a process that allows one subset to seize short-term benefits while externalizing the long-term costs. Our ultimate goal is to highlight these dynamics and the trust infirmities they produce to persuade courts and litigants to pursue more equitable structural choices at the point of initiation.

I
TRUST CREATION

Mass-tort cases eclipse all others in the litigation ecosystem. These cases—including ones involving Johnson & Johnson, 3M, Purdue Pharma, and Boy Scouts of America—affect millions of claimants asserting billions in damages. The sheer scale of these disputes eviscerates any possibility that traditional resolution approaches will suffice. And the size of these cases is growing[28] and presaging the possibility that "forever chemical" cases could overwhelm the system.[29]

The clarion call of plaintiffs' firms and claim aggregators has been steadily drawing more claimants.[30] The benefit is that actual victims have an increased chance of participating in these cases. The consequence, however, is that various nonmeritorious claimants also join the claim inventory. As these cases build—at its height the Combat Arms MDL had over 275,000 claimants[31]—resolution options narrow. One of

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28 *See* Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425, 449–50 (2022).

29 *See, e.g.*, Wolf, *supra* note 27.

30 *See* Samir D. Parikh, *The Alchemist's Inversion*, 110 CORNELL L. REV. 1693, 1712 (2026).

31 *See* Roy Strom, *Camp Lejeune Ads Surge Amid 'Wild West' of Legal Finance, Tech*, BLOOMBERG L. (Jan. 30, 2023), https://news.bloomberglaw.com/business-and-practice/camp-lejeune-ads-surge-amid-wild-west-of-legal-finance-tech [https://perma.cc/HW2X-TT8R].

us has written extensively about how multidistrict litigation is suboptimal for most modern mass-tort cases.[32] Federal bankruptcy has become a popular resolution alternative in the last decade, but that platform presents its own significant obstacles and complexities.[33]

Putting aside the intractable problems that must be addressed in order to resolve mass-tort cases, a victims' settlement trust is the ultimate goal. The idea is relatively simple: the corporate defendant, affiliated entities, and insurers contribute funds to a trust that will be tasked with processing and settling all claims in the case based on the protocols approved by the governing court. In exchange, contributing parties become the beneficiaries of a channeling injunction that directs all claims based on the subject matter of the dispute to the trust for recovery.[34] Unfortunately, the framework for almost all trusts is based on a forty-year-old case that many have described as a failure.[35]

A. Asbestos Trusts as the Fountainhead

Mass-tort disputes present a broad spectrum of injuries involving product liability,[36] wartime herbicides,[37] use of pharmaceuticals,[38] unique personal injuries,[39] and abhorrent

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32 *See* Parikh, *supra* note 6, at 473–79; *see also* Parikh, *supra* note 30, at 1721; Samir D. Parikh, *Bankruptcy Is Optimal Venue for Mass Tort Cases*, Law360 (Feb. 28, 2022), https://www.law360.com/articles/1468363/bankruptcy-is-optimal-venue-for-mass-tort-cases [https://perma.cc/B8R4-QBFN].

33 *See* Parikh, *supra* note 6, at 485–94.

34 *See* 11 U.S.C. § 524(g).

35 *See, e.g.*, Labaton, *supra* note 20.

36 The Dalkon Shield case involved a defective intrauterine birth-control device that caused pelvic infections, sterility, involuntary abortion, and death in thousands of women. *See* Karen Kenney, *Dalkon Shield Gives Birth to a Generation of Lawsuits*, Chi. Trib. (Apr. 30, 1985), https://www.chicagotribune.com/news/ct-xpm-1985-04-30-8501260779-story.html [https://perma.cc/78N7-RZ5C].

37 Agent Orange was a powerful herbicide used by U.S. military forces during the Vietnam War, affecting millions of veterans. *See* Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 3–4 (1986).

38 DES—or diethylstilbestrol—is a synthetic estrogen that was approved by the U.S. Food and Drug Administration for the prevention of early miscarriage. Unfortunately, female children of mothers who had ingested the drug "develop[ed] preneoplastic vaginal and cervical changes in adolescence or adulthood." Han W. Choi & Jae Hong Lee, *Pharmaceutical Product Liability*, *in* Principles and Practice of Pharmaceutical Medicine 688, 694 (Lionel D. Edwards, Anthony W. Fox & Peter D. Stonier eds., 3d ed. 2011).

39 In *In re National Football League Players' Concussion Injury Litigation*, former players in the National Football League brought suits alleging that the league and executive members "concealed [the risks of head injuries] from the players."

sexual abuse.[40] But settlement trusts that emerged from asbestos bankruptcies provide the primary foundation for design choices seen today.[41]

As noted in the Introduction, Johns-Manville is the fountainhead for the trust design prevalent over the last thirty-five years. This influence can be attributed to the approximately sixty asbestos trusts related to other asbestos manufacturers that ultimately followed Johns-Manville into bankruptcy and solidified the initial choices that created the Manville Trust.[42] A distinctive template has emerged.

Asbestos settlement trusts are organized under the law of a particular state and structured as qualified settlement funds under 26 U.S.C. § 468B.[43] The trusts are managed by a diverse group involving one or more trustees, a trust advisory committee, and—in cases involving future claimants—a future-claimants' representative. The trust distribution procedures ("TDP") primarily govern how claims are processed and recoveries distributed, while the settlement-trust agreement ("STA") establishes trust financing and administration, as well as trustee rights and responsibilities. Despite the heterogeneity of mass-tort disputes, TDPs and STAs follow a similar template and often include identical terms and protocols.[44] We observed this with the documents we reviewed for this Article.

In re Nat'l Football League Players' Concussion Inj. Litig., 301 F.R.D. 191, 195 (E.D. Pa. 2014).

40 *See, e.g.*, *In re* Boy Scouts of Am. & Del. BSA, LLC, 137 F.4th 126, 142 (3d Cir. 2025).

41 Trusts generally fall into one of two distinct categories. On one hand, public trusts are the result of tortious conduct by the government or foreign citizens or organizations. The September 11th Victim Compensation Fund ("VCF")—which was created to assist victims of the terrorist attack on the World Trade Center in New York—is the most prominent example of a public trust. More recently, the United States government is in the process of creating a trust to compensate individuals exposed to contaminated water at the Marine Corps Base in Camp Lejeune, North Carolina. These public trusts are funded entirely by contributions from the federal government or a mix of federal funds and public donations. Because these trusts tend to be well funded, allocation of funds is the primary issue. Private trusts are far more prevalent and result from litigation settlements involving corporate tortfeasors. In contrast to public trusts, private trusts are rarely fully funded and present far greater risks of claimant exploitation and threats to the integrity of the court system. This Article focuses exclusively on private trusts.

42 *See* U.S. Gov't Accountability Off., GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 15–16 (2011) [hereinafter GAO Report].

43 *See* S. Todd Brown, *How Long Is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 Buff. L. Rev. 537, 551 (2013).

44 *See id.* at 552.

One of us has asserted that trusts that result from mass-tort bankruptcies are at risk of significant underfunding.[45] Consequently, trusts include protocols that allow the trustee to avoid fund exhaustion. Initial asbestos trusts faced what can accurately be described as a "bank run"— where claimants feared trust insolvency and rushed to file claims even before any harm had been realized. Trust design in asbestos cases had to ensure that those first to the door would not deny subsequent claimants a recovery; and, just as important, that claimants with relatively minor injuries and questionable compensability would not deprive claimants with serious, documented injuries of the recovery they deserve. These trusts generally prioritized claimants with the most serious injuries by placing a "payment ratio" provision that requires trusts to allocate a certain amount of funds to the most serious claims.[46] Trusts also had a "maximum annual payment" ceiling that—once reached—forces the trust to push all pending claims to the subsequent year.[47] This last provision was one we saw in the modern trusts we reviewed.

Asbestos settlement trusts offer two paths to recovery. Traditional review—also known as individual review—is the first option. The traditional review requires a claimant to submit a claim form with evidence of exposure, medical reports, or other documentation that can support the asserted ailment.[48] The claim is reviewed by the trustee or a third-party claims processor. If the claim is approved, the trust sends the claimant a settlement offer and a release of liability.[49] The offer is often a percentage of the actual value of the claim—a reduction in distribution that the trustee has established to "maintain sufficient assets for future claims."[50] Surprisingly, in most asbestos cases, few claimants sought to access the traditional review process, even though it offers the highest potential recovery.[51]

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45 Parikh, *supra* note 6, at 493–94.

46 GAO REPORT, *supra* note 42, at 17.

47 *See id.* at 17 n.22.

48 *See id.* at 18–19.

49 *See id.* at 19.

50 *See id.* at 21; *see also* Brown, *supra* note 43, at 555. This percentage will invariably decline over the life of the trust. For example, as noted in the Introduction, the Johns-Manville trust set the distribution percentage at a woefully inadequate 10% in 1995 and reduced it to 5.1% in 2022. *See* Campos & Parikh, *supra* note 17.

51 *See* GAO REPORT, *supra* note 42, at 20 ("Two to 3 percent of claims are processed through the individual review process, while most claims flow through the expedited claims queue.").

Expedited review is the second option. Claimants have chosen this option far more frequently.[52] The expedited review recognizes the trust's own operational limits. TDPs assert that expedited review is comparable to the quality-assurance review under the traditional review process, but this is false. The expedited review entices claimants with the promise of a cursory review—a boon for claimants with suspect evidentiary bases—and a financial distribution stated clearly in the TDP.[53]

Claimants who believe that they are able to secure a higher recovery through the judiciary have the option of filing a lawsuit against the trust and presumably having their "day in court." This option is often touted as a way that the trust ensures due process rights, but there are various restrictions that erode this option.[54] The primary restrictions are (i) any recovery received by an opt-out claimant is capped at the amount she was originally offered by the trust; and (ii) a claimant who opts-out will receive a distribution only after other claimants are compensated.

Through the late part of the twentieth-century, asbestos cases "consumed the judiciary and produced a bespoke resolution structure."[55] The prominence of these cases has faded in recent years. By 2007, nearly all of the major asbestos manufacturers had declared bankruptcy and reached some sort of resolution.[56] In many respects, a transformative trust template for resolution of mass torts is the true legacy of Johns-Manville and its progeny.

B. Modern Mass Torts and the Weary Traveler

Modern mass-tort bankruptcies follow a well-trodden path to resolution. As described in detail in Professor Parikh's recent article, various events can initiate a modern mass torts case, "including a natural disaster like the Maui wildfire, a report identifying a product as harming users in an unforeseen way and a new drug that is extremely profitable."[57] Once the meta-

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52 *See id.*

53 *See* Parikh, *supra* note 30, at 1740–42 (arguing that the structure of the expedited review process has helped drive the explosion of nonmeritorious claims in mass tort cases).

54 *See infra* subpart III.B.

55 Parikh, *supra* note 6, at 464.

56 *See* RAND REPORT, *supra* note 1, at 3 (citing JENNIFER L. BIGGS ET AL., AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS CLAIMS, ISSUES, AND TRENDS 5 (2007)).

57 Parikh, *supra* note 30, at 1711 (footnote omitted).

phorical starting gun is shot, teams of claim aggregators and plaintiffs' attorneys employ aggressive marketing strategies to acquire as many potential claimants as possible, even those holding claims that appear to be noncompensatory or nonmeritorious. The goal is to build inventory, which creates a number of benefits, not least of which is the fact that coveted and remunerative positions on key steering committees in these cases are often awarded based on the size of a plaintiffs' attorney's inventory.[58] Complaints will be filed across the country in both state and federal court if a legal claim appears viable or, at the very least, has the prospect of gaining the scale necessary to force a corporate defendant to settle, merit notwithstanding,

As these cases proliferate, multidistrict litigation will invariably be instituted, consolidating cases in one federal district court under the pretext of procedural streamlining. MDL is a platform that can effectively resolve many cases, but the process has a number of deficiencies.[59] Consequently, modern mass-tort cases begin as MDLs, but many file for federal bankruptcy in search of a more efficient and expedient resolution.[60] Once in bankruptcy, settlement remains the goal. But settlement comes in the form of a plan of reorganization proposed by the corporate debtor. The plan presents the settlement framework, and, once informally approved by plaintiffs' attorneys and other key parties, the plan can be presented to claimants, who get to vote on it.[61] If 75% or more of claimants approve the plan, the court can confirm it.[62]

In our discussion with various insiders, we learned that trust distribution procedures are often an "afterthought"—overlooked as the bankruptcy case nears settlement.[63] The primary settlement issues involve the aggregate amount of funds contributed to the settlement trust, how this aggregate number compares to alternative recovery options, and the scope of

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58 *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 22–23 (2019); *see also* Parikh, *supra* note 28, at 32 (detailing the benefits of inventory building).

59 *See* Parikh, *supra* note 6, at 475–79 (detailing MDL distortion).

60 *See id.* at 479.

61 *See id.* at 481.

62 *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). Note that this section of the Bankruptcy Code imposes the 75% voting threshold only on cases involving claims based on exposure to asbestos. Nevertheless, bankruptcy courts have enforced the requirement in other mass-tort cases not involving asbestos exposure, including bankruptcies involving Boy Scouts of America and Purdue Pharma.

63 *See* Interviews with Mass-Tort Insiders, *supra* note 22.

the releases being offered contributing parties.[64] We were told that the trust mechanism is seen as merely the "plumbing" delivering the recovery.[65] We attribute this perspective, at least in part, to the "Weary Traveler" phenomenon—a term that describes the fate of all key stakeholders trapped in protracted litigation. Keep in mind that by the time a modern mass-tort case nears settlement, an exhaustive legal battle has been consuming litigants for a decade or longer. For example, the first state to bring litigation against Purdue Pharma for their role in the opioid crisis filed suit in 2001.[66] After over twenty years, Purdue Pharma recently reached a settlement that will finally provide compensation for victims.[67] In 2012, the Oregon state supreme court ordered Boy Scouts of America to release 20,000 pages of confidential records that detailed sexual abuse by the organization's leaders and volunteers.[68] But the order confirming the Boy Scouts of America's ultimate bankruptcy plan and allowing for payments to abuse survivors did not take effect until April 2023.[69] And Deane Berg filed the first talcum powder lawsuit alleging ovarian cancer against Johnson & Johnson in 2013.[70] The legion of cases that followed ultimately led to the creation of an MDL, which was the precursor to multiple bankruptcy filings that were all dismissed by various courts.[71] After twelve years, the talcum powder litigation remains unresolved.

These modern mass-tort cases and many others like them follow a long meandering path from state and federal courts to

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64 *See id.*

65 *Id.*

66 *See* Complaint, State *ex rel.* McGraw v. Purdue Pharma L.P., CC-27-2001-C-137 (W. Va. Cir. Ct. June 11, 2001).

67 Fabiana Negrin Ochoa, *Purdue Pharma Files New Reorganization Plan with $7.4 Billion for Creditors*, WALL ST. J. (Mar. 19, 2025), https://www.wsj.com/articles/purdue-pharma-files-new-reorganization-plan-81854427 [https://perma.cc/FV5U-C5UB].

68 *See* Mark Memmott, *20,000 Pages of Boy Scouts' Perversion Files Ordered Opened in Oregon*, NPR (June 14, 2012), https://www.npr.org/sections/thetwo-way/2012/06/14/155020936/20-000-pages-of-boy-scouts-perversion-files-ordered-opened-in-oregon [https://perma.cc/8U8K-AL3D].

69 *See* Clara Geoghegan, *Boy Scouts Claimants Lose Appeal to Fix Ch. 11 Opt-in Error*, LAW360 (Mar. 27, 2025), https://www.law360.com/bankruptcy-authority/articles/2316555? [https://perma.cc/BT8S-XU2W].

70 Casey Cep, *Johnson & Johnson and a New War on Consumer Protection*, THE NEW YORKER (Sept. 12, 2022), https://www.newyorker.com/magazine/2022/09/19/johnson-johnson-and-a-new-war-on-consumer-protection [https://perma.cc/3L4A-4D7E].

71 *See, e.g.*, *In re* Red River Talc LLC, 670 B.R. 251, 251 (Bankr. S.D. Tex. 2025).

MDL to bankruptcy before ultimately reaching—or in some case not reaching—settlement. This grueling ordeal makes Weary Travelers of the victims, attorneys, stakeholders, judges, and other third parties captured by this process. Consequently, settlement has the gravity of a black hole; once the parties approach resolution, they are drawn in and appear willing to ignore troubling details at the back end of the process.

Not surprisingly, the Johns-Manville case offers a good example of the phenomenon. There, after years of futility, the bankruptcy court engaged Leon Silverman to assemble some sort of settlement. Silverman did in fact return to the court with a settlement. The court was overwhelmed and seemingly so grateful that it overlooked all the infirmities in the deal and awarded Leon $2.3 million for his billable work and then awarded him an *additional* $2.3 million bonus as a success fee.[72] The court reached this lavish figure even though the debtor's attorneys insisted that a 10% success fee was sufficient.[73] The court agreed with Silverman that a 10% fee would be "insulting" and "offensive."[74] Naturally, the court did not see—or was so relieved, it was willing to overlook—the various landmines that had been buried in the deal. Of course, Silverman did not offer to return his success fee once the trust's systemic deficiencies were revealed.[75]

Ultimately, the trust distribution procedures are worthy of scrutiny. And, as part of that process, it is necessary to understand how best to assess trust performance and what distinguishes success from failure.

C. Assessing Trust Performance and Solvency

One of the difficulties in assessing trust performance is that the mission objectives for the trust are often unclear. Almost all the trust distribution agreements we reviewed provided a general statement that the trust's purpose was to pay

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72 *See* Labaton, *supra* note 20.

73 *See id.*

74 *See id.*

75 Manville failed in large part because of excessive fees charged by attorneys representing victims, and the trust contained odd protocols that created a "policy of doling out unusually large sums of cash to the first victims." *See* Labaton, *supra* note 20. The Weary Traveler phenomenon is also evidenced in MDL cases as judges use plaintiff fact sheets and *Lone Pine* orders as a way to strongly encourage recalcitrant claimants to accept proposed settlements. *See* Parikh, *supra* note 30, at 1759.

similarly situated claimants substantially the same amount.[76] While this statement is laudatory, we suspect that navigators of this terrain lack a North Star. The undercurrent in these cases is that there may not be an even remotely equitable outcome in cases where there are hundreds of thousands of claimants—many of which hold non-meritorious claims and cannot be detected—and a severely limited pool of funds. The complicated dynamics compel large distributions at the outset with the hope that claims taper dramatically over the life of the trust so that some funds remain for subsequent claimants. This very well may be one of the dirty little secrets in the mass-torts ecosystem. If so, protecting the most compromised claimants may need additional emphasis.

One of us has argued that the objective of mass-tort resolution processes should be to award meritorious claimants the largest recovery possible on the shortest timeline.[77] That may be a useful opening point in the larger mass-tort debate, but trust design demands more detailed goals, which has proven elusive. Is one objective to provide claimants distributions as close to 100 cents on the dollar as possible? Should comparable claims be compensated at similar levels? Should claimants be allowed to opt out of the trust distribution process entirely and seek recovery through the court system? Should the trust be required to maintain its solvency; if so, at what cost? How does the trust prevent early claimants from decimating the corpus? The Manville Trust failed in large part because of protocols that

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76 *See, e.g.*, Imerys Trust Agreement, *supra* note 26, § 2.1 (stating that the trust will seek to pay similar claims "in substantially the same manner"); Duro Dyne Trust Agreement, *supra* note 26, § 2.1 (stating its goals are to "treat all claimants equitably" and pay "all claimants . . . as equivalent a share as possible of the value of their claims based on historical values"); PSAN PI/WD Trust Distribution Procedures § 1.1, Exhibit N to Notice of Filing of Fourth Plan Supplement Pursuant to the Fifth Amended Joint Chapter 11 Plan of Reorganization of TK Holdings and Its Affiliated Debtors, *In re* TK Holdings Inc., No. 17-11375 (BLS) (Bankr. D. Del. Feb. 20, 2018) (stating that goals are to provide an efficient process to fairly and reasonably compensate valid claims); Trust Distribution Procedures for Abuse Claims art. I(A), Exhibit 4 to BSA Settlement Trust Agreement, *In re* Boy Scouts of America and Delaware BSA, LLC, No.20-10343 (Bankr. D. Del. Sept. 5. 2022) [hereinafter BSA Trust Distribution Procedures] (same); *but see* Dalkon Shield Trust Agreement, *supra* note 26, at CRF–1 (Claims Resolution Facility) ("The purpose of the facility is to provide all persons full payment of valid claims at the earliest possible time."). Academics have supported this objective. *See* Langston, *supra* note 25 (summarizing scholarship).

77 *Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy: Hearing Before the S. Comm. of the Judiciary*, 118th Cong. (Sept. 19, 2023) (statement of Samir D. Parikh).

created a "policy of doling out unusually large sums of cash to the first victims."[78]

One of the primary issues with the distribution process is that—despite the stated purpose of the trusts in these cases—the protocols create disparate distributions to similarly situated claimants. Indeed, trusts have historically compensated claimants at wildly uneven levels over their respective distribution timelines. The first wave of claimants invariably receives a distribution percentage that initially lured the parties to settlement while subsequent claimants receive percentages that were never discussed or contemplated. There seems to be some confusion regarding the cause of these variances, but the answer is fairly obvious.

Key actors are incentivized to establish trusts that distribute most of their funds in the initial years after settlement, especially if attempting to establish the long-term viability of the trust could delay or otherwise preclude settlement. Indeed, once the general framework of settlement is reached, corporate defendants, insurers, plaintiffs' attorneys, current victims, and even the court are all aligned. Corporate defendants, affiliated entities, and insurers contribute a set amount to the settlement trust. The ultimate distribution of those funds is of no concern to them. The corporate debtor is dissolved through the bankruptcy proceedings and does not accept responsibility for trust failure. Affiliated entities and insurers receive the benefits of the channeling injunction and cannot be accountable for distribution variances nor trust failure.[79] A trust that becomes insolvent has absolutely no financial backstop; the only option is to reduce distributions ex ante to avoid a full depletion of resources. Future claimants who emerge years after the trust is created and face a woefully underfunded trust have no recourse against the FCR, who may have agreed to suboptimal distribution protocols. The FCR enjoys full immunity through the order confirming the plan of reorganization.[80] The FCR is expected to represent future victims, but as explained in subpart IV.B, often faces her own perverse incentives and capture risk. Plaintiffs' attorneys represent current victims, and their recoveries come from two sources: 1) contingency fees realized

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78 *See* Labaton, *supra* note 20.

79 The trust agreements we reviewed prohibited the trust from bringing suit against any of these parties to collect any sums related to the claims asserted in the case. *See, e.g.*, Dalkon Shield Trust Agreement, *supra* note 26, at CRF-7 (Claims Resolution Facility).

80 *See* Parikh, *supra* note 6, at 493.

when clients receive trust distributions and 2) attorneys' fees awarded by the governing court through the common-benefit fund based on a "substantial contribution" to the case.[81] The former is based entirely on initial distributions from the trust, and the latter is based on the settlement being confirmed by the court. The premature insolvency of the trust is a concern, but we suspect plaintiffs' attorneys refuse to allow it to potentially derail their two revenue streams. These dynamics ensure an elevated risk of compromised pillars and disparate recoveries. Part III explores this infirmity and others like it in order to assess corrective measures.

This Part outlined the various historical pathologies that have plagued the process leading to settlements of mass-tort cases and the trust that results from these settlements. With this background, the following Part presents the results of our analysis of eleven representative mass-tort trusts originating over the last 30 years to demonstrate the persistence of various systemic deficiencies.

II
TRUST STRUCTURE

Having laid out the genesis of trust settlements above, we now turn to analyzing the elements of these trust settlements. This section surveys eleven trusts (the "Subject Trusts")[82] that are representative of the class, and detail what we identify as key provisions regarding governance, distributions, and opt-out rights. We focus on terms relevant to our ultimate normative argument: mass-tort trusts are built on the Manville Trust's compromised foundation, and the resultant infirmities threaten to deprive claimants—future claimants, in particular—of the recovery they deserve. As detailed in Part III, *infra*, we advocate for better structural choices for these trusts at the point of initiation.

We divided the trust provisions we reviewed into three broad categories: governance, distribution, and opt-out rights. Within these categories, we provide an overview of the common provisions that our Subject Trusts share, providing both the language in the agreements and a discussion of how these provisions interact and cross-reference with other aspects of the trust agreement. As a preliminary matter, we focus on only the trust settlement agreements (the "TSA") and trust distribution

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81 *See* Parikh, *supra* note 30, at 1718.

82 *See supra* note 26.

protocols (the "TDP" and together with the TSA, the "Trust Documents") applicable to the Subject Trusts. As described above, the trust settlement process is complicated and implicates many different procedures and documents. However, most—if not all—of the provisions that implicate the subject matter of this Article are found in the Trust Documents.

A. Governance

Our analysis of the governance for the Subject Trusts focuses on the parties that are tasked with important decisions involving trust function and how these parties' powers are distributed.[83] In terms of decision-making authority, eight of the eleven Subject Trusts we analyzed had three decision makers: the trustee, advisory committee, and the FCR.

First, the trustee's[84] primary role—as delineated in the trust agreement—is to serve as a fiduciary for each respective trust.[85] Uniformity of this point was juxtaposed with some variance as to how the trustee position was structured.

Four of the trusts appoint one sole individual as trustee.[86] These trustees are invariably attorneys with substantial experience in managing processes like the trust agreements. Several trusts, however, distributed power among several trustees.[87] For example, the Dalkon Shield Trust Agreement vested power

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83 Governance in this context focuses on who has the power to change and administer the trust and what those specific powers are.

84 For example, in BSA Trust Agreement, the trustee is Hon. Barbara J. Houser, and in the Red River Trust Agreement, the trustees are Scott Freeman, Fouad Kurid, and Delaware Trustee. *See* BSA Trust Agreement, *supra* note 26, § 5.1; Red River Trust Agreement, *supra* note 26, §§ 4.1, 7.6. For a discussion on the nature of the appointment of trustees for older asbestos-related trusts, see S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 552 (2013).

85 This designation could take various forms depending on the nature of the trust agreement. For example, in the Kaiser Aluminum Trust Agreement, the Trustees "serve in a fiduciary capacity, representing all of the holders of present Asbestos Personal Injury Claims for the purpose of protecting the rights of such persons," and in the Red River Trust, the "Trustees are and shall act as fiduciaries to the Talc Trust." *See* Kaiser Aluminum Trust Agreement, *supra* note 26, § 6.2; Red River Trust Agreement, *supra* note 26, § 2.1.

86 These trusts included the following: BSA Trust Agreement, Duro Dyne Trust Agreement, Diocese Trust Agreement, Takata Trust Agreement.

87 These trusts distributed power among more than one trustee (in some cases, five separate individuals): Dalkon Shield Trust Agreement, Imerys Trust Agreement, Kaiser Aluminum Trust Agreement, Red River Trust Agreement, Manville Trust Agreement.

in five different trustees.[88] In addition, other trusts—including the Dow Corning Trust Agreement—vest power in corporate entities like Wells Fargo.[89] This variance is significant for at least a few reasons. First, the trustees, as described further below, have the authority to make seismic decisions affecting all pending and future claims. When more than one person (or decision maker) operates in this manner, the likelihood of quality decision-making increases. Group decision making is more time consuming, but often more thoughtful and reasoned than individual decision making.[90] In addition, given that trustee decisions implicate various other important entities in the trust agreement, a diverse set of trustees provides more opportunities for fruitful collaboration among the decision-making entities.[91]

Each trust agreement creates a trust advisory committee ("TAC") populated with one or more claims representatives.[92] The TAC is tasked with representing the interests of claimants with currently pending claims against the trust.[93] These

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88 The Dalkon Shield Trust Agreement vested power in five trustees: Barbara B. Blum, Kenneth R. Feinberg, Gene Locks, Stephen A. Saltzburg, Ann E. Samani. Dalkon Shield Trust Agreement, *supra* note 26, at 46.

89 Dow Corning Trust Agreement, *supra* note 26, § 2.01.

90 Research has shown that group decision making creates more rational and consistent outcomes than individual decision making. For a paradigmatic example, see Tamar Kugler, Edgar E. Kausel & Martin G. Kocher, *Are Groups More Rational than Individuals? A Review of Interactive Decision Making in Groups*, 3 WIREs Cognitive Sci. 471-82 (2012); *see also* James Surowiecki, The Wisdom of Crowds: Why the Many Are Smarter than the Few and How Collective Wisdom Shapes Business, Economies, Societies, and Nations 3-22 (2004); Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 Law & Contemp. Probs. 107, 109–15 (2021). The Condorcet Jury Theorem captures this simple idea. *See* Parikh, *supra* note 6, at 498 ("Condorcet Jury Theorem was formulated to assess the optimal size of a deliberative body . . . . The theorem has been applied by scholars assessing juries. But the theorem has broader applications and posits an interesting proposition. Imagine that a person is choosing between two options: one is deemed correct and the other incorrect. Further assume that the probability that the person will choose the correct option is only slightly greater than 50 percent. The Condorcet Jury Theorem holds that having multiple individuals vote—instead of just one—significantly increases the probability that the correct option will be chosen." (footnote omitted)).

91 Here we note that several decisions that a trustee makes require consent or consultation with other members of the trustee. We discuss those consent and consultation decisions below.

92 For example, the Dioceses Trust Agreement establishes a TAC made up of three lawyers: Jeffery Anderson, Adam Slater, and Jeffery Herman. *See* Diocese Trust Agreement, *supra* note 26, § 5.4.

93 In the Kaiser Aluminum Trust Agreement, the TAC duties are defined in the following way: "The members of the Asbestos PI TAC shall serve in a fiduciary capacity, representing all of the holders of present Asbestos Personal Injury

interests mostly include the payments that claimants are to receive and the processes by which they can receive or appeal trustee decisions.[94]

Lastly, each trust agreement governing a dispute involving future claimants[95] appoints a future-claimants' representative ("FCR"). The FCR's duties include making sure that funds allocated to the trust are managed in a way that improves the probability that the trust will provide a distribution to a future claimant that is comparable to that received by a similarly situated current claimant.[96] The FCR—unlike the TAC—is often an individual person rather than a committee.[97]

The trustee(s), TAC, and FCR work in tandem to manage the trust and trust distributions. One key aspect of these distributions, as discussed further in subpart II.B., *infra*, is the amount that each claimant receives based on their proven injury (the "Base Matrix Value").[98] This amount is derived from the payment matrix invariably delineated in the applicable trust agreement (the "Payment Matrix"). But the final distribution is not merely a function of what the Payment Matrix

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Claims . . . ." Kaiser Aluminum Trust Agreement, *supra* note 26, § 6.2. The Imerys Trust Agreement provides similar language:

> The members of the Mesothelioma / Lung Cancer TAC shall serve in a fiduciary capacity, representing the interests of all holders of present Mesothelioma Claims, Lung Cancer Claims, and any other Talc Personal Injury Claims that might be paid from Fund B. The members of the Ovarian Cancer TAC shall serve in a fiduciary capacity, representing the interests of all holders of present Ovarian Cancer Claims and any other Talc Personal Injury Claims that might be paid from Fund A. The TACs shall have no fiduciary obligations or duties to any party other than the holders of present Talc Personal Injury Claims.

Imerys Trust Agreement, *supra* note 26, § 5.2. This kind of language emphasizes that the TAC is focused solely on present claimants and does not consider future claimants' interests.

94 These payments and these appeals are all included in the Trust Distribution Procedures as described further below.

95 Parikh, *supra* note 6, at 451–52 ("[Future Claimant is a term that captures] those who have been affected by the defendant's tortious conduct but may not exhibit harm for years or decades.").

96 "The FCR shall serve in a fiduciary capacity on behalf of the holders of Future Abuse Claims, representing the interests of holders of Future Abuse Claims against the Debtors for the purpose of protecting the rights of such persons." BSA Trust Agreement, *supra* note 26, § 7.1.

97 In the eleven trust agreements we surveyed, nine had an individual person appointed as the FCR. Neither the Dow Corning Trust Agreement nor the BSA Trust Agreement contemplate future claimants and, as a result, do not appoint an FCR.

98 See discussion, *infra* subpart II.B, on distribution procedures and payment schedules.

provides for that claimant's class. The Base Matrix Value is reduced by multiplying this amount by a trustee-determined discount rate (the "Payment Percentage"). The Payment Percentage is arguably the trustee's only means of attempting to ensure the long-term viability of the trust.[99] For example, by 2022, the Johns-Manville trustee determined that the trust was at significant risk of insolvency and reduced the Payment Percentage to 5%. A claimant in that case may be entitled to a Base Matrix Value of $100,000 based on the injury suffered, but that claimant would receive only $5,000 from the trust after the Payment Percentage is applied to the Base Matrix Value. The Payment Matrix and Payment Percentage determine how much a claimant receives from the pool of funds and, in turn, the fund level remaining for future claimants. As such, changes to the Payment Percentage are arguably the most important decision trustees make—affecting current and future claimants (and to some degree claimants that have already been paid).[100]

Trustees often have a broad mandate to change key trust provisions.[101] For example, in the Kaiser Aluminum Trust Agreement, the trustee's responsibilities include general administration of the trust, defining the payment percentages and procedures for eligible claimants, appointing successor Trustees and determining their compensation, and to regularly analyze the amount and types of claims submitted to the

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99 *See, e.g.*, Duro Dyne Trust Agreement, *supra* note 26, § 7.3 (affording trustee discretion to vary payments in the event of the trust's "limited liquidity"); *see also* Imerys Trust Agreement, *supra* note 26, § 2.7 ("The [trust] assets . . . over their lives are estimated to be substantially less than the aggregate liquidated values of the [claims] anticipated to be asserted against them. . . . [Claimants] shall ultimately receive a pro-rata share of the value of their claim based on [the Payment Percentage set in that case]."); Imerys Trust Agreement, *supra* note 26, § 4.2 (Detailing the need and procedures for the Payment Percentage in that case); BSA Trust Agreement, *supra* note 26, § 4.2(b) ("The Initial Payment Percentage shall apply to all Allowed Abuse Claims to be paid by the Trust until the Trustee, with the consent of the STAC and the FCR, determines that the Initial Payment Percentage should be changed to assure that the Trust shall be in a financial position to pay present and future holders of similar Allowed Abuse Claims in substantially the same manner . . . .").

100 For discussions of discounts and how they affect current and future claimants, see *infra* Part III.

101 Most trustees have broad powers to manage the trust. For example, in the 3M Trust Agreement, the trustee has powers that involve "retention of the trust estate, investments and preservation of principal, disbursements, payments of administrative expenses and costs, retention of [professionals], consultation with counsel, execution of documents, litigation, and compliance with applicable law." Moreover, each trustee in each of the agreements we reviewed has the ability to change distribution amounts and protocols. 3M Trust Agreement, *supra* note 26, at 5.

trust to assess the impact past distributions will have on future claims.[102]

This power, however, is curtailed in two ways by the TAC and the FCR. For some decisions, the trustee must seek consent of both the TAC and FCR, or at least one of the parties.[103] This ensures that various decisions take into consideration the interests of current and future claimants. Consent decisions include things like determination of adjustments to payments, sale or transfer of trust assets, and other material changes as defined by the trust agreements.[104] The procedures for receiving consent differ to some degree but primarily require the trustee to provide written notice to the parties with an explanation of the nature of trustee's action. The TAC and FCR then have a set number of days to provide their consent otherwise consent is assumed. If they object, they have to provide some explanation of why.[105] While this seems normatively optimal, some trusts actually vest *all* power in the trustee and give minimal veto power to the TAC and FCR. For example, the Dalkon Shield Trust does not require the trustee to consult with other parties and allows the trustee to make broad sweeping decisions

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102 Kaiser Aluminum Trust Agreement, *supra* note 26, § 2.2(e). Similar language appears in other trust agreements. For example, in the Insys Trust Agreement, the trustee has broad powers to manage the trust, including "the power and authority and is authorized to perform any and all acts necessary and desirable to accomplish the purposes of this Trust Agreement." Notice of Filing of Second Plan Supplement Pursuant to the Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and Its Affiliated Debtors § 3.02(b), No. 19-11292 (KG), *In re* Insys Therapeutics, Inc. (Bankr. D. Del. Jan. 6, 2020). Critically, these powers include adjusting and managing the distributions and the schedule of payments.

103 For example, in the Red River Trust Agreement, the Trustee must seek consent from both the TAC and the FCR for several actions, including, but not limited to, any changes in the Trust Distribution Procedures that do the following:

> [alter] . . . (B) the Claim Submission Procedures, including the Claim Submission Requirements; (C) the Preliminary Evaluation Criteria; (D) the Expedited Review Process, including the Expedited Review Criteria; (E) the Individual Review Process, including the Individual Review Criteria; (F) the Quickpay Review Process, including the Quickpay Review Criteria; (G) the Maximum Value; (H) the Cash Value of a Point; or (I) the forms of Acceptance and Release; (J) the first-in-first-out processing procedures; or (K) the first-in-first-out payment procedures.

Red River Trust Agreement, *supra* note 26, § 2.2(f)(ii). The Red River Trust Agreement is generally representative for the course for the trusts we surveyed.

104 *See id.*

105 *See id.* § 7.1(b).

on behalf of the trust.[106] This was, however, the case for just two of the eleven trusts we reviewed.

In addition to needing consent for various actions, most of the trust agreements also require the trustee to consult the TAC and FCR for actions that do not rise to the level of consent.[107] For example, a trustee would not need consent if she wanted to change her compensation to account for the cost of living. Instead, the trustee would have to consult the TAC and FCR for this change.[108] In addition, things like common administration and expense changes also require only consultation with the TAC and FCR. Like receiving consent, the changes require the Trustee to provide notice and an opportunity for comment from the TAC and FCR. In doing so, the Trustee cannot take the proposed action for a period of time while the TAC and FCR review the proposal. However, neither enjoys veto power with their consultation rights. Once the TAC and FCR have been given an opportunity to comment, the Trustee can take action unilaterally. Based on our survey, most changes that require consultation seem to be changes to the procedural aspects of the trust rather than the substantive changes of payment percentages. Once again, just two of the eleven trusts did not include robust consultation provisions for changes in the trust distribution procedures.

B. Distribution

Each TDP sets out a very detailed account of how claimants—both current and future—are to submit their request for payment. The protocols establish a review process for vetting

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106 The Dalkon Shield Trust Agreement grants the trustees sweeping power to change any aspect of the trust without consent of the current or future claim representatives. The Trustee

> shall have the power to take any and all actions as, in the sole judgment and discretion of the Trustees, are necessary or advisable to effectuate the purposes of the Trust, including, without limitation, each power expressly granted in Section 4.03(b) of this Agreement and any power reasonably incidental thereto.

Dalkon Shield Trust Agreement, *supra* note 26, at CTR-5 to -6 (Claimants Trust Agreement).

107 For example, in the BSA Trust Agreement, the Trustee must consult with the TAC and FCR for (i) "the form(s) of release to be executed by a Beneficiary," (ii) the annual budget estimate for the Trust Operating Expenses, and (iii) "the administration, investment of assets of, and expenses to be charged against the Future Abuse Claims Reserve, if any." BSA Trust Agreement, *supra* note 26, § 5.13.

108 For example, in the Red River Trust Agreement, "The hourly compensation payable to the Trustees hereunder shall be reviewed every year by the Trustees and, after consultation with the TAC and the FCR, appropriately adjusted for changes in the cost of living." Red River Trust Agreement, *supra* note 26, § 4.5(a).

and classifying claims.[109] Once classified, claims are subject to the Base Matrix Value established by the Payment Matrix. The trustee is also tasked with establishing the Payment Percentage, which will ultimately determine the amounts individual claimants receive.[110] While the trusts differ in the nuances of these provisions, they all take a similar approach in delineating the primary facets. We describe these aspects of the distribution process broadly below, pointing out any significant outliers. There also is an important appeals process available to those claimants who wish to challenge the trustee's distribution determination, covered in subpart II.C.

Submission of Claims:

All trusts require claimants to submit specific requests for compensation in accordance with the trust agreements. These submissions range from simple forms[111] to more complicated submissions that must include detailed affidavits substantiating

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109 Review procedures can be complex in cases where claimants may lack evidence supporting their claim. For example, in the BSA Trust Agreement, to receive any form of compensation a claimant must do the following:

> (i) complete under oath a questionnaire to be developed by the Settlement Trustee and such signature and oath must be of the Abuse Claimant individually (or of an executor); (ii) produce all records and documents in his or her possession, custody or control related to the Abuse Claim, including all documents pertaining to all settlements, awards, or contributions already received or that are expected to be received from a Protected Party or other sources; and (iii) execute an agreement to be provided or made available by the Settlement Trust with the questionnaire[:] (1) to produce any further records and documents in his or her possession, custody or control related to the Abuse Claim reasonably requested by the Settlement Trustee, (2) consent to and agree to cooperate in any examinations requested by the Settlement Trustee (including by healthcare professionals selected by the Settlement Trustee) (a "Trustee Interview"); and (3) consent to and agree to cooperate in a written and/or oral examination under oath if requested to do so by the Settlement Trustee. The questionnaire shall be approved by the STAC and the Future Claims Representative but, at a minimum, will require Direct Abuse Claimants to confirm his/her name, date of birth, home address, dates of abuse, frequency of abuse, and level of abuse.

BSA Trust Distribution Procedures, *supra* note 76, art. VII(A).

110 For a discussion of these payments and how these payments are calculated, see *infra* Part III.

111 For the Takata Trust Settlement, the distribution procedure specifies that to submit a claim, a claimant must

> submit a Notice of Claim which shall include information identifying the Claimant and owner or lessee of the vehicle, if different from the Claimant, make and model year of vehicle, VIN, date and location of incident, preliminary and general description of known injuries, which may be supplemented as any time, and type of event such as rupture, aggressive deployment, or other allegation; or may submit a

alleged injuries.[112] All of the trust agreements we reviewed specified the time frame during which existing claims must be filed in order to receive a distribution. The trust agreements that contemplated future claimants also required these claimants to file a claim within a set period of time—depending on the trust—after the manifestation of injuries.[113]

Putting aside minor variances, each trust agreement offered three different paths for claim submission. These paths presented different protocols for filing deadlines, requirements of proof, and submission fees. The first is the expedited filing, which is the least demanding—in terms of evidentiary burden—and, therefore, the most popular. This path promises claimants a cursory merits analysis and provides a fixed distribution amount delineated in the trust agreement.[114] Some of the trusts just give one set distribution amount for any type of claim that seeks an expedited review.[115]

Individual review is the second type of submission path.[116] Although various trusts differ in the details of this option, this

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wrongful death or personal injury claim form ("Claim Form"), depending on the type of injury alleged.

Fifth Amended PSAN PI/WD Trust Distribution Procedures, § 3.1, Exhibit N to Takata Trust Agreement, *supra* note 26 [hereinafter Takata Trust Distribution Procedures].

112 For example, in the Diocese Trust Agreement, the Trustee evaluates the claimant's submission on various factors, including the nature of the abuse and the impact of the abuse. To prove these two things, claimants are asked to write a brief summary of their injuries and the context in which they occurred. Disclosure Statement for Plan of Reorganization Proposed by the Roman Catholic Diocese of Rockville Centre, New York and Additional Debtors at 9, *In re* Roman Catholic Diocese of Rockville Ctr., No. 20-12345 (MG) (Bankr. S.D.N.Y. Oct. 7, 2024).

113 For example, in the Diocese Trust Agreement, "Future Abuse Claimants must submit their claim form at least sixty (60) days prior to the anniversary of the Effective Date to be included in the annual distribution." *Id.*

114 Most trusts in the expedited category still use a schedule of payments, some instead define expedited as a set fee regardless of the injury. For those that have a set fee, their individualized payment path uses a schedule of payments that is pegged to a given injury. In the BSA Trust Agreement, future claimants were required to submit "at a time when the Claim would be timely under applicable state law if a state court action were filed on the date on which the Future Abuse Claim is submitted to the Settlement Trust." BSA Trust Distribution Procedures, *supra* note 76, art. IV(C).

115 *See id.*, art. VI(B) (establishing a flat $3,500 expedited payment). Some trusts provide a flat fee in the expedited review. The Imerys Trust Agreement is another example, stating that the expedited review process provides a claimant "an expeditious, efficient, and inexpensive method for liquidating applicable, compensable Talc Personal Injury Claims where the claim, after meeting the applicable Medical/Exposure Criteria, can easily be verified by the Trust; and (b) a fixed and certain liquidated claim value." Imerys Trust Agreement, *supra* note 26, § 5.2(a).

116 Individual review provides a more nuanced approach to compensation. In this pathway for payments, the claimant often submits further evidence of their injury, and an individualized assessment of that injury occurs.

type of submission invariably offers claimants the promise of a much larger recovery than what is possible under the expedited path. However, claimants are also required to provide a much stronger evidentiary basis for their alleged injuries. This option allows the trustee to deviate from payments calculated in the expedited review but also reject the claim.[117]

In individual review, different injuries receive different distribution payments. For example, in the BSA Trust Agreement, individual review procedures and payments differ from expedited review in the following way. Expedited review receives a set fee of $3,500. Individual review, however, looks at a given injury and compares it to the Payment Matrix in that case, which is premised on recognized injuries. In the BSA Trust Agreement these payments are listed on a schedule, which provides some broad estimate of the damages associated with a given injury.[118] These payments then are discounted by the Payment Percentage in that case determined by the trustee in her sole discretion. The final payment is the product of the Base Matrix Value and the Payment Percentage.[119]

Finally, most trusts give claimants an option to opt out of the compensation schedule that is listed in the trust agreement and instead file a tort action. We discuss this option in subpart II.C, *infra*.

Compensation Schedules and Payments:

The Payment Matrices can be established by the trustee with oversight from various stakeholders or the framework can be part of the initial settlement.[120] Payment Matrices calculate

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117 In individual review, the specific injury is tied to a specific compensation amount rather than a blanket amount in the expedited pathway. For example, in the Dalkon Shield Trust Agreement, to opt into this individual review, claimants must specify the injury or injuries for which they are claiming, answer additional questions about Dalkon Shield use and injury, and provide supporting evidence. This evidence can include medical records showing Dalkon Shield use or an affidavit from a healthcare provider indicating that an IUD was more likely than not a Dalkon Shield, along with other medical records substantiating the claimed injury. *See* Dalkon Shield Trust Agreement, *supra* note 26, at CRF-2 (Claims Resolution Facility).

118 For example, Oral Contact by an Adult Perpetrator carries a base payment of $450,000. Based on various scaling factors, the payment to a claimant would be increased or decreased from the base payment.

119 The BSA Trust Agreement also adds a separate Independent Review Option that can lead to a damage award in excess of what is determined in the individual review pathway. This option, however, costs the claimant $1,000 to pursue.

120 *See, e.g.*, Duro Dyne Trust Agreement, *supra* note 26, § 5.3(a)(3) (providing scheduled payments based on the type of disease realized, including $140,000 for mesothelioma and $34,000 for asbestosis); *see also* Takata Trust Distribution Procedures, *supra* note 111, § 5.2 (awarding a point total to each claim based on injuries suffered and then instructing the trust trustee to allocate a dollar amount to each point).

a payment for a given injury that is pegged on the amount that is put in the trust by the offending entity. The matrix theoretically assists the trustee in making consistent and equitable payments to claimants. The matrix categorizes damages that claimants might have realized by the defendants' actions and then assigns values to them. The values become the base for the damage award that a claimant is owed by the trust, referred to as the Base Matrix Value. Of course, there are many changes that can diminish the Base Matrix Value prior to distribution. For example, as noted above, the trustee can severely discount distributions by imposing an aggressive Payment Percentage, which will automatically decrease all payments. The Payment Percentage is the trustee's key—and perhaps only effective—means of ensuring that a trust does not become insolvent.

The following is the payment matrix from the 3M Combat Arms Settlement Allocation Methodology:[121]

Level	Name	Minimum Guaranteed Gross Payment	Criteria
1	Non-US Citizens	$100	Claimants who did not serve in the U.S. Military and are not U.S. Citizens.
2	Tinnitus Only	$5,000	Claimants with tinnitus, but no contemporaneous records to corroborate or confirm and who did not have slight or greater hearing loss, will be placed in Level 2 Expedited Pay.
3A	Recorded Tinnitus	$10,000	Claimants who provide contemporaneous records of tinnitus and who do not have evidence of mild or greater hearing loss, will be placed in Level 3A Expedited Pay.

[121] 3M Combat Arms Settlement Allocation Methodology tbl.1 (on file with authors).

Level	Name	Minimum Guaranteed Gross Payment	Criteria
3B	Slight Hearing Loss	$10,000	Claimants who have evidence that establishes slight hearing loss, will be placed in Level 4 Expedited Pay.
4	Mild Hearing Loss	$16,000	Claimants who have evidence that establishes mild hearing loss, will be placed in Level 4 Expedited Pay.
5	Moderate or Greater Hearing Loss	$24,000	Claimants who have evidence that establishes moderate or greater hearing loss, will be placed in Level 5 Expedited Pay.

The agreement establishes various damage levels and minimum payments associated with those levels. The schedule is for an Expedited Payment Program. A claimant that elects the individual assessment pathway (the Full Evaluation Program) has the potential to receive more based on a complex point system where a claimant's compensation depends on the number of points they are awarded, adjusted for age and relatedness to the time the claimant wore a respective hearing device.[122] The evidentiary burden, however, is much higher in the individual assessment pathway.

C. The Litigation Option

There is a distinct attractiveness to the idea that trust agreements' primary directive is to provide justice for injury. But, as noted in subpart I.C, *supra*, formulating the sacrosanct goals for mass-tort trusts is complicated. Nevertheless, we acknowledge that receiving a basket of cash may in no way represent an equitable outcome for many claimants. Some claimants may want their "day in court." Further, due process concerns plague these cases, and a court may not be able to confirm a settlement—and bind future claimants—unless the plan offers

122 *See id.* § 3.

claimants some means to access the court system. Therefore, mass-tort trusts provide for a third option that allows a claimant to opt out of the trust process and seek a recovery through the judiciary (the "Litigation Option").[123]

The Litigation Option is a unique pathway that differs from both an expedited and individualized option. Instead of having the trust itself look over and assess a claimant's injury, the Litigation Option allows for a court to review the claim and provide a recovery, if justified. This option, of course, comes with a unique set of procedural challenges.

No trust in our data set allows claimants to automatically access a court of law. Instead, claimants must progress through lower levels of review and procedures, bearing the burden of timely appealing any trust assessments in order to preserve the opportunity to exercise the Litigation Option.[124] For example, in the Kaiser Aluminum Trust Agreement, in order to elect the Litigation Option, the claimant must first file a standard claim. After doing so and receiving a settlement offer, a claimant disinclined to accept that offer can elect to participate in arbitration. Only after participating in arbitration can the claimant access the court system.[125] Similarly, in the Takata Trust and the Dalkon Shield Trust, the claimant is required to exhaust the claim procedures in the trust distribution process before gaining access to the court system.[126] This is also

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123 Out of the eleven trusts we analyzed, nine include some form of Litigation Option. The Red River Trust Agreement and the Diocese Trust Agreement did not provide such an option.

124 All the trusts that we surveyed that allow for a Litigation Option first require the claimant to submit a claim through one of the alternative pathways, either expedited or individualized. Only after the claimant receives some award from the trust is the claimant allowed to proceed to the Litigation Option.

125 If the holder of a disputed claim disagrees with the Asbestos PI Trust's determination regarding the Disease Level of the claim, the claimant's exposure history or the liquidated value of the claim, and if the holder has first submitted the claim to non-binding arbitration as provided in Section 5.10 above, the holder may file a lawsuit in the Claimant's Jurisdiction as defined in Section 5.3.

> Kaiser Aluminum & Chem. Corp., Third Amended Asbestos Trust Distribution Procedures, § 7.6 (Nov. 20, 2007), https://www.kaiserasbestostrust.com/assets/documents/resources/Third-Amended-Asbestos-Trust-Distribution-Procedures.pdf [https://perma.cc/BSB8-D4JT].

126 After the Claimant has exhausted the Claim Process, including a review and determination by the Trustee, an appeal, and a conference with the FCR, if the Claimant is dissatisfied with the offer made, he may pursue relief in an appropriate jurisdiction of law after submitting written rejection of the PSAN PI/WD Trust's proposed final claim award to the PSAN PI/WD Trust pursuant to the terms of this TDP.

the case in Boy Scouts of America, but, in that case, claimants are required to pay $1,000 to pursue reconsideration of their claim.[127] This intermediation creates a daunting obstacle. Keep in mind that by the time a claimant has reached this stage, she is certainly a Weary Traveler—having been trapped in this dispute for years. By placing additional obstacles in a claimant's path to court, the trust structure significantly deters use of the Litigation Option.[128]

There are other deterring facets of this option. Primarily, punitive and exemplary damages do not qualify for payment.[129] The damages associated with the Litigation Option could possibly be much larger than the recoveries realized through the expedited or individualized options because they are presumably not bound by the Payment Matrix. But the trusts we reviewed provided that if the Litigation Option yielded a damage award greater than (1) the amount a claimant received while exhausting the review process or (2) the maximum award amount provided for that claimant, the claimant would not receive the complete payout.[130] Further, the opt-out claimant goes to the back of the claimant queue and receives only the amount

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Takata Trust Distribution Procedures, *supra* note 111, § 6.4; *see also* Dalkon Shield Trust Agreement, *supra* note 26, at CRF-2 to -4 (Claims Resolution Facility) (explaining that claimants seeking more than a de minimis recovery must submit their claim with supporting evidence to the trust before receiving a payment offer; if dissatisfied, the claimant must participate in a mandatory settlement process before being allowed to access binding arbitration or trial).

127 *See* BSA Trust Distribution Procedures, *supra* note 76, art. VI(G).

128 Some trusts are slightly more permissive than others. The BSA Trust Agreement provides that a claimant is required to file only one standard claim, receive an award, and then may appeal it, after which she can file a complaint with the court. *Id.* art. XII(A) ("Within thirty (30) days after a Direct Abuse Claimant receives an Allowed Claim Notice or Claim Notice on its Proof of Claim following a Reconsideration Request in accordance with Article VII.G (the 'Tort Election Deadline'), an Abuse Claimant may notify the Settlement Trust of its intention to seek a de novo determination of its Abuse Claim by a court of competent jurisdiction.").

129 *See, e.g.*, Duro Dyne Trust Agreement, *supra* note 26, § 7.4; Takata Trust Distribution Procedures, *supra* note 111, § 6.4(a).

130 *See* Imerys Trust Agreement, *supra* note 26, § 5.7(c) ("The arbitrator shall not return an award in excess of the Maximum Value for the applicable Disease level as set forth [in § 5.2]"). In the Rochester Trust, the claimant receives the lesser of the amount of a judgment and the amount awarded by the trustee. *See* Eighth Amended Joint Chapter 11 Plan of Reorganization for the Diocese of Rochester at 47, *In re* Diocese of Rochester, No. 19-20905 (Bankr. W.D.N.Y. Mar. 14, 2025). Also, as to non-settling insurer CNA, the trustee determines who will be allowed to bring suit based on the highest expected claim valuation amount. *See id.* at 50.

promised in the lower levels of review in a lump sum.[131] Any surplus payments are subordinated.[132] These extra tort payments are then paid out in installments, which differ by trust but are premised on the trust's enduring financial vitality.[133] Consequently, the odds of ever receiving these surplus payments

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131 *See, e.g.*, Duro Dyne Trust Agreement, *supra* note 26, § 7.7 (explaining that opt-out claimants are placed in the queue based on the date they received their final judgment, which is invariably years after the trust began accepting claims, and receive the greater of (i) the last offer to the claimant or (ii) award declined by claimant during arbitration, assuming these amounts are greater than the applicable judgment); *see also* Imerys Trust Agreement, *supra* note 26, § 7.8 (same).

132 *See, e.g.*, Duro Dyne Trust Agreement, *supra* note 26, § 7.7 (explaining that the difference between what the opt-out claimant is initially paid out and her judgment will only be paid out in years six through ten following the initial payment and subject to the prevailing scaling factor at that time and other various maximum payment restrictions); *see also* BSA Trust Distribution Procedures, *supra* note 76, art. XII(G) (subordinating any judgment amount in excess of the maximum distribution allowed for such a claimant under the BSA Payment Matrix); Imerys Trust Agreement, *supra* note 26, § 7.8 (same).

133 In the Kaiser Aluminum Trust, the procedure for paying out a Litigation Option is the following:

> Thereafter, the claimant shall receive from the Asbestos PI Trust an initial payment (subject to the applicable Payment Percentage, the Maximum Available Payment, and the Claims Payment Ratio provisions set forth above) of an amount equal to one-hundred percent (100%) of the greater of (i) the Asbestos PI Trust's last offer to the claimant or (ii) the award that the claimant declined in non-binding arbitration. The claimant shall receive the balance of the judgment, if any, in five equal installments in years six (6) through ten (10) following the year of the initial payment (also subject to the applicable Payment Percentage, the Maximum Available Payment and the Claims Payment Ratio provisions set forth above in effect on the date of the payment of the subject installment).

Kaiser Aluminum & Chem. Corp., Third Amended Asbestos Trust Distribution Procedures, § 7.7 (Nov. 20, 2007), https://www.kaiserasbestostrust.com/assets/documents/resources/Third-Amended-Asbestos-Trust-Distribution-Procedures.pdf [https://perma.cc/BSB8-D4JT]. In the BSA Trust, a similar procedure is set in place where the claimant will receive some portion of their tort determination award immediately based upon what they would have received in the regular individualized review, and the surplus will be paid out in accordance with other trust procedures:

> Within thirty (30) days of executing the release as set forth in Article IX.D above, the Abuse Claimant shall receive an Initial Distribution from the Settlement Trust (assuming an Initial Payment Percentage has been established by the Settlement Trust at that time). Thereafter, the Abuse Claimant shall receive any subsequent distributions based on any applicable Payment Percentage as determined by the Settlement Trust.

BSA Trust Distribution Procedures, *supra* note 76, art. XII(I); *see also* Duro Dyne Trust Agreement, *supra* note 26, § 7.7 (explaining that the difference between what the opt-out claimant is initially paid out and her judgment will only be paid out in years six through ten after the initial payment, subject to the prevailing scaling factor at that time and other various maximum payment restrictions).

are extremely low based on the historical performance of mass-tort trusts. Finally, any distribution is subject to the prevailing Payment Percentage in place at the time of distribution.[134] Considering the time necessary to receive a judgment in the US court system, the opt-out claimant runs the risk that the Payment Percentage in their case may be low enough to significantly distort their ultimate recovery.

III
Trust Issues: The Devil in the Details

The notion of accepting short-term benefits in exchange for some distant cost is ubiquitous. But the Faustian Bargain is especially pernicious in mass torts because many of the trust features described in Part II, *supra*, appear harmless or marginally threatening. Unfortunately, the confluence of these seemingly harmless characteristics can wildly distort the assumptions underlying settlement. In fact, they alter the deal. As described below, the chaos that ensues can affect all stakeholders, but future claimants bear the heaviest burden.

We concede that the bargain's allure is undeniable. For Weary Travelers, the trust construct promises to address various intractable problems. One, it provides the long-sought recovery for claimants through an apparently efficient distribution scheme. Claimants have often waited over a decade to receive compensation. In many cases, these individuals have been grappling with staggering medical fees and various end-of-life quandaries. The settlement is long overdue.

The settlement trust also allows the corporate defendant, its affiliates, insurance companies, and various other corporate entities to finally move past the dispute. When implemented through bankruptcy, the process effectively channels claims against these parties to the trust, ostensibly eliminating all legacy liability. The dark cloud that has invariably affected the brand, market capitalization, borrowing, and resources for growth can be lifted.

The trust framework promises to solve the "future-victim" problem by allowing the bankruptcy court to appoint a future-claimants' representative (FCR) to represent these claimants'

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134 *See* BSA Trust Distribution Procedures, *supra* note 76, art. XII(I) ("[The opt-out claimant] shall receive an Initial Distribution from the Settlement Trust (assuming an Initial Payment Percentage has been established by the Settlement Trust at that time). Thereafter, the [opt-out claimant] shall receive any subsequent distributions based on any applicable Payment Percentage as determined by the Settlement Trust.").

interests and ultimately bind them to a deal the FCR believes is fair. This option does not exist in MDL or other resolution platforms for mass torts outside of federal bankruptcy court.[135] Due Process is seemingly addressed through interest representation and the fact that future claimants and those who voted against the settlement are permitted to opt out of the settlement and pursue their claim in court.

Finally, the trust offers another feature that no other platform can: a promise to filter non-meritorious claims that threaten to deprive meritorious claimants of the recovery they deserve. After all, every dollar that goes to a non-meritorious claimant in a limited-fund trust is a dollar that is unavailable to a meritorious one. The trustee is in a position to demand and carefully review evidence for each claim.

The collective promise offered by mass-tort trusts is undeniable. Not surprisingly, the devil is in the details.

A. Distribution Infirmities

Mass-tort trusts in bankruptcy are the result of a settlement offer to claimants that makes two financial promises: a fixed, aggregate contribution to the trust and a highly speculative per-claimant recovery figure.

Primarily, the corporate debtor, certain affiliated entities, and insurers are required to make a financial contribution to fund the trust. Once this contribution is made, these parties receive releases and other court-ordered protections that allow them to walk away from the dispute without any fear of future liability.[136] The payments are invariably staggered over the course of multiple years and contingent on certain voting benchmarks and court approval of the plan of reorganization.[137]

The aggregate settlement number is going to capture headlines, but that number is somewhat meaningless to the claimants in the case. Buried in that often-times staggering multi-billion-dollar number is the far more important individual

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135 *Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy: Hearing Before the S. Comm. Of the Judiciary*, 118th Cong. (Sept. 19, 2023) (statement of Samir D. Parikh).

136 *See* Parikh, *supra* note 6, at 487. Harrington v. Purdue Pharma, 144 S. Ct. 2071 (2024), limits the use of nonconsensual, third-party releases in mass-tort bankruptcies, but stakeholders have developed workarounds. *See, e.g.*, *In re* Robertshaw US Holding Corp., 662 B.R. 300 (Bankr. S.D. Tex. 2024) (ruling that third-party releases were "consensual" because claimants had the opportunity to opt-out of a plan of reorganization containing such releases and failed to do so).

137 *See* Parikh, *supra* note 6.

recovery figure. The plan of reorganization classifies claimants in the case based on various factors, and each tier is assessed a per-claimant recovery to help claimants understand what they could realize in a best-case scenario.[138] Of course, that last qualifier does not appear in the disclosure documents—or, more accurately—does not appear in a place where anyone is likely to see it. The per-claimant recovery number is the high-water mark if all goes according to plan. But the actual number of claims that will ultimately be filed against the trust is unclear.[139] Estimates can vary wildly.[140] The fear is that the blended recovery rate over the life of the trust will diverge significantly from the per-claimant recovery that initially made the settlement look favorable.[141]

Insolvency risk is an inveterate part of all settlement trusts we reviewed. Unfortunately, it would be naïve to assume that key parties internalize this risk and provide for contingency financing or some other financial backstop. The trusts we reviewed had absolutely no meaningful contingency plan for addressing insolvency aside from allowing the trustee to reduce payments to merely mask the problem. For trusts in the 1990s and early 2000s, trustees aggressively lowered the Payment

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138 These amounts can be established in the payment matrix, *see infra* subpart II.B., or determined by the trustees managing the trust, *see* Dalkon Shield Trust Agreement, *supra* note 26, at CRF-1 (Claims Resolution Facility).

139 *See* Transcript of Trial Testimony of Jim Onder at 256-57, *In re* Red River Talc LLC, No. 24-90505 (Bankr. S.D. Tex. Feb. 20, 2025), Doc. No. 1234 ("[W]e don't know how many cases there are. The range is somewhere [between 25,000 and 50,000], although there were in excess of 70,000 votes [cast in the case] [a]nd the more cases there are with the fixed fund like here, that's going to decrease the average case value.").

140 *See id.*

141 For example, as of February 5, 2025, the Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust has set its interim payment percentage at 10.6% for all claims. This adjustment was implemented following a formal proposal by the Trustees to reduce the payment percentage from the previous rate of 15.5%. *See* AsbestosClaims.Law, https://www.asbestosclaims.law [https://perma.cc/HZ97-PLNH]; Kaiser Asbestos Tr., https://www.kaiserasbestostrust.com [https://perma.cc/TF3U-SLJS]; Mesothelioma L. Ctr., https://www.mesotheliomalawyercenter.com [https://perma.cc/7PU6-GH7X]. It's important to note that this 10.6% rate is provisional and will remain in effect until the Trust Advisory Committee (TAC) and the Futures Claimants' Representative (FCR) reach a consensus on a permanent payment percentage. In accordance with Section 4.3 of the Trust Distribution Procedures (TDP), during this interim period, claimants will receive the lower of the current or proposed payment percentage. *See* Kaiser Asbestos Tr., https://www.asbestosclaims.law/ [https://perma.cc/TF3U-SLJS]. Historically, the payment percentage has seen several adjustments: In April 2019, it was reduced from 35% to 25%; in November 2020, it was further decreased to 18.1%; by August 2023, the rate had been adjusted to 15.5%.

Percentage.[142] This act has seismic effects. The claimants may have agreed to a certain baseline distribution, but a diminished Payment Percentage turns their actual distribution into a fraction of what was expected. For example, for claims from the Duro Dyne Trust, a claimant with mesothelioma was scheduled to receive $140,000 according to the Duro Dyne Trust Agreement,[143] but by 2024 the Payment Percentage was reduced to 20%.[144] A claimant with the stated injury who filed today would receive only $28,000, a fraction of the anticipated distribution at the time of the original settlement. This dichotomy undermines the fundamental terms of the settlement. Also, trustees in that case reduced the Payment Percentage over the life of the trust. This action created significant variances between similarly situated claimants. The justifications for these types of distribution variances are often unsatisfying.[145] We acknowledge practical realities often mean that a bad deal is preferable to no deal. We suspect, however, there may be other factors at play.

The risk of a prematurely insolvent trust is not internalized by the parties at the negotiating table for a variety of reasons. Corporate defendants are extremely vociferous regarding non-meritorious suits and claims in the years leading up to the bankruptcy case, but that refrain recedes the closer they approach a final settlement. As noted above, final settlement in bankruptcy means that the corporate debtor, affiliated entities, insurance companies, and various other parties can finally move past the dispute by funding the trust to the amount required by the plan of reorganization. A parade of horribles could ensue after the bankruptcy case closes and the trust begins distributing funds—as was seen in *Johns-Manville*—but these parties are completely absolved of any future liability, barring fraudulent or illegal acts committed during the bankruptcy case.[146] At the precipice of settlement, these parties are unconcerned about a prematurely insolvent trust or

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142 *See, e.g.*, *In re* Johns-Manville Corp., 60 B.R. 612 (Bankr. S.D.N.Y. 1986).

143 *See* Duro Dyne Trust Agreement, *supra* note 26, § 5.3(a)(3).

144 *See Asbestos Trust Claims: Compensation Is Available Without Filing a Lawsuit*, AsbestosClaims.Law, https://www.asbestosclaims.law/asbestos-trusts/trusts-database/duro-dyne-corporation/ [https://perma.cc/5LLT-PGWF].

145 *See, e.g.*, Imerys Trust Agreement, *supra* note 26, § 7.5 ("Because [the trust's] assets and liabilities over time remain uncertain, and decisions about payments must be based on estimates that cannot be made precisely, such decisions may have to be revised in light of experiences over time, and there can be no guarantee of any specific level of payment to claimants.").

146 *See* Parikh, *supra* note 6, at 487–88.

non-meritorious claimants consuming trust resources. These are problems borne by future claimants, the silent stakeholder in the room.

We assert that plaintiffs' firms are only slightly more concerned about trust failure. The Weary Traveler theory applies here. After a decade of war, plaintiffs' firms are ready to settle. There are many pressures, primarily from clients who are desperate to address their medical costs. Further, in most cases, key law firms have taken litigation finance. Their shadowed business partners may be pressuring the law firm to finalize settlement and secure a distribution.[147] Financiers can employ direct tactics in the form of veiled threats of financial retaliation, or indirect tactics in the form of threatening enforcement of contractual interest payments that escalate over time.[148] We believe a reasonable assumption is that the leadership team managing negotiations would prefer that all claimants be paid in full. Demanding this outcome, however, is unrealistic because it could preclude any settlement at all.[149] The leadership team is in a difficult position. They could advocate for individuals who may never materialize, but this course is a luxury that cannot be reconciled with the realities of these disputes or the fiduciary duties these attorneys possess. The best path forward is to ensure that the demands of invisible parties do not threaten settlement or distributions to very real clients currently involved in the case. We argue that the law firms involved in settling these cases understand the risk inherent in the system and choose to allocate this risk to future claimants. In other words, a prematurely insolvent trust is just a casualty of war.

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147 *See* Parikh, *supra* note 30, at 1699; *see also* Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 YALE L.J. F. 32, 36 (2023).

148 *See* Parikh, *supra* note 30, at 1754.

149 *See* Parikh, *supra* note 6, at 461 ("Mass torts offer a particularly unique example of an anticommons dynamic. There are a significant number of claims seeking compensation from a limited pool of settlement funds. Current victims . . . would like to consume these resources immediately. Plaintiffs' attorneys have devoted significant resources to identifying and marshalling these victims. Consequently, current victims are able to coordinate and negotiate a mechanism that allows them to access promptly the trust fund resources. But there is a problem. Corporate tortfeasors are interested in resolving mass tort claims that represent an existential threat to their businesses . . . . However, corporate tortfeasors demand global settlements—a term describing resolution of substantially all outstanding current and future claims at a known price. Without a global settlement, corporate tortfeasors are willing to continue with fragmented and protracted litigation, in effect denying the victims collective access to the settlement funds, or, at the very least, delaying access for an unacceptable period of time." (footnote omitted)).

We believe that the courts overseeing these cases also understand the infirmities in these deals but refuse to allow perfect be the enemy of good enough.[150] The court is tasked with representing the interests of all claimants, not merely future claimants. We could not identify any case in our dataset where a court attempted to reallocate premature-trust-failure risk to other parties in the case; for example, this could be realized by requiring the trust to hold back a meaningful portion of all initial distributions to assure there is a way to at least potentially assure that subsequent distributions do not diverge from initial ones. Bankruptcy courts have avoided this level of intervention; content, instead, to confirm case settlement as long as the statutory requirements in the Bankruptcy Code are satisfied.[151]

The future-claimants' representative is the one party explicitly tasked with assuring that harm is not externalized onto future claimants. But this party is a compromised actor in a compromised system. One of us has explored this discrete issue in previous scholarship.[152] We believe, however, that it is worthwhile to revisit that discussion because the FCR is arguably the linchpin issue in understanding trust-design risks.

Section 524(g) of the Bankruptcy Code requires the appointment of an FCR in asbestos-exposure cases involving future claimants.[153] This directive has been enforced by courts in mass-tort cases that do not involve asbestos exposure.[154] The FRC represents the interests of future claimants, who will ultimately be bound by the terms of the settlement. The requirement is a safeguard that attempts to satisfy due process and thereby protect the settlement agreement. This is the linchpin for securing a global settlement and finality for the corporate defendant and its affiliates. But the importance of this provision is in sharp contrast to the woefully incomplete statutory provisions supporting it.

Primarily, the bankruptcy court is responsible for selecting the FCR.[155] Most courts delegate this task to the corporate debtor—the party against whom the FCR will be negotiating.

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150 *See* Mass Tort Insiders, *supra* note 22.

151 *See id.*

152 Parikh, *supra* note 6, at 489.

153 11 U.S.C. § 524(g)(2), (h)(1)(B).

154 *See, e.g.*, *In re* Boy Scouts of Am. and Del. BSA, LLC, 642 B.R. 504, 533 (Bankr. D. Del. 2022), *aff'd*, 650 B.R. 87 (D. Del. 2023), *aff'd in part, rev'd in part, dismissed in part sub nom. In re* Boy Scouts of Am., 137 F.4th 126 (3d Cir. 2025).

155 11 U.S.C. § 524(g).

The debtor is invariably the only stakeholder invited to propose FCR candidates and, "in almost all cases, nominates only one."[156] Bankruptcy courts have been quick to approve the debtor's nominee, in stark contrast to the vital role this party will play in settlement and ensuring equality of distribution across the claimant class.[157] Courts review candidates under the extremely permissive "disinterested" standard, which focuses only on whether the individual has any overt conflicts of interest.[158]

Bankruptcy courts do not actively monitor the FCR once appointed. This is the same approach courts exhibit with many professionals employed in bankruptcy cases. Unfortunately, the FCR is unlike other professionals. Future claimants are entirely absent from the proceedings and unable to monitor their agent. We believe that this creates an untenable principal-agent problem and capture risk in these cases:

> A small pool of professionals manages the universe of mass tort bankruptcy cases, and the process is characterized by repeat players. FCRs receive significant fees and, once appointed, immediately hire as legal counsel the law firm at which they are a partner, thereby amplifying the benefit. Therefore, the promise of multiple engagements is a truly distortive incentive for these individuals. This promise can incentivize an FCR to discount their invisible clients' interests. FCRs seeking subsequent engagements face extreme pressures to avoid taking positions in one case that may alienate key parties who will be involved in future cases. The reality is that today's adversary could be tomorrow's client.[159]

The potential contagion goes further. Courts are also subject to self-interested behavior. The bankruptcy judge does not want a multi-billion-dollar mass-tort case to fail, stranding claimants who have already endured years of delay. An accommodating FCR greatly improves the likelihood of settlement. The false narrative that we suspect is embedded in these cases is that an accommodating FCR creates significant benefits with minimal consequences. Under that premise, a dereliction of duty is presumably in the best interests of all stakeholders in the case.

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156 *See* Parikh, *supra* note 6, at 490.

157 *See id.*

158 *See id.*

159 *See id.* at 490–91.

B. Procedural Infirmities

One prominent tension in the structure of these settlements arises from the desire to allow claimants to opt out of the trust distribution process and pursue litigation in a court of law.[160] This notion is premised on affording claimants' their "day in court" and, as noted above, attempting to satisfy Due Process strictures. Unfortunately, allowing claimants to opt out of a seemingly comprehensive settlement runs the risk of incinerating the settlement. Corporate defendants and their affiliates demand global settlements, which describes resolution of substantially all outstanding current and future claims at a known price.[161] These parties exhibit this fixation because they are exposed to a destabilizing degree of uncertainty without a settlement that binds all current and future victims. Incomplete settlements that include opt-outs or ones that fail to address future victims create the risk of material unaddressed claims. Victims with high-value claims will invariably opt out of the settlement in order to keep their recovery from being diluted in the general pool. And "future victims can emerge at any time and in unknown numbers, decimating otherwise profitable industries as they did for countless asbestos companies."[162]

Without a global settlement, many corporate defendants are willing to continue with fragmented and protracted litigation. Consequently, the trusts we reviewed conditioned opt-out rights in ways that severely diminished the right's value. The Duro Dyne Trust offers a representative structure. In that case, all claimants are required to submit claims to the trust and receive a distribution offer. A claimant has the right to appeal the offer to non-binding arbitration. After arbitration, the claimant can reject the arbiter's assessment and file an action in federal district court. At the end of that multi-year process, if the claimant receives a judgment, then she is required to return to the trust. The trust will not pay punitive or exemplary damages.[163] Further, the trust will pay the claimant only the amount she was initially offered by the trust, subject to any Payment Percentage in effect at that time. Keep in mind that this claimant is seeking a distribution from the trust many years after distributions started and, therefore, faces the risk

160 *See supra* subpart II.C.

161 *See* Parikh, *supra* note 6, at 461–62.

162 *See id.* at 462.

163 *See, e.g.*, Duro Dyne Trust Agreement, *supra* note 26, § 7.4.

of a significantly reduced Payment Percentage. In effect, the opt-out claimant—who invariably has a high-value claim—has been forced to the back of the line. The difference between the judgment amount and the trust distribution offer will only be paid after a moratorium (in Duro Dyne that was 5 years) and only if sufficient funds are available as determined by the trustee(s).

It is unclear why any claimant would wish to opt out in such a regime. Even if the claimant wished to opt out, it is highly unlikely that she would be able to find an attorney willing to take the case on a contingency basis because there are significant obstacles to enforcing any judgment. Naturally, this outcome is by design.

C. The Nonmeritorious Claim Quandary

Filtering nonmeritorious claims in mass-tort cases with hundreds of thousands of claimants is an almost impossible task.[164] Plaintiffs' attorneys (and potentially claim aggregators) who originally interview potential claimants have an obligation to vet the claims and assess basic compensability.[165] But attorneys have abdicated this duty, arguing that claim assessment is impossible when thousands of clients are being onboarded in a relatively short period of time.[166] Naturally, courts lack the resources to undertake the herculean task of filtering at the back end of the process. The trust offers a convenient solution.

Settlement trusts are tasked with reviewing and assessing claims—at least those that seek "individual review." But claimants seeking an expedited review—also referred to as "short form review" or "immediate payment option"—understand that the trust is not going to be reviewing their claims in any meaningful way.[167] These trusts invariably lack the necessary

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164 Samir D. Parikh, *How Courts Can Filter Nonmeritorious Claims in Mass Torts*, Law360 (Feb. 27, 2025), https://www-law360-com.proxy.library.cornell.edu/lifesciences/articles/2302792/how-courts-can-filter-nonmeritorious-claims-in-mass-torts [https://perma.cc/XX28-ZR53].

165 Parikh, *supra* note 30, at 1740.

166 *See id.* at n.212.

167 *See, e.g.*, Linda Williams, *$2.4-Billion Dalkon Shield Payout Options Disclosed*, L.A. Times (Mar. 18, 1990), https://www.latimes.com/archives/la-xpm-1990-03-18-mn-1045-story.html [https://perma.cc/PJX8-XXST] (explaining that claimants could opt for one of two expedited payment options: the first entitled a claimant to receive $725 without providing evidence that they had suffered an injury or even used the Dalkon Shield; the second entitled a claimant to receive $5,500 by merely providing some form of evidence establishing a medical complication that could be linked to the Dalkon Shield).

resources.[168] The expedited review is a means of guaranteeing claimants and their attorneys a simple path to recovery, which serves to funnel the supermajority of claimants towards this option. But in seeking this short-cut, the trust process fuels marshaling of nonmeritorious claims at the front end of the litigation. As one of us has explained:

> The burden of filtering nonmeritorious claims invariably falls to the trustee of the settlement trust. These trustees, however, face the same resource constraints as courts, plaintiffs' attorneys and corporate defendants and invariably adopt streamlined operations. Bankruptcy trusts presume the validity of submitted claims. Insiders understand this well, and the incentive to file nonmeritorious claims persist. Trusts also contain an "immediate payment" option, which allows claimants to accept a reduced distribution in exchange for an extremely cursory review of their claim. This is the failsafe for those with the most specious claims.[169]

The fact that nonmeritorious claims are often paid at the same rate as meritorious ones through the expedited review process incentivizes parties to marshal nonmeritorious claims and bring them into the dispute resolution process.[170] Nonmeritorious claimants have arguably minimal impact on meritorious claimants at the initial stages of trust distribution because the trust holds significant funds and claimants are entitled to no more than the amounts delineated by the Payment Matrix. Nonmeritorious claimants, however, accelerate the depletion of the trust and that shortfall invariably affects future claimants.

D. The Victim a Second Time

This Part unpacks various infirmities in the trust distribution process. The Trust Documents we reviewed contained anomalistic features, which were arguably the result of a complicated negotiation where parties are forced to accept various benefits and detriments in order to secure settlement. But the

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168 *See, e.g.*, Duro Dyne Trust Agreement, *supra* note 26, § 7.2 (mandating that the trustee "shall always give appropriate consideration to the cost of investigating and uncovering invalid [claims] so that the payment of valid [claims] is not further impaired . . . "); Takata Trust Distribution Procedures, *supra* note 111, § 7.3 (using ostensibly identical language); Dalkon Shield Trust Agreement, *supra* note 26, at CRF-1 (Claims Resolution Facility) (explaining that the short form claim process is attractive because it allows the Trust to process claims "without substantial transaction costs").

169 Parikh, *supra* note 30, at 1764 (footnote omitted).

170 *See id.*

infirmities outlined above and the various others outside this Essay's scope create an increased risk of trust failure. And the consequence of trust failure is borne by one group in particular. Future claimants are harmed by the corporate defendant and then ultimately become victims again at the hands of the mass-tort machinery. In the next Part, we explore means to minimize exploitation risk.

IV
Normative Proposals

The previous Part explored some key issues associated with distributions under mass-tort trusts. This Part explores some simple proposals that could help equalize recoveries across claimant classes and ideally accelerate distribution timelines.

Given that this Article is one of the first to analyze modern mass-tort trusts, we cannot claim to offer comprehensive proposals. We also cannot claim to have identified all infirmities. Rather, the previous parts of this Article have explained that key trust provisions have become entrenched over the last four decades; extrapolating from trust performance from previous generations—coupled with our own understanding of distributions in mass-torts cases—allows us to anticipate potential cataclysms. In the upcoming years, modern, mass-torts cases will provide performance data that will allow our analysis to evolve. In the interim, we offer proposals for trust reformation based, in part, on the recent Takata Trust and focused on adjusting the roles of the FCR, judges, and corporate defendants. These proposals will ideally improve process integrity for the upcoming wave of mass-tort cases—including those involving "forever chemicals"—that we believe will impose unprecedented pressure on the US judiciary.[171]

A. Takata Trust's Pay-As-You-Go Feature

The trusts we have reviewed require corporate defendants, affiliates, and insurers to contribute a lump sum to the trust as part of settlement. By doing so, these parties receive liability releases and are able to walk away from the dispute and satisfy the global settlement directive, which appeases shareholders, investors, lenders, and various stakeholders.[172] This model,

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171 *See* Parikh, *supra* note 28, at 449–51 (explaining the proliferation of mass-tort cases); Wolf, *supra* note 27.

172 *See supra* Part I.

while seemingly efficient, amplifies many of the problems with the trust distribution process identified in this Article.

The Takata Trust, however, takes a different approach—one that appears to have enhanced claim assessment and distribution integrity. The Takata Trust resulted from the bankruptcy of TK Holdings and other affiliated entities.[173] The company manufactured airbags, many of which were defective and killed or severely injured vehicle occupants when deployed.[174] Records regarding the vehicles containing defective airbags were incomplete; consequently, this case includes future victims—those who may be injured after the closing of the bankruptcy case when a defective airbag inflates in a car that should have been recalled.[175] The bankruptcy case yielded a settlement that created the Takata Trust. The trust was funded with approximately $134 million.[176] Claims for personal injury or wrongful death were channeled to the trust. The debtor and its affiliated entities contributed the bulk of the trust corpus and received the customary releases that allowed them to ostensibly walk away from the dispute. However, Honda and Nissan—who were defendants in the case and referred to as participating original equipment manufacturers (the "P-OEMS")—accepted a different arrangement.[177]

Under the Trust Distribution Procedures, the Takata Trust is tasked with accepting claims by those allegedly injured by a Takata airbag and segregating claims based on whether they involve the P-OEMS or other equipment manufacturers.[178] All claims are subject to an elaborate claim valuation process.[179] The Takata Trust has been conservative in assessing claims and making distributions.[180] Each claim is awarded points

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173 *See In re* TK Holdings, Inc., No. 17–11375-BLS (Bankr. D. Del. 2018).

174 *See* Sean McLain & Mike Spector, *With 54 Million to Go, This Airbag Recall Is Never Going to End*, WALL ST. J. (June 26, 2017), https://www.wsj.com/articles/bankrupt-air-bag-maker-takata-means-to-keep-limping-along-1498477869 [https://perma.cc/XH7V-AGJJ].

175 *See* Disclosure Statement for Second Amended Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors at 90, *In re* TK Holdings, Inc., No. 17-11375 (BLS) (Bankr. D. Del. 2018).

176 *See* TAKATA AIRBAG TORT COMP. TR. FUND, SPECIAL-PURPOSE FINANCIAL STATEMENTS WITH SUPPLEMENT INFORMATION: YEARS ENDED DECEMBER 31. 2024 AND 2023 13 (2025).

177 *See id.*

178 *See* Interviews with Mass-Tort Insiders, *supra* note 22.

179 *See* Eighth Amended PSAN PI/WD Trust Distribution Procedures, § 4; Exhibit A (TD Claim Process); Exhibit B (Scheduled Claim Process), *In re* TK Holdings, Inc., Case No. 17-11375 (BLS) (Bankr. D. Del. 2018).

180 *See* Interviews with Mass-Tort Insiders, *supra* note 22.

according to the governing schedule, but the monetary value assigned to each individual point is continually assessed based on economic analysis intended to ensure comparable distribution through the trust's life.[181] In the event that the monetary value of a point increases, the trust will make an additional payment to previous claimants to account for this variance.[182]

As to the P-OEMS' claims, once the aggregate claim amount is determined, the Participating OEM Contribution Agreement instructs the trustee to reduce this amount by (i) the amount the claimant is entitled to be compensated by the trust's payment matrix, (ii) any insurance proceeds received by the trust that are earmarked for the claim, and (iii) any distributions the claimant received from the Individual Restitution Fund (the "IRF").[183] The P-OEMs are responsible for paying the entire remaining balance (the "P-OEM Residual Liability"),[184] if any, based on which manufacturer built the vehicle in which the claimant was injured. P-OEM Residual Liability is assessed on a monthly basis.[185]

The P-OEMS accepted a pay-as-you-go feature as opposed to the more traditional "upfront-contribution" scheme.[186] The most surprising aspect of the model is that payments to address P-OEM Residual Liability are uncapped.[187] These features keep P-OEMS tethered to the trust. As a result, P-OEMS pushed for rigorous claim assessment procedures and are incentivized to carefully monitor the execution of these procedures.[188] Our discussion with industry insiders revealed that this facet produces a number of benefits.

Takata's pay-as-you-go feature precludes P-OEMS from disentangling from the dispute. The "uncapped contribution" dimension creates uncertainty for defendants and could have soured the deal. But the resultant trust model has motivated these defendants to remain invested in the claim assessment

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181 *See id.*

182 *See id.*

183 *See* Participating OEM Contribution Agreement at 3–4, Exhibit O to Notice of Filing of Fourth Plan Supplement Pursuant to the Fifth Amended Joint Chapter 11 Plan of Reorganization of TK Holdings and Its Affiliated Debtors *In re* TK Holdings, Inc., No. 17-11375 (BLS) (Bankr. D. Del. Mar. 26, 2018).

184 *See* Interviews with Mass-Tort Insiders, *supra* note 22.

185 *See* Participating OEM Contribution Agreement, Exhibit O to Notice of Filing of Fourth Plan Supplement Pursuant to the Fifth Amended Joint Chapter 11 Plan of Reorganization of TK Holdings and Its Affiliated Debtors *supra* note 183, at 3.

186 *See* Interviews with Mass-Tort Insiders, *supra* note 22.

187 *See id.*

188 *See id.*

process and, in turn, bolstered distribution integrity. A POEM's financial obligation increases with every nonmeritorious or overstated claim the trustee approves. Therefore, each P-OEM has a strong incentive to police claims and monitor the Trustee. This dynamic has apparently created a unique degree of trustee vigilance in the Takata case. The result is enhanced filtering of nonmeritorious claims and proper classification of claims that have been overstated, thereby reducing the funds the participating P-OEMS have had to contribute to the trust.[189] By some accounts, the outcome has been beneficial to the P-OEMS; their aggregate contributions are far less than what would have been required under the "upfront-contribution" model.[190] Meritorious claimants have similarly benefited. The Tataka Trust has a strong financial position, and the trust has to date been successful in ensuring comparable recoveries across claimant classes.[191] Future claimants are the primary beneficiaries of these developments.

Corporate defendants seek global settlement.[192] The pay-as-you-go feature undermines that outcome, because the settlement does not provide a set price the defendant must pay and the "uncapped-payment" feature diminishes the idea of certainty. But the potential benefits of this small shift are undeniable. The Takata Trust offers proof of concept. We argue that this approach could be explored in subsequent cases. One obvious adjustment to the Takata model is to cap the ultimate payout to offer at least some certainty. For example, imagine that a corporate defendant assessed its pro rata liability in a given mass-torts case at $100 million. This modified pay-as-you-go feature could replicate key aspects of Takata but place a $120 million cap on the defendant's liability. The defendant may believe that rigorous claim review will suppress their liability to an amount closer to $70 million. In order to manage downside risk, the defendant could seek an insurance policy to cover payments above the $100 million threshold—arguably creating a large deductible on the policy. This would shift monitoring duties from the defendant to the insurance company. The monitor would change but the actual monitoring would continue.

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189 *See id.*

190 *See id.*

191 *See id.* (explaining that the Takata trustee's charge is to provide similar distributions to similarly situated claimants and the trust has been successful in pursuing that).

192 *See supra* subpart III.A.

There remains a significant obstacle to the pay-as-you-go feature finding its way into future mass-tort cases. A corporate defendant may be lured by the promise that the pay-as-you-go feature will ultimately lead to a lower aggregate cost vis-à-vis the "upfront contribution" model. But certainty has significant value, and the fixed cost of the "upfront-contribution" model may prove too alluring. Further, the model's benefits are premised entirely on enhanced claim scrutiny. In theory, enhanced claim scrutiny is beneficial to the claimant collective, but that prospect is unappealing to individual plaintiffs' attorneys representing a subset of claimants, many of whom may lack sufficient evidence to support their claims.[193] Consequently, we suspect that the leadership group that ultimately negotiates and consummates settlements in these cases is unlikely to propose the pay-as-you-go feature. Insiders we spoke to indicated that the P-OEMS accepted the model in the Takata case in large part because they were desperate to settle a scandal that could ultimately tarnish their brand and business.[194] We argue, however, that this dynamic will conceivably exist in many future mass-tort bankruptcy cases. If so, there may be room to discuss the feature in settlement negotiations for future cases. But in order for this feature to secure a place alongside entrenched trust provisions, we believe the burden of advocating for it and other features that improve outcomes will, as explored below, fall on the FCR and the presiding court.

B. Future-Claimants' Representative

Part III, *supra*, explained the capture risk affecting the FCR. The failure of interest representation certainly affects future claimants. The consequences, however, could go much further. The FCR allows parties to attempt to address Due Process strictures; the failure to do so can actually threaten to eviscerate a seemingly finalized settlement. One of us has explained the risks:

> Imagine, for example, a mass torts bankruptcy involving both current and future victims. Imagine further that the case produces a plan of reorganization that relies on a channeling injunction to force all victims to seek recovery by filing claims against a settlement trust. All defendants and affiliated parties enjoy a form of immunity through the channeling injunction and nonconsensual, third-party releases. A group

193 *See* Parikh, *supra* note 30, at 150.

194 *See* Interviews with Mass-Tort Insiders, *supra* note 22

> of future victims then emerges fifteen years after the bankruptcy case is closed. This group holds high-value claims but faces a prematurely insolvent settlement trust. The plan of reorganization does not contain a contingency plan to address this scenario and creates an outcome where similarly situated victims will receive wildly disparate recoveries. The victims in this example have only one argument: the claims representative in bankruptcy did not adequately represent future victims and agreed to an underfunded settlement trust approved by the bankruptcy court. By failing to adequately represent the interests of the future victims, the representative and the bankruptcy process did not satisfy due process. If successful, potential remedies could involve dissolving the immunity shields distributed as part of the confirmation process. The global resolution reached decades earlier would be unwound. This represents the ultimate doomsday scenario.[195]

As explored in subpart I.C., *supra*, almost all of the trust distribution agreements we reviewed list their purpose as paying similarly situated claimants substantially the same amount. Ensuring equitable distributions appears to be a first principle. But once a trust is underfunded, there are few levers that a trustee can pull if a course correction is necessary. In fact, we doubt that trustees have the tools or incentives to ensure comparable distributions for similarly situated claimants across even a fraction of the trust's protracted life. The fatal misstep with mass-tort trusts is invariably the first one: an underfunded trust and the failure to properly disclose the risk that recoveries will not approximate what the settlement initially promised. The remaining structural framework is designed to mitigate the harm from this misstep, but efficacy is limited.

Once underfunding becomes apparent, the trustee is incentivized to aggressively reduce the Payment Percentage to ensure that trust funds are never at risk of exhaustion. An insolvent trust affects more than just claimants in the case. The trust agreements we reviewed provided that each trustee's salary, benefits, and essential indemnification protections are funded exclusively by trust assets.[196]

The ultimate impact of instituting a reduced Payment Percentage is often misconstrued. At a superficial level, it appears that mass-tort trusts are enduring, remaining vital through distribution and claimant cycles. This endurance appears to

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195 *See* Campos & Parikh, *supra* note 17, at 329–30 (footnotes omitted).

196 *See, e.g.*, BSA Trust Agreement, *supra* note 26, at 25–26.

be a testament to the efficacy of the settlement and trust agreement. In reality, the reduced Payment Percentage is decimating claimant recoveries over the life of the trust, ensuring that the endurance narrative proliferates and there remains funds sufficient to protect the trustee and her team from potential exposure.

We argue that an effective way to mitigate this risk and others is to embolden the FCR to be a more aggressive advocate for (i) increased contributions to the trust, (ii) robust disclosures at the front end of the process, (iii) financial backstops in the event of trust insolvency; and (iv) pay-as-you-go features in certain cases. This shift requires us to revisit the overall FCR framework.

1. *The FCR Appointment Proposal*[197]

The most effective way to embolden the FCR is to mandate that the U.S. Trustee (UST) manage FCR selection, as opposed to the corporate debtor who will be negotiating against the FCR. The UST already manages the committee appointment process in bankruptcy cases. We advocate for a new statutory subsection that would instruct the UST to compile a list of independent candidates and be tasked with selecting an FCR from this list, subject to approval by the bankruptcy court.[198] Stakeholders in the case may nominate candidates, but the master list should include candidates that the UST has identified independently. The bankruptcy court should have the responsibility to remove an FCR if the court believes that the change is necessary to ensure adequate representation of future victims' interests.

One of us has argued that the FCR should be analogized to a guardian ad litem.[199] The Federal Rules of Bankruptcy Procedure permit courts to appoint a guardian ad litem to represent an incompetent person who cannot appear in proceedings or otherwise represent themselves. This analogy is apt in mass tort cases. Future victims are not incompetent in a traditional sense, but they are unable to appear or retain representation. "This new framework would result in a modified assessment of FCR candidates. Under the guardian model, the bankruptcy court must—in addition to finding that a candidate is

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197 This section is premised in part on a discussion found in Parikh, *supra* note 6, at 496–97.

198 This provision would need to apply to all cases where an FCR is appointed.

199 Parikh, *supra* note 6, at 497.

disinterested, qualified, and competent—determine that a candidate will act as an objective, impartial, and effective advocate for future victims."[200]

2. *Multiple FCRs*

As noted in subpart II.A, *supra*, we believe that selectively bringing additional parties into the decision-making processes in these high-stakes matters can help improve outcomes. The current format places too much power in the hands of one FCR. A true committee representing future claimants is preferable. We propose appointing three FCRs to negotiate on behalf of future victims. This reimagined committee would help reduce capture risk because "distorted self-interest is more easily managed as additional individuals are added to a process that originally involved one decision-maker."[201] The members of this new committee would enjoy the right to vote on any proposed plan of reorganization. Under this proposal, a plan could be confirmed only if at least two out of the three FCRs approve.

In assessing the plan, our proposed three-person committee of FCRs should employ a standard that diverges from what is currently employed by FCRs. In modern bankruptcy cases, an FCR who chooses to support the confirmation of a proposed plan of reorganization merely asserts her belief that the terms of the trust provide a reasonable assurance that the trust will value and be in a financial position to pay future claimants in a "fair, objective, reasonable, and efficient manner."[202] This standard fails to address the key risks posed by modern trusts. We propose that in voting to approve a plan under the three-person FCR model, each FCR should be tasked with assessing (i) whether the plan's proposed total settlement value and per claimant value is no less than what could be realized outside of bankruptcy; (ii) the risks posed by rejection of the proposed plan; (iii) if the plan presents a material risk of significant distribution variance over the life of the trust; (iv) if similarly situated claimants will receive comparable distributions in the first 5 years of the trust; and (v) the efficacy of the Litigation

200 *See id.*

201 *See id.* at 499.

202 *See, e.g.*, Declaration of Roger Frankel, the Future Claimants' Representative, in Support of Confirmation of the Fourth Amended Joint Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors at 3, *In re* TK Holdings Inc., No. 17-11375 (BLS) (Feb. 14, 2018).

Option[203] offered to claimants (collectively, the "Key Criteria"). The bankruptcy court should require the FCRs to provide their assessment of the Key Criteria. FCRs who cannot confirm the key objectives implicit in these issues would be precluded from voting in favor of the plan. This holdout would force key parties to consider alternative structures that would conceivably open the door to (i) demands for additional funding, (ii) modified distribution protocols that would minimize the risk of initial claimants exhausting the trust,[204] and (iii) revised payment models—including a pay-as-you-go feature—that could better support filtering of nonmeritorious claims.

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203 *See supra* subpart II.C. As to the Litigation Option, we accept that some degree of herding is necessary for parties to reach settlement. If the Litigation Option is too easy or attractive, then the number of opt-outs will preclude settlement—a result that hurts the claimant collective. That being said, the Litigation Option cannot be punitive. For example, a litigant who pursues the Litigation Option should not have their ultimate recovery capped at what the trust would have originally paid them. In the event the recovery is larger than what is provided in the applicable payment matrix, the claimant should be entitled to receive a fixed percentage of this variance; perhaps 20—30%. Further, a claimant that pursues the Litigation Option should be subject to the prevailing Payment Percentage that was in place at the time they opted out; they should not be subject to the Payment Percentage in place when they seek recovery based on a successful judgment, which could occur years later at a time when the Payment Percentage could be a fraction of its original value.

204 For example, the payment matrix could be altered to provide for a much larger distribution for certain catastrophic injuries and, consequently, reduce the Immediate Payment Option for claims with little evidentiary support. Imagine a party who contracted mesothelioma and suffered serious injuries for a significant period of time before passing away and has the evidentiary basis to establish (1) their injuries; and (2) that corporate debtor's prepetition conduct is the likely cause. In the A.H. Robins Dalkon Shield case, the payment matrix provides that a claimant who was forced to undergo a hysterectomy due to use of the Dalkon Shield is entitled to receive $5,500; children born with birth defects caused by the Dalkon Shield were entitled to $4,000; and claimants who experienced infertility were scheduled to receive $3,900. What if these amounts were increased by 30%? A claimant who survives the individualized review likely holds a powerful, meritorious and catastrophic claim. That claimant should receive the largest distribution by far. This premium recovery should come at the expense of claimants that seek expedited review, which is often the supermajority of claimants. There could be various understandable reasons for why the expedited review is consistently oversubscribed but the possibility that a significant portion of these claims are nonmeritorious cannot be overlooked. This potential reallocation may be part of a more equitable distribution regime, helping reduce distributions on more questionable claims and allowing the trustee to ultimately impose a relatively more reasonable Payment Percentage. Trusts rarely entertain this option because trustees actually need claimants to seek expedited review. Trusts rarely have the resources to properly assess and review claims or pay some third party to do so. The alternative we suggest would encourage more claimants to seek individualized review and force the trust to fulfill one of its primary tasks—properly reviewing and assessing claims; a task that trusts are often content to abdicate.

The ultimate effect of these adjustments is to bring a more deliberate and nuanced assessment to the settlement formulation process.

C. The Judiciary's Extended Obligation

The bankruptcy court itself plays an important role in shaping these trust settlements. While the corporate defendant in bankruptcy owes some duties to claimants as described above and the FCR owes duties to future claimants, the court arguably owes duties to all creditors in the case and to the legal system as a whole.

We propose that courts should play a more active role in monitoring the creation and execution of settlement trusts. Naturally, the court already plays an important role in reviewing and approving the plan of reorganization in mass-tort bankruptcy cases. But we argue that some courts may have stopped short of meaningfully monitoring settlement discussions[205] or reviewing trust features—describing the distribution mechanism created by the applicable trust distribution agreement as an "afterthought" and the "mere plumbing" that affords claimants the negotiated recovery.[206] We can appreciate that courts are hesitant to intervene and pull threads that could unravel a settlement years in the making. But bankruptcy courts cannot be timid in these circumstances because—as explained above—initial errors in funding and distribution protocols can be impossible to cure. In many respects, we are advocating for bankruptcy judges to be as involved in mass-tort cases they adjudicate as they are in most corporate bankruptcy cases.[207] Bankruptcy courts have embraced the idea that they are somewhat unique, perhaps even exceptional, required to "do their job in a different way or use different tools than judges in other

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205 This could conceivably be done by requiring settlement mediators to report on tentative settlement provisions or, in the event Bankruptcy Rule 9031 is amended, through the appointment of a special master. *See generally* Hon. Robert Drain, Jay Goffman & Joseph Gomez, *Amending Federal Rule of Bankruptcy Procedure 9031: A Measured Approach*, 99 AM. BANKR. L.J. 391 (2025) (advocating for amending Bankruptcy Rule 9031 to allow bankruptcy courts to appoint special masters in mass-tort cases to facilitate resolution).

206 *See* Interviews with Mass-Tort Insiders, *supra* note 22 (describing the trust as an "afterthought" and merely the "plumbing" that delivers claimants a recovery).

207 *See* Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1939 (2022).

federal civil cases."[208] Though disfavored by some,[209] the notion of bankruptcy exceptionalism has been a prominent fixture in traditional corporate bankruptcy cases,[210] and we advocate for it in the mass-tort context as well.

More specifically, our proposal envisions bankruptcy judges impressing on the stakeholders that the court will be focused on the Key Criteria in considering plan approval. We think having both the FCR and bankruptcy judge focused on the Key Criteria will create unique alignment that will improve distribution outcomes. This sentiment will ideally influence settlement negotiations. In reviewing the disclosure statement that presages any plan of reorganization, the court should return to the Key Criteria in addition to other requirements for approval of the disclosure statement.[211] And after a debtor receives the necessary votes for confirmation, the court should still consider the Key Criteria in determining whether to approve the plan of reorganization. We do not assert that bankruptcy courts are ignoring the Key Criteria during seminal stages of the bankruptcy case, but we would like to make consideration of these criteria specific and a guiding light in negotiations and settlement formation. By emphasizing the Key Criteria through the settlement process, the court can be in a position to subtly propose alternative models—including the pay-as-you-go feature—in order to break deadlocks or improve trust design.

Once the trust is established, the bankruptcy court should continue monitoring the trustee and the FCR. While we do not seek to inject destructive intermediation into the trust distribution process, changes in the Payment Percentage for a trust should be communicated immediately to the presiding judge, who should take an active role in understanding the degree of change and if it was properly disclosed in the settlement. Of course, extra costs are associated with a judge more actively monitoring the trust, but we see unnecessary risk in a

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208 *See id.*; *see generally* Jonathan C. Lipson and Pamela Foohey, *The End(s) of Bankruptcy Exceptionalism: Purdue Pharma and the Problem of Social Debt*, 46 CARDOZO L. REV. 861 (2025).

209 *See generally* Seymour, *supra* note 207.

210 *See id.* at 1938 ("Everywhere in bankruptcy, judges alter rights, create remedies, and steer cases out of fidelity to unwritten norms that seek to advance what those within the bankruptcy culture understand to be the better and more efficient functioning of the bankruptcy system. . . . Judges that do this operate based on an understanding that bankruptcy is special: it is a unique field of law that requires its own distinctive approach.").

211 *See* 11 U.S.C. § 1125.

framework that allows a trustee to operate with minimal oversight. We are particularly troubled in cases where there is only one trustee who enjoys autonomy as to key decisions affecting trust distributions.[212]

D. Creating a Backstop with Corporate Defendants

A corporate defendant not subject to a pay-as-you-go scheme should bear some responsibility for an accelerated trust failure. We argue that—generally speaking—resolution of a mass-tort dispute through bankruptcy is far more beneficial to the corporate tortfeasor than an individual claimant.[213] As we have explained, claimants invariably receive a fractional recovery that appears paltry when the delay in payment and time value of money are considered. The corporate defendant has incurred significant legal fees, but insurance coverage, resolution delay, and clever tax management strategies minimize the impact of the final settlement payment. And the corporate defendant has received a global settlement and finality that further softens the blow. This elusive gift is premised on the creation of a trust that is presumably offering clear guidance on what individual claimants can expect to recover. We accept that these defendants are entitled to finality but argue that the term has limits. Indeed, the wonders of bankruptcy resolution should come with some responsibility in the event the trust fails within a few years after initiation. We argue that corporate defendants and their affiliated entities should be obligated to fund a trust that ensures similarly situated claimants (both current and future) receive comparable distributions.[214]

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212 For a discussion of existing trusts and the checks on the power of the trustees, see *supra* Part II.

213 We acknowledge the argument that plaintiffs' firms in these cases capture the settlement premium and are, therefore, the primary beneficiaries of resolution.

214 There is an argument that promissory accounts of corporate governance might provide further support for corporate actors taking the functioning of these trusts more seriously. *See generally* Vikram R. Bhargava & Suneal Bedi, *Brand as Promise*, 179 J. BUS. ETHICS 919 (2022) (arguing that a company that makes out a promise commits a wrong when its business activities deviate from that promise). When defendant companies decide to remove all liability associated with mass torts using the trust settlement procedure, they are effectively making a promise to claimants. This promise is that the company will be ensuring equitable payment by putting adequate monies into the trust in the first instance. One legal way to conceptualize this is that the trust settlement agreement is a contractual promise that the defendant will make sure that the claimants are paid justly. *See* Charles Fried, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (Oxford University Press 2015) (1981). If, for whatever reason, the company

The problem is that these trusts often have a material failure risk associated with them. As described above, if the trust begins to approach insolvency, the trustee is likely to dramatically decrease the Payment Percentage. This act precludes subsequent claimants from receiving the recovery for their type of injury that was a fundamental settlement term and creates an unacceptable recovery variance in the claimant classes. This outcome occurred with trusts founded in previous generations,[215] and we do not think it should be ignored as we anticipate the next wave of mass-tort bankruptcies. We propose that the corporate defendant bear some responsibility when the trust significantly decreases the Payment Percentage shortly after inception. Our proposal evokes the Johns-Manville case, where trust failure prompted the bankruptcy court to summon the key parties back to the table to ostensibly "refund" the trust. But we do not envision anything quite so dramatic.

Under our proposal, as a prerequisite to plan confirmation, the debtor and select parties receiving third-party releases through the plan would be obligated to provide an insurance policy or other means[216] to supplement their contribution to the trust if the trustee reduces the original Payment Percentage by 50% or more within the first 5 years of the trust's creation.[217] A drop of this size within such a short period of time indicates a corrupt trust foundation. An insurance policy in this context is likely the second-best solution in comparison to the

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has established a trust ill-suited to fulfill this promise, the company breaks this promise to claimants.

215 *See, e.g.*, Johns-Manville Trust Agreement, *supra* note 26; Kaiser Aluminum Trust Agreement, *supra* note 26. As of February 5, 2025, the Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust has set its interim payment percentage at 10.6% for all claims. This adjustment was implemented following a formal proposal by the Trustees to reduce the payment percentage from the previous rate of 15.5%. *See* MESOTHELIOMA L. CTR., https://www.mesotheliomalawyercenter.org/ [https://perma.cc/7PU6-GH7X]. It's important to note that this 10.6% rate is provisional and will remain in effect until the Trust Advisory Committee (TAC) and the Futures Claimants' Representative (FCR) reach a consensus on a permanent payment percentage. In accordance with Section 4.3 of the Trust Distribution Procedures (TDP), during this interim period, claimants will receive the lower of the current or proposed payment percentage. *See* KAISER ASBESTOS TR., https://kaiserasbestostrust.com [https://perma.cc/TF3U-SLJS].

216 For example, a non-debtor affiliate of the corporate debtor could provide a guarantee to backstop the obligation.

217 Naturally, a trustee may be pressured by various corporate actors to avoid dropping the Payment Percentage by 50% or more during this 5-year window. Our proposal is premised on the trustee abiding by her duties and obligations outlined in the trust agreement.

pay-as-you-go feature. A requirement that the corporate defendant must purchase an insurance policy that supplements its contribution if the trust becomes distressed is intriguing. First, although such a requirement requires ongoing investment by the debtor (mainly a premium paid to the insurance company), it still allows the debtor to avoid the risk of making future payments to the trust. Second, this type of insurance policy is not likely to produce moral hazard as the debtor is not going to change their behavior to the detriment of the insurer, which is generally a problem with insurance contracts. Third, unlike the Takata Trust structure, it does not require the debtor to invest in costly monitoring of the Trustee. Remember, in the Takata Trust, the P-OEMS were incentivized to verify that the trustee was assessing claims diligently. In the insurance structure, this cost is born by the insurer who is likely to demand that the trust structure minimizes this risk, and the trustee properly assesses claims to avoid decreasing the Payment Percentage. Fourth, with the insurance structure, there is another sophisticated party that will help estimate the funds the trust should initially receive. Given that the insurer will be responsible for an underfunded trust, the insurer is going to likely be part of the settlement formulation process. This is an important feature because, as we assert above, the probability of successful outcomes increases as more sophisticated parties analyze and contribute their expertise to trust design.

The possibility of securing such an insurance policy is a legitimate concern, as is the risk that the premiums associated with such a policy would be staggering. These fears underscore the efficacy of merely putting these funds into the trust and accepting the failure risk. We urge parties to resist this temptation. The insurance policy we envision would be triggered by a contingent, conceivably unlikely event. The insurer is not accepting the risk of making claimants whole; rather, the insurer is merely agreeing to provide a set amount of funds that will bridge the gap between the level to which the trustee wishes to reduce the Payment Percentage and the protected threshold. We suspect there is a market for such a policy, and the protections afforded by such a policy offset the costs.

Ultimately, this proposal strikes the right balance. One of the key reasons mass-tort settlements come about in bankruptcy is that the promise of finality heightens the allure of resolution. We do not intend to undermine that. But a trust that is forced to abandon its purpose within 5 years of creation and begin paying claimants a fraction of what a similarly situated claimant received just a few months earlier was invariably

defective at initiation. Our proposal forces the debtor and key parties to provide a backstop to address this potential risk and implicitly consider ways to minimize failure if such a backstop proves impossible to secure.[218]

Conclusion

In many retellings of the story of Dr. Faustus and Mephistopheles, divine figures ultimately destroy the contract binding Faustus, and he is allowed to retain his soul upon death.[219] But the notion of an unexpected intervention defusing the consequences of mass-tort's diabolical contract is naive. Mass-tort cases present hundreds of thousands of victims and billions of dollars of harm. The long-term consequences in this ecosystem metastasize over time and cannot be remedied easily. In fact, we fear that the consequences of mass tort's Faustian Bargain are more dire than anticipated, which may become evident in the next wave of mass-tort cases.

This Article analyzes eleven trusts created over the last four decades to explain the entrenched provisions that plague the recovery process and how these provisions externalize harm onto future claimants—the one party ill-equipped to protect themselves. We hope to initiate a meaningful dialogue on this overlooked issue and persuade key parties to consider ways to increase the probability of fulfilling the stated goal of comparable distributions for all similarly situated claimants.

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218 One criticism of this proposal is that it could potentially pull funds out of the trust and divert them to covering the premiums for insurance policies. We acknowledge this possibility but see it as a necessary evil to improve the probability of mass-tort trusts fulfilling their stated objective of comparable payments across the claimant class.

219 *See* Ed Simon, Devil's Contract: The History of the Faustian Bargain 54–55 (2024).