ETHICAL ISSUES IN ASBESTOS LITIGATION

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I. INTRODUCTION

Asbestos litigation continues apace. Through 2004, approximately 845,000 claimants have filed asbestos-related claims.[1] In 2003, approximately 101,000 new claimants surfaced—the most ever in a single year.[2] Since each claimant files claims against approximately sixty to seventy different defendants and bankruptcy trusts,[3] this translates into approximately six to seven million new claims which will have been generated by these claimants. However in 2004, there was a substantial decline in nonmalignant claims filings which appears to herald a substantial, continuing and nonsecular trend.[4] Even at

1. *See* STEVEN CARROLL, RAND INST. FOR CIVIL JUSTICE, THE DIMENSIONS OF ASBESTOS LITIGATION 3 (May 2004) (unpublished, on file with author) [hereinafter RAND, DIMENSIONS OF ASBESTOS LITIGATION] (stating that there were over 730,000 claimants through 2002). Adding 101,200 new claimants from 2003, *see infra* note 2, and 14,600 new Manville Trust claimants in 2004, *see* Letter from Manville Personal Injury Settlement Trust to Judges Jack B. Weinstein and Burton R. Lifland (Feb. 28, 2005), *available at* http://www.mantrust.org/filings/q4_04/4thqtr04.pdf, yields a total number of approximately 845,000 claimants through 2004.

2. In 2003, approximately 101,200 new claimants filed with the Manville Trust. *See* Letter from the Manville Personal Injury Settlement Trust to Hon. Jack B. Weinstein and Hon. Burton R. Lifland (Feb. 27, 2004) (accompanying financial statements and report), *available at* http://www.mantrust.org/filings/q4_03/4thqtr03.pdf. This represented a 64% increase over the approximately 56,000 claims filed in 2002. *Id.* Virtually all asbestos claimants file claims with the Manville Trust. *See* Declaration of David T. Austern at ¶¶ 10-13, *In re* Johns-Manville Corp., No. 82B11656 (Bankr. S.D.N.Y May 2, 2004) (indicating that the Manville Trust has compared its data base with the data bases kept by other leading defendants and bankruptcy trusts and found a "nearly complete" "degree of overlap"). Accordingly, I am using the Manville Trust number 101,200, as the total of new asbestos claimants in 2003.

3. STEPHEN CARROLL et al., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 41 (2002) [hereinafter RAND REPORT].

4. New Manville Trust filings declined to 14,600 in 2004; of these, approximately 3600 alleged malignancies. Thus the ratio of nonmalignant claims presented to the Manville Trust declined from 9:1 in 2003 to 3:1 in 2004. *See* Letter from Manville Personal Injury Settlement Trust to Judges Jack B. Weinstein and Burton R. Lifland (Feb. 28, 2005), *available at* http://www.mantrust.org/filings/q4_04/4thqtr04.pdf; Letter from Manville Personal Injury Settlement Trust to Judges Jack B. Weinstein and Burton R. Lifland (Oct. 29, 2004), *available at*

significantly reduced levels, however, thousands of new claimants can be expected to file annually. Moreover, some have estimated that future claimants will range in number from 1.6 to 2.1 billion.[5] In addition, while defendants have so far paid out over $70 billion,[6] leading estimates are that former asbestos-containing product manufacturers, distributors and installers, as well as owners of premises containing asbestos and their insurers, will have to pay out an additional $160 billion before the litigation is concluded.[7]

It may be thought that, because of the nature of the processes of acquiring, pressing and settling so massive and complex a series of claims, the legal literature spawned by the biggest litigation in history would be amply populated by discussion of such ethical issues as solicitation, reasonable fee requirements and conflicts of interest. Surprisingly, however, there is a notable paucity of such discussion.[8] As a first step in rectifying this failure of scholarship, I identify and analyze selected ethical issues that are commonplace in asbestos litigation. In doing so, I do not put this article forth as a complete treatment of the subject but rather offer it as a work-in-progress, and invite other scholars to similarly address these heretofore largely ignored issues. To put ethical issues generated by asbestos litigation practices into a context, I begin with a brief primer on asbestos litigation, in particular, on attorney-sponsored asbestos screenings.

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http://www.mantrust.org/filings/q3_2004/3rdqtr04.pdf. Other trusts experienced declines in the range of 25-35%. *See, e.g.*, Celotex Asbestos Settlement Trust Interim Claims Report, Feb. 1, 2005 (indicating a 25% decrease in new claims filing in 2004 compared to 2003). The ratio of nonmalignant to malignant claims dropped from 9:1 to 6.5:1. *Id.*

5. Letter from David Austern, President, Claims Resolution Management Corporation, Manville Personal Injury Settlement Trust, to Hon. Patrick J. Leahy, United States Senate Committee on the Judiciary at 2 (July 8, 2003) (on file with the author); *see* RAND REPORT, *supra* note 3, at 77 (stating that future projections of total claimants range from one to three million); *see also* RAND, DIMENSIONS OF ASBESTOS LITIGATION, *supra* note 1, at 20.

6. RAND, DIMENSIONS OF ASBESTOS LITIGATION, *supra* note 1, at 11 ("We estimate total outlays of $70 billion through 2002.").

7. Estimates of the total cost of asbestos litigation range from $200 to $265 billion. RAND, DIMENSIONS OF ASBESTOS LITIGATION, *supra* note 1, at 20. Subtracting from that the $70 billion estimate of the amounts already paid by defendants and their insurers, leaves an estimated future payout of between $130 and $195 billion. A bill that has been introduced before the United States Senate Judiciary Committee would commit approximately $140 billion dollars in payment of asbestos claims. *See infra* note 9.

8. For a discussion of asbestos-related scholarship and a critique of that literature for failing to acknowledge the role of specious evidence in that litigation, see Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 166-168 (2004) [hereinafter Brickman, *Theories of Asbestos Litigation*], *available at* http://www.ssrn.com/abstract=490682.

II. A BRIEF PRIMER ON ASBESTOS LITIGATION AND ATTORNEY-SPONSORED SCREENINGS

Approximately 10% of asbestos claims involve malignancies.[9] The substantial majority of the remaining 90% allege mild asbestosis and, to a lesser extent, a condition known as pleural plaques.[10] Most of these claimants have no lung impairment but are characterized as having an asbestos-related injury or illness or the basis of x-ray readings by certified specialists.

Substantially all nonmalignant claimants are recruited by screening companies—entrepreneurial entities begun by individuals with no health care background that are hired by plaintiff lawyers to solicit potential "litigants."[11] These enterprises arrange and publicize screenings aimed at former industrial and construction workers with pre-1972 occupational exposure to asbestos-containing products. At these screenings, x-rays are administered in an assembly line basis often using mobile x-ray equipment housed in truck trailers brought to union halls, hotel and motel sites and shopping center parking lots; in addition, pulmonary function tests are administered.[12] There are no material health benefits associated with these screenings.[13] Rather, the sole purpose of asbestos screenings is to recruit "litigants" and generate supporting medical documentation.

On the basis of my research, I have concluded that nonmalignant asbestos litigation today mostly consists of:

(1) a massive client recruitment effort accounting for 90% of all claims currently being generated and resulting in the screening of over 750,000 and perhaps as many as 1,000,000 "litigants" in the past fifteen years;

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9. *See* S. REP. NO. 108-118, at 18 (2003) (citing *Hearing on Asbestos Litigation, Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (statement of David Austern)); RAND, DIMENSIONS OF ASBESTOS LITIGATION, *supra* note 1, at 12 (noting that malignancies count for 13% of claims).

10. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 44-54, 60-62.

11. "Litigants" is a term used by screening enterprises to refer to those screened. *Id.* at 80 n.128. The word "patient" is not applied to screened recruits; in fact, both the screening enterprises and the doctors hired by plaintiff lawyers to render diagnoses emphatically deny the existence of a doctor-patient relationship. *Id.* at 85 n.161.

12. *Id.* at 65. Fixed site x-ray facilities are also used.

13. *Id.* at 63-65. In fact, there may be detriment. *See id.* at 65 n.96; *see also* David Egilman & Susan Rankin Bohme, *Attorney-Directed Screenings Can Be Hazardous*, 45 AM. J. INDUS. MED. 305, 305 (2004); Statement of Ass'n of Occupational and Envtl. Clinics, *Asbestos Screening* (Apr. 2000), *at* http://www.aoec.org/content/principles_1_3.htm (last visited May 18, 2005).

(2) generating claims of injury though most of these "litigants" have no medically cognizable asbestos-related injury and cannot demonstrate any statistically significant increased likelihood of contracting an asbestos-related disease in the future;

(3) the claims of injury are often supported by specious medical evidence, including: (a) evidence generated by the entrepreneurial screening enterprises and B-readers—specially certified x-ray readers that the plaintiff lawyers select because they produce "diagnoses" which are not a product of good faith medical judgment but rather a function of the millions of dollars a year in income that they receive for these services, and (b) pulmonary function tests which are often administered in knowing violation of standards established by the American Thoracic Society and which maladministration often results in findings of impairment which would not be found but for the improper administration of these tests;

(4) the claims of injury are further supported by "litigants'" testimony which frequently follows scripts prepared by their lawyers which are replete with misstatements with regard to: (a) identification and relative quantities of asbestos-containing products that they came in contact with at work sites (in order to shift the focus of testimony from certain manufacturers which have declared bankruptcy to others which are solvent), (b) the information printed on the containers in which the products were sold, and (c) their own physical impairments;[14]

(5) being asserted in a civil justice system that accommodates the interests of these "litigants" and their lawyers by dispensing with certain evidentiary requirements and proof of proximate cause, under a legal regime which I have termed "special asbestos law."[15]

It is thus beyond cavil that the quantum of specious claiming in asbestos litigation constitutes a massive civil justice system failure.

I have previously noted the near complete absence of discussion in the scholarly literature of the high incidence of specious claiming in asbestos litigation and have advanced some theories to explain this glaring omission.[16] It is also notable that there is a dearth of scholarly discussion of ethical issues that are prevalent in asbestos litigation despite compelling evidence that such issues abound.

Ethically mandated candor requires an acknowledgement at the outset that an effort to identify ethical issues in asbestos litigation may

14. These conclusions are documented in Brickman, *Theories of Asbestos Litigation*, *supra* note 8.

15. *Id.* at 54-59.

16. *Id.* at 43-44, 166-70.

be largely academic. If the Model Rules of Professional Conduct[17] were to be amended to include the provision: "*These Rules shall not apply to asbestos litigation,"* it is doubtful whether there would be a substantial change in current litigation practices or enforcement efforts by disciplinary agencies. Even egregious violations of rules of ethics usually generate disinterest from bar disciplinary counsel and state supreme courts when the subject is asbestos litigation.[18]

Despite the virtual absence of enforcement of ethical rules in this arena, it would be an overstatement to assert that ethical rules are simply inapplicable to asbestos litigation.[19] Nonetheless, ethical rules and

17. MODEL RULES OF PROF'L CONDUCT (2003) [hereinafter MODEL RULES].

18. *See, e.g.*, Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 72 n.109, 117-19 n.289 (listing such examples of clear ethical violations as charging screening expenses of those who test negative against the recoveries of those who test positive, thus charging an "unreasonable amount for expenses," in violation of Model Rule 1.5(a); and a patently unethical payment arrangement between a screening enterprise principal and an attorney).

19. A more exhaustive empirical examination than I have undertaken would be required before such a position could be advanced. Moreover, the Third Circuit Court of Appeals' disqualification of Senior District Court Judge Alfred M. Wolin from presiding over a number of asbestos bankruptcies on the grounds that a conflict of interest gave rise to an appearance of impropriety is at least suggestive of the continuing relevance of conflicts of interest principles. The facts relating to Judge Wolin's extraordinary recusal begin with his appointment on November 27, 2001, by then-Chief Judge Becker of the Third Circuit Court of Appeals to preside over five asbestos-related chapter 11 cases, which were then pending in the District of Delaware, termed the "Five Asbestos Cases" by the court, which were transferred to him from bankruptcy court. *In re* Kensington Int'l Ltd., 353 F.3d 211, 214-15 (3d Cir. 2003). Chief Judge Becker explained that the single-judge consolidation would facilitate the development and implementation of a "coordinated plan for management" of these cases that "carr[ied] with them tens of thousands of asbestos claims." *Id.* at 215. The five bankruptcies that Judge Wolin was appointed to coordinate involved the following corporate entities: Owens Corning, W.R. Grace & Co., USG Corporation, Armstrong World Industries, Inc., and Federal-Mogul Global, Inc. *Id.* at 214. "On December 28, 2001, Judge Wolin [as a self-proclaimed asbestos 'neophyte,' *In re* Kensington Int'l Ltd., 368 F.3d 289, 303 (3d Cir. 2004)] named five 'Court Appointed Consultants' to assist him in the Five Asbestos Cases. The five individuals he named were David Gross, Judson Hamlin, William Dreier, John Keefe, and Francis McGovern, all of whom had prior experience with asbestos or mass tort litigation." *Kensington*, 353 F.3d at 215. Judge Wolin also announced with this order that he would conduct *ex parte* meetings with his advisors and the attorneys. *Id.*

Two of the court-appointed advisors, David Gross and Judson Hamlin, were also counsel for future asbestos claimants in the G-1 Holdings bankruptcy. *Id.* at 216. (For a discussion of the Future Representative see *infra* Part VI.D.) While the G-1 Holdings case was unrelated to the Five Asbestos Cases and Judge Wolin had no role in the G-1 Holdings proceedings, "[t]he G-1 Holdings bankruptcy [also] faced a wave of asbestos lawsuits." *Id.* (citing Official Comm. of Asbestos Claimants of G-I Holdings, Inc. v. Heyman, 277 B.R. 20, 24-28 (S.D.N.Y. 2002)). The Third Circuit also noted that many of G-1 Holdings' "significant creditors, as well as asbestos-claimant creditors," also had claims against the debtors in the Five Asbestos Cases. *Id.* at 215-16.

Subsequently, Kensington International Limited ("Kensington") and Springfield Associates, LLC ("Springfield"), creditors of Owens Corning, and three creditors of W.R. Grace & Co., filed motions for Judge Wolin's recusal on the grounds that Gross and Hamlin had conflicts of interest. *Id.* at 216. Kensington and Springfield and the other creditors then filed emergency

asbestos litigation appear to exist on separate planets. Despite the risk of irrelevance, I will focus on four areas of asbestos practice which raise ethical concerns: fee-setting in light of "reasonable fee" limitations; client recruitment techniques raising "solicitation" issues; witness preparation practices; and conflicts of interest. The first three issues focus on plaintiff lawyer practices; the fourth, conflicts of interest, focuses on both plaintiff and defense counsel. Separate consideration is accorded to conflicts of interest that occur in the course of asbestos bankruptcy proceedings.

Petitions for Writs of Mandamus with the Third Circuit when Judge Wolin "withdrew the recusal motions from the Bankruptcy Court and stayed the corresponding discovery." *Kensington*, 368 F.3d at 293. The Petitions alleged that Judge Wolin, through his association with Gross and Hamlin, and through his *ex parte* communications with his advisors and the attorneys, "created a perception that his impartiality 'might reasonably be questioned' under 28 U.S.C. § 455(a)." *Id.* The Third Circuit responded by refusing to rule on the merits of the Mandamus Petitions, but vacating Judge Wolin's order staying discovery and directing that he issue an expedited ruling on the recusal motions before him which he had refused to do. *Kensington*, 353 F.3d at 223.

On February 2, 2004, Judge Wolin denied the recusal motion in a 102-page opinion. *In re* Owens Corning, 305 B.R. 175 (D. Del. 2004). The Third Circuit had retained jurisdiction in the matter, *see Kensington*, 353 F.3d at 214, and following Judge Wolin's refusal to recuse himself, the Petitioners appealed to the Third Circuit again. Appellant's Brief, *In re* Kensington Int'l Ltd., Nos. 03-4212, 03-4526, 2004 WL 419442 (3d Cir. Feb. 23, 2004). In this second appeal, Petitioners argued that Gross and Hamlin were in a position to urge Judge Wolin to make rulings that they could then cite to the judge in the G-1 Holdings bankruptcy, to their profit. Indeed, they noted that Gross and Hamlin had "cited Judge Wolin's decisions as precedents in regard to disputed issues in G-1 [Holdings]." *Id.* at 12 (citing Joint Appendix 2728—"May 6, 2003, letter from Gross to District Judge Bassler urging him to withdraw the reference of estimation issues to Bankruptcy Judge Gambardella, and relying on Judge Wolin's order of April 25, 2003 in [the Owens Corning bankruptcy]").

The Third Circuit then decided to recuse Judge Wolin. *Kensington*, 368 F.3d at 318. The Court concluded that Gross and Hamlin had conflicts of interest because of their obligation to "act as zealous advocates for the future asbestos claimants in the G-1 Holdings bankruptcy," while they were obligated to remain neutral in their advisement to Judge Wolin. *Id.* at 303-04. The Court further held that "a reasonable person, knowing all of the relevant circumstances, would conclude that Judge Wolin's impartiality might reasonably be questioned in the Owens Corning, W.R. Grace & Co. and USG Corp. bankruptcies." *Id.* at 294. With regard to the *ex parte* communications, the Court stated that it "look[ed] with disfavor upon both the extent to which, and the manner in which, Judge Wolin engaged in *ex parte* communications," but did not include that as a reason for disqualification. *Id.*

The recusal of Judge Wolin for an appearance of impropriety based on the conflicts of interest of two of his advisors is itself recognition of the applicability of ethical rules to asbestos-related bankruptcy proceedings. To be sure, bankruptcy law has a specific provision with regard to conflicts of interest. *See* 11 U.S.C. § 327(a) (2005) ("the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title").

III. "REASONABLE FEES . . . AND EXPENSES"

Ethical rules mandate that lawyers "shall not make an agreement for, charge, or collect an unreasonable fee."[20] In many if not most asbestos representations where the client is recruited through an attorney-sponsored screening and then sold to a law firm higher up on the food chain, contingency fees paid by the client often are 40%. Many of these claims have involved little and even insubstantial risk. This is especially the case where there were agreements to settle all of a law firm's inventory of cases as well as future claims to be brought by that firm on behalf of litigants to be recruited, according to an agreed on matrix of claim values.[21] Accordingly, charging standard contingency fees of 40% or even 33 1/3%, would appear to constitute charging an "unreasonable fee." Nonetheless, I am unaware of any invocations of Rule 1.5 in asbestos litigation with regard to fees.[22]

Lawyers are also precluded from "charg[ing], or collect[ing] . . . an unreasonable amount for expenses."[23] Litigation expenses in asbestos litigation amount to tens of millions of dollars annually, and consist largely of payments to screening enterprises for recruiting litigants, payments to B-readers and other medical professionals, and expenses incurred in the course of actual litigation including expert witnesses, deposition transcription costs, filing fees, etc.[24]

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20. MODEL RULES, *supra* note 17, at R. 1.5(a).

21. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 63, 64 & n.91 (2004).

22. The failure to apply ethical rules limiting fees to "reasonable amounts" in contingency fee-financed litigation is not confined to asbestos litigation; rather it is a systemic failure, though often more egregious in the case of asbestos litigation. *See generally* Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339 (1996). For an analysis of the competitiveness of the market for contingency-fee financing of tort litigation, see generally Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65 (2003).

23. MODEL RULES, *supra* note 17, at R. 1.5(a).

24. Litigation expenses incurred by plaintiff attorneys and charged to plaintiffs were 5% of the total compensation paid by defendants and their insurers. JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, COSTS OF ASBESTOS LITIGATION 36 (1983). In cases that proceed to trial, these expenses range from 6-9% of total plaintiff compensation, and can at times be as high as 12%. *Id*. at 36. This calculation, however, was published in 1983, prior to the advent of attorney-sponsored screenings, *id.* at 20, which began in earnest in approximately the mid 1980s. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 63 n.87. Since virtually all nonmalignant claims are generated by these screenings, *see* SENATE REPORT, *supra* note 9, at 18 (citing *Hearing on Asbestos Litigation, Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (statement of David Austern)); *id.* at 84 (citing Letter from Steven Kazan to the Honorable Jack B. Weinstein which states that "90% of the [Manville] Trust's last 200,000 claims have come from attorney-sponsored x-ray screening programs"); and involve tens of million of dollars a year paid to screening enterprises, B-readers and other medical professionals, these substantial litigation expenses may not

In a typical nonmalignant claim, plaintiff lawyers will name sixty to seventy different defendants. As settlements are reached, lawyers send checks to claimants with a cursory listing of expenses that have been deducted, including the lawyer's fee.[25]

According to RAND, plaintiff contingency fees are approximately 34% of recoveries and litigation expenses are about 7% bringing the total of fees and expenses to approximately 41% of recoveries.[26] My own unscientific sporadic observations indicate that unless restricted by court rule,[27] a substantial number of fees in asbestos litigation are 40%

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be reflected in the 5% calculated by RAND. No updated data on the percentage of plaintiff recoveries that plaintiff attorneys deduct for litigation expenses is available.

25. In most tort settlements, settlement checks are made out to both lawyer and client. Typically, the lawyer has the client endorse the two-party check, deposits it to his client security account and then issues a check to the client for the client's share after deducting the contingency fee and litigation expenses advanced by the lawyer. I have not been able to ascertain whether this model prevails in asbestos litigation. Based on an assortment of anecdotal data, there is some indication that the client learns of the settlement when he or she receives a check in the mail from the attorney. It may be that in such cases, clients have signed retainer agreements authorizing their attorneys to endorse settlement checks on their behalf and deposit the checks into the firm's trust account without the need to have the client separately endorse the settlement check before its deposit. Another alternative is that there has been an aggregate settlement or the settling defendant has sent the firm a single check combining the settlement amounts due to multiple clients. In both cases, the check would be made out to the attorney and would not be a two-party check.

26. Email from Stephen J. Carroll, Senior Economist, RAND, to Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law (Aug. 10, 2004 16:53 EST) (on file with author); Notes of conversation with Stephen J. Carroll (April 18, 2005) (on file with author). RAND data expresses plaintiffs' lawyers' fees and expenses as a percentage of total expenditures. Plaintiff legal fees and expenses accounted for 24%-30% of total expenditures per claim between January 1, 1980 and August 26, 1982. *See* JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii (1984) [hereinafter RAND, VARIATION IN ASBESTOS LITIGATION]. To convert this data to a percentage of plaintiffs' gross recoveries, the following formula is used: plaintiff lawyers' fees and expenses expressed as a percentage of total expenses, divided by gross plaintiff compensation expressed as a percentage of total expenses, multiplied by 100. Based upon this formula and the above data collected by RAND in the 1980s, it can be determined that plaintiffs' lawyers' fees and expenses were 39%-44.8% of gross recoveries. *See id.* at xvii-xviii.

27. Some court rules restrict lawyers' fees in personal injury lawsuits. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, §§ 603.7(e)(2), 691.20(e)(2), 806.13(b), 1022.31(b) (2005). New Jersey has a court rule that, if enforced, would significantly limit fees in many asbestos cases brought in New Jersey. See N.J. CIV. PRAC. R. 1:21-7(i), which provides, in pertinent part:

> When representation is undertaken on behalf of several persons whose respective claims, whether or not joined in one action, arise out of the same transaction or set of facts or involve substantially identical liability issues, the contingent fee shall be calculated on the basis of the aggregate sum of all recoveries . . . and shall be charged to the clients in proportion to the recovery of each.

Vast savings to clients would result if, as the New Jersey Rule provides, contingent fees were applied on the aggregate amount in mass asbestos settlements. For example, if an attorney for 100 plaintiffs reached a settlement with five defendants that provided for an aggregate payment of $24 million (or $240,000 for each plaintiff), and the facts alleged would fall under the ambit of Rule

of recoveries[28] and that expenses charged to clients often total another 10%, so there is often, at best, an even split of the recovery between lawyer and client.[29]

The expenses advanced by the lawyer which are deducted from the recovery are typically broken down into broad categories which are listed on the statement that accompanies a check sent to the client representing the client's share of a settlement.[30] These expense totals are

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1:21-7(i), but the rule is ignored, then under New Jersey Civil Practice Rule 1:21-7(c), which limits contingent fees to 33 1/3% on the first $250,000, 25% of the next $250,000, and 20% on the excess of $250,000, the contingent fee on the aggregate amount would be $8 million. However, if the fees are calculated pursuant to Rule 1:21-7(i), which would take into account the aggregate nature of the mass settlement, the total fee would be $4,845,833—which would be 39% less. On the basis of conversations with New Jersey practitioners, Rule 1:27-7(i) appears to be routinely ignored by New Jersey plaintiffs' attorneys and is unenforced by New Jersey courts in asbestos cases.

28. RAND obtained the information on plaintiff lawyer fees from confidential communications with several plaintiff law firms. *See* notes of conversation with Stephen Carroll, Senior Economist, RAND (Apr. 18, 2005) (on file with author). Judge Jack Weinstein estimated in 1991 that plaintiff lawyer fees ranged from 33-45%. Findley v. Blinken (*In re* Joint Eastern & Southern Dists. Asbestos Litig.), 129 B.R. 710, 867 (E. & S.D.N.Y. 1991). At that time, I estimated that the fees ranged from 25-50%. *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1834 n.60 (1992). The reorganized Manville Trust that Judge Weinstein approved capped fees at 25%. I estimated that this generated effective hourly rates of $1,500-$2,750. Nonetheless, there is reason to believe that the data from the law firms that allowed RAND access to fee information may not have been representative of fees being charged in the litigation. Baron & Budd, one of the leading asbestos law firms, which including its affiliates have represented 40,000-50,000 claimants, charges a standard contingency fee of 40% and presumably was not one of the firms that provided RAND with access to its fees. "Asbestos Litigation," a one page advertisement prepared by the law firm of Fitzgerald & Associates, undated circa 2000, stated: "Many firms take a fee of 40% from the total amount of the recovery. The client's 60% is then first used to reimburse the law firm for out of pocket expenses. The net result, in many cases, is that the check to the law firm is larger than the check to the client." Exhibit 39, Deposition of Charles Lewis, *In re* Asbestos Cases (ACR XXIII Asbestos Cases), No. 89-2-18455-9-SEA (Wash. Super. Ct. Sept. 12, 2002).

29. *See, e.g.*, Settlement Statement to (redacted) issued by Baron & Budd, undated, circa 1997 (on file with author). The statement indicates receipt of $4,000 from Combustion Engineering and deductions of 40% (contingency fee) and 22% for expenses ($886.85) totaling $2,486.85, amounting to 62% of the settlement, as follows:

Attorneys fee (40%):		$1,600.00
Partial Litigation Expenses		
Medical Exams & Reports:	$390.00	
Filing & Service Fees:	$150.00	
Travel:	$62.85	
Misc. Postage, Copies, etc.:	$99.88	
IRS & Social Security Reports:	$77.50	
Sub Total Expense:		$886.85
Balance Due Claimant:		$1513.15

Id.; *see also* Settlement Statement to (redacted) issued by Baron & Budd, Sept. 24, 1997 (on file with author). This statement indicates receipt of $2500 from Asten Group, Inc. and deductions of 40% (contingency fee) and 20% for expenses ($500.00), as follows:

substantial and are virtually never subjected to any verification process. Thus, the opportunity exists for lawyers to pad these expense totals in violation of Model Rule 1.5(a).[31] Absent an audit of such statements, it is not possible to say whether this practice is widespread.

IV. SOLICITATION

Most if not virtually all nonmalignant asbestos claims today are recruited through attorney-sponsored asbestos screenings.[32] In a typical screening, a lawyer is solicited by and hires a screening enterprise on a per diem basis to conduct a screening of persons who had been occupationally exposed to asbestos-containing materials prior to 1972. At the outset of a screening, either the screening enterprise or a representative of the law firm requires the person to be screened to sign a retainer agreement provided by the firm that is paying for the screening.[33] On its face, this form of solicitation violates Model Rule 7.2(b)[34] because it involves lawyers paying agents, i.e., screening enterprises, to recruit clients.[35] It has been suggested that because many

Attorneys Fee (40%):		$1,000.00
Partial Litigation Expenses		
Travel:	$350.00	
Misc. Postage, Copies, etc.:	$150.00	
Sub Total Expenses:		$500.00
Balance Due Claimant:		$1,000.00

Id.

30. There is a dearth of data with regard to actual practices. My description is based on a small number of instances where, in conversations, lawyers have commented on their settlement payment practices.

31. MODEL RULES, *supra* note 17, at R. 1.5(a). In one instance that I could document, a lawyer who contracted to screen thousands of "litigants," under an arrangement to refer claimants to one or more of the leading asbestos law firms, charged screening expenses for those "litigants" who tested negative for asbestos exposure in the x-ray screenings against the recoveries of those who tested positive. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 72 n.109; *cf.* Buckwalter v. Napoli, Kaiser & Bern LLP, No. 01 Civ. 10868, 2005 U.S. Dist. LEXIS 5231 at *1, *10 (S.D.N.Y. Mar. 29, 2005) (where one law firm in the "Fen-Phen" litigation accused another law firm of "deduct[ing] false costs and disbursements from their clients' final settlement amounts").

32. For a detailed account of these screenings, see Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 62-103.

33. If a "litigant" shows up for a screening who has previously signed up with a different law firm, he is informed that he is not eligible for the free screening and can either pay a fee, usually $50-$80, for the screening or else leave.

34. Lack of privity with the solicitor is not a defense. Model Rule 7.2(b) provides: "A lawyer shall not give anything of value to a person for recommending the lawyer's services. . . ." MODEL RULES, *supra* note 17, at R. 7.2(b).

35. In some instances, lawyers or their screening enterprise agents make indirect payments to the union locals for agreeing to sponsor the screening, in the form of hiring union officials' wives to work at the screenings, or by rental payments to the union local for agreeing to allow screenings at

of the screenings proceed through use of union locals as intermediaries, this raises associational issues that may privilege the conduct.[36] I disagree. The use of union locals in the screening process is simply a client acquisition means, not one that invokes associational rights, and therefore does not privilege this conduct.[37] Moreover, while the letters sent to the former workers urging them to sign up for screenings usually emanate from the union locals, the actual letters sent out by the union locals as well as the letters they write to the lawyers inviting them to conduct screenings, are in fact drafted by the lawyers. The entire process is a "turnkey" one with all of the work being done by the lawyer's agent, the screening enterprise, for a fee paid by the law firm.[38] If solicitation remains proscribed by the rules of ethics and that prohibition has not been eradicated by prevailing constitutional interpretation,[39] then asbestos lawyers hiring screening companies to solicit clients, and the law firms higher up on the litigation chain to which the claims are routinely referred, are engaged in solicitation in violation of Rule 7.2(b).[40]

V. WITNESS PREPARATION

The most significant part of witness preparation in asbestos litigation involves product identification. For each defendant named, and usually each claimant lists sixty to seventy defendants, a client or

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their offices; in some instances, payments are made to "litigants" in the form of door prizes or "giveaways" of TV sets, etc., to encourage attendance at screenings. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 72 n.109; *cf.* North Carolina State Bar Ethics Comm., Formal Op. 2004-2 (Apr. 23, 2004) (opining that it is improper solicitation for a lawyer who sends targeted direct mail to accident victims, to offer free promotional merchandise to recipients who call the lawyer's office)

There are also indications that some lawyers and screening enterprises split legal fees. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 117-19 n.289 (describing alleged illegal and unethical conduct and quoting a screening enterprise principal as stating that the payment arrangements he entered into with that attorney "were never what they actually look like on their face" and intimating that the reason was because the real arrangements were unethical if not illegal).

36. *See* Roger C. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 PEPP. L. REV. 175, 182 (2004).

37. For a discussion of associational rights, see Lester Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. REV. 595, 628-37 (1973).

38. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 72-74.

39. For a discussion of the constitutionally permissible scope of the prohibition of in-person solicitation, see STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 995-97 (6th ed. 2002).

40. Model Rule 8.4(a) prohibits acting through another to violate the Rules. *See* MODEL RULES, *supra* note 17, at R. 8.4(a).

witness on behalf of the client usually must demonstrate that the claimant was sufficiently exposed to that defendant's asbestos-containing product at a particular place during a specific time period that it was a substantial factor in causing the asbestos-related injury being alleged. Frequently, the places of exposure are sites where the claimant worked, e.g., construction sites, industrial plants, shipyards and on board ships, twenty, thirty or even forty or more years earlier.

To assist claimants to recall the asbestos-containing products they were exposed to twenty to forty years earlier, paralegals at law firms show claimants binders containing pictures of certain asbestos-containing products and ask them to identify the products with which they came in contact. There is evidence that one of the leading asbestos law firms went beyond mere memory enhancement and used the "picture book" and other techniques to "implant false memories" in clients; these witness preparation techniques were also used to steer clients away from identifying products of manufacturers such as Johns-Manville which had entered bankruptcy and were paying only a fraction of the value of claims.[41] While it is unethical for a lawyer to assist or induce a client or witness to testify falsely or to offer evidence that the lawyer knows to be false,[42] nonetheless, no criminal or disciplinary proceedings ensued.[43]

According to that law firm, its witness preparation techniques typify asbestos law as practiced and were neither unethical nor illegal.[44] Traditionally, legal ethicists have declared that the witness preparation techniques used, including the technique of telling the witness before he relates critical facts that certain facts that he might relate or the failure to relate certain facts would be highly injurious to his cause and then

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41. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 139-66.

42. Model Rule 1.2(d) states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULES, *supra* note 17, at R. 1.2(d).

However, "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." *Id.* at R. 1.2 cmt. 9.

Model Rule 3.4(b) states: "A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." *Id.* at R. 3.4(b). Model Rule 3.3(a)(3) provides that "[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. . . ." *Id.* at R.3.3(a)(3). Model Rule 1.0(f) states that while "knows" or "knowingly" refers to "actual knowledge," "knowledge may be inferred from circumstances." *Id.* at R. 1.0(f).

43. Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 163-66.

44. *Id.* at 148.

asking the witness to relate the facts,[45] sometimes referred to as the *Anatomy of a Murder* model of witness preparation,[46] clearly transgress the line dividing the ethical from the unethical. However, a number of scholars have opined that the witness preparation techniques in question are not unethical.[47]

In my view, the techniques described in the above cited material are unethical if not illegal[48] and violate Model Rules 3.3(a)(3) and 3.4(b). Moreover, there is evidence that the use of product picture books containing pictures of products that law firms want clients to identify as well as other witness preparation techniques described in the cited materials are in widespread use in asbestos claiming. This may explain how claimant and witness testimony with regard to products used at sites twenty to forty years earlier has shifted over time as former payors into the tort system enter bankruptcy and other solvent companies are drafted into the litigation. These periodic sea changes in testimony minimize the product share of companies in bankruptcy, enlarge the shares of solvent defendants and constantly expand the universe of defendants.[49]

The absence of any disciplinary enforcement of Model Rules 3.3(a)(3) and 3.4(b), even in the case of egregious violations,[50] would appear to indicate a further failure of the disciplinary process to apply ethical rules to asbestos litigation.

VI. CONFLICTS OF INTEREST IN ASBESTOS REPRESENTATION: THE PLAINTIFFS' SIDE

A. Sources of Law

No ethical issues raised by asbestos litigation loom larger than those generated by the rule that a lawyer may not represent conflicting interests—a principle which applies with equal force to asbestos-related

45. *See id.* at 146 n.420.

46. *See id.* at 146-48.

47. *Id.* at 145 n.417. One leading ethics scholar has stated that "[i]n the absence of ethics opinions, disciplinary decisions and cases involving judicial sanctions dealing with improper coaching as an ethics violation, patterns of 'aggressive' coaching are prevalent in many sectors of the litigation bar." Cramton, *supra* note 36, at 188.

48. I have expressed the view in an expert's affidavit that a witness preparation document used by the firm, referred to as the "script memo," suborned perjury. Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 430.

49. *Id.* at 137-41; *see also id.* at 108-10.

50. For an example of a lawyer brazenly instructing her client to change his testimony with regard to product identification, see *id.* at 143 n.409.

bankruptcy proceedings. There are at least three sources of conflicts of interest law[51] that apply to asbestos litigation: the Model Rules of Professional Conduct, United States Supreme Court pronouncements on Federal Rule of Civil Procedure 23, and the Bankruptcy Code.

1. Model Rules of Professional Conduct

The beginning point of any discussion of conflicts of interest is the Model Rules of Professional Conduct—in particular Rules 1.7 and 1.9. Rule 1.7 prohibits attorneys from representation in which there is a "concurrent conflict," that is, where "there is a significant risk that the representation [of a current client] will be directly adverse to another client" or "that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[52]

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51. Lawyers are subject to regulation under at least four legal regimes: criminal law; civil law, which includes liability for breach of contract and malpractice; fiduciary law, which establishes a standard of conduct and which can give rise to liability for breach of that standard; and disciplinary law, which is usually created by state supreme courts and which is mostly expressed in codes of ethics which the courts promulgate. The relationship between disciplinary law (rules of ethics) and fiduciary law is explored in Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 44 nn.65-66 (1989). The origin of fiduciary obligation is summarized in Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. ILL. L. REV. 1181, 1186-92 (2003). A more accurate count of the number of sources of applicable conflicts of interest law would include fiduciary law which, though largely replicated in disciplinary law, has independent and wider application to lawyers' conduct. For a discussion of conflicts of interest law from the broader perspective of fiduciary law see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 121-135 (2000) [hereinafter RESTATEMENT].

52. Model Rule 1.7 provides:

> Conflict of Interest: Current Clients
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

MODEL RULES, *supra* note 17, at R. 1.7.

Rule 1.9 prohibits attorneys from representing clients whose interests conflict with those of a former client.[53] The purpose of these rules is not only to ensure that attorneys will loyally and effectively represent their clients and that clients can trust their attorneys, but also to safeguard the adversarial representation on which our legal system is based.[54]

In some cases, attorneys may proceed to represent clients though there are concurrent conflicts, provided the attorney obtains the interested clients' informed, written consent to proceed with the conflicted representation.[55] "Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client."[56] A variety of sanctions and remedies may be imposed where an attorney fails to decline representation or obtain waiver of a conflict.[57]

Some conflicts are so paramount that public policy, as reflected in both fiduciary law and ethical rules, forbids the representation regardless of client consent.[58] In such cases, the tribunal's interest in vigorous advocacy for both sides outweighs the clients' and lawyer's interests in waiving the conflict and proceeding with the representation.[59]

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53. Model Rule 1.9 provides:

> Duties to Former Clients
>
> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Id. at R. 1.9.

In addition to Rules 1.7 and 1.9, Rule 1.8, which prohibits aggregate settlements unless there is informed client consent, is also relevant.

54. RESTATEMENT, *supra* note 51, at § 121 cmt. b. Other policy considerations underlying conflict of interest law are the desire for lawyers to protect clients' confidential information and the goal of ensuring that lawyers will not "exploit" clients, as by creating pressure for the client to give the lawyer gifts in order to buy the lawyer's loyalty. *Id.*

55. MODEL RULES, *supra* note 17, at R. 1.7; *see also* RESTATEMENT, *supra* note 51, at § 121 cmt. e.

56. RESTATEMENT, *supra* note 541, at § 122. The Model Rules of Professional conduct define "[i]nformed consent" as "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES, *supra* note 17, at R. 1.0(e).

57. RESTATEMENT, *supra* note 541, at § 122 cmt. f. Sanctions include "professional discipline," disqualification or injunction from participating in the matter, and in some cases, forfeiture of legal fees. *Id.* Injured clients can pursue legal malpractice claims. *Id.* If the unwaived conflict prejudicially affects the outcome of litigation, the disposition may be reversed or set aside. *Id.* Some conflicts may even subject the lawyer to criminal sanctions. *Id.*

58. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING 11-59 (3d ed. 2004 Supp.).

59. *Id.*

Unwaivable conflicts exist where 1) the law prohibits the representation (as in joint representation of multiple defendants in a criminal trial), 2) the attorney's clients assert claims against one other (including cross-claims) in the same litigation,[60] and 3) where "it is not reasonably likely that the lawyer will be able to provide adequate representation to the affected clients . . . ."[61] An objective standard applies in determining whether an attorney is able to provide adequate representation despite the conflict of interest.[62] The analysis "includes the requirements both that the consented-to conflict not adversely affect the lawyer's relationship with either client and that it not adversely affect the representation of either client."[63] Thus, even where a client purportedly waives his or her right to conflict-free counsel, the conflict may so impair the lawyer's ability to provide "competent and diligent representation"[64] that the law prohibits the representation.

2. Federal Rule 23[65] Asbestos-Related Jurisprudence

The United States Supreme Court has weighed in on the issue of conflicts of interest in class action asbestos litigation, holding that failure to avoid conflicts of interest mandated rejection of proposed mega–asbestos class action settlements.

In one such action, *Amchem Products, Inc. v. Windsor*, the Supreme Court affirmed the Third Circuit's reversal of the trial court's certification of a settlement-only class intended to achieve "global settlement of current and future asbestos-related claims."[66] Counsel for defendants, the twenty former asbestos manufacturers that comprised the

60. MODEL RULES, *supra* note 17, at R. 1.7(b)(3).

61. HAZARD & HODES, *supra* note 58, at 11-59–11-60; RESTATEMENT, *supra* note 51, at § 122 cmt. b. Rule 1.7(b)(1) requires that in order for the concurrent conflict to be waivable, "the lawyer [must] reasonably believe . . . that [he or she] . . . will be able to provide competent and diligent representation to each affected client." MODEL RULES, *supra* note 17, at R. 1.7(b)(1). In addition, effective waiver is not possible where a client cannot give informed consent because s/he "lacks capacity to consent" or possesses "inadequate understanding of the nature and severity of the lawyer's conflict." *Id.*; *see* RESTATEMENT, *supra* note 51, at § 122 cmt. b. "Decisions holding that a conflict is nonconsentable often involve facts suggesting that the client, who is often unsophisticated in retaining lawyers, was not adequately informed or was incapable of adequately appreciating the risks of the conflict . . . ." RESTATEMENT, *supra* note 51, at § 122 cmt. g(iv).

62. *See* HAZARD & HODES, *supra* note 58, at 11-60; RESTATEMENT, *supra* note 54, at § 122 cmt. g(iv) (stating that an attorney may not represent a client where "joint representation would be objectively inadequate despite a client's voluntary and informed consent").

63. RESTATEMENT, *supra* note 541, at § 122 cmt. g(iv).

64. MODEL RULES, *supra* note 17, at R. 1.7(b)(1).

65. FED. R. CIV. P. 23 (2005).

66. Georgine v. Amchem Products, Inc., 878 F.Supp. 716 (E.D. Pa. 1994), *vacated by* 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 597 (1997).

Center for Claims Resolution (the "CCR"), and counsel for thousands of inventory plaintiffs (those with then-pending claims), had agreed on enormous settlements for all inventory claimants, contingent on court approval of a separate class action settlement binding all future claimants.[67] The proposed global settlement provided that unimpaired or "exposure-only" claims would not have any value,[68] though unimpaired inventory claimants were generously compensated.[69] In formulating the global settlement, which established an administrative procedure and payment schedule for claims handling, plaintiffs' counsel purported to act on behalf of a class of anticipated future claimants with whom counsel had no attorney-client relationship.[70]

The Court rejected the certification of the class because it failed to meet the structural requirements of Federal Rule of Civil Procedure 23.[71] The Court found, *inter alia*,[72] that the class lacked adequate representation, a requirement that "serves to uncover conflicts of interest between named parties and the class they seek to represent,"[73] and also

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67. *Id.* at 600-02. The consideration for the Futures Agreements included "CCR's agreement to settle some 50,000 pending asbestos cases for approximately $750 million . . . [which] was paid . . . by CCR. . . ." Proposed Fifth Amended Complaint at ¶¶ 170-174, G-1 Holdings, Inc. v. Baron & Budd, No. 01 Civ. 0216 (S.D.N.Y. Sept. 22, 2003)

68. The settlement did, however, provide that exposure-only claimants might later qualify for benefits if they "developed[ed] a compensable disease and [met] the relevant exposure and medical criteria." *Amchem*, 521 U.S. at 604.

69. *Id.*; *see* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggressive Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 295 (2001).

70. *Amchem*, 21 U.S. at 601 (Plaintiffs' counsel "endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.").

71. Rule 23 provides that

> (a) . . . [o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23.

The proposed class in Amchem sought certification under Rule 23(b)(3), which provides

> (b) . . . [a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Id.

72. The Court also held that the class did not meet Rule 23's predominance requirement. *Amchem*, 521 U.S. at 622-23.

73. *Id.* at 625.

"factors in competency and conflicts of class counsel."[74] The Court identified intra-class conflicts of interest (primarily conflicts between the interests of currently injured class members and not-yet-identified future claimants),[75] and held that "[t]he settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected."[76]

In *Ortiz v. Fibreboard Corp.*,[77] another mega–asbestos class action settlement, the Court reversed the Fifth Circuit's affirmance of the trial court's certification of a Rule 23(b)(1)(B)[78] (or "limited fund") mandatory settlement-only class.[79] Defendant Fibreboard negotiated the settlement of 45,000 inventory claims with plaintiffs' counsel, contingent on either global settlement of all future asbestos claims against Fibreboard or Fibreboard's success in separate insurance coverage disputes in which it was then involved.[80] The terms of the

74. *Id.* at 626 n.20.

75. The Court stated that

> the named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

Id. at 626.

76. *Id.* at 627. The Court, however, "decline[d] to address adequacy-of-counsel issues discretely." *Id.* at 626 n.20.

77. 527 U.S. 815 (1999).

78. *See* FED. R. CIV. P. 23. Section 23(b)(1)(B) provides:

> (b) . . . [a]n action may be maintained as a class action if . . . (1) the prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

Id.

79. *Ortiz*, 527 U.S. at 821. The proposed class included "those with present claims never filed, present claims withdrawn without prejudice, and future claimants," but excluded those who had sued Fibreboard before but had "retain[ed] the right to sue again 'upon development of an asbestos related malignancy,' plaintiffs with claims pending against Fibreboard at the time of the initial announcement of the Global Settlement Agreement, and the plaintiffs in the 'inventory' claims settled as a supposedly necessary step in reaching the global settlement." *Id.* at 854.

80. *Id.* at 824. At the insistence of plaintiffs' counsel, Fibreboard then settled its insurance disputes with a Trilateral Settlement Agreement. *Id.* at 825. The proposed Global Settlement Agreement included no opt-out provision, *id.* at 834 n.13, and established a trust and a series of remedies plaintiffs would have to pursue before resorting to the courts. *Id.* at 827. The settlement further provided that plaintiffs who did resort to a court could recover a maximum of $500,000 and would receive the funds over a longer period of time than those plaintiffs who resolved their claims without litigation. *Id.*

inventory settlements were significantly more favorable than those negotiated for class members.[81]

The Court held that the class failed to meet the requirements for a limited fund class action,[82] and stated that conflicts of interest between inventory claimants and class members, as well as intra-class conflicts, required "the structural protection of independent representation."[83] "[I]t is obvious after *Amchem*," the Court stated, "that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."[84] Since "the full payment of [the separate inventory claim settlements] . . . was contingent on a successful" global settlement, plaintiffs' counsel were pitting their own financial interests against the interests of class members and "could [not] be of a mind to do their simple best in bargaining for the benefit of the settlement class";[85] "[t]he resulting incentive to favor the known [inventory] plaintiffs [because that generated the most income for the lawyers] . . . was . . . an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants."[86]

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81. The Court stated that "[a]s for the settled inventory claims, their plaintiffs appeared to have obtained better terms than the class members." *Id.* at 855.

82. *Id.* at 848. Specifically, the Court found that the fund in this case was "limited" only by agreement of the parties, and that "exclusions from the class and allocations of assets [were] at odds with the concept of limited fund treatment and the structural protections of Rule 23(a) explained in *Amchem*." *Id.*

83. *Id.* at 855.

84. *Id.* at 856.

85. *Id.* at 852.

86. *Id.* at 853. The Court further indicated that counsel's conflicting interests may have contributed to the substantive unfairness of the proposed settlement, stating that

> [o]ne may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. But no such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees. In this case, certainly, any assumption that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, the full payment of which was contingent on a successful Global Settlement Agreement or the successful resolution of the insurance dispute . . . .

Id. at 852 (citations omitted). The Court noted that the inventory settlement terms were more favorable than the terms of the Global Settlement. *See id.* at 855.

Thus, in both *Amchem* and *Ortiz*, the Court held that in a Rule 23 class action, the inherent conflict between the interests of present claimants and future claimants and the conflicting loyalties of the attorneys for the present claimants who purported to also represent the interests of future claimants required rejection of both settlements. Such conflicting interests require the structural protection of separate counsel for each of the classes competing for a share of the available assets.

3. Bankruptcy Proceedings

Conflict of interest principles are made applicable to bankruptcy proceedings through various statutory provisions and judicial decisions.[87] Under § 327(a) of the Bankruptcy Code, the trustee, or debtor in possession,[88] may employ attorneys to represent the trustee or assist in administering the trustee's duties, provided that the attorneys are "disinterested persons,"[89] and "do not hold or represent an interest adverse to the estate."[90] Similarly, § 1103 empowers creditors'

87. *See* Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 920-21 (2d Cir.), *cert. denied*, 340 U.S. 813 (1950), and *cert. denied*, 340 U.S. 831 (1950) (holding that an attorney had a conflict of interest in representing holders of two different series of bonds in a reorganization proceeding); *see also* 4 DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE § 17.2 (7th ed. 1998) (stating that courts can enforce standards for the quality of attorneys' work in bankruptcy proceedings by applying the Model Code of Professional Responsibility (which the current Model Rules of Professional Conduct has since replaced)).

88. In a majority of Chapter 11 bankruptcy proceedings the debtor serves as trustee of the bankruptcy estate and is labeled "debtor in possession." *See* 11 U.S.C. § 1101(1) (2005). The trustee or debtor in possession is appointed by the court, in accordance with 11 U.S.C. § 1104(a). Within 30 days of the appointment of a trustee by the court a party in interest can request that the United States Trustee convene a meeting of the creditor's committee at which, the creditors shall elect one disinterested person to act as trustee. *See* 11 U.S.C. § 1104(b) (2005). The debtor in possession, subject to any limitations prescribed by the court, has the same rights, powers, and duties of a trustee serving in a Chapter 11 case. 11 U.S.C. § 1107(a) (2005). The duties of the trustee are set out in 11 U.S.C. § 1106. *See also* COWANS, *supra* note 87, at § 17.2.

89. *See* 11 U.S.C. § 327(a) (2005). Section 101(14) of the Bankruptcy Code defines a "disinterested person," *inter alia*, as one who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor . . . or for any other reason." 11 U.S.C. § 101(14)(E) (2005).

90. 11 U.S.C. § 327(a). *But see* 11 U.S.C. § 1107(b) (stating that professionals, such as accountants, attorneys, or appraisers, hired by debtor in possession will not be solely disqualified based on their previous "employment by or representation of the debtor before the commencement of the case." Section 327(e) of the Bankruptcy Code permits the trustee or debtor in possession to hire special counsel that had previously represented the debtor, for a particular purpose other than representing the trustee in his duties as trustee. This representation must be in the best interest of the estate, and special counsel must not hold any "interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." *See* 11 U.S.C. § 327(e). Section 327(e) counsel are not subject to the disinterested standard.

committees appointed by the United States Trustee under § 1102[91] to hire attorneys, provided that, "while employed by such committee[s], [the attorney does not] represent any other entity having an adverse interest in connection with the case."[92]

The United States Trustee is responsible for monitoring and advising the court with respect to hiring counsel under § 327.[93] In addition to filing comments on such applications,[94] a United States Trustee may intervene and be heard in any bankruptcy proceeding.[95] If the court determines, with or without intervention by the United States Trustee, that an attorney hired under §§ 327 or 1103 fails to meet the requirements set forth in those sections, it may, under § 328, deny the conflicted attorney compensation and reimbursement of expenses.[96]

a. Rule 2019

As additional protection against conflicts of interest, Federal Rule of Bankruptcy Procedure 2019(a) requires that attorneys representing more than one creditor file a verified statement listing the creditors, the amount and nature of their claims (as well as the acquisition date of claims acquired within the last year), the facts surrounding the attorney's employment in the case, and the nature and amount of any claims or interests owned by the attorney at the time he or she was hired.[97] This

91. Section 1102 delegates to United States Trustees the task of appointing creditors' committees. 11 U.S.C. § 1102(a)(1) (2005). The statute further provides that parties in interest may request that the court order the United States Trustee to appoint additional committees "if necessary to assure adequate representation of creditors or of equity security holders." *Id.* § 1102(a)(2).

92. 11 U.S.C. § 1103(b) (2005). Section 1103(b) further provides that "[r]epresentation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest." *See also* COWANS, *supra* note 87, at § 17.11.

93. 28 U.S.C. § 586(a)(3)(H) (2005).

94. *Id.*

95. 11 U.S.C. § 307 (2005).

96. 11 U.S.C. § 328(c) (2005).

97. Rule 2019(a) provides:

> (a) Data required. In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement setting forth (1) the name and address of the creditor or equity security holder; (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity. . . . The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly,

requirement enables the court to identify actual or potential conflicts, so that it may require conflicted counsel to withdraw from representing one or more of the lawyer's clients.[98] Every law firm representing more than one plaintiff against a defendant in bankruptcy is required to file this statement.[99] However, in practice, plaintiff lawyers representing large numbers of asbestos claimants in bankruptcy proceedings have routinely failed to file such disclosures and have strongly resisted efforts to secure compliance.[100] On two occasions, however, courts have mandated compliance with Rule 2019. In one instance, Bankruptcy Judge Judith Fitzgerald issued an omnibus order requiring all counsel representing more than one creditor in several specified asbestos bankruptcy proceedings to comply with Rule 2019 or else the votes of their clients would not be counted.[101] However, although Judge Fitzgerald ordered

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setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

FED. R. BANKR. P. 2019(a).

98. *See* 2 FEDERAL RULES OF BANKRUPTCY PROCEDURE 184, Rule 2019 Selected Case Comment (Alan N. Resnick and Henry J. Sommer, eds., Collier Pamphlet Ed. 2004).

99. *Id.* Exceptions to this requirement exist where counsel represents a plaintiff class, or where the attorney is hired by a § 1102 creditors' committee. *See id.*; FED. R. BANKR. P. 2019(a).

100. *See, e.g.*, *infra* note 104 (discussing the attempt by a leading asbestos plaintiff lawyer, Joe Rice of Motley, Rice (formerly Ness, Motley) to evade service of process to appear at deposition relating to the Rule 2019 proceeding).

101. *See* Order Requiring Filing of Statements Pursuant to Fed. R. Bankr. P. 2019, *In re* Owens Corning, No. 00-3837 (Bankr. D. Del. Aug 25, 2004). This order was directed at counsel representing more than one creditor or equity security holder in Owens Corning, Armstrong World Industries, W.R. Grace & Co., USG Corp., United States Mineral Products Company, Kaiser Aluminum Corporation, Inc., ACandS, Inc., Combustion Engineering, Inc., and The Flintkote Company bankruptcies. The order required that counsel supply to the court the following information for each creditor alleged to be represented by counsel:

- a table of contents listing each claimant by last name then first name and for each claimant Exhibit A and Exhibit B, subparts 1 though 7 as described below; if information required to be submitted as Exhibit A or Exhibit B items 1 through 7 does not exist for a particular claimant, the table of contents shall so state.
- Exhibit A shall consist of copies of any powers of attorney or other agreement or instrument whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders.
- Exhibit B shall consist of all the following:
    1. the name and address of creditor . . . ;
    2. the last four digits of the Social Security Number of any such creditor . . . ;
    3. the nature and amount of the claim or interest and the time of acquisition thereof or an allegation that the claim or interest was acquired more than one year prepetition;
    4. a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee and, in the case of a committee, the name or names of the entity or entities at

counsel to submit exhibits in compliance with Rule 2019, she muted the effect of her decision by ordering that the exhibits were not to be scanned into the docket and instead would be kept by the court, thus essentially causing the exhibits to be filed under seal.[102] U.S. Bankruptcy Judge Kathryn C. Ferguson, presiding over the Congoleum bankruptcy, ordered full compliance with Rule 2019.[103] Judge Ferguson's order was in response, *inter alia*, to a motion to compel the law firm of Motley Rice to provide the information called for by Rule 2019.[104] U.S. District

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> whose instance, directly or indirectly, the employment arrangement was arranged or the committee was organized or agreed to act; and
> 5. with reference to the time of the employment . . . ,
> - the amounts of claims or interests owned by the entity, the committee members . . . ;
> - the times acquired;
> - the amounts paid therefore, and
> - any sales or other disposition thereof
> 6. a description of how counsel became involved with the claimant;
> 7. a copy of the fee agreement, if any, between counsel and the claimant(s) or between counsel and any other law firm or entity representing a claimant.

Id. Paragraph (7) was thereafter amended to read: "(7) a copy of the instrument, if any, whereby the entity, committee or indenture trustee is empowered to act on behalf of creditors or equity security holder." Amendatory Order Requiring Filing of Statements Pursuant to Fed. R. Bank. P. 2019, *In re* Owens Corning, No. 00-3837 (Bankr. D. Del. Aug. 27, 2004).

102. *See* Order Requiring Filing of Statements Pursuant to Fed. R. Bankr. P. 2019, *In re* Owens Corning, No. 00-3837 (Bankr. D. Del. Aug. 25, 2004).

> [E]xhibits required to be filed and listed below shall not be electronically filed but shall be submitted to the Clerk on compact disk ("CD"). Two sets of CDs shall be submitted and shall be identified on their faces as "Set 1" and "Set 2" and shall note the name, address, and telephone number of the attorney and firm submitting the disks.

Id. at 2.

103. *See* Order Requiring Compliance with Bankruptcy Rule 2019 and Granting Other Relief, *In re* Congoleum, No. 03-51524 (Bankr. D.N.J. July 26, 2004). Judge Ferguson gave all counsel representing more than one creditor 10 days to fully comply with the requirements of 2019. If counsel did not comply, the disclosure statement allowing the claimants to vote on the reorganization plan was to be sent directly to the claimants, thereby bypassing the uncooperative counsel. *Id.* at 2.

104. Joe Rice of Motley Rice is regarded as a leading asbestos attorney and has been closely involved in a number of asbestos-related bankruptcies. *See* Motion to Compel the Law Firm of Motley Rice LLC to Comply with its Obligation Under Federal Rule of Bankruptcy Procedure 2019, *In re* Congoleum Corp., No. 03-51524 (Bankr. D.N.J. July 6, 2004). In that motion, attorneys for insurers stated that Rice had "either refused to answer . . . questions [posed at depositions tailored to elicit Rule 2019 information] or answered them evasively and non-responsively, so as to obscure the identity of his clients." *Id.* at 2. Though Mr. Rice was alleged to have "purported to 'speak for' the claimants when he, together with Mr. [Perry] Weitz [of Weitz & Luxenberg negotiated the Congoleum pre-pack]," *id*. at 5, he refused to identify his clients. *Id.* at 4. Insurers contended that according to Rice's testimony, "he may or may not represent anywhere between a few and approximately seventy five thousand individual claimants in this bankruptcy proceeding."

Court Judge Chesler affirmed Judge Fitzgerald's order, holding that complete disclosure in compliance with Rule 2019 is necessary to ensure the overall fairness of the reorganization plan.[105]

B. "Limited Funds" and Limited Numbers of Law Firms

In asbestos litigation, most claimants are represented by just a handful of law firms.[106] These firms both directly contract with

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Id. at 7. Insurers further contended that "Mr. Rice's clients are not exclusively individual claimants after all, but rather that he extracted fee sharing agreements from attorneys who represent other claimants in connection with the prepetition process, whereby he conferred preferential security interests on their clients." *Id.* at 8. Insurers suggested that Rice refused to comply with Rule 2019 because doing so may demonstrate that Rice, in representing some individual claimants and also other plaintiff lawyers representing most of the tort claimants in the Congoleum bankruptcy, may be involved, as well, in representing conflicting interests and that he may not have secured the informed consent of his clients to these conflicts. *Id.* at 11.

The vigor with which Rice has resisted providing the Rule 2019 information is illustrated by Rice's alleged attempts to evade being served with a subpoena to appear at a deposition to elicit Rule 2019 information. *See* Transcript of Motion Hearing Before the Honorable Kathryn C. Ferguson, *In re* Congoleum, No. 03-51524 (Bankr. D.N.J. Jan. 24, 2004). Joe Rice was subpoenaed by the court to answer questions regarding his failure to comply with Rule 2019. As related by counsel for those trying to execute service:

> [I]t's a sort of bizarre story of Mr. Rice refusing to schedule his deposition and at the same time ducking service, putting us through extensive, extensive efforts sort of chasing him around South Carolina after he wouldn't schedule a deposition, to have process servers follow him from one gated community to another to finally serve him.

Id. at 6; *see also infra* note 212.

105. *See In re* Congoleum, No. 04-5634 (D.N.J. Feb. 25, 2005). Judge Chesler affirmed the bankruptcy court's order requiring appellants' compliance with Bankruptcy Rule 2019. In particular, he affirmed the challenged elements of Judge Ferguson's Rule 2019 Order requiring appellants to list and explain any "co-counsel, consultant or fee-sharing relationships and arrangements whatsoever, in connection with this bankruptcy case." *Id.* at 24. Judge Chesler held that the information being sought does not come within the privilege of the attorney-client relationship as long as it is relevant. *Id.* at 28. The facts before the bankruptcy court regarding the representation of plaintiffs and fee sharing between plaintiffs lawyers, "suggested the opportunity for abuse of fee sharing relationships" and therefore, complete Rule 2019 disclosure is "inextricable from the overall fairness of the reorganization plan." *Id.* at 14.

106. These include Baron & Budd and its affiliated firm, Silber Pearlman, Motley Rice (formerly Ness Motley), Weitz & Luxenberg, Kelley & Ferraro, Goldberg, Persky, Jennings & White, as well as Wilentz, Goldman & Spitzer, Brayton & Purcell, Cooney & Conway, Kazan McCain, Levy Phillips & Konigsberg, Cumbest, Cumbest, Hunter & McCormick and the Law Firm of Peter Angelos, among others. *See* Frances McGovern, ASBESTOS LEGISLATION II: SECTION 524(G) WITHOUT BANKRUPTCY, 31 PEPP. L. REV. 233, 247-48 (2004): Professor McGovern states:

> The [asbestos] plaintiffs' bar is represented by approximately twenty-five lawyers who serve on the various asbestos bankruptcy committees. Roughly seven to fifteen of those lawyers can effectively speak for all of their peers. If those seven to fifteen lawyers can agree among themselves on the details of a prepackaged bankruptcy, there is a substantial likelihood that there will be no critical opposition from the plaintiffs to an eventual plan of reorganization.

Id.

screening enterprises to acquire clients and also acquire clients through arrangements with law firms lower down on the food chain which hire the asbestos screening enterprises to solicit "litigants"—persons with pre-1972 occupational exposure to asbestos-containing products who are found to have either 1/0 asbestosis on the ILO scale or pleural plaques by the handful of B-readers consistently hired by plaintiff lawyers.[107]

As noted, the number of claimants, which so far approximates 845,000[108] (accounting for perhaps fifty to sixty million claims), is projected by some to grow to at least double that number in the next five to eight years,[109] barring a legislative reordering of the litigation.[110] It is therefore likely that the assets of at least some if not many of the solvent defendants who are at risk will be insufficient to pay all remaining present and future claims. Because present as well as future claimants are thus competing for a finite and insufficient quantum of assets, they are engaged in a zero-sum game[111] in which winners' winnings will be at the expense of other winners whose consequent lowered recoveries properly denominates them as losers in the zero-sum game. This poses a quintessential conflict of interest for lawyers representing the full spectrum of claimants. Those clients whose claims are pending are seeking to maximize their recoveries. As a consequence, newer clients may be precluded from recovery or subjected to lower recoveries by the depletion of assets in favor of clients further along in the claiming process. Moreover, all present clients are seeking maximum recoveries and therefore have interests adverse to future clients to be recruited by these firms. This is especially the case if defendants which are providing major percentages of current settlement funds are likely to become insolvent and declare bankruptcy, precipitating a process whereby a portion of funds that would otherwise be available to pay current claimants must be set aside to pay the claims of future claimants.[112]

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107. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 72, 91-94.

108. *See supra* note 1.

109. *See supra* note 5.

110. *See* THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ("FAIR") ACT, S. 2290, 108th Cong. (2004), S. 1125, 108th Cong. (2003) (proposing, as an alternative to tort litigation, the creation of a trust fund in the amount of $140 billion to be funded by defendant companies in asbestos litigation, § 524(g) trusts and insurers). Senator Specter introduced a new discussion draft of the Act to the 109th Congress on February 7, 2005. 151 Cong. Rec. S1011 (2005).

111. *See* Francis Heylighen, *Zero Sum Games*, *at* Principia Cybernetica Web, http://pcp.lanl.gov/ZESUGAM.html ("Zero-sum games are games where the amount of 'winnable goods' is fixed. Whatever is gained by one actor is therefore lost by the other actor; the sum of gained . . . and lost . . . is zero.") (last visited May 18, 2005).

112. Conflicts of interest issues raised by bankruptcy are separately considered in Part V.C.

Accordingly, law firms which represent large numbers of asbestos claimants and which recruit new claimants who will be actively competing for limited resources simultaneously with the firms' current clients are violating Model Rule 1.7 if they fail to secure the informed consent of new clients and current clients with pending claims to the conflicts of interest.[113] As *Amchem* and *Ortiz* implicitly held, class counsel's representation of future claimants is impaired when it is also engaged in simultaneous representation of present clients with differing interests.[114] Moreover, such representation violates these firms' fiduciary obligations to current clients because the new clients' claims will reduce the amounts actually payable to current clients.[115]

In addition to concurrent conflicts of interest which arise when lawyers represent current asbestos claimants while actively recruiting new claimants to become additional clients, lawyers who previously represented a client may not thereafter represent a client in the same or substantially related matter in which the client's interests are materially adverse to the interests of the former client unless the former client consents after consultation.[116] Such a situation may be presented when a lawyer previously represented client A in a suit against company B resulting in a liquidated but unpaid claim against B which is now in

113. I am unaware of any widespread practice of plaintiff lawyers of seeking informed consent to such conflicts. Model Rule 1.0(e) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Thus, to obtain informed consent, the firms must assure that the clients with the differing interests are aware of the relevant circumstances including an explanation of how the representation could have adverse effects on the clients' interests. Even were these conditions to be complied with, serious questions exist as to whether a waiver from litigants so recruited would be valid under Model Rule 1.7(b)(1). *See supra* text accompanying notes 58-64.

114. *See* MODEL RULES, *supra* note 17, at R. 1.7(b); *see also* Roger Cramton, *Lawyer Conduct in the "Tobacco Wars*," 51 DEPAUL L. REV. 435, 445-447 (2001).

115. *See* Findley v. Falise (*In re* Joint Eastern & Southern Dists. Asbestos Litig.), 878 F. Supp. 473, 492 (E. & S.D.N.Y. 1996) (holding that an attorney had an ethical obligation to disclose a conflict of interest to new clients and secure waiver where his success in representing current clients would deplete assets available to new clients); *see also* Complaint, Huber v. Taylor, No. 02-0304, (W.D. Pa. Feb. 6, 2002), *cited in* Richard C. Stanley, *Ethics in Asbestos: An Oxymoron?*, ALI-ABA COURSE OF STUDY MATERIALS: ASBESTOS LITIGATION IN THE 21ST CENTURY (Course No. SJ031 LEXIS Combined ALI-ABA Course of Study Materials File) at 376-77 (Nov. 2003) (an action filed by a group of asbestos plaintiffs against their lawyers alleging, *inter alia*, breach of fiduciary duty, professional malpractice, conversion and fraud, on the grounds that their lawyers "consented to a settlement agreement with various asbestos defendants without informing the plaintiffs of the settlement offer or seeking their approval; failed to inform the plaintiffs of the nature of the asbestos related claims of the lawyers' other clients involved in the settlement," and that "the lawyers' representation of these other clients along with plaintiffs posed conflicts of interest or potential conflicts of interest").

116. MODEL RULES, *supra* note 17, at R. 1.9(a).

bankruptcy, and the lawyer now represents clients C and D with claims against the debtor which because of the limited funds of the debtor, pit the interests of C and D against A.

Conflicts of interest in asbestos litigation are not confined to scenarios pitting the interests of present and future claimants. Conflicts also arise because of the differing interests of subclasses of current claimants. While a few asbestos law firms confine their representation mostly to claimants with malignancies, most of the major asbestos law firms, which have the largest inventories of claimants, represent both malignant and nonmalignant claimants. Conflicts of interest are created by this common practice of representation of multiple claimants with a diverse disease mix. In entering into settlements with various defendants and thus divvying up defendants' assets among the competing claimants, these firms are essentially deciding the proper division of a limited fund among the competing inventory subgroups, in particular, as between the relatively small malignant subgroups which are competing with the much larger nonmalignant subgroups. In view of the finite assets and the competing interests of the malignant and nonmalignant subgroups, even were lawyers to include provisions in their retainer agreements providing for waivers of conflicts of interest, it appears doubtful that lawyers can provide adequate representation to each person in each subgroup and thus meet the objective standard for determining the ethical validity of conflicts waivers.[117]

A further conflict of interest arises when plaintiff firms are engaged both in negotiating large scale class action settlements on a state or national level and also handling large numbers of individual cases. This simultaneous representation can result in prejudicing the rights of either or both individual clients and class members. For example, one firm "agreed to abandon punitive damages for members of the class [it was representing] while simultaneously asserting such claims in damage cases."[118]

Violations of Model Rule 1.7 as well as breaches of fiduciary rights of clients also occur when lawyers structure Federal Rule 42 consolidations or state equivalents thereof to include a small number of seriously injured claimants in a much larger group of lesser injured or arguably non-injured claimants. Empirical evidence indicates that such aggregations often lead to lower claim values for the seriously injured claimants and much higher claim values than would otherwise be the

117. *See supra* text accompanying notes 58-654.

118. Cramton, *supra* note 36, at 197.

case for the lesser injured claimants.[119] Moreover, by diluting the plaintiff class with less injured people, plaintiffs' attorneys are transferring money that would have gone to the seriously injured had the others not been in the class. As Professors Carrington and Apanovitch have observed:

> [T]he guesswork associated with mass tort class action settlement effects a substantial modification of the property rights of class members. The modification of rights from those that can be enforced at trial to those that will be measured by weak conjecture effects a transfer of wealth from class members with clearly meritorious claims to those whose claims are more dubious. Intangible property rights are thus modified by any law conferring authority on a court to approve en masse a settlement of personal injury claims.[120]

This strategic positioning by plaintiff lawyers generates higher contingency fee income than if the aggregations were limited to claims of similar severity[121] and therefore breaches the ethical and fiduciary obligations of the lawyer to severely injured clients who receive less so that their lawyers may receive more.[122]

C. Conflicts of Interest in Bankruptcy Proceedings

An increasing amount of asbestos claiming is now being channeled through the bankruptcy process, meriting separate consideration of conflicts of interest that arise in those proceedings.

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119. *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1873 n.231 (1992); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U.L. REV. 469, 480 (1999); *see also* Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1783-84 (1994); Paul C. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 471 (1997). Judge Weinstein argues that

> consolidations do tend to encourage the commencement of suits of questionable merit. Since consolidated cases probably will be settled in large groups, the less defensible claims are likely to obtain more than they would if they were litigated (assuming they would have been brought at all), while the more serious claims will probably be settled for less then they would in individual suits.

Weinstein, *supra*, at 480.

120. Carrington & Apanovitch, *supra* note 119, at 471.

121. *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 64 (1995) (noting that "[m]ixing the cases for trial and settlement may result in a lower recovery for the more seriously injured, but generally it will result in a quicker fee for counsel").

122. *See* MODEL RULES, *supra* note 17, at R. 1.7(a)(2).

1. The Uniqueness of Asbestos-Related Bankruptcies

In a conventional Chapter 11 case, a debtor files for bankruptcy in order to begin the process of negotiating with its creditors over a plan of reorganization.[123] The end result is a reorganization plan which sets forth the recovery that each class of creditor or stockholder will receive and allows the company to emerge as a viable entity.[124] For a reorganization plan to be adopted, it must normally be approved by a two-thirds majority of each class of affected creditors or stockholders.[125] However, if one class of creditors votes the plan down, the plan can still take effect if the judge finds that it is "fair and equitable"—a process known as "cramdown."[126] Cramdown limits the ability of a creditor group to hold up the bankruptcy to obtain a disproportionate and economically unjustified amount. It is the threat of cramdown that keeps parties honest, pressures them to resolve their differences at the bargaining table, and allows the company to reorganize without protracted delays.

Parties entitled to vote on a plan are identified through a process that requires all creditors to assert their claims by a court-designated "bar date."[127] Claims not filed by that date are forfeited. In asbestos-related bankruptcies, however, it is not possible to establish a bar date for the tort claimants. This is so because asbestos-related diseases have long latency periods; many victims, therefore, do not know at the time of the bankruptcy that they will have claims to assert against that company.[128] Therefore, if a conventional bar date was set in asbestos bankruptcies, future claimants would be barred from later bringing claims upon manifestation of injury.

The early asbestos bankruptcies, beginning with the Johns Manville bankruptcy, attempted to solve the problem of future claims by

123. 7 COLLIER ON BANKRUPTCY ¶ 1100.01 at 1100-01 (15th ed. 1996) ("Chapter 11 of the Bankruptcy Code provides an opportunity for a debtor to reorganize its business or financial affairs or to engage in an orderly liquidation of its property. . . .The plan negotiation process is intended to lead normally to a consensual plan under which the debtor and a majority of creditors have agreed to both business and financial plans that offer some realistic chance of success.")

124. 7 COLLIER ON BANKRUPTCY ¶ 1100.09 at 1100-01 (15th ed. 1996) ("The object in a chapter 11 reorganization case is normally to formulate a restructuring or reorganization plan that will enable the debtor to emerge from bankruptcy as a viable, profitable enterprise. . . . The plan generally provides for the treatment of claims against and interests in the debtor and its property, and, if the debtor is reorganizing, a plan for the continuation of the business after confirmation.").

125. 11 U.S.C § 1126(d).

126. 11 U.S.C. § 1129(b).

127. FED. R. BANKR. P. 3003(c)(3).

128. *See* RAND, VARIATION IN ASBESTOS LITIGATION, *supra* note 26, at 5 (noting that the latency period for asbestos-related diseases is between fifteen and forty years); *see also* Kane v. Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988) ("An individual might not become ill from an asbestos-related disease for until as long as forty years after initial exposure.")

estimating the amount of these future claims and funding a trust with the debtor's assets which was intended to provide those claimants with recoveries similar to those being received by current creditors.[129] Because the trusts' assets would include equity in the debtor, it was to the advantage of present claimants looking to the trust for payment that the company emerging from bankruptcy be insulated from future claimants because otherwise the value of the equity would be depreciated. To accomplish this, bankruptcy courts issued "channeling injunctions," which required future asbestos claimants to sue the trust rather than the reorganized company.[130] To resolve doubts about whether the bankruptcy courts' inherent powers were broad enough to issue such a channeling injunction, in 1994, Congress created explicit statutory authority for channeling injunctions in asbestos cases: § 524(g).[131]

a. The Effect of the Adoption of § 524(g) of the Bankruptcy Code

Section 524(g) increased the usual two-thirds requirement for approval of a plan of reorganization to 75% of those claimants with

129. *See* Findley v. Falise (*In re* Joint Eastern & Southern Dists. Asbestos Litig.), 878 F. Supp. 473, 571 (E. & S.D.N.Y. 1995) (stating that "[m]ethods for operating the trust must be established, 'such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of numbers and values of present claims and future demands . . . that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner'"); Findley v. Blinken (*In re* Joint Eastern & Southern Dists. Asbestos Litig.), 982 F.2d 721, 732, 750 (2d Cir. 1992) (affirming Judge Weinstein's order directing the trustee to make $60,000 available for studies to be undertaken to estimate future claims against the trust and ensure that there are sufficient funds to pay these future claims).

130. *See In re* Johns-Manville Corp., 68 B.R. 618, 624-26 (Bankr. S.D.N.Y. 1986) (finding that the court had the authority to issue, as part of the plan, an injunction channeling all asbestos-related claims away from debtor and toward certain trusts for resolution); *see also In re* Joint Eastern & Southern Dists. Asbestos Litig., 120 B.R. 648 (E. & S.D.N.Y. 1990); Katherine M. Anand, Note, *Demanding Due Process: The Constitutionality of the § 524 Channeling Injunction and Trust Mechanisms That Effectively Discharge Asbestos Claims in Chapter 11 Reorganization*, 80 NOTRE DAME L. REV. 1187, 1192-96 (detailing the effort to create a channeling injunction in the Manville bankruptcy).

131. 11 U.S.C. § 524(g)(2) allows courts to issue channeling injunctions to require future claimants to sue the bankruptcy trust directly. For examples of where such channeling injunctions have been issued, see, for example, Certain Underwriters at Lloyd's v. ABB Lummus Global, Inc., No. 03 Civ. 7248, 2004 U.S. Dist. LEXIS 10621 at *1 (S.D.N.Y. 2004); *In re* J. T. Thorpe Co., 308 B.R. 782 (Bankr. S.D. Tex. 2003); Official Comm. of Unsecured Creditors of Artra Group, Inc. v. Artra Group, Inc. (*In re* Artra Group, Inc.), 300 B.R. 699 (Bankr. N.D. Ill. 2003); *In re* Asbestos Claims Management Corp., 294 B.R. 663 (N.D. Tex. 2003); *see also* Anand, *supra* note 130, at 1197-1202.

allowed claims to be paid under the plan from the assets of the trust.[132] The legislative change did not directly address the section of the bankruptcy code allowing a court to cram down a plan of reorganization and thus providing it with significant leverage in bringing parties to agreement. Bankruptcy courts, however, appear to operate under the assumption that § 524(g) exempts asbestos claimants from cramdown.[133] Exemption from cramdown coupled with the 75% supermajority provision has drastically shifted the balance of forces vying for the debtor's assets. From the moment an asbestos bankruptcy commences, it is an overriding reality that the company will not be able to emerge from bankruptcy unless the plaintiff lawyers representing the substantial portion of claimants approve of the restructuring plan.[134] The same small

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132. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). The conflicts of interest in the representation leading to the establishment of a § 524(g) trust are exacerbated by the perverse incentives created by this section of the bankruptcy code. As noted,

> Bankruptcy filings by asbestos defendants . . . create additional distortions. One is that in order for a bankrupt asbestos firm's reorganization plan to be adopted, 75 percent of current tort claimants must vote in favor of the plan, but future tort claimants do not have the right to vote at all. (The 75 percent approval requirement is higher than the normal standard for adopting reorganization plans.) As a result, asbestos reorganization plans over-compensate present claimants relative to future claimants. Another problem is that if asbestos producers expect to file for bankruptcy, their managers have an incentive to encourage the filing of claims by the unimpaired. After all, these claimants have an incentive to vote in favor of a reorganization plan even if it provides only low compensation, and because there are too few claimants with serious asbestos diseases to block adoption of the plan, those with serious diseases tend to be under-compensated. Thus the voting rules for adoption of asbestos firms' reorganization plans lead to over-compensation of unimpaired claimants and under-compensation of future claimants and those with serious asbestos diseases. This pattern of compensation further increases the cost of asbestos litigation by encouraging plaintiffs' lawyers to continue filing additional claims by the unimpaired.

Michelle White, *Asbestos & the Future of Mass Torts*, NBER Working Paper No. W10308 at 18 (Feb. 2004).

133. *See* Walter v. Celotex (*In re* Hillsborough Holdings Corp.), 197 B.R. 372, 378-79 (Bankr. M.D. Fla. 1996) Though not specifically addressing the cramdown point, the court agreed that Celotex's attempt to circumvent the 75% voting requirement violated § 524(g). *Id.* at 379. The decision cites Ralph Mabey & Peter Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 487 (1995), which mentions in passing and without authority that § 524(g) precludes cramdown. *See id.* Though the court stated that "the determination as to the scope and the extent of a § 524(g) injunction is limited to the determination of what was required by the [settlement agreement]," *id.* at 379, nonetheless, the decision is relied on by asbestos creditors to support their argument that § 524(g) precludes cramdown.

134. Judge Wolin, who was presiding over five asbestos related bankruptcies, *see* discussion *supra* note 19, has stated:

> [Section] 524(g) creates an unlevel playing field and gives the asbestos claimants virtually an absolute veto over a consensual plan . . . . You could have 99 other issues to

cadre of plaintiff lawyers who appear in most asbestos bankruptcies have thus been vested with near complete and substantially unchecked power to dictate the terms of the plan.[135] Bankruptcy judges understand that this is so and with rare exception, accept, adopt and otherwise ratify whatever is needed to satisfy plaintiff lawyer demands, which typically include adoption of trust structures and trust distribution procedures that allow claims to be paid even if they lack valid evidence of actual injury and proof of actual exposure to the debtor's products.[136]

This near unbridled power is compounded by the practice of voting for the confirmation of the § 524(g) trust on a one-claimant–one-vote

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> deal with but ultimately it's going to boil down to, Can the debtor get a 524(g)? And if the debtor can't get a 524(g), everything else is for naught.

Roger Parloff, *Tort Lawyers: There They Go Again*, FORTUNE, Sept. 6, 2004, at 186, 194 (quoting Judge Wolin).

135. Their power over the process is also aggrandized by the provision in § 524(g) that the trust to which all claims will be channeled hold or be capable of holding, under certain circumstances, a majority of the voting stock of the reorganized company. *See* 11 U.S.C. § 524 (g)(B)(i)(III).

> The requirements of this subparagraph are that the injunction is to be implemented in connection with a trust, that, pursuant to the plan of reorganization is to own, or by exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—
> (aa) each such debtor;
> (bb) the parent corporation of each such debtor; or
> (cc) a subsidiary of each such debtor that is also a debtor.

Id.

The practical effect of this provision is that when the reorganized company emerges from bankruptcy, the corporate officers may be operating under the aegis of the plaintiff lawyers who control the bankruptcy and who through their designees, the trustees of the trust, will control the majority of shares of the reorganized company. This has the obvious effect of deterring these officers from opposing plaintiff lawyers by, for example, seeking to restrict claiming eligibility against the trust to those with actual asbestos-related injuries that have resulted from exposure to the debtor's products.

However, in recent pre-packaged asbestos bankruptcies, *see infra* text accompanying notes 163-69, ownership of debtor company stock remains almost exclusively with the parent company. *See* Mark Plevin et al., *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. TEX. L. REV. 883 (2003). In these pre-packs, the debtor and plaintiff's counsel agree that the debtor's parent can retain control of the debtor stock, in return for a nominal promissory note given to the § 524(g) trust which is secured with company stock. Only if the debtor defaults on the note, which is very unlikely given its nominal value, will the stock become property of the trust. As there is thus a situation in which the trust would be entitled to own a majority of the debtor stock, this agreement complies with the literal wording of 11 U.S.C. § 524(g)(B)(i)(III).

136. *See, e.g.*, *In re* Combustion Eng'g, Inc., 295 B.R. 459 (Bankr. D. Del. 2003); *In re* Combustion Eng'g, Inc., No. 03-10495, 2003 Bankr. LEXIS 1044 (Bankr. D. Del. July 2, 2003). *But cf. In re* Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004), discussed *infra* at note 169; *see also* Written Statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law of Yeshiva University, Before Subcommittee on Commercial and Administrative Law of the House Comm. on the Judiciary, July 21, 2004, at 25 [hereinafter House Comm. on the Judiciary Statement]; *Leahy's Legal ATM*, WALL ST. J., Apr. 8, 2005, at A12.

basis, not by the value of the claims.[137] Equal valuation of claims is not a legal requirement, but rather a convention which furthers the interests of plaintiff lawyers mostly representing nonmalignant claimants, where each claim is valued at $1 for the purpose of counting votes.[138] Thus, an unimpaired claimant who may have no asbestos-related illness recognized by medical science, has the same one vote as does a mesothelioma claimant with a claim value in excess of one million dollars.

The near unbridled power is further compounded by the virtually unregulated voting process. Plaintiff lawyers claiming appointment as attorney-in-fact for their asbestos clients, deliver their votes in a block—listing the names of those they claim to represent and the total vote for and against. While there is, in theory, a limitation on who is eligible to

137. A perverse refinement of this provision has come into use. In the pre-packaged bankruptcy agreement that created, *inter alia*, the Combustion Engineering Settlement Trust, which was a pre-petition entity to pay current inventory claims of certain plaintiff lawyers, three classes of claims were created. One class was to be paid 95% of the agreed pre-bankruptcy settlement, leaving the remaining 5% "stub claim" as a claim to be asserted in the bankruptcy case. The second class was to be paid 85% pre-bankruptcy with a 15% stub claim to be asserted in the bankruptcy case and the third class was to paid 75% with a 25% stub claim remaining. *See* Plevin et al., *supra* note 135, at 900. Thus, though thousands of claimants received substantial pre-petition settlements, they continued to be entitled to vote on the plan's approval because of the artificially-created "stub claim" device. This use of this artifice has been criticized by the Third Circuit, which rejected the Combustion Engineering Bankruptcy Plan principally on grounds of discriminatory treatment of the future claimants. *See In re* Combustion Eng'g, Inc., 391 F.3d at 238-242. The court found the plan inequitable in that the future and non-participating claimants received neither funding through nor representation during the establishment of the CE Settlement Trust, essentially the initial phase of the settlement. *Id.* at 245. The court further recognized that while "stub claims" are often used and permissible in many bankruptcy proceedings, the use of them here, coupled with the unequal representation of claimants, was problematic. *See id.* at 243-44.

138. Notably, there is nothing in the Bankruptcy Code that precludes the Bankruptcy Court from decreeing that varying values be applied to injuries of varying severity. For example, one can imagine a system in which mesothelioma claims are valued at $1 million, lung cancers at $50,000, and mild asbestosis with lung impairment at $10,000 and $1,000 without. Each claimant's vote would be multiplied by the value of their claim, and then totaled to determine the outcome of the vote. It seems remarkable that plaintiff lawyers who specialize in mesothelioma and other cancer claims have apparently not advanced such an argument. *See* Mark D. Taylor & Scott L. Alberino, *Who Is Authorized to Vote on a Plan of Reorganization?: Issue Pending in the USG Bankruptcy Case Could Alter the Asbestos Bankruptcy Landscape*, 2 MEALEY'S ASBESTOS BANKR. REP. 6 (2003) (examining the possibility of disabling the block voting of unimpaired claimants through a weighted voting procedure); *see also* Victor E. Schwartz et al., *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. BANKR. L. & PRAC. 61 (2004) (propounding a legal framework that bankruptcy courts should use to assess whether unimpaired claimants have a right to payment and including a requirment that to state a claim in a bankruptcy proceeding and therefore be eligible to vote on the plan of reorganization, an asbestos claimant should have to demonstrate physical injury or functional impairment caused by asbestos exposure).

vote on approval of a § 524(g) trust,[139] in practice, there are no controls over who gets to vote. The absence of any auditing process to confirm that the claimants have exposure to the debtor's product, that counsel represents them, that counsel has authority to cast their ballots, and even that the listed claimants actually exist, is indicative of the control that plaintiff lawyers exercise over asbestos bankruptcy proceedings.[140]

These voting practices perversely operate to provide additional stimulus to plaintiff lawyers to sponsor additional screenings[141] because the more claimants they generate, the more control they can exert over the bankruptcy process and the more fee income they can obtain. More perversity is added by the incentive that plaintiff lawyers have to cast the votes of the clients they represent in favor of the interests of these current claimants—whom they represent—over that of the as yet unidentified future claimants whom they might represent. This highlights a defect in the implementation of § 524(g): that lawyers for current claimants are casting a block vote on the adoption of a

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139. *See* 11 U.S.C. § 1126(a). Any holder of an allowed claim may vote to either accept or reject a plan for reorganization. According to § 502(b) of the Bankruptcy Code, all claims are allowed unless a party in interest objects. 11 U.S.C. § 502(b). 11 U.S.C. § 502(c) provides that claims should be estimated but provides no mechanism for doing so and does not require verification of claims. Section 101(5)(a) of the code defines a claim as the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, unmatured, disputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(a); *see also* Taylor & Alberino, *supra* note 138. Only those who have a claim, or right to payment, against the debtor, and whose claims are to be paid by the § 524(g) trust, may vote on a § 524(g) plan. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). There is another class called "demands." Those holding demands are not entitled to vote on a § 524(g) plan. Demands are defined by § 524(g)(5) as follows:

> a demand for payment, present or future, that—
>
> (A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;
>
> (B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the [§ 524 injunction]; and
>
> (C) pursuant to the plan, is to be paid by a [§ 524(g)] trust . . . .

11 U.S.C. § 524(g)(5). If the claims of nonmalignant asbestos claimants who demonstrate no lung impairment were classified as demands, they would not be entitled to vote. *See* Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2073 (2000) (indicating that the adoption of § 524(g) referred to future rights to compensation for asbestos-related injuries as future "demands," rather than "claims"); *see also* Debtor's Motion for a Declaration with Respect to Voting Rights of Certain Putative "Claimants" at 1, *In re* USG Corp., No. 01-2094 (Bankr. D. Del. August 21, 2002) (seeking an order that for voting purposes only, persons seeking to vote on a plan of reorganization be required to demonstrate impairment as determined according to objective medical criteria to be adopted by the court).

140. There appears to be a link between plaintiff lawyers' concerted efforts to avoid compliance with Rule 2019, *see supra* notes 97-105, and the voting procedure practices that prevail. The extensive litigation now occurring in the Congoleum bankruptcy may shed some light on this interrelationship.

141. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 62-63.

reorganization plan that may pit the interests of present claimants (and their lawyers) against future claimants, who of course, are not yet in being and so cannot vote on the plan of reorganization.[142]

Even were § 524(g) not to be encumbered by the perverse incentives it creates, the fact that nonsick claimants vastly outnumber malignant claimants and others with serious illnesses,[143] often leads to significantly shortchanging the latter in the asset division. This is reflected both in settlements that are entered into on the eve of a bankruptcy filing and the provisions of the trusts created under § 524(g) setting forth the medical and exposure criteria for claiming against the trusts and the claim values set forth in the plan of reorganization.[144]

2. The Unprecedental Control Vested in Plaintiff Lawyers

The same baker's dozen or so law firms that represent the large majority of asbestos claimants also represent the majority of claimants in bankruptcy proceedings.[145] These leading asbestos law firms largely

142. *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 244-45 (3d Cir. 2004) ("manipulation [of the voting system] is especially problematic in the asbestos context, where a voting majority can be made to consist of non-malignant claimants whose interests may be adverse to those of claimants with more severe injuries"). It is the role of the future claims representative to assure that there is equivalence in the compensation provided to future claimants with that provided to current claimants. *Id.* at 237-38. The future claim representative is discussed *infra* at notes 165 et seq. It was the lack of equivalence that led the Third Circuit to reverse the lower court's approval of the plan in the Combustion Engineering bankruptcy. *Id.* at 242.

143. *See supra* notes 9-10 and accompanying text.

144. In the course of more than seventy bankruptcies of companies because of asbestos-related liabilities, bankruptcy trusts have been created in the Celotex, National Gypsum, Johns-Manville, Eagle-Picher, UNR, United States Lines, Prudential Lines, E.J. Bartells, Lykes Brothers Steamship, Rutland Fire Clay Co., Keene, Delaware Insulation Industries and H.K. Porter bankruptcies. Bankruptcy trust assets already approximate $4 billion. Added to this are the recently confirmed trusts in the Western MacArthur and Halliburton subsidiary bankruptcies. With respect to the latter, DII Industries and Kellogg Brown and Root were put into bankruptcy by their parent Halliburton. Pursuant to the confirmed plan, Halliburton funded the asbestos and silica 524(g) trusts with approximately $2.4 billion cash and 59.5 million shares of Halliburton stock. In addition, Halliburton is providing up to $350 million in DII financing for Debtors to meet financial obligations during and after Reorganization Cases and has entered into a third-party master letter of credit covering draws on approximately $1.1 billion in letters of credit issued on behalf of various debtors. *See In re* Mid-Valley, 2004 Bankr. LEXIS 1553 at *21 (Bankr. W.D. Pa. July 21, 2004). The total value of the assets committed to the trust approximates $5 billion. *See* Russell Gold, *Halliburton Finalizes Settlement for $5.1 Billion Over Asbestos*, WALL ST. J., Jan. 4, 2005, at A3; *see also*, *Halliburton Asbestos Settlement Wins Approval*, N.Y. TIMES, Nov. 30, 2004, at C4. An additional $20 to $30 billion may be added to trust assets as up to a score of companies now in bankruptcy, including Owens Corning, W.R. Grace, Armstrong World Industries, USG, Combustion Engineering, Congoleum, J.T. Thorpe, Burns & Roe, Pittsburgh Corning, Federal Mogul, G-I Holdings (the former GAF), and Babcock & Wilcox, establish such trusts.

145. A memorandum filed in the Owens Corning ("OC") bankruptcy estimates that the handful of law firms listed above, *see supra* note 106, represent over 100,000 asbestos claimants in the OC

control the asbestos bankruptcy process. While the U.S. Trustee selects the members of the various committees, which includes the members of the "asbestos creditors committee,"[146] the practice is for those tort creditor/clients to cede control to their attorneys through powers of attorney.[147] Thereafter, the appointed members of the committees immediately fade from view. The handful of law firms so selected not only constitute the asbestos creditors' committees,[148] they draft the critical part of the plan of reorganization which establishes the criteria for the payment of the very claims which they are asserting. In addition, they effectively select the trustees to operate the § 524(g) bankruptcy trusts that will be created to actually pay the claims, the administrator of the trust and the representative appointed to represent the interests of future claimants; they also constitute the trust advisory committees which have authority over trustees' actions and veto power over changes in the trusts' structure. Medical and exposure criteria to be met by claimants are set forth in a document called the Trust Distribution Procedures ("TDP").[149] The TDPs that have been established reflect this

bankruptcy proceeding. *See* Memorandum in Support of Motion for Structural Relief Required to Eradicate the Legal Ethical Conflicts of Asbestos Law Firms (filed by Official Committee of Unsecured Creditors) at 5, *In re* Owens Corning, No. 00-03837 (Bankr. D. Del. Oct. 24, 2003). Moreover, prior to the filing of the OC bankruptcy, approximately 111 law firms said that they represented approximately 235,000 claimants; of these, 10 law firms represented approximately 120,000 of these claimants. *See id.* at 6.

146. *See* 11 U.S.C. § 1102(a)(1) (2005).

147. 7 COLLIER ON BANKRUPTCY ¶ 1102.02 (2)(a)(iii)(A) (15th ed. 1996). (The general view is that a creditor may designate whatever individual it wants to serve on the creditors' committee on its behalf. The type of person most often designated by the appointed creditor is the creditor's attorney). *See In re* Celotex Corp., 123 B.R. 917 (Bankr. M.D. Fla. 1991) (noting potential for conflicting fiduciary duties when attorneys on committee represent more than one person); *In re* M.H. Corp., 30 B.R. 266 (Bankr. S.D. Ohio 1983) (attorneys were discouraged to be members of the committee, but were to be approved if the creditor so desires, although attorney may only represent a single entity).

148. An examination of the bankruptcies of Armstrong World Industries, Babcock & Wilcox, Combustion Engineering, Federal-Mogul, G-1 Holdings, Global Industrial Technologies, Owens Corning, Pittsburgh Corning, W.R. Grace and USG indicates that there is a high concentration of the same law firms which effectively constitute the asbestos tort creditors committees in these bankruptcies. Thus, Baron & Budd is in nine of these ten bankruptcies as is Weitz & Luxenberg, Goldberg, Persky (7), Kazan, McClain (7), Kelley & Ferraro (6), Ness Motley (6), Silber & Perlman (4), and Peter Angelos, Cumbest, and Levy Phillips—each serving on two committees.

149. *See* 11 U.S.C. § 524 (g)(2)(B)(ii)(V) ("the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner"). In light of this requirement, many TDPs include a matrix of payment values for varying asbestos-related conditions. *See, e.g.*, MANVILLE PERSONAL INJURY SETTLEMENT TRUST, 2002 TRUST DISTRIBUTION PROCESS § D, *available at* http://www.mantrust.org/FTP/C&DTDP.pdf.

power by allowing substantial portions of trusts' assets to be paid out irrespective of whether claimants are actually injured or were sufficiently exposed to defendants' products for that to have been a substantial factor in causing their injury.[150] This unprecedented degree of control exercised over the bankruptcy process results in numerous conflicts of interest.

a. Conflicts Generated by Control of the Asbestos Creditors Committees

While serving as de facto members of the asbestos creditors committees,[151] this handful of law firms cast the claimants' votes they control to approve the plan of reorganization and the creation of the § 524(g) trust. The voting rights being exercised which were delegated to the law firms by their clients are fiduciary in nature, i.e., the firms have been entrusted with clients' rights which must be exercised in favor of each client's fiduciary rights. In theory, these law firms have an obligation to advise their clients with conflicting interests how to instruct their own counsel to vote to apportion the limited funds to be available

150. An illustration of the degree of control over asbestos-related bankruptcies exercised by plaintiff lawyers is provided by the awarding of contracts to claim-processing entities to process the claims that were settled in prepackaged bankruptcies as well as the claims to be paid by the § 524(g) trust. Kenesis, Inc. was hired to do claim processing for three prepackaged bankruptcies and then subcontracted the work to another company, called the Clearing House. *See* Parloff, *supra* note 134, at 196. The sole proprietor of the entity was a paralegal on leave from the Ness Motley firm who cleared "just under a million dollars" for running the company, and then sold it and returned to Ness Motley. *Id.* The effect was that a paralegal on leave from the Ness Motley firm was determining the validity of claims submitted by that firm and others. *See also In re* Nat'l Gypsum Co., 243 B.R. 676 (Bankr. N.D. Tex 1999) (suggesting that the managing trustee of the NGC Settlement Trust resign as a condition for the trust to be allowed to purchase stock held by that trustee in a claims processing enterprise); Memorandum of the United States Trustee in Support of Objection to Debtor's Application to Employ the Kenesis Group, *In re* ACandS, Inc., No. 02-12687 (Bankr. D. Del Aug. 7, 2003) (concluding that the debtor had retained a claims handling firm that was owned by the debtor's law firm to do postpetition claims processing which had subcontracted the work to an affiliate of a law firm representing claimants, without disclosing these relationships or seeking bankruptcy court approval).

151. *See* 11 U.S.C. § 1103. The creditors committee is entitled to hire "attorneys, accountants, or other agents, to represent or perform services for such committee." 11 U.S.C. § 1103(a). These attorneys for the creditors committee may not simultaneously "represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest." 11 U.S.C. § 1103(b). *See, e.g*, *In re* Celotex Corp., 123 B.R. 917, 923 (Bankr. M.D. Fla. 1991) (sustaining the U.S. trustee's objection to two law firms', Caplin & Drysdale and Rydberg, Goldstein & Bolves, petition to be appointed as legal counsel for the Official Asbestos Personal Injury Creditors Committee due to current and potential conflicts of interest).

to pay the competing claims. It is difficult to see how this fiduciary duty can be effectuated in a context in which conflicts of interest abound.

b. Conflicts of Interest in the Bankruptcy Process

Among the claimants represented in the bankruptcy, a relatively small percent list malignancies such as mesothelioma, lung cancer and other cancers. The large majority allege pleural plaques or mild (1/0) asbestosis.[152] These nonmalignant claims include both those alleging impairment on the basis of pulmonary function tests typically administered during attorney-sponsored asbestos screenings, and those who do not allege impairment—the so-called "unimpaireds."[153] Because of the zero-sum nature of the bankruptcy process, each of these groupings of claimants has differing interests. In particular, the malignant subgroups (mesothelioma, lung cancers and other cancers) have interests which conflict with the nonmalignant subgroups. These conflicts of interest are magnified by the routine failure to comply with Bankruptcy Rule 2019(a) which requires that any entity purporting to represent more than one creditor in a Chapter 11 case "shall file a verified statement" listing the name and address of each creditor and the nature and amount of each creditor's claim.[154]

In addition to conflicts of interest between current claimants represented by the same law firms, there are also conflicts of interest

152. *See supra* notes 9-10 and accompanying text.

153. These appears to be considerable confusion over the case of the word "unimpaired" in reference to asbestos-related claims. In this context, the term is widely used to refer to non-malignant asbestos-related claims. However, a significant but unknown fraction of non-malignant claimants are found to be impaired on the basis of performance on pulmonary function tests administered by screening enterprises. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 86. However, on the basis of my research, I have concluded that at least many and, in some cases, virtually all of those found impaired on this basis would likely not have been found impaired if the tests were administered in a medical setting, as for example, in a hospital setting. *See id.* at 111-128. *See also* Report of Dr. Gary K. Friedman for Owens Corning, undated circa 2000, titled "Subject: Owens Corning Impaired Nonmalignant Claim Submissions 1999-1999 (approx.)." A study of a pulmonary function tests administered to a "stratified random sample" of 1691 nonmalignant asbestos claims selected from 22,578 claims submitted to the Owens Corning Corporation under its NSP settlement program, indicated that only 13.3% of the sample met the appropriate medical standards for validity of the tests. *Id.* at 2, 4. Moreover, the finding that only 13.3% of those claiming impairment presented valid evidence of impairment was predicated "on the acceptance of an underlying diagnosis of nonmalignant, asbestos related disease based on all submitted x-ray reports without an audit of the actual films or exclusion of more probable causes." *Id.* at 4. However, there were "serious questions" with regard to the reliability of the x-ray readings and this placed "downward pressure on the 13.3%." *Id.* The claim sample was of claims filed in the period 1991-1999. *Id.* at. 3.

154. FED. R. BANKR. P. 2019(a); *see also supra* notes 97-105.

resulting from the representation of those current claimants while at the same time actively recruiting new claimants to compete for the limited resources. As noted, the Supreme Court held in *Amchem Products v. Windsor*,[155] that class members were deprived of adequate representation by class counsel in a mega–asbestos settlement because of intra-class conflicts of interest between currently injured class members and future claimants not yet identified. There had to be, said the Court, "structural assurance of fair and adequate representation for the diverse groups . . . affected."[156] Moreover, in the other mega–asbestos settlement struck down by the U.S. Supreme Court, *Ortiz v. Fibreboard*,[157] the court held that class counsel's inventory settlement on different and more favorable terms than those provided in the proposed class action settlement for future claimants constituted a concurrent conflict of interest. Applying the thrust of these holdings to the bankruptcy context leads to the conclusion that because malignant and nonmalignant claimants in the same bankruptcy proceeding are competing for a limited share of the same assets, that is, one subgroup's gains are at the expense of the other subgroups, law firms which simultaneously represent such different subgroups in the same bankruptcy proceeding must disclose those conflicts and obtain the informed consent of their clients (assuming that it is a waivable conflict). That same reasoning would apply to the representation of both present claimant/creditors and future claimants who will seek compensation from the § 524(g) trust. As stated in *Ortiz*, there has to be both structural protection of independent representation for subclasses with conflicting interests and also separate counsel to eliminate conflicting interests of counsel.[158]

An additional conflict of interest exists in the case of the 111 plaintiff law firms that entered into National Settlement Program agreements with Owens Corning ("OC") in 1998, two years prior to its

155. 521 U.S. 591 (1997). See *supra* text accompanying notes 66-76 for a discussion of *Amchem*.

156. 521 U.S. at 594.

157. 527 U.S. 815 (1999). See *supra* text accompanying notes 77-86 for discussion of *Ortiz*.

158. 527 U.S. at 855-56; *cf.* Md. Bar Ass'n Ethics Op. 2003-10. The Opinion responds to the following facts. Lawyer represents asbestos clients in suits against defendants A, B and C. A filed for bankruptcy under Chapter 11 and the creditors committee asked Lawyer to be the Futures Representative. To resolve any conflict, Lawyer announced that he would no longer represent clients suing A but would continue to represent his clients suing B and C. The Bar Association opined that Lawyer's proposed action would not cure the conflict and would still violate Rule 1.7, stating: Lawyer's obligations to the futures "(to preserve as much of the 'pie' for these future claimants) will necessarily require [that lawyer] to advocate against [present claimants whom Lawyer still represented against other asbestos defendants] (who themselves want as large a piece of the 'pie' from [the debtor] as they may be able to obtain." Op. 2003-10, at 6-7.

bankruptcy filing, setting forth specific amounts for various types of injury that OC would pay to claimants who were clients of these firms.[159] Under the terms of these agreements, in addition to settling current inventory claims, most of the firms agreed to recommend to their future clients that they agree to accept specified amounts in settlement of their claims.[160] To be eligible for payment, claimants had to satisfy certain documentary conditions, including providing a release.[161] Claimants who accepted the standing OC offer and signed releases accepted by OC thus entered into contracts with OC. Approximately 60,419 contracting claimants had not yet received the contractually specified amounts when OC filed for bankruptcy.[162] These claimants therefore had fixed liquidated claims against the debtor equivalent in most respects to the claims of commercial debt holders evidenced by debentures or notes.

Post bankruptcy, these same law firms also represent persons who rejected OC's offer as well as other asbestos claimants asserting unliquidated and contingent tort claims. The conflicts of interest between the contract claimants and the contingent tort claimants are manifest. Contract claimants' interests are to minimize the value of the unliquidated claims in order to maximize their own pro rata recoveries. This would include demonstrating that the contingent tort claimants did not have valid claims under state law, that they had no actual injury or that exposure to OC's products was not a substantial factor in causing any asbestos-related injury that they did have. At the same time, these law firms had a duty of loyalty to the contingent tort claimants to obtain the maximum recovery possible.

159.

> OC and Fibreboard established a National Settlement Program ("NSP") in 1998. By October 4, 2000, most of OC's pending cases had been settled in the NSP. Under the NSP, 111 plaintiffs' firms settled their entire inventory of pending asbestos claims . . . against Owens Corning, and agreed to use certain procedures when asserting future claims . . . . The terms of these settlements are set forth in 107 separate NSP agreements. Although there are variations among NSP agreements, each of them settled an identifiable group of claims for agreed-upon dollar amounts . . . .

Report of Mark W. Mayer on Owens Corning's Pre-Petition Asbestos Personal Injury and Wrongful Death Claims at 3-4, *In re* Owens Corning, No. 00-03837 (Bankr. D. Del May 21, 2002).

160. *Id.*

161. *Id.*

162. As of October 5, 2000, OC had received 60,419 claims for which it had executed releases which OC had not fully paid. Of these, 48,856 had been approved for payment and the remaining 11,563 had not. *Id.* at 4.

3. Pre-Packaged Bankruptcies

Increasingly companies which are overwhelmed by asbestos litigation and facing insolvency are resorting to negotiating a pre-packaged bankruptcy ("pre-pack"). In a pre-pack, the Chapter 11 plan is negotiated between the leading attorneys representing the asbestos claimants and the debtor-to-be and voted on before the company files its bankruptcy petition.[163]

> This enables the debtor to file a plan and disclosure statement along with the petition and the bankruptcy court to hold a single hearing to determine the adequacy of the disclosure and whether the plan should be confirmed. The consensual confirmation of a plan of reorganization may occur only if each impaired class of creditors votes to accept the plan by a simple majority of creditors within the class and by two-thirds of the dollar amounts of the claims within the class. It is possible in theory for a pre-packaged bankruptcy to be confirmed in four to six weeks, with obvious substantial attendant advantages in savings of time and expense.[164]

Companies facing bankruptcy because of increased asbestos filings may seek out the attorneys or the latter may initiate the contact. In conventional asbestos-related bankruptcies, control over the reorganized company is usually reposed in the plaintiff lawyers. However, in a pre-pack, the company's officers and directors may be promised that they will be able to retain control of the company after it emerges from bankruptcy. The deal struck with the plaintiff lawyers calls for the company to issue a promissory note payable to the § 524(g) trust secured by the company's stock.[165] The assets of the trust will mostly consist of the debtor's insurance coverage which is assigned to the trust. A pre-petition trust may also be established to pay claims of the plaintiff lawyers' current inventory of clients at values that are considerably inflated when compared to the amounts to be paid out by the § 524(g) trust for similar claims after the approval of the plan and trust.

Pre-packs have some procedural advantages over conventional bankruptcy filings. For example, after the filing of the petition, the court may than hold a single hearing to determine whether the requirements of

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

164. Philip E. Karmel & Peter R. Paden, *Pre-Packaged Asbestos Bankruptcy up in Smoke in Third Circuit?*, N.Y. L.J., Dec. 28, 2004, at 3 (footnotes omitted).

165. *See supra* note 135 and accompanying text.

the Bankruptcy Code have been adhered to and whether the plan should be approved.[166]

Despite the stated advantages and objectives of pre-packaged bankruptcy filings,[167] the practices that have developed reveal serious distortions and perversions of the bankruptcy process. As noted, asbestos bankruptcy pre-packs have been used to favor the interests of lawyers' current clients at the expense of future claimants.[168] This discriminatory treatment has led the Third Circuit to overturn the approval of the Combustion Engineering pre-pack in a decision that will likely have a significant impact on asbestos related bankruptcies.[169]

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166. *See generally* Plevin et al., *supra* note 135. Asbestos-related pre-packaged bankruptcy filings have been made by Fuller-Austin Insulation Co., Shook & Fletcher Insulation Co., J.T. Thorpe Company and Combustion Engineering, Inc. *Id*. at 889-91. Prepacks have also been filed by ACandS, Western Asbestos Co., Mid-Valley (involving certain Halliburton subsidiaries including DII Industries, LLC, formerly Dresser Industries, and Kellogg, Brown & Root), Utex and the Congoleum Corporation. *See also* Richard Barliant et al., *From Free-Fall to Free-for-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441, 446 (2004).

167. *See* Plevin et al., *supra* note 135, at 889-91.

168. One particular abuse in asbestos pre-packs is the discriminatory treatment of claimants. An overriding purpose of the Bankruptcy Code is to treat like claimants alike. 11 U.S.C. § 1123(a)(4) ("[A] plan shall . . . provide the same treatment for each claim or interest of a particular class. . . .") However, because pre-pack negotiations take place in secret, select groups of claimants whose lawyers are part of or know about the negotiations are able to receive more favorable treatment than other similarly situated claimants. Such discriminatory actions would be objectionable in any context but are especially objectionable because some of the targets of the discrimination are persons who have suffered actual injury. *See In re* ACandS, Inc., 311 B.R. 36, 39 (Bankr. D. Del. 2004). This discriminatory treatment financially benefits the lawyers for the preferred claimants who typically charge contingency fees of 40 %. This benefit is spelled out in a recent law journal article:

> Because their clients get paid more, and sooner, than other claimants, these lawyers personally benefit when the plan is structured in such a fashion. If the plan treated all claimants the same, paying all current claimants through the mechanism of a post-petition trust, the lawyers for the current claimants would make less money—even assuming the bankruptcy court or the trust made no effort to restrict the portion of a trust beneficiary's payment that could be paid as a contingent fee. This, as much as anything, explains why asbestos pre-packs are structured in such a Byzantine fashion that is so different than any "conventional" asbestos bankruptcy case.

Plevin et al., *supra* note 135, at 912-13. For further analysis of these distortions and perversions, see House Comm. on the Judiciary Statement, *supra* note 136. *See also* Parloff, *supra* note 134, at 186.

169. *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 238-40 (3d Cir. 2004). The Third Circuit reversed confirmation of the plan and remanded for further proceedings, in part because of its concern that the plan provided preferential treatment to those claimants who participated in the Combustion Engineering (CE) Settlement Trust, a portion of the settlement that occurred pre-bankruptcy. During the establishment of this trust, the future claimants were not represented, and received no funding through the trust. Additionally, eighty-seven days prior to the bankruptcy, CE transferred over $400 million, approximately half of its assets, to the CE Settlement Trust. The court found that the payments to this settlement trust may constitute a voidable preference (a transfer that provides a creditor with a greater payment of his claim against the debtor then he would have received through the bankruptcy proceeding at the expense of the other creditors. A payment found

D. The "Futures" Representative

Complex conflicts of interest issues are raised by the appointment of a futures representative ("FCR") to represent the interests of future claimants. Section 524(g) of the bankruptcy code requires the appointment of a "futures representative" as part of the creation of a § 524 trust.[170] In pre-packaged asbestos bankruptcies, often there is a "purported futures representative" appointed by the parties, though there is no provision in the Bankruptcy Code so requiring.[171]

1. The Future Claims Representative in a § 524(g) Trust

The appointment of the § 524(g) FCR is intended to act as a counter to the interests of plaintiff lawyers in seeking to maximize payment to their current inventory of clients at the expense of future claimants. While the appointment of a futures representative is facially responsive to the statutory requirements set out in § 524(g)[172] as well as the thrust of *Ortiz*,[173] nonetheless, the role of the § 524(g) FCR is steeped in conflicts of interest. Irrespective of whether it is in the interests of future claimants that the proposed plan of reorganization be approved, it is in the financial interest of the FCR that a plan be approved since the FCR's fees, after approval, are typically quite lucrative.[174] Irrespective of the FCR's personal financial interests, conflicts of interest abound. For

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to be a voidable preference under § 547(b) of the Bankruptcy Code must be returned to the bankruptcy estate to ensure the equal treatment of all similarly situated creditors). The court also found inequality in the plan in that the future and non-participating claimants received neither funding through nor representation during the establishment of the CE Settlement Trust, essentially the initial phase of this settlement. *See also* 11 U.S.C. §§ 724(c), 726(b), 1123(a)(4).

The Third Circuit's rejection of the Combustion Engineering pre-pack was presaged by the decision of Judge Randall J. Newsome, sitting as a visiting judge in Delaware. *See In re* ACandS, Inc., 311 B.R. 36, 40-42 (Bankr. D. Del. 2004). *ACandS* was filed as a conventional bankruptcy after negotiations over a pre-packaged plan failed. Some of the objectionable practices typical of a pre-pack, however, were carried over into the proposed plan. *See* Barliant et al., *supra* note 165, at 441 n.1. Judge Newsome, in recommending that confirmation of the plan be denied, found that the plan discriminated unfairly within and among classes of claims and that it was not proposed in good faith. *In re* ACand S, Inc., 311 B.R. 36, 42-43 (Bankr. D. Del. 2004). Tellingly, he observed: "The court is informed that other judges have confirmed plans with such discriminatory classifications. This judge cannot do so in good conscience." *Id.* at 43.

170. 11 U.S.C. § 524(g)(4)(B)(i).

171. Although there is no mention of these purported futures representatives in the Bankruptcy Code, the Third Circuit, in *In re* Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004), essentially made appointment of a futures representatives a necessity while negotiating a pre-packaged bankruptcy. *See supra* note 137 and accompanying text.

172. 11 U.S.C. § 524(g)(4)(b)(i).

173. *See supra* notes 83-86.

174. *See infra* note 184.

example, it is common in asbestos bankruptcies to divide future claims into five to eight subgroups ranging from the unimpaireds to those with mesothelioma. Each subgroup typically has different applicable evidentiary requirements and different dollar amounts or ranges of dollar amounts.[175] These dollar values which are listed in the TDP, or the matrix that is part of the TDP, in effect represent allocations of the limited funds set aside for the future claimants among competing subgroups. It is doubtful that a single person, the futures representative, can adequately represent the conflicting interests of unimpaired asbestosis and pleural plaque claimants, impaired asbestosis claimants, asbestosis claimants with an ILO grade of 2/1 or higher, mesothelioma claimants, lung cancer claimants who were smokers and those that were nonsmokers and other future cancer claimants. To comply with the thrust of the Supreme Court's holding in *Ortiz*, each significant subgroup of future claimants would have to have separate representation. As stated by the Second Circuit:

> Within the category of health claimants, marked differences exist between identifiable subgroups that require division of health claimants themselves into appropriate subclasses.
>
> . . .
>
> [W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. *But the adversity among subgroups requires that the members of each subgroup cannot be bound by a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups*.[176]

175. For example, the 2002 Manville TDP specifies eight levels of claimants ranging from Level I, for other asbestos diseases such as bilateral asbestos-related nonmalignant disease, with a scheduled value of $600, to Level VIII, for mesothelioma, with a scheduled value of $350,000. *See* MANVILLE PERSONAL INJURY SETTLEMENT TRUST, 2002 TRUST DISTRIBUTION PROCESS § D, *available at* http://www.mantrust.org/FTP/C&DTDP.pdf.

176. *In re* Joint Eastern & Southern Dists. Asbestos Litig., 982 F.2d 721, 741, 743 (2d Cir. 1992) (emphasis added), *modified on other grounds*, 993 F.2d 7 (2d Cir. 1993).

The Second Circuit's analysis was substantially adopted by the Third Circuit in rejecting the *Amchem* asbestos settlement.[177] The Third Circuit ruled that certifying a unitary class of asbestos claimants, including present and future claimants with such conflicting interests, was improper because the conflicts "preclude[d] a finding of adequacy of representation. . . . Absent structural protections to assure that differently situated plaintiffs negotiate for their own unique interests, the fact that plaintiffs of different types were among the named plaintiffs does not rectify the conflict."[178]

The Third Circuit's opinion, which largely incorporated the Second Circuit's analysis, was adopted by the Supreme Court in rejecting the *Amchem* and *Ortiz* asbestos settlements. Both settlements had included claimants with widely conflicting interests in a unitary class represented by a single representative or undifferentiated group of representatives; both lacked the structural assurance of fair and adequate representation of groups with conflicting interests.[179] The conflicts of interest that surround the § 524(g) FCR are magnified many fold by the appointment of a purported future representative in the negotiation of a pre-packaged bankruptcy.

2. The Pre-Pack Future Claims Representative

In pre-packs, the debtor and the plaintiff lawyer together select a purported futures representative, arrange the terms of the representative's compensation and retain the right to hire and fire the representative.[180] This futures representative is often hired after the pre-petition trust is in place and a majority of the negotiations between debtor and plaintiff's lawyers have taken place.[181] Even if the futures

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

178. *Id.* at 631.

179. *See Amchem Prods., Inc.*, 521 U.S. at 627-28 (extensively quoting the Second Circuit's opinion and stating that "the settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency"); Ortiz v. Fibreboard Corp., 527 U.S. 815, 857-59 (1999) (holding that a unitary class with widely conflicting interests among the subgroups precludes a finding of adequacy of representation).

180. The National Bankruptcy Review Commission has suggested that a bankruptcy that is discharged without the appointment of a futures representative is likely a violation of the future claimants' due process rights. *See* NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS: NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT 316, 331-332 (1997).

181. *See* Plevin et al., *supra* note 135, at 917. This was the case in both *Combustion Engineering* and *J.T. Thorpe*. In *Combustion Engineering*, over half of all of the debtor's assets

representative is selected earlier in the negotiation, it is still the case that she will be negotiating on behalf of future claimants with those who hired her and on whom she depends for her future employment.[182] As a reward for "successfully" discharging the representative's duties in the negotiation of the pre-packaged plan, plaintiff lawyers and debtors, now in concert, may propose to the bankruptcy court that this hand-picked designee of parties with interests that may fundamentally conflict with those of future claimants, should be appointed by the bankruptcy court as the futures representative under the provisions of § 524(g).[183] Such an

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were irrevocably committed to a pre-petition trust at the time when the prospective futures representative was hired. *Id.* Another problem impeding the effectiveness of the futures representative in a pre-packaged bankruptcy is their inability to acquire information. All information is provided by the debtor, and therefore the futures representative only acquired that which the debtor chose to provide. *Id.* at 918.

182. *See* Barliant et al., *supra* note 166, at 467 (stating that "future claimants do not receive the benefit of a disinterested advocate" because the futures representative is retained and paid by parties adverse to the future claimants' interests, namely the debtor and claimant's counsel); *see also* Francis E. McGovern, *Asbestos Legislation II: Section 524(g) Without Bankruptcy*, 31 PEPP. L. REV. 233, 248 (2003) (arguing that "[t]he selection of the futures representative [in a pre-pack] is problematic because having a weak futures representative is in the interests of both the debtor and the current claimants").

183. Barliant et al., *supra* note 166, at 468 (stating that permitting this representative to be appointed as futures representative post-petition arguably violates constitutional due process). Due process in the futures representative context requires, as in other contexts of representation of absent parties, an identity of interests between the representative and the absent parties and the representative's undivided loyalty to those parties. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (absent parties must have their "interests adequately represented by someone with the same interests") (internal quotation marks and citation omitted); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997) (class representatives must operate under a proper understanding that their "role is to represent solely the members of their respective" class) (internal quotation marks and citation omitted); Hansberry v. Lee, 311 U.S. 32, 45 (1940) (selection of a representative whose interests are "not necessarily or even probably the same as those whom [the representative] is deemed to represent, does not afford that protection to absent parties which due process requires . . . [because of] the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties"). Arguably, a pre-pack futures representative, who is looking forward to becoming the post-petition FCR, has additional interests separate from those interests of the future claimants—interests that are, at best, not the "same," and, at worst, "sacrificial" of the future claimants' rights.

The Subcommittee on Mass Torts of the United States Judicial Conference has recommended that "a forceful and independent future claims representative is critical . . . to prevent a mass tort future claims representative from colluding with, or simply being overswayed by, counsel for present claimants and debtors." Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why, and the How*, 78 AM. BANKR. L.J. 93, 146 (2004) (Appendix A, U.S. Judicial Conference Committee on the Administration of the Bankruptcy System, Report of the Subcommittee on Mass Torts). The Subcommittee continued:

> [T]he classic kind of collusion said to arise in certain "prepackaged" bankruptcies is very unlikely to arise in mass tort bankruptcies involving future claims representatives. . . . [T]he essence of a "prepack" is that most or all of the negotiation and solicitation occurs prebankruptcy and therefore is presented to the Court as a fait accompli. *A future claims*

appointment is often quite lucrative.[184] The power reposed in the parties to the pre-pack to reward the futures representative poses a significant threat to that representative's independence and poses conflicts of interest issues that have not been adequately addressed by bankruptcy courts.[185]

> *representative, however, would always be appointed after the bankruptcy petition has been filed.* Because that additional party would be interjected, any prebankruptcy agreements among other parties could be challenged, and the future claims representative would often have a fiduciary duty to do so. By contrast, without that new party the "prepack" collusion would not likely be challenged.

Id. (emphasis added).

The Subcommittee did not consider that, in the prepack asbestos bankruptcy negotiations, the parties often designate a purported future claims representative, whom they would then propose to the bankruptcy court be appointed as the post-petition FCR. This feature of asbestos pre-packs would seem to eviscerate the Subcommittee's confidence that the FCR would check any pre-pack collusion, as the FCR will have already, pre-petition, essentially approved the reorganization plan, and will have a substantial interest in seeing it confirmed. Still, perhaps in recognition of this possibility, the Subcommittee advocated that the "Bankruptcy Court itself . . . play an active role in both the selection and the supervision of the future claims representative." *Id.* at 147. Ostensibly, active involvement of the Bankruptcy Court may help prevent the court's rubber-stamping of a pre-pack futures representative (hired and retained by the parties, with promises of significant returns upon confirmation of the reorganization plan) as the post-petition FCR, who may have severe conflicts of interests—namely between her own financial interests and the interests of the future claimants.

184. In the proceedings for the Chapter 11 bankruptcy filings by Mid-Valley, Inc. and other subsidiaries of Halliburton, certain insurers of the debtors objected to the debtors' application for an order appointing Professor Eric Green as the 524(g) FCR. Brief of Hartford Accident and Indemnity Co. and Affiliates at 1, *In re* Mid-Valley, Inc., 305 B.R. 425 (Bankr. W.D. Pa. Dec. 16, 2003) (No. 03-35592) [hereinafter "Hartford Br."]. The debtors retained Professor Eric Green, pre-petition, to represent the interests of future claimants in the bankruptcy plan negotiations. Hartford Br. at 13. The insurers asserted that during the sixteen-month period in which Professor Green was involved in the negotiations, "he was paid $9,000 per day plus expenses for time spent working on the proposed Plan—a total of $855,920.92 through July 31, 2003." Hartford Br. at 13 (citing Application at 7-8). The insurers also asserted that, after appointment as the 524(g) FCR, not only would the terms of Professor Green's retention and payment remain as they were established by the debtors and the plaintiffs' lawyers pre-petition, but Professor Green would also earn further compensation if the plan was confirmed. Hartford Br. at 13. Upon confirmation, the insurers claimed, Professor Green would be "employed by the Asbestos PI Trust and Silica PI Trust at his regular hourly rate (currently $600/hour) as the representative of unknown and future claimants." Hartford Br. at 13-14 (citing Plan § 13.5; Disclosure Statement §§ 4.1(c), 4.2(c)). (The court eventually ruled that the insurers had no standing to raise the interests of the asbestos claimants and overruled their objection to Professor Green's appointment. *In re* Mid-Valley, Inc., 305 B.R. at 433-35.)

185. Professor Alan Resnick, a supporter of resolving asbestos claims through the bankruptcy process, cautions that the "essential characteristics" of a future claims representative (FCR) are "independence and a lack of conflicts of interest." Alan Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2080 (2000). Resnick argues that any pre-pack FCR appointed by the parties should not continue as the FCR post-filing:

3. The Unique Role of Gilbert Heintz & Randolph in Pre-Packaged Asbestos Bankruptcies

The law firm of Gilbert Heintz & Randolph ("GHR") has come to play a unique role in pre-packaged asbestos bankruptcy filings. The firm devotes a significant part of its practice to representing asbestos defendants in coverage disputes with the asbestos defendants'

> [T]he legal representative should be selected by the United States trustee with court approval, rather than by the debtor, parties in interest, or attorneys purporting to represent future claimants when the bankruptcy petition is filed.
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> Caution should be exercised to assure that shortcuts are not taken regarding the selection of the legal representative. For this reason, courts should be extremely reluctant to permit a proposed settlement of future claims—negotiated with a legal representative selected by the parties before bankruptcy—to be presented to the court for confirmation in a "prepackaged" Chapter 11 plan. In such cases, any votes to accept the plan cast by the prebankruptcy legal representative should not count. A new, independent legal representative appointed after the filing of the bankruptcy case, with sufficient time to review any proposed estimation or settlement and an opportunity to vote on the proposed plan on behalf of future claimants, should be required.

Id. at 2080-81; *see also* Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAPMAN L. REV. 43, 44, 65 (2000) (arguing that "the FCR device has not received the careful scrutiny it deserves," and that the FCR faces considerable pressure to compromise the future claimants' interests).

In the Congoleum Corp. Chapter 11 bankruptcy proceedings, the debtors' insurers appealed to the District Court from the Bankruptcy Court's order appointing the pre-petition futures representative as the 524(g) FCR. Insurer Appellants' Brief at 1, *In re* Congoleum Corp., No. 04-1517 (D.N.J. Apr. 12, 2004) [hereinafter "Insurer Appellants' Br."] Similar to the insurers' objections in *Mid-Valley*, the *Congoleum* insurers claimed that because the proposed reorganization plan, as written, was so contrary to the interests of the future asbestos claimants, any true and loyal representative of the future claimants' interests would have rejected it. Insurer Appellants' Br. at 5. The *Congoleum* insurers argued that the FCR had already essentially approved the plan while "beholden" to the debtors pre-petition, and thus, could not adequately represent the future claimants' interests. Insurer Appellants' Br. at 3, 5 (arguing that "this Plan should have been rejected by anyone considering the interests of the future claimants: It promises $225 million in payments to current claimants before the future claimants get one penny, restricting the future claimants to an uncertain and perhaps even non-existent pool of assets").

In *Mid-Valley*, the insurers also argued that the proposed plan significantly limited future claimants' rights:

> Whereas future claimants who hold valid claims would have the right, in the absence of the bankruptcy and proposed Plan, to liquidate their claims by any means that the tort system allows and to obtain payment in full in cash from these solvent Debtors, the proposed Plan would cap their claims at predetermined amounts, limit their percentage recoveries in light of available Trust assets (none of which will be cash) and estimates of competing claims, stretch out payment to fit Trust cash flow, and insulate the Debtors from deficiency claims.

Hartford Br., *supra* note 184, at 11. Because it was doubtful that future claimants would fare as well under the proposed plan as they would outside of bankruptcy, the *Mid-Valley* insurers argued that Professor Green should not be appointed as the 524(g) FCR because "he had incentives to cooperate in creating the proposed Plan rather than to question why any bankruptcy filing was necessary." *Id.* at 4.

insurers.[186] It has been retained by the defendant/debtor in a number of pre-packaged asbestos bankruptcies upon the recommendation of two plaintiff law firms, Weitz & Luxenberg and Motley Rice, because according to these firms, retention by the debtor of GHR will help facilitate the filing.[187] GHR also represents or is co-counsel to asbestos claimants asserting claims against the companies that retained the firm to facilitate the pre-packaged bankruptcies.[188] The firm's dual role has given rise to a considerable volume of litigation focusing on the issue of conflicts of interest.

GHR's role in the pre-packaged Congoleum filing and related proceedings has given rise to two separate sets of challenges, one before the bankruptcy court and another before a New Jersey state court presiding over insurance coverage dispute litigation. In the Congoleum bankruptcy pre-pack, GHR was retained by the debtor, Congoleum, upon the recommendation of Perry Weitz of Weitz & Luxenberg, one of the lead plaintiff's attorneys in the bankruptcy to explore the option of a pre-packaged bankruptcy and to negotiate with its insurance carriers.[189] At the same time, GHR was also representing, as co-counsel with Weitz, asbestos claimants with claims against Congoleum and other defendants.[190] Additionally, GHR appointed the Kenesis Group,[191] of

186. *See* Parloff, *supra* note 134, at 198; *see also* Brief of Plaintiff Congoleum Corporation in Opposition to Objecting Insurer's Motion to Disqualify Gilbert Heintz & Randolph LLP as Counsel at 4, *In re* Congoleum Corp., No. MID-L-890801 (N.J. Super. Ct. Apr. 13, 2005). In addition to representing asbestos defendants, GHR also represents asbestos claimants in their "pursuit of insurance proceeds from policies issued to companies" but not in their underlying tort claims directly against the asbestos defendants. *Id.*

187. *See* Memorandum of Law in Support of Motion for Summary Judgment by Continental Casualty Company and the Continental Insurance Company at 14-15, *In re* Congoleum Corp., No. MID-L8908-01 (N.J. Super. Ct. Sept. 10, 2003). The GHR/Weitz/Rice team collaborated to arrange the pre-packaged bankruptcies of ACandS, JT Thorpe, Shook & Fletcher and Congoleum. *Id.*

188. *See* Parloff, *supra* note 134, at 200.

189. *See* Opening Brief of Appellants ACE Companies Regarding the Retention of Gilbert Heintz & Randolph LLP at 16, *In re* Congoleum Corp., No. 04 Civ. 1709 (D.N.J. May 6, 2004) [hereinafter Opening Brief, May 2004]. In September 2002, Congoleum's chief officers had meetings with Mr. Weitz, in which Weitz learned that Congoleum held a large amount of insurance coverage, although their cash funds were almost fully depleted. Weitz recommended that Congoleum retain GHR to represent them in the pre-pack negotiation and an overall global settlement. *See* Memorandum of Law in Support of Motion for Summary Judgment by Continental Casualty Company and the Continental Insurance Company at 11-12, *In re* Congoleum Corp., No. MID-L8908-01 (N.J. Super. Ct. Sept. 10, 2003). Weitz testified that his recommendation of GHR to Congoleum served a dual purpose: both because the firm was experienced in asbestos pre-packs, and to ensure that someone he trusted verified the amount of coverage held by Congoleum.

190. *See* Opening Brief, May 2004, *supra* note 189, at 17. The day that GHR was retained by Congoleum, Gilbert and Weitz negotiated a multi-million dollar settlement regarding two of Weitz's clients, Cook and Arsenault. At the same time, Gilbert was also serving as co-counsel to Weitz in

which GHR is a 70% owner, to process the claims in the Congoleum pre-pack, and agreed to a billing arrangement in which Kenesis received payment on a per claimant basis.[192]

Congoleum's retention of GHR was challenged by Congoleum's insurers which claimed that GHR's retention violated § 327(a) of the Bankruptcy Code which requires that counsel hired to represent the debtor in possession must not hold any interests adverse to the estate, and must be disinterested persons.[193] Congoleum argued that GHR was in fact special counsel, and therefore only subject to the more lenient requirements of § 327(e). The insurers also argued that GHR's

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the representation of these two clients against various other asbestos defendants. GHR did not obtain a waiver of this conflict of interest from either plaintiff.

191. Kenesis's claims processing contract in the ACandS bankruptcy was the subject of a disgorgement order by the bankruptcy judge. *See infra* note 216.

192. *See* Reply Brief in Further Support of Insurers' Motion to Disqualify Gilbert Heintz & Randolph LLP as Counsel to Congoleum Corporation at 1, *In re* Congoleum Corp., No. MID-L-8908-01 (N.J. Super. Ct. Apr. 29, 2005). The payment to Kenesis on a per claim basis created a conflict of interest for GHR. That is, the more claims processed, the higher the monetary reward for Kenesis and its majority shareholder, GHR. Thus, GHR's interest that Kenesis process as many claims for payment as possible conflicted with the interest of Congoleum to limit the amount of claims approved.

193. *See* 11 U.S.C. § 327(a); *see also supra* Part VI.A.3. The insurer's argued that the § 327(a) standard for general counsel should apply, *see* Reply of Certain Insurers to Debtor's Response to Objection to the Retention of Gilbert Heintz & Randolph, LLP as Counsel for the Debtors, *In re* Congoleum Corp., No. 03-51524 (D.N.J. Feb. 27, 2004), for the following reasons. First, the success of the pre-pack is entirely predicated upon a favorable decision in the insurance coverage litigation. Indeed, plan proponents seek to virtually entirely fund the § 524 (g) trust with insurance proceeds, with no contributions from the debtor. *Id* at 4. Moreover, Congoleum acknowledged that GHR will be advising it on insurance matters relating to the plan of reorganization. Therefore, since GHR has been retained because of its coverage expertise, it is acting as a general counsel and thus must meet the § 327(a) standard—which it cannot do. Because of its close ties with plaintiff lawyers, GHR fails the disinterested person test of § 327(a).

Second, the insurers argue that even if the court finds GHR to be special counsel, its fails to meet the no "adverse interest" requirement of § 327(e) because GHR's interests are aligned with the plaintiff attorneys. GHR counters that this is not an adverse interest to the estate, as both the estate and the plaintiffs are seeking to maximize the insurance funding of the § 524(g) trust. The insurers dispute this, arguing that the primary interest of the debtor is to prevent the payment of invalid claims and the overpayment of valid claims, *id.* at 8-9, a goal adverse to that of plaintiff's counsel who has an obligation to seek the maximum amount of funding for individual claimants and to maximize the number of claims satisfied, regardless of the legitimacy of the claims. *See* Brief of Appellees Congoleum Corporation, Congoleum Sales Corporation, and Congoleum Fiscal, Inc. Regarding the Retention of Gilbert Heintz & Randolph LLP as Debtors' Counsel, *In re* Congoleum Corp., No. 04 Civ. 1709 (D.N.J. May 28, 2004). Congoleum, however, claimed that GHR's retention should be reviewed under the special counsel standard of 327(e). *Id.* at 14-15. Since GHR was retained for the limited purpose of negotiating with Congoleum's insurance carriers and advising Congoleum on matters regarding their insurance coverage during the bankruptcy proceedings, they argue that there was no conflict between the interests of Congoleum and that of the claimants whom GHR has represented in the past.

representation of Congoleum was prohibited by Model Rule 1.7(A)(1) because GHR was acting simultaneously as advocate for Congoleum and separately representing claimants suing Congeleum.[194]

The bankruptcy court approved Congoleum's application to employ GHR, finding that they were special counsel, and that they met the § 327(e) requirements because the interests of Congoleum and the claimants were aligned in regards to the insurance coverage. As for Model Rule 1.7(A)(1), the court found that the "current client" prohibition is limited to adverse positions "in the same matter,"[195] though prevailing interpretations of this rule of ethics are to the contrary.[196] After their appeal to the District Court was rejected,[197] the

194. *See* MODEL RULES, *supra* note 17, at R. 1.7(a)(1) (2004); *id.* at R. 1.7 cmt. 6 (stating that "absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated"); HAZARD & HODES, *supra* note 58, at § 1.7:203 (interpreting Rule 1.7(a) as prohibiting a lawyer's representation of adverse interests even where the matters are wholly unrelated); *see also* Reply of Certain Insurer's to Debtors' Response to Objection to the Retention of Gilbert Heintz & Randolph, LLP as Counsel for the Debtors at 10-13, *In re* Congoleum Corp., No. 03-51524 (D.N.J. Feb. 27, 2004). The insurers argued that there is no basis for applying waivers of conflict of interest to the conflicts that disqualify counsel under § 327 of the Bankruptcy Code; moreover, that even if waivers were possible, the waivers obtained by GHR were not valid as they were given by Perry Weitz, and the record does not reflect that the claimants were actually informed about, or gave their informed consent to this conflict of interest.

195. *See* Order Pursuant to 11 U.S.C. § 327 Granting Application to Employ Gilbert Heintz & Randolph LLP and Dughi, Hewit & Palatucci, P.C. as Special Counsel to the Debtors, *In re* Congoleum Corp., No. 03-51524 (D.N.J. Mar. 2, 2004); Reply of Certain Insurers to Debtors' Response to Objection to the Retention of Gilbert Heintz & Randolph, LLP as Counsel for the Debtors at 1, *In re* Congoleum Corp., No. 03-51524 (D.N.J. Feb. 27, 2004). GHR claims that their representation of Congoleum is not a violation of Rule 1.7(a)(1) as that rule only prevents counsel from representing adverse interests of current clients in the same matter.

196. *See supra* note 194. By simultaneously representing Congoleum and asbestos claimants suing Congoleum, GHR may also be violating Model Rule 1.7(a)(2), which prohibits a lawyer, absent informed consent, to represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." MODEL RULES, *supra* note 17, at R. 1.7 (a)(2). GHR's duty to Congoleum is to minimize its liability whereas its duty to the individual claimants is to maximize their recovery. *But see* Expert Report of Bruce A. Green, Congoleum Corp. v. Ace Am. Ins. Co., No. MID-L-8908-01 (N.J. Super. Ct. Oct. 7, 2003); Declaration of Thomas D. Morgan, Congoleum Corp. v. Ace Am. Ins. Co., No. MID-L-8908-01 (N.J. Super. Ct. Oct. 7, 2003). Both experts found that Gilbert Heintz & Randolph's representation of Congoleum did not violate Rule 1.7 of the Washington D.C. Rules of Professional Conduct. Professor Green concluded that although Gilbert Heintz & Randolph had a "punch pulling" conflict of interest in representing Congoleum (referring to those situations where a lawyer's commitment to adverse clients, although not directly adverse, might tempt the lawyer the "pull her punches" on behalf of a client), Heintz was entitled to conclude that the firm was able to represent Congoleum to the best of their ability. Green, *supra*, at ¶¶ 9, 11. Therefore, Heintz was permitted to seek Congoleum's waiver of the conflict, which he successfully acquired in order to comply with Rule 1.7. *Id.* at ¶ 11. Professor Morgan came to the same conclusion by focusing on the "limited role"

insurers appealed to the Third Circuit Court of Appeals where the matter is now *sub judice*.[198] After the motion to reject the employment of GHR was argued in the bankruptcy court and the record was closed, GHR reluctantly disclosed that it is counsel with Perry Weitz in representing approximately 10,000 claimants who are currently suing Congoleum and others.[199] GHR has so far succeeded in fighting off all efforts to expand the record on this matter.[200]

A somewhat parallel proceeding has been underway in state court where the insurers have been attempting to disqualify GHR from representing Congoleum in the coverage dispute litigation.[201] After expressing concern about a conflict of interest,[202] the insurers filed a complaint with the New Jersey Office of Attorney Ethics, which, however, declined to act in the absence of a request from the presiding judge.[203] After that declination, argument over the issue of

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that Gilbert Heintz & Randolph assumed in the Congoleum case. Morgan, *supra*, at ¶¶ 7(a), 9. As Heintz's role was recovering insurance proceeds out of which the claimants would be paid, Professor Morgan contended that the interests he was representing were not adverse to those of his other clients. In forming his opinion, Professor Morgan relied upon the assertion that both Congoleum and the plaintiffs, through counsel, expressly waived this conflict. *Id.* at ¶¶ 6(h), 7(b). However, this assumption is questionable from the perspectives of whether the conflict was waivable and if it was, whether counsel had the authority to waive the conflict on behalf of the individual claimants who were not consulted about the conflict.

197. *See* Notice of Appeal, *In re* Congoleum Corp., No. 03-51524 (D.N.J. Mar. 12, 2004); Opening Brief of Appellants ACE Companies Regarding the Retention of Gilbert Heintz & Randolph, LLP as Debtors' Counsel, *In re* Congoleum Corp., No. 04 Civ. 1709 (D.N.J. May 6, 2004); Brief of Appellees Congoleum Corporation, Congoleum Sales Corporation, and Congoleum Fiscal, Inc. Regarding the Retention of Gilbert Heintz & Randolph LLP as Debtor's Counsel, *In re* Congoleum Corp., No. 04 Civ. 1709 (D.N.J. May 28, 2004).

198. *See* Notice of Appeal, *In re* Congoleum Corp., No. 04 Civ. 1709 (D.N.J. Sept. 8, 2004); Notice of Docketing of Appeal, *In re* Congoleum Corp., No. 04-3609 (3d Cir. Sept. 14, 2004).

199. *See* Brief in Support of Insurers' Motion to Disqualify Gilbert Heintz & Randolph LLP as Counsel to Congoleum Corporation at 17 n.59, *In re* Congoleum Corp., No. MID-L-8908-01 (N.J. Super. Ct. Apr. 13, 2005). Under the retainer agreements, GHR is compensated on a contingency fee basis of ten percent of any recovery from the insurers.

200. *Id.* at 17 n.59. The insurers are seeking have the cases remanded so that the record can be expanded and for reconsideration of GHR's fitness to represent Congoleum in this matter.

201. Congeleum Corp. v. ACE American Ins. Co., No. MID-L-8908-01 (N.J. Super. Ct.).

202. *See* Brief in Support of Insurers' Motion to Disqualify Gilbert Heintz & Randolph LLP as Counsel to Congoleum Corporation at 17, *In re* Congoleum Corp., No. MID-L-8908-01 (N.J. Super. Ct. Apr. 13, 2005). Judge Epstein stated:

> I have to express the concern I have about GHR's possible conflict of interest here and I think that's something that has to be addressed. . . . I'm concerned about GHR's involvement because . . . they represent Congoleum in this case with whom claimants have made agreements and they represent those same claimants apparently in other matters.

203. *Id.* at 17. The Office of Attorney Ethics made clear that they would conduct an ethics investigation, which could ultimately have led to disciplining GHR, if Judge Epstein had initiated

disqualification moved forward.[204] While the insurer's case for disqualification in the state court proceeding was stronger because it was not laden down with the § 327(a) versus § 327(e) distinction, the long delay in proceeding with the disqualification motion led the presiding judge to dismiss it:

> I think if this application to disqualify GHR had been presented to me in a very early stage in these proceedings it would have been a fairly easy decision to preclude GHR from representing Congoleum. If for no other reason than to avoid the appearance of impropriety, to protect the integrity of the Court system and to instill and preserve confidence in the integrity of the legal profession.
>
> However, at this late stage in the proceedings and considering all of the previously recited arguments and circumstances, including the Bankruptcy and District Court's decisions, the waivers by Congoleum and the claimants' attorneys and the statement to the District Court by the insurance company attorneys they had no objection to GHR's continued representation in the New Jersey case, and despite . . . argument which suggests that I ignore any possible underlying conflict GHR had in negotiating the claimants' agreement, which argument almost convinced me to grant this application, I'm reluctantly denying the insurance companies' motion to disqualify GHR as Congoleum's attorney.[205]

4. The Role of Joe Rice in the Combustion Engineering Pre-Packaged Bankruptcy

Joe Rice, of the firm of Motley Rice, is one of the leading plaintiff asbestos lawyers in the country. He negotiated the terms of the

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the investigation. However, the OAE was unwilling to provide an advisory opinion based on best practices. Judge Epstein decided that he would not initiate the investigation, but would rather let the insurers file a motion to disqualify GHR if they so desired.

204. *See* Reply Brief in Further Support of Insurers' Motion to Disqualify Gilbert Heintz & Randolph LLP as Counsel to Congoleum Corporation at 1, *In re* Congoleum Corp., No. MID-L-8908-01 (N.J. Super. Ct. Apr. 29, 2005). The insurers' motion to disqualify is based primarily on 1) GHR's conflict of interest in representing both Congoleum and over 10,000 claimants who have current claims against Congoleum; 2) GHR never obtained valid waivers from these clients; 3) even if GHR had obtained waiver they would have been invalid, as these conflicts of interest at bar cannot be waived; 4) GHR has a continuing conflict of interest based on its longstanding relationship with Perry Weitz and Joe Rice, lead plaintiff's counsel in these proceedings; and 5) GHR has an additional self-interest conflict in that the fee arrangement with Kenesis group is adverse to the interests of Congoleum.

205. Transcript of Motion at 67-68, Congoleum Corp. v. ACE American Ins. Co., No. MID-L-8908-01 (N.J. Super. Ct. May 13, 2005).

Combustion Engineering pre-packaged bankruptcy agreement with ABB Ltd., the parent of Combustion.[206] ABB agreed to pay Rice a "success fee" of $20 million for obtaining the requisite 75% claimants' vote in favor of the Combustion Engineering ("CE") Master Settlement Agreement ("MSA").[207] While Bankruptcy Judge Judith K. Fitzgerald determined that this fee was not subject to the approval of the court, she held that she had equitable power to protect the process since Rice had "an actual conflict of interest in this case [because h]e is being paid $20 million by the parent of an entity he is suing. In addition, he has tort clients who have claims against Debtor . . . and he has contingency fee agreements with those clients who will be or have been paid through the CE Settlement Trust . . . and/or by the Asbestos PI Trust."[208] Under that equitable power, she determined that Rice would have to return any amount of the fee paid and waive any unpaid amount to unwaiving clients unless he informed them of the existence and nature of the conflict and obtained written waivers from these clients.[209] Nonetheless, despite the conflict of interest and the requirements of the Bankruptcy Code, the bankruptcy court approved the plan.[210]

Rather than seek to obtain a waiver from his clients, Rice appealed. Judge Alfred Wolin, the district court judge, vacated that portion of the bankruptcy court's confirmation order concerning the "Claimants' Representative's" success fee, concluding that the bankruptcy court lacked subject matter jurisdiction over the "Claimants' Representative's" "private, contractual relationship between himself and his *asbestos plaintiff clients.*"[211] While it is true that Rice argued that he was acting only on behalf of his own clients and not on behalf of all asbestos

206. *See* Parloff, *supra* note 134, at 200.

207. *See* Alex Berenson, *A Cauldron of Ethics and Asbestos*, N.Y. TIMES, Mar. 12, 2003, at C1; *In re* Combustion Eng'g, Inc., 295 B.R. 459, 468 (Bankr. D. Del. 2003).

208. *Combustion Eng'g, Inc.*, 295 B.R. at 478-79.

209. *Id.* However, she recommend withholding confirmation of the plan for ten days. *Id.* Despite finding a conflict and further finding considerable uncertainty as to just whom Rice was representing, as well as misrepresentation by Rice of his role as "Claimants' Representative," *id.* at 478, the bankruptcy court concluded that it could not compel repayment or waiver. *Id.* at 479. The court further held that "the prepetition vote was not tainted under the unusual circumstances of this case," *id.* at 477, and that "there was no prejudice created by the misrepresentation that Mr. Rice was Claimants' Representative." *Id.* at 479.

210. *Id.* at 488-90. In confirming the plan, the court seemingly ignored the fact that the plan was largely negotiated by a "Claimants' Representative" with an actual conflict of interest who was to receive improper payments from the debtor's parent. *Id.* at 477 n.29; *see also* 11 U.S.C. § 1129(a)(1)-(4).

211. *See* Opinion and Order, Rice v. Combusion Eng'g, Inc. (*In re* Combustion Eng'g, Inc.), No. 03-755, 03-10495 (D. Del. Sept. 15, 2003) (emphasis added).

claimants affected by the MSA,[212] the Disclosure Statement refers to Rice as "Claimants' Representative."[213] Moreover, the bankruptcy court held that Rice could not have been retained as a Claimants' Representative because he had a conflict of interest as to the estate due to his employment and payment by Debtor's parent which is a creditor of Debtor.[214] Furthermore, the "success fee" was not being paid by the claimants that he represented but by the parent of the debtor. If the district court's ruling is to the effect that the fee was, in actuality, a private contractual matter with his clients, then it effectively recognized that the $20 million would have been available to have been added to the trust to pay claimants had it not been paid to Rice—making it all the more bizarre that the district court gave its effective imprimatur to the fee. The fee arrangement was also arguably unethical because Rice was being paid part of his fee by the adversary of his client (the parent of the debtor-to-be, which was providing most of the funding of the trust) without the express knowledge and informed consent of his clients.[215] Finally, the somewhat bizarre circumstances surrounding Judge Wolin's

212. *Combustion Eng'g, Inc.*, 295 B.R. at 468. In a number of other bankruptcy proceedings, Rice has testified that although he and another attorney represented 75% of the asbestos claimants, he did not purport to "speak for" the claimants when he appeared before the court. *See* Motion to Compel the Law Firm of Motley Rice LLC to Comply with its Obligation Under Federal Rule of Bankruptcy Procedure 2019, *In re* Congoleum Corp., No. 03-51524 (Bankr. D.N.J. July 6, 2004). Rice explained that he represents attorneys who in turn represent individual claimants. *See* Baron & Budd v. Unsecured Asbestos Claimants Comm., 321 B.R. 147, 160 & n.3 (D.N.J. 2005). Rice has testified that he has arrangements with law firms where his responsibility is only to negotiate on behalf of the law firms with various defendants, but not to actually represent the firm's clients. *Id.* Recently, a client of one firm with which Rice presumably had such an arrangement sued Rice for, *inter alia*, breaching his alleged fiduciary duty to the plaintiff by helping to negotiate pre-pack bankruptcy plans for asbestos defendants. Pope v. Rice, No. 04 Civ. 4171, 2005 WL 613085 at *1 (S.D.N.Y. Mar. 14, 2005). The U.S. District Court for the Southern District of New York dismissed the claims, agreeing with Rice that he had established no attorney-client relationship with, and owed no fiduciary duty to, the plaintiff. *Id.* at **6-9, 12.

The issue of who Rice actually represents is compounded by the fact that despite repeated demands that he and other plaintiff counsel comply with Rule 2019 and list the names and addresses of their creditor/clients and the nature and amount of their claims, Rice and others have repeatedly failed to do so. *See* Motion to Compel, *supra*; *see also supra* note 103. "The purpose of Rule 2019 is to further the Bankruptcy Code's goal of complete disclosure" and to "'ensur[e] that lawyers adhere to . . . ethical standards.'" *In re* CF Holding Corp., 145 B.R. 124, 126-27 (Bankr. D. Conn. 1992) (quoting *In re* Oklahoma P.A.C. First Ltd. P'ship, 122 B.R. 387, 393 (Bankr. D. Ariz. 1990)). This includes disclosure of conflicts of interest so that bankruptcy courts can take prompt action to prevent such conflicts. *Id.* The consistent failure by plaintiff attorneys to comply with Rule 2019 in asbestos bankruptcies facilitates the continuation of conflicts of interest in bankruptcy proceedings. The effective exemption from adherence to Rule 2019 afforded to plaintiffs' counsels in asbestos bankruptcies may be coming to an end. *See supra* notes 100-105.

213. *Combustion Eng'g, Inc.*, 295 B.R. at 478.

214. *Id.* (citing to FED. R. BANKR. P. 2014).

215. *See* MODEL RULES, *supra* note 17, at R. 1.8(f).

reversal of the bankruptcy court's order requiring Rice to secure the informed consent of his clients may be seen to be a part of the conflicts of interest that appear to abound in this proceeding.[216]

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216. In addition to appointing David Gross and Judson Hamlin as advisors, *see supra* note 19, Judge Wolin also appointed Professor Francis McGovern as an Advisor to assist him in overseeing the bankruptcies of Owens Corning, W.R. Grace, USG, Federal Mogul and Armstrong World Industries. As noted previously, *see id*., Hamlin and David Gross, also served as class counsel for asbestos cases in the G-I Holdings bankruptcy. Because legal rulings by Judge Wolin could serve as a precedent for the G-I Holdings bankruptcy in which these advisors had a financial interest, thereby giving rise to a conflict of interest, and further because of numerous *ex parte* meetings that Judge Wolin had with his Advisors and interested parties, the Third Circuit Court of Appeals issued a writ of mandamus to disqualify Judge Wolin from three of the bankruptcies. *Id.*

Professor McGovern was later appointed as a Mediator in the Owens Corning bankruptcy. Professor McGovern had also served as a Trustee of both the Fibreboard Asbestos Compensation Trust (now the Fibreboard Settlement Trust) and the Celotex Asbestos Settlement Trust. Joe Rice and other plaintiff lawyers on the ACCs were responsible for Professor McGovern's appointments in those cases. Deposition of Francis McGovern at 57, *In re* Celotex Corp., Nos. 90100168B1, 9010017B1 (Bankr. D.D.C. July 8, 2003). It appears that Professor McGovern may have continued to serve as Trustee of the Fibreboard Settlement Trust long after Owens Corning had acquired Fibreboard in 1997 and perhaps as late as 2001 when Judge Wolin appointed him as Advisor. It further appears that Professor McGovern's activities as mediator included negotiation of a plan that transferred $140 million of Owens Corning's assets to the Fibreboard Settlement Trust—a development favorable to the interests of Rice and the other plaintiff attorneys.

While Professor McGovern was involved in his role as Mediator in the Owens Corning bankruptcy, he was employed by ABB, the parent of Combustion Engineering, "to mediate the Combustion Engineering bankruptcy" between the company and "any creditors of Combustion Engineering." *Id.* at 142. At the time he was hired by ABB, Rice was not involved in the deliberations. Rice was later engaged to put together a pre-packaged bankruptcy deal. *Id.* at 146, 148-149. McGovern was one of three people present at a meeting in Zurich with ABB and Joe Rice when the offer of a $20,000,000 "success fee" was made and accepted. *Id.* at 147-49. When asked whether he had contacted Rice as part of his mediation effort for ABB, whether he had traveled to Zurich with Rice, and whether he had discussed Rice's compensation with Rice, Professor McGovern refused to answer, claiming these facts were confidential. *Id.*; *see also St. Francis of Asbestos*, WALL ST. J., June 15, 2004, at A14.

On September 10, 2003, after the bankruptcy court found Rice's unconsented $20 million fee unethical because of an "actual conflict of interest" with his clients, and while the matter was on appeal to Judge Wolin, Rice participated in a six hour, *ex parte* meeting with Judge Wolin, Professor McGovern, Gross and other plaintiff counsel. Time Entry of David R. Gross, Sept. 10, 2003 (page 3571 of the Joint Appendix submitted to the Third Circuit, Feb. 20, 2004), in *In re Kensington*. Judge Wolin's log refers to this meeting as a session with "Francis and the boys"—the latter a term he used to refer to Rice and other leading plaintiffs' attorneys with whom he periodically met *ex parte*. Five days after this *ex parte* meeting, on September 15, 2003, Judge Wolin reversed Judge Fitzgerald's order requiring Rice to acknowledge his conflict and obtain waivers from his clients or forfeit the fee. *See* Order, *In re* Combustion Eng'g, Inc., No. 03-10495 (D. Del. Sept. 15, 2003); *see also supra* notes 211-215.

Little is known about the details of this meeting. Professor McGovern, when deposed less than four months later, said he did not remember what had occurred. Deposition of Francis McGovern, *supra*, at 65-66. Though Judge Wolin barred any inquiry into Professor McGovern's role in the Combustion Engineering case, *see* Deposition of David R. Gross at 253, *In re* Owens Corning, No. 00-3837/00-3854 (Bankr. D. Del. Jan. 5, 2004), there is evidence that Judge Wolin did in fact discuss the CE pre-packaged plan with Professor McGovern and his other Advisors both

VII. CONFLICTS OF INTEREST IN ASBESTOS LITIGATION: THE DEFENSE SIDE

Conflicts of interest on the defense side arise because some firms represent multiple clients.[217] In addition to multiple representation, conflicts of interest may also arise because firms that had previously represented defendants that were bankrupted have continued to work in the field by taking on new solvent asbestos defendant clients.

Concurrent and past-client conflicts of interest arise because it is increasingly in the interest of current clients to have juries apportion liability to other defendants as well as to previous defendants which

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before and after CE filed for Chapter 11. *See* Motion of Kensington Int'l Ltd., et al. Pursuant to 11 U.S.C. §§ 105 and 327 and Delaware Local Bankruptcy Rule 9019 for Order Disqualifying and Terminating Appointment of Francis E. McGovern as Mediator in These Chapter 11 Cases at ¶ 34, *In re* Owens Corning, No. 00-03837 (Bankr. D. Del. May 24, 2004). The court's approval of the CE pre-packaged plan was reversed by the Third Circuit. *See supra* note 169. However, there is no mention of the $20 million fee in that appellate opinion.

The September 10, 2003 *ex parte* meeting was followed approximately two weeks later by another ruling by Judge Wolin which was favorable to Rice's interests. Judge Wolin stayed a $2.4 million disgorgement order issued by Judge Newsome in the ACandS bankruptcy against the Kenesis Group, LLC ("Kenesis"). *See In re* ACandS, Inc., 297 B.R. 395, 404 (Bankr. D. Del. 2003) (ordering disgorgement of the $2.4 million fee); Order Granting Stay Pending Appeal, *In re* ACandS, Inc., No. 03-895, 02-12687 (Bankr. D. Del. Sept. 26, 2003) (staying Judge Newsome's order). The following recitation of facts about Kenesis is taken from Memorandum of the United States Trustee in Support of Objection to Debtor's Application to Employ the Kenesis Group, *In re* ACandS, Inc., No. 02-12687 (Bankr. D. Del. Aug. 7, 2003). The Kenesis group is a claims processing firm 70% owned by Gilbert Heintz, the law firm hired by the debtor in the ACandS pre-packaged bankruptcy filing which works closely with plaintiff law firms involved in asbestos litigation and bankruptcies, including Motley Rice and Weitz & Luxenberg. *See supra* notes 186-188. Kenesis was to be paid $3 million to do postpetition claims processing. Kenesis, in turn, subcontracted two thirds of that work to and paid approximately $2 million to another entity which was owned by a paralegal on leave from employment at Rice's law firm but using the firm as her address. Under this arrangement, it appears that the Rice firm's paralegal was determining the eligibility of claims submitted by Rice's law firm on behalf of its clients for payment from the ACandS settlement trust.

Given the circumstances described above with reference to Kenesis's subcontracting claims processing to a paralegal on leave from Rice's law firm, Judge Wolin's stay of Judge Newsome's order to disgorge the $2.4 million so far paid to Kenesis, *see* Findings of Fact, Opinion and Conclusions of Law Re: Debtor's Motion to Employ the Kenesis Group, LLC, *In re* ACandS, Inc., No. 02-12687 (Bankr. D. Del. Aug. 25, 2003), despite numerous violations of the Bankruptcy Code, *see* Memorandum of the United States Trustee in Support of Objection to Debtor's Application to Employ the Kenesis Group, *supra*, at 6-13, would appear to have been highly favorable to Rice.

217. Some counties that host large volumes of asbestos litigation maintain lists of asbestos defendants and their counsel. These lists document the multiple defendants some attorneys represent. *See, e.g.*, Travis County Asbestos Litigation Standing Order Defendant Distribution List, *at* http://www.co.travis.tx.us/district_courts/pdffiles/asbestosdefendant.pdf (last visited May 28, 2005); Dallas County Counsel List, *at* http://www.inreasbestos.com/ServiceList.html (last visited May 20, 2005).

entered bankruptcy and are now survived for asbestos claiming purposes by § 524(g) trusts. In those instances, the interests of client one, and the other present or past clients, to whom client one seeks to apportion liability, conflict;[218] because of the incompatibility of interests, Model Rule 1.7(a)(2)[219] prohibits the multi-defendant representation. Likewise, Rule 1.9(a)[220] prohibits attorneys from representing a current client who attempts to shift blame to a former client, such as where a solvent asbestos defendant seeks to apportion liability to a past client which the attorney no longer represents, usually because that past client has filed for bankruptcy.

Moreover, the conflicts raised by representation of multiple defendants may be unconsentable under either Rule 1.7(b)(1) (if the attorney could not reasonably believe that he or she "will be able to provide competent and diligent representation to each affected client")[221] or Rule 1.7(b)(3) (if the allocation defense constitutes "the assertion of a claim by one client against another client represented by the lawyer in the same litigation").[222] Even if waiver of such conflicts is permissible, client consent is effective only where the client is sufficiently informed, that is, where the attorney adequately disclosed the nature of the conflicts the common representation might present.[223] Where the waiver

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218. The commentary following Model Rule 1.7 states that "[a] conflict [between codefendants represented by the same lawyer] may exist by reason of substantial discrepancy in the parties' testimony, [or] incompatibility in positions in relation to an opposing party . . . ." MODEL RULES, *supra* note 17, at R. 1.7 cmt. 23. Positions taken by, and testimony on behalf of, codefendants seeking to apportion liability to one another for the plaintiff's alleged injuries are certainly incompatible. *Id.*

219. *Id.* at R. 1.7(a)(2).

220. *Id.* at R. 1.9.

221. *Id.* at R. 1.7(b)(1). In *Franklin High Income Trust v. APP Global, Ltd.*, for example, the court disqualified an attorney for representing multiple clients with conflicting interests despite the conflict waiver forms the clients had signed. Franklin High Income Trust v. APP Global, Ltd., No. 602567/02, 2004 WL 2963916 at **2-3 (N.Y. Sup. Ct. June 23, 2004). The attorney in that case represented both the plaintiff and one of the plaintiff's affiliate companies, which the defendant named as a third party defendant for contribution. *Id.* at *1. Professor Geoffrey Hazard, a legal ethics expert, reviewed and approved the dual representation. Michael Bobelian, *Counsel Is Disqualified Despite Waiver*, N.Y. L.J., July 1, 2004, at 5. Still, the court found that, since the plaintiff could potentially have an independent cause of action against the third party defendant, the interests of the two clients conflicted. *Franklin High Income Trust*, 2004 WL 2963916 at *2. The court further found the conflict unconsentable. *Id.* Quoting the New York Court of Appeals, the court stated that "'where a lawyer represents parties whose interests conflict as to the particular subject matter, the likelihood of prejudice to one party may be so great that misconduct will be found despite disclosure and consent.'" *Id.* (quoting *In re* Kelly, 23 N.Y.2d 368, 378 (1968)).

222. MODEL RULES, *supra* note 17, at R. 1.7(b)(3).

223. *Id.* at R. 1.7 cmts. 18-19. Where the attorney makes adequate disclosure when obtaining consent, waivers by asbestos codefendants are likely to be effective since asbestos defendants are

at issue was signed by a past client purportedly consenting to future conflicts of interest (a so-called "advance waiver"), it is "subject to special scrutiny"[224] and thus less likely to be enforced.

The conflicts of interest are heightened because of an endemic feature of asbestos litigation: the ability of plaintiffs (and their lawyers) to counteract the negative effects of the bankruptcies of leading defendants on claim values by continuously drawing other companies in as replacement revenue sources to maintain claim values. Doing so reflects a seemingly uncanny ability to shift party and witness testimony with regard to the identity and relative quantity of asbestos-containing products used at job sites thirty to fifty years prior to the testimony in a way that is consistent with the financial interests of claimants and their lawyers.[225] Despite this "evergreen" aspect of asbestos litigation, it is beyond cavil that the greatest amount of injury inflicted on the largest numbers of workers exposed to asbestos-containing products was caused by or at least has been attributed to a comparative handful of companies—most of which have filed for bankruptcy, including: Johns Manville, Celotex, National Gypsum, H.K. Porter, W.R. Grace, Armstrong Industries, Babcock & Wilcox, USG, G-I Holdings (GAF), Combustion Engineering, subsidiaries of Halliburton, Federal Mogul and Owens Corning.

As the list of companies bankrupted by asbestos litigation grows longer, the opportunities for the solvent companies to attribute even more substantial percentages of liability to those on the bankruptcy list grows wider. The confluence of an ever widening bankruptcy list and certain practices of defense lawyers including multiple representation and replacing bankrupted clients with newly inculpated asbestos clients generates conflict of interest issues what have been largely ignored.

To be sure, there is no hard evidence on the incidence of multiple representation or on the number of defense firms that formerly represented companies that have become bankrupt and now represent solvent defendants. However, the incidence of both types of representation appear to be sufficiently widespread to merit if not mandate attention.

"already familiar" with the "particular type of conflict" and are "experienced user[s] of the legal services involved." *Id.* at cmt. 22.

224. RESTATEMENT, *supra* note 51, at § 122 cmt. d; *see also APRL Speakers and Audience Debate Possibility of Model Advance Waiver Form*, 21 A.B.A./B.N.A LAW. MAN. PROF. CONDUCT 96, 96-97 (2005).

225. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 137-41.

There are a variety of reasons why multiple representation occurs.[226] In some cases, it undertaken at the request of a common insurer. The insurer's action may be prompted by the fact that it had issued liability policies providing for defense cost coverage that did not count against policy limits. For example, a ten million dollar aggregate policy might well cost the insurer fifty million dollars in defense cost reimbursement if the insured aggressively defended against claims. In addition, having a single firm represent multiple defendants can give rise to economies of scale and therefore defense cost savings. Insurers may also urge its insureds to retain a particular firm because the insurer has negotiated a favorable fee structure with that firm.

Historically, in asbestos litigation, the desire to avoid incurring substantial defense costs in litigated cases and also outlier verdicts in jurisdictions especially favorable to plaintiffs has also induced insurers to urge its insureds to enter into large scale settlements of plaintiff lawyers' current inventories of claimants. Often such "inventory settlements" also provide for settlement of future acquired claims. Typically, the settlement values are set forth in a matrix and vary by disease category as well as several other criteria. Settlement values are informed by prior tort system outcomes, including jury trials, the ability of that firm to command certain courts' dockets and schedule cases for trial at an expedited rate as well as its ability to join or consolidate substantial numbers of claims in jurisdictions where plaintiffs have obtained huge judgements, and the ability of a defendant to generate the requisite cash flow to sustain such a settlement policy which is a function of its business income, insurance coverage and experience with other plaintiff law firms.

226. In Northern California, a court order requires that all defense counsel use the "Designated Defense Counsel" ("DDC")—a specified law firm—as co-counsel for all administrative matters involved in asbestos case management. Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 SANTA CLARA L. REV. 1, 26-27 (2004). In *Asbestos Claims Facility v. Berry & Berry*, a fee dispute between a client and the DDC, the California Court of Appeal identified a conflict of interest arising out of the DDC's simultaneous representation of multiple defendants, but did not address the issue because the issue had not been preserved for appeal. *Id.* at 28-29. Still, the court upheld its authority to require that defendants use the DDC, suggesting that courts must monitor DDC representation for impropriety such as that identified in *Berry & Berry*. *Id.* at 29. However, Berry & Berry, the firm which has served as DDC since the position was created, has received little judicial oversight. *Id.* at 28 n.143, 32.

A. The Effects of Tort Reform on Conflicts of Interest on the Defense Side

Asbestos defendants seek to minimize their own liability by, at least in part, maximizing the liability of other asbestos defendants and the § 524(g) trusts established upon confirmation of the plan of reorganization in bankruptcy proceedings. The conflicts of interest generated by this defense strategy are being accentuated by tort reform measures being adopted by states, including those eliminating or limiting joint liability.[227] When liability is several only, there is an increased impetus for each defendant to minimize its own liability by, for example, arguing that the quantity of its product that the plaintiff was exposed to as well as the friability of the asbestos in that product was substantially less than the products of other manufacturers. Necessarily that strategy includes shifting responsibility to other defendants, including the trusts established to which claims against bankrupted defendants are now channelled.

As allocation of liability among defendants becomes a more prominent part of the defense of asbestos claims, so to does the issue of conflicts of interest stemming from former representation of asbestos clients which are now in bankruptcy and multiple representation. To illustrate the conflicts generated by multiple representation, a number of scenarios are presented below and are analyzed in the context of tort reform measures adopted in California and Texas.

For purposes of analysis of the ethical issues, defendants in asbestos litigation may be divided into two classes: 1) manufacturers, installers[228] or sellers of asbestos-containing products; and 2) owners of

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227. Joint and several liability means that "each liable party is individually responsible for the entire obligation." BLACK'S LAW DICTIONARY 926 (7th ed. 1999); *see* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 47, at 328 (5th ed. 1984). Therefore, a defendant that is found to be only one percent at fault could end up being liable for all of the damages awarded if the defendants with the 99% share are insolvent. Proponents of tort reform note that "[a]s a result of this shortcoming, plaintiffs often target persons they perceive to have the greatest resources from which to pay claims[, c]ommonly known as 'deep-pocket' defendants." Senator Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 U. DENV. L. REV. 651, 652 (1988) (referring to such targeting as "deep pocket abuse"). Frequently the "deep pocket" is a municipal government. At least one author has argued that deep pocket abuse has made Americans perceive "civil suit[s] against a corporation or municipality as a kind of lottery—a lottery to be played whenever they can." Jill Andresky et al., *A World Without Insurance?*, FORBES, July 15, 1985, at 40.

228. Additional conflicts may be given rise to because of differing insurance coverage for manufacturers of asbestos-containing products and installers of those products. Coverage of the former usually is subject to an aggregate policy limit whereas coverage for the latter may not be subject to any aggregate limit. The same company may have both types of coverage.

premises which have asbestos-containing products on their premises, exposures to which have allegedly resulted in injury.[229] Each asbestos claimant typically sues sixty to seventy different defendants and bankruptcy trusts, claiming exposure to asbestos-containing products either manufactured, installed or sold by these multiple defendants or present on the premises of a defendant.[230]

The process of apportionment of asbestos liability in which each defendant seeks to minimize the degree of exposure to its products or to asbestos on its premises and therefore its responsibility for any injury and conversely, maximize the evidence of exposure to others' products or asbestos located on others' premises, creates, at least in theory, a zero-sum game similar to that which exists on the plaintiffs' side. In reality, the situation is more complex. When claiming against defendants or bankruptcy trusts, plaintiff lawyers typically refuse to disclose the settlement amounts they have already received from other defendants or trusts.[231] While such information is available when there are settlements and trials involving multiple defendants in a single consolidated action, only a tiny percentage of asbestos claims go to trial. Hence, plaintiff lawyers can obtain settlements for a single plaintiff which may effectively amount to more than 100% of the liability that would be determined in a single consolidated trial. Indeed, that effective percentage could be many multiples of 100%.[232]

In defending asbestos cases, the litany of defenses largely conforms to the following template:

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229. Premises owners which have been sued on such a basis include Dow Chemical, Dupont, Shell Oil Co., Exxon, Motorola, Mars Candy and Rhone Poulenc.

230. While there is some data available in RAND reports on the incidence of multiple claiming, there is little hard data. *See* RAND REPORT, *supra* note 3. The RAND survey shows this number rose from approximately twenty defendants named by the average asbestos claimant in the 1980s. *Id.* The number of claims made per claimant is an estimate based mostly on conversation with some defense lawyers. There is also a dearth of data on the amounts that plaintiff lawyers collect, *in toto*, for individual claimants. Indeed, this appears to be a closely guarded secret.

231. *See* Anderson & Martin, *supra* note 226, at 38-39. Anderson and Martin note that, although Northern California court orders require plaintiffs to disclose compensation they have received from bankruptcy trusts, plaintiffs often object and ultimately avoid such disclosure. *Id.* at 38. As a result, "asbestos defendants feel that they are 'negotiating in a vacuum,' not knowing whether the plaintiff has received nothing for his injuries, or whether he has already received hundreds of thousands of dollars from bankruptcy trusts or other defendants, ultimately receiving what could amount to double or even triple recovery." *Id.* at 38-39.

232. This is one of the factors that accounted for plaintiff lawyer opposition to S.1125, The Fairness In Asbestos Injury Resolution Act of 2003. *See* FAIR Act, *supra* note 110. The bill set damage caps for each disease category. In many cases, claimants in plaintiff firms' inventories had already obtained gross recoveries in excess of those caps. Thus, if the bill passed, the value of plaintiff lawyers' inventories would have precipitously declined. *Id.*

1) the claimant was not exposed to my client's product;

2) whether or not the claimant was exposed, he or she does not have an injury or does not have an injury caused by exposure to an asbestos-containing product;

3) the claimant was exposed but my client's product does not (and did not) cause an asbestos-related disease;

4) the claimant was exposed to my client's product, the product can cause harm, the claimant suffered an injury but the exposure was insignificant and was not a substantial factor in causing that injury;

5) the claimant was exposed to my client's products and though injury resulted, it was not the result of any negligence or actionable conduct;

6) the claimant was meaningfully exposed to my client's products, thus contributing to an injury, but those exposures account for only a small portion of the injury and the largest contributor to the injury was exposure to others' products; and

7) the claimant was exposed to my client's products or premises as well as other products or premises, injury resulted, but irrespective of whether my clients' products or premises account for a portion of the injury, the independent acts or omissions of others in failing to warn my client of the dangers of asbestos-containing products supercedes my client's liabilities.[233]

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233. While I am unaware of any invocation of such a "superceding act or omission" argument by an asbestos defendant, such a defense, which is in part modeled after plaintiff theories of liability, is plausible. Consider the suit brought by Owens-Illinois ("OI") against T&N, Ltd. (Turner & Newell). Both companies have been major targets of plaintiffs seeking damages for injuries arising from asbestos exposure. OI brought suit in June 1999, seeking more than one billion dollars in damages, and alleging that though T&N knew as early as the 1940s of the health risks that end users of asbestos insulation fibers were exposed to, T&N knowingly withheld that information from consumers, unions and government officials, and that had OI known about the inherent dangers of asbestos, it would never have gotten involved in selling asbestos-containing products. *See Texas Court Vacates $1.63B Judgment in Civil Conspiracy Action, Trial Ordered*, 15 MEALEY'S LITIG. REP.: ASBESTOS 1 (Apr. 7, 2000). Although I was not able to obtain a copy of the complaint, it is substantially repeated in the findings of fact and conclusions of law in the default judgment in the amount of $1,630,604,268.29 entered against T&N. Findings of Fact and Conclusions of Law, Owens-Illinois, Inc. v. T&N Ltd., No. 2:99CVI17DF (E.D. Tex. Aug. 23, 1999). In that judgment, the court stated the following Findings of Fact:

> 23. Beginning in the late 1920's and continuing through the 1950's and beyond, T&N engaged in a scheme to defraud and a conspiracy with other asbestos fiber suppliers to create and protect a demand for asbestos through the suppression and misrepresentation of information concerning health risks to users of finished insulation products containing asbestos.
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> . . .

> 30. The wrongful acts of T&N which are deemed admitted relate to a conspiracy and scheme which was designed to conceal the costs, especially the long-term liability costs, of incorporating asbestos fibers into the products of Owens-Illinois and others.
> 31. The conspiracy and scheme perpetrated by T&N upon Owens-Illinois included, but is not limited to, the following acts:
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> a. Concealing from the public, the scientific and regulatory authorities and their customers (including Owens-Illinois) the fact that contract unit employees of certain conspirators developed asbestos related disease;
>
> b. Failing to advise purchasers of asbestos fiber of disease risks known to the conspirators and discouraging efforts to disclose such information;
>
> c. Making false and misleading statements to the British government that the use of finished insulation products containing asbestos did not result in asbestos-related diseases.
>
> d. Suppressing publication of scientific research concerning the potential risks posed by exposure to asbestos dust; and
>
> e. Monitoring and editing scientific research prior to their publication in order to eliminate references to unfavorable results, withholding information about asbestos-related illnesses from their own employees and from the public, and attempting to suppress publication of scientific research.
>
> 32. All of the above acts, and others, were committed by T&N with the knowledge that, if its customers, such as Owens-Illinois, learned that end users of the finished insulation products were at risk of contracting asbestos-related diseases, demand for asbestos fiber would be negatively affected. The above outlined acts created an inequality of bargaining power between the conspirators and Owens-Illinois, relating to the terms under which the purchase of asbestos fibers would be made.
> 33. This scheme to defraud and conspiracy induced Owens-Illinois to enter into a business which Owens-Illinois would not have entered had it known the full costs and risks associated with the incorporation of asbestos fibers in insulation and other asbestos containing products.
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> . . .
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> 37. Owens-Illinois purchased asbestos fiber in reliance on the false perception, perpetuated by T&N and its conspirators, that end-users of asbestos-containing products were not at risk.
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> . . .
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> 40. But for T&N's acts in furtherance of the purposes of the conspiracy to perpetuate the false perception, Owens-Illinois would not have entered into production of asbestos containing products, or Owens-Illinois would have conducted its business differently. As a direct and proximate result of the conspiracy and scheme to defraud set out herein and in the Complaint, Owens-Illinois has suffered, and continues to suffer, substantial injury to its business and property.

Id. at 3-8.

The court stated the following Conclusions of Law:

> 10. T&N fraudulently concealed its conduct and Owens-Illinois could not have previously discovered the fraudulent scheme and its harmful effects on Owens-Illinois.
> 11. T&N committed fraud, conspired with others to commit fraud upon Owens-Illinois and others and made negligent misrepresentations to Owens-Illinois by actively suppressing the information that its insulation workers had contracted asbestos-related diseases and interfering with the development of the medical and scientific literature by

> suppressing and altering scientific publications, thus distorting the published medical and scientific literature. T&N knew or should have known that revealing this information would jeopardize its ability to sell asbestos fibers to Owens-Illinois and others and that this information was material to the decision of customers to purchase asbestos fiber and, if purchased, to the terms under which the purchase would be made. T&N knew or should have known that Owens-Illinois and others would rely, and indeed Owens-Illinois did rely on the absence of information contrary to that published in medical and scientific literature. T&N intended to deceive Owens-Illinois by its conduct in furtherance of its scheme to defraud and conspiracy.
>
> 12. T&N aided and abetted other members of this conspiracy to defraud in their illegal actions which were designed to, and actually did, suppress and misrepresent the true nature of the health hazards faced by end-users of asbestos containing products. The misrepresentations of T&N and the other aiders and abettors thus became part of the state of the art about asbestos related health risks available to Owens-Illinois and the medical and scientific communities. The aiders and abettors knew or should have known that Owens-Illinois would rely and in fact Owens-Illinois did rely, on the absence of information contradicting the available medical and scientific literature in deciding to purchase asbestos fiber and/or attempting to negotiate terms which would reflect the incorporation of the concealed information into its normal commercial decision-making process, thus creating unequal bargaining power between Owens-Illinois and the members of the conspiracy which includes T&N.
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> . . .
>
> 14. At the time Owens-Illinois purchased asbestos fibers, T&N knew or should have known that its knowledge regarding health risks to end-users of asbestos-containing products was more accurate and complete than the information available in the published medical and scientific literature and than the knowledge possessed by Owens-Illinois. The information possessed by T&N regarding the health hazards posed to end-users of asbestos-containing products was unique in that it was contrary to the state of the medical and scientific art. T&N and the conspirators owed Owens-Illinois a duty to reveal what they knew. Owens-Illinois had a right to rely, and did rely, on T&N and the conspirators to reveal what they knew about the health risks associated with use of finished asbestos-containing products.

Id. at 13-15.

After issuing a default judgment against T&N for over $1,630,000,000, the court later set aside the judgment pending settlement negotiations and when these failed, permanently vacated the judgment, ruling that the case could go to trial. *See Texas Court Vacates $1.63B Judgment in Civil Conspiracy Action, Trial Ordered*, 15 MEALEY'S LITIG. REP.: ASBESTOS 1 (Apr. 7, 2000). The parties thereafter settled the suit though the terms are confidential. Had the court allowed the default judgment to stand, it would have posed a serious threat to the viability of other asbestos defendants. This is so because T&N was a member of the CCR (Center for Claims Resolution) defense consortium which was a substantial settlement source for plaintiffs. T&N would have been forced into bankruptcy by the judgment. Since it was one of the four largest contributors to the CCR and the CCR was a major provider of funds to plaintiffs, the CCR's continued existence would have been in jeopardy. *Id.*

The substance of OI's suit against T&N could have also been pleaded by OI as a defense against suits against OI for failure to warn of the dangerous condition of products containing asbestos that it manufactured or marketed. Other asbestos defendants could plausibly take a page out of the plaintiff lawyer's playbook, and argue that the conspiracy between Johns-Manville and Raybestos-Manhattan Corporation and others to suppress information regarding the hazards of asbestos inhalation, *see generally* PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS

Despite the conflicts of interest generated by multiple and former client representation, there is virtually no discussion in the literature of these issues. In large measure, this appears to be a function of defense lawyers' failure to seek to apportion liability to others—which itself may be a conflict of interest and, in any event, could constitute malpractice. Once again, there is no hard evidence on the incidence of defense lawyers seeking, or failing to seek, apportionment of liability. Nonetheless, on the basis of inquiries, I am convinced that defense lawyers are not actively seeking to apportion liability in cases where it would appear to their clients' advantage to do so. There are a variety of plausible explanations for this failure: (1) a stigma-avoiding etiquette may be prevalent among defense counsel and their clients, of not seeking to shift blame to solvent defendants (with the notable exception of Owens Corning before it entered the NSP); (2) lawyers representing a solvent defendant who formerly represented one or more companies that became bankrupt may think it unseemingly to aggressively seek to inculpate their former clients;[234] (3) these same lawyers may further conclude that seeking to inculpate former clients now in bankruptcy may involve using confidential information acquired during the course of that representation to the disadvantage of that former client, thus raising an ethical issue;[235] (4) defense counsel may be concerned that a vigorous policy of allocating liability to other entities including bankruptcy trusts that pay only a fraction of their shares, may be sufficiently successful that it significantly reduces plaintiff lawyers' cash flow and that some of the latter may react by communicating to defendant companies that it

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INDUSTRY ON TRIAL (1985), precluded or limited that defendant's ability to learn of the dangers of the asbestos-containing products it had manufactured or installed on its premises. The argument would be that those actions by third parties supercede defendant's liability for negligence (but not strict liability). Even if the argument fails, it may still be a basis for interpleading those third parties. Other similar scenarios exist. For example, taking another page out of the plaintiff lawyer's playbook, a product manufacturer could claim that certain insurers (life and liability) had become aware in the 1930s and 1940s, of the dangers of asbestos exposure and though arguably having a duty to do so because those insurers also insured the product manufacturer or premises owners who installed those products on its premises, failed to make that information available to their insureds.

234. Inculpating a former client would likely require the lawyer to put on the same "plaintiff's case" that she defended against when she represented that former client. That might well include arguing that a certain document produced in discovery which was introduced to support a punitive damages claim against the former client—which the lawyer zealously argued against—in fact demonstrates the culpability of that former client. Or that the "chrysotile" defense that the lawyer had previously put on should be rejected by the jury being called upon to apportion liability.

235. MODEL RULES, *supra* note 17, at R. 1.9(b). However, if the former client has emerged from bankruptcy and has established a § 524(g) trust to which all future asbestos claims are channeled, then it would appear that seeking to apportion liability to that former client may not be to the disadvantage of that former client.

would be in their self-interest to discontinue use of that defense firm;[236] (5) law firms seeking to allocate significant shares of liability to other solvent defendants may be concerned that doing so will focus attention on the firms' multiple representations and the conflicts of interest thereby created; (6) a desire not to offend insurance carriers which are sometimes instrumental in the selection of law firms to represent insureds; (7) joint and several liability which tempers somewhat the advantages of one defendant's pinning a share of responsibility on another; (8) bankruptcy trusts may be relatively easy targets for assignment of a share of liability, thus perhaps obviating the felt need to identify other solvent defendants as tortfeasors; (9) on the other hand, defense counsel may find it difficult to identify the bankrupt entities to whom they might seek to apportion liability because plaintiffs' counsel are motivated by apportionment statutes to minimize information in the record about the identity of potentially responsible bankrupt entities;[237] and (10) even where plaintiffs identify (or defendants are able to ascertain the identities of) such potentially responsible bankrupt entities, defense counsel may lack the time or resources required to mount "plaintiffs'" cases successfully implicating the bankruptcy trusts as responsible parties.[238]

The last factor—joint and several liability—has been the subject of intensive state tort reform efforts.[239] In 1986, California voters approved

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236. *Cf.* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 157 n.463.

237. *See* Anderson & Martin, *supra* note 226, at 37. In California, where Proposition 51 eliminated joint liability among asbestos defendants for non-economic damages, *see infra* text accompanying note 240, Anderson and Martin report that "[d]iscussions with asbestos defense practitioners reveal a prevailing belief that plaintiffs do not identify these [potentially responsible bankrupt] parties because of the effect of Proposition 51" (that is, because bankrupt entities will pay only a fraction of any damages for which they are severally liable). Anderson & Martin, *supra* note 226, at 37. Anderson and Martin conclude that the failure of plaintiffs' counsel to identify potentially responsible bankrupt defendants prevents defendants from fully utilizing the allocation defense. *Id.* at 37-38. Indeed, at a recent asbestos litigation conference I attended, several plaintiffs' counsels acknowledged to me that, in so-called "apportionment states," they do not file claims against bankruptcy trusts in order to preclude defendants from using the filings to seek to apportion liability to those trusts. HarrisMartin, Conference: Asbestos Allocation: Apportioning Liability in Asbestos Litigation, San Francisco, June 17-18, 2004. Defense counsel, of course, may counter this tactic by propounding interrogatories and deposing plaintiffs to obtain a complete statement of all past employments and asbestos exposures at those employments.

238. *See* Anderson & Martin, *supra* note 226, at 37. Successfully employing the allocation defense places a "significant burden" on defendants; "most defendants do not have the time or resources to spend building a case against a third-party defendant on the off chance that a jury will accept the proffered evidence and apportion some liability to the third party, thereby reducing the named defendants' liability for non-economic damages." *Id.* at 38.

239. In addition to California and Texas, discussed in the text that follows, numerous other states have enacted legislation eliminating or limiting joint liability and/or permitting allocation of

Proposition 51 by initiative.[240] To more closely align tort defendants financial liability to their degree of fault, the initiative provided that

> (a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for *non-economic damages* shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.[241]

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liability to nonparties. *See, e.g.*, 42 PA. CONS. STAT. § 7102 (2004) (eliminating joint liability for defendants found less than 60% liable); WIS. STAT. § 895.045 (1995) (eliminating joint liability for defendants found less than 51% liable); N.Y. C.P.L.R. § 1601 (1996) (same); IND. CODE § 34-51-2-14-17 (1998) (permitting apportionment of liability to nonparties). For a discussion of similar measures in various other states, see Alan J. Brinkmeier, *Damages: Apportionment Among Joint Tortfeasors*, DCBA BRIEF (DuPage County Bar Association) (Oct. 1997), at 4-5 (discussing tort reform measures eliminating joint and several liability in Arkansas, Illinois, Kentucky, Tennessee, Utah, Vermont, and Wyoming; limiting joint and several liability in Idaho, Iowa, Ohio, and Montana; and allowing apportionment of liability to nonparties in Florida, Illinois, Kansas, and Utah), *available at* http://www.dcba.org/brief/octissue/1997/art31097.htm; *see also* UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT (2003). The Uniform Act proposes to eliminate joint and several liability in favor of a reapportionment system under which courts, after apportioning liability severally among defendants, may reallocate any uncollectible share of such liability severally among the other parties to whom the court initially allocated responsibility. *Id.* at § 5. The Uniform Act would not, however, permit allocation of fault to nonparties. *Id.* at § 5 cmt.

240. Proposition 51 was approved by 62% of California voters and was codified as CAL. CIV. CODE § 1431.1 (2004). One of the main arguments for the enactment of The Fair Responsibility Act of 1986 was the perceived injustices of a system based on joint and several liability and the perception of the unfairness of "deep pocket" abuse. *See* Evangelatos v. Superior Court, 753 P.2d 585, app. at 614 (Cal. 1988) (argument in favor of Proposition 51 stating that the deep pocket rule turns the taxpayer into another victim of the tort); *see also* Carolyn Hacker, *Fair To Whom? Misapplication of the Fair Responsibility Act*, 39 CAL. W. L. REV. 69, 81 (2002) (noting that the legislature was seemingly "concerned above all with ensuring justice"); Ellyn Moscowitz, *The Fair Responsibility Act of 1986: How Fair Is It?*, 13 WHITTIER L. REV. 909, 910 (1992). Others have argued that the movement for tort reform in the 1980s was really a result of a perceived insurance crisis. James A. Gash, *Rethinking Principles of Comparative Fault in Light of California's Proposition 51*, 19 PEPP. L. REV. 1495, 1496 (1992); Robert L. Habash, *The Insurance "Crisis": Reality or Myth? A Plaintiffs' Lawyer's Perspective*, 64 DENV. U.L. REV. 641, 641 (1988) (also noting that the perceived crisis was created by the "wealthy and powerful insurance industry and related interests . . . to reap higher profits").

The statute states two basic goals. The first goal is to protect public and private entities from the "inequity and injustice" of a rule that imposes liability on defendants based on their ability to pay rather than in proportion to each defendant's fault. CAL. CIV. CODE § 1431.1(a)-(b); *see* Hacker, *supra*, at 70. The statute was also enacted to remedy the increased burden on "taxpayers and consumers alike," of having to "pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums." CAL. CIV. CODE § 1431.1(b); *see* Moscowitz, *supra*, at 910 (noting that the Proposition "promised . . . a reduction or windfall in their insurance premiums").

241. CAL. CIV. CODE § 1432.1(a) (emphasis added).

California Supreme Court opinions construing Proposition 51 suggest that liability may be apportioned to all responsible parties including bankrupt entities.[242]

California's elimination of joint liability for noneconomic damages impacts both plaintiff and defendant lawyers. For plaintiff lawyers, Proposition 51 "changes the dynamic of against whom you go to trial and what kind of loss you can take to trial, because if you do not have large economic damages, and you have a one percent responsible defendant, it is not economically viable to take that case to trial."[243] For defense lawyers, Proposition 51 makes it incumbent to seek to apportion damages to other named defendants as well as to non-parties which may arguably have contributed to the harm being alleged by the plaintiff.[244] Because this would create conflicts of interest where attorneys represented multiple defendants and might create conflicts of interest where attorneys formerly represented defendants which have gone into bankruptcy, one would expect that defense lawyers' practices would change as a consequence. Neither premise—that defense lawyers would actively seek to apportion damages to others and that conflicts of interest generated by multiple representation would necessitate changes in lawyers' practices—appears to have come to fruition.[245] Though the

242. Though it did not mention bankruptcy trusts specifically, the California Supreme Court in *Evangelatos v. Superior Court* recognized that, under Proposition 51, plaintiffs would recover less than full damages where liability is apportioned to insolvent defendants. The court later clarified that "with respect to . . . non-economic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." DaFonte v. Up-Right, Inc., 828 P.2d 140, 144 (Cal. 1992). *See* Anderson & Martin, *supra* note 226, at 35-36 (discussing the *Evangelatos* and *DaFonte* cases and concluding that California Supreme Court rulings support allocation to bankrupt defendants).

Judge Helen Freedman, who heads the asbestos docket in New York, has reached a similar result in construing N.Y. C.P.L.R. § 1601. *In re* New York City Asbestos Litigation ("Tancredi"), 750 N.Y.S.2d 469 (N.Y. Sup. Ct. 2002), *aff'd*, 6 A.D.3d 352 (N.Y. App. Div. 2004). She held that "the culpability of a bankrupt, nonparty tortfeasor will be included when calculating the defendant tortfeasors' exposure . . . ." *Id.* at 479. This case has not yet been reviewed by the New York Court of Appeals.

243. Alan Brayton, *Alternatives to Asbestos Impairment Standards*, 31 PEPP. L. REV. 29, 29-30 (2004).

244. Proposition 51 has been construed to allow a defendant to request apportionment of damages if that defendant can attribute a portion of the fault to a non-party. Wilson v. Ritto, 105 Cal. App. 4th 361, 369 (Ct. App. 2003). The *Wilson* court also noted that a defendant has the burden of proving the fault of a non-party joint tortfeasor in order to request apportionment. *Id.* Assuming that an attorney representing a named defendant has confidential information regarding a non-party client, that attorney would have to choose between keeping such information confidential or using it to prove the fault of a non-party tortfeasors. In such a situation it is unclear whether there can be a waiver of a possible conflict of interests by the informed consent of each client.

245. *See* Anderson & Martin, *supra* note 226, at 36 ("[W]hile Proposition 51 theoretically provides an empty chair for asbestos defendants to point to, this defense is significantly

empirical evidence is at best murky, it appears that Proposition 51 has been significantly underused by defense lawyers.[246] Firms are, however, apparently aware of the conflicts generated by multiple representation in the post Proposition 51 era because several include conflict waiver provisions in their retainer agreements.[247] Presumably, these waivers[248] contain provisions similar to the following:

1) you, the client, acknowledge that it is our policy to not actively pursue a claim against an existing client of the firm; discussion of waiver.

2) by so acknowledging, you are waiving your right to have us seek to reduce your share of liability by attempting to ascribe some share of liability to one of our existing or future clients;

3) you further acknowledge that one effect of our policy is to protect you since we will not actively pursue a claim against you when representing another client;

4) you further acknowledge that you will benefit from the efficiency and lower costs generated by our representation of multiple asbestos defendants; and

5) you have independently verified that this waiver serves your best interest for the above stated reasons.

Use of conflict of interest waivers may be part of a joint defense agreement.[249] Such an agreement might provide that in the event one or more parties to the agreement were not named as defendants in a proceeding, the common attorney for the participants could seek to allocate liability to that party or parties. In such instances, any conflict of interest would appear to be waivable by informed consent.[250] However, the issue would be complicated if seeking apportionment of liability to

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underutilized because the identities of bankrupt manufacturing defendants are not easily obtainable through discovery. Defendants do not often use discovery motions to press plaintiffs for information about potentially liable third parties. As long as plaintiffs are allowed to withhold information or knowledge about product identification and the issues relating to exposure, defendants will be unable to utilize Proposition 51 to its fullest extent.").

246. *Id.* at 37.

247. Again, the use of conflicts waivers is based on off-the-record conversations with defense lawyers. I have not seen any of the waiver provisions. My discussion is therefore conjecture.

248. *See supra* notes 55-64 and accompanying text.

249. *See* Hanson, Bridgett, Marcus, Vlahos, Rudy LLP, Mealey's Asbestos Premises Liability Conference: Identifying and Managing Potential Conflicts in Joint Defense Groups (Dec. 9-10, 2004) (recommending that joint defense agreements a) specify how the attorney will handle conflicts of interest among the joint defendants and b) provide for potential future conflicts, perhaps with a provision waiving the right of joint defendants to seek disqualification of the attorney in future lawsuits).

250. *See supra* notes 55-56 and accompanying text.

the non-party client included revealing confidential information that could operate to the detriment of that client in a future litigation.[251] Accordingly, the waiver and joint defense agreement may provide that the license granted to the attorney to seek to apportion liability to a non-party joint defense client is limited to the use of publicly available information regarding that non-party's culpability and specifically excludes the use of confidential information.

A presumably more common type of joint defense agreement entered into by asbestos defendants would provide that when named as defendants in the same litigation, they will coordinate their defense and use a common lawyer. Each participating defendant in that joint defense agreement may agree not to seek to apportion liability to other participants and may further provide that irrespective of how the jury apportions liability, each will contribute to their joint allocation of liability according to agreed upon shares.[252]

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251. Where codefendants share a common interest in litigation, their communications with each other and with their counsel may be protected against disclosure to third parties by the joint defense privilege. *See, e.g.*, Ageloff v. Novanda, Inc., 936 F. Supp. 72, 76 (D. R.I. 1996); *In re* Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990), *cited in* Joseph C. Kearfott & D. Alan Rudlin, ALI-ABA COURSE OF STUDY MATERIALS: ENVIRONMENTAL AND TOXIC TORT MATTERS: ADVANCED CIVIL LITIGATION (Course No. SG084 LEXIS Combined ALI-ABA Course of Study Materials File) § (B)(1) (Jan. 2002). The rationale behind this privilege is that parties with a common interest in litigation, whether as coplaintiffs or codefendants, should be able to share information with each other to more effectively litigate their claims or defenses. *Id.* However, in subsequent litigation between joint defendants (such as actions for contribution), such confidential information loses its privileged status. Kearfott & Rudlin, *supra.* In *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, for example, the insured, after defending against a tort claim, sued its insurer for indemnification. Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991), *cited in* Kearfott & Rudlin, *supra.* The court found that, although the insurer was not directly involved in the litigation, the joint defense privilege attached to information shared by the insured with its attorney because the insured and the insurer shared a common interest in the litigation. *Id.* at 328-29. Thus, in a subsequent action by the insured against the insurer for indemnification, the insured had to disclose information from the underlying tort litigation to the insurer because the information retained no protection. *Id.* Since not all jurisdictions recognize the joint defense privilege, the American Law Institute recommends that joint defendants enter a joint defense agreement expressing their understanding that their arrangement does not waive applicable privileges and spelling out the steps they will take to keep shared information confidential. Kearfott & Rudlin, *supra*, at § B(2); *see also* Hanson, Bridgett, Marcus, Vlahos, Rudy LLP, *supra* note 249.

252. Although I have not seen an agreement expressly pre-determining allocation of liability, I have found instances in which defendants defer the question of proportionate responsibility until after conclusion of the underlying litigation. *See, e.g.*, Southwestern Bell Tel. Co. v. Gen. Cable Indus., Inc., 966 S.W.2d 166, 171 (Tex. Ct. App. 1998) (allowing action for contribution based on agreement between codefendants to jointly settle with the plaintiff and later litigate their proportionate responsibility), *cited in* Gregory J. Lensing, *Proportionate Responsibility and Contribution Before and After the Tort Reform of 2003*, 35 TEXAS TECH L. REV. 1125, 1160 (2004); Hanson, Bridgett, Marcus, Vlahos, Rudy LLP, *supra* note 249 (recommending that joint defendants agree to wait to litigate cross-claims until the underlying litigation concludes).

The use of joint defense agreements may constitute valid reasons for defendants both to waive conflicts of interest and to not demand that their counsel seek to shift significant percentages of liability to certain other parties. Nonetheless, it continues to appear that a primary motivation for most defense firms' failure to seek to allocate responsibility to others is an amalgam of one or more of the ten factors listed above, ranging from etiquette to self-interest. To the extent that self-interest is implicated, that may lead defense firms to fail to fully explicate the full nature of the conflict generated by multiple client representation to their clients. Even though these clients are, by definition, "sophisticated clients,"[253] in actual fact, many clients may not be fully aware of the dimensions of the multiple and former client conflicts. Accordingly, the waiver may not represent "informed consent."[254] Moreover, even when armed with a sophisticated client waiver, the waiver may be invalid because "it is 'not reasonably' likely that the lawyers will be able to provide 'adequate representation' to the [affected] clients."[255] If the conflict is unconsentable, the law firm may have to decline to represent each of the multiple asbestos clients that he represents which would negatively impact the firms' fees.

Whatever the explanation for the apparent failure of California defense firms to seek to invoke Proposition 51 on behalf of their clients, the tort reform that has been enacted in Texas with regard to joint liability is more extensive and raises the issue of conflicts of interest to even more commanding heights.

Texas H.B. 4, Article 4 amended Chapter 33 of the Texas Civil Practice and Remedies Code (TCPRC) to allow defendants to have the benefits of joinder of third parties for allocation purposes without having to actually join them in the action.[256] Instead of joinder, they need only designate another entity as a "responsible third party" (RTP). An RTP is defined as "any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these."[257]

253. *See* MODEL RULES, *supra* note 17, at R. 1.7.

254. *See supra* notes 55-56 and accompanying text.

255. HAZARD & HODES, *supra* note 58, at 11-59–11-60 (interpreting Model Rule 1.7 (b)).

256. 2003 Tex. Sess. Law Serv. 204 (Vernon) (amending TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (1995)).

257. *Id.* at § 4.05.

A three-step process is prescribed.[258] If as a result of that process, an RTP is named on the jury charge, then the jury can allocate a percentage of the responsibility for the claimant's injury to the RTP.[259] Thus, under the Texas statute, the jury can assign a share of the liability to an entity which is not made a party to the lawsuit. The larger the share assigned to one or more RTPs, the less the share assigned to named defendants. However, if a person is designated by a defendant as an RTP, the plaintiff may then join that person as a defendant even though "such joinder would otherwise be barred by [a statute of] limitations. . . . [provided the plaintiff] join[s] that person . . . not later than 60 days after" designation as an RTP.[260]

The potential effects of H.B.4 on litigation strategies are profound. Whereas defendants' strategy in depositions was to minimize a plaintiff's exposure to asbestos-containing products, the defendants may now be expected to seek to maximize that exposure.[261] To do so, defendants will need to adopt litigation practices employed by plaintiff lawyers, including the use of "picture books" containing photographs of a wide array of asbestos containing products shown to plaintiffs to

258. First, the defendant must initially provide "sufficient facts" (§ 4.04(g)) in its pleading "concerning the alleged responsibility of [the RTP]." *Id.* at § 4.04(g). If the motion to designate an RTP is objected to, then the motion is to be granted "unless the objecting party establishes that: (1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure; and (2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure. *Id.*

If the defendant's motion has been granted, then the objecting party has a second opportunity to strike the RTP designation. After adequate time for discovery, the objecting party can move to strike the RTP designation on the ground that there is "no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage." § 4.04(*l*).

If the defendant prevails once again, then the defendant has one more hurdle: getting the designated RTP named on the jury charge. The issues here are whether there is "sufficient evidence" to support such designation and the standard by which that is to determined—a matter of the intersection of H.B. 4, § 4.2, with TCPRC § 33.003. *See generally* JACK RATLIF & WILSON ALBRIGHT, TEXAS COURTS TRIAL & APPEAL: CASES & MATERIALS 29 (8th ed. 2002); Lensing, *supra* note 252.

259. If the percentage of responsibility attributed to defendant is greater than 50% (or the defendant is found to have had "the specific intent to do [criminal] harm," then the defendant, in addition to the percentage of damages determined by the trier of fact, shall be *jointly* and severally liable for the damages. § 4.07(b)(1)-(2) (emphasis added).

260. § 4.04(e).

261. *See* Lensing, *supra* note 252, at 1186 ("[A] defendant names a responsible third party in the hope of shifting a large percentage of responsibility onto it and of avoiding joint and several liability.").

refresh their recollections of the products that they were exposed to twenty to fifty years earlier at a variety of job sites.[262]

Plaintiff lawyers' strategies may also be expected to change. In preparing parties and witnesses for testimony, they will seek to have the plaintiff *not* identify the products of the bankrupt companies rather than just minimize the quantity of those products relative to others at the work sites. In cases of severe injury where substantial damages are being sought, as for example, most mesothelioma claims, plaintiff lawyers will likely delay filing claims with the § 524(g) trusts until after the litigation has been concluded because the product exposure statements that accompany those trust filings can be obtained by subpoena by defendants and used to increase allocation to those bankrupts.[263] To illustrate the range of conflicts of interest that may result under the Texas statute, four scenarios are set forth below:

1) *Two clients, one a product manufacturer and the other a premise owner/two distinct causes of action/both parties named in the same action.*

Assume defense counsel represents two separate clients, one a premise owner and the other, a product manufacturer, in the same action. Assume further that the manufacturer's product has been identified as being at the premise owner's site at relevant times. Under traditional joint and several liability law, there is no conflict if the joint defense is that the disease alleged is nonexistent or that it has not been caused by exposure to asbestos. However, if that defense is not sustained and there is sufficient proof of a disease attributed to asbestos exposure, then the two clients' interests conflict.

The premise owner, sued under a negligence theory, will want to defend the case by arguing "state of the art," that is, by claiming that it did not breach a duty to warn of the danger posed because it did not know asbestos was harmful; it is held to the standard of a reasonable person in this regard. The premise owner will further argue that the

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262. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 139. There is evidence that some law firms sought to instill false memories in witnesses. *Id.* at 137-57.

263. The incentive for plaintiff lawyers to hide or minimize the responsibility of bankrupt entities under H.B. 4 is similar to that which exists in California under Proposition 51. *See supra* note 241. In addition, since § 33.012(b) of the Texas Code reduces a claimaint's recovery by the percentage of fault apportioned to any entities with whom the claimant has already settled (regardless of the dollar amount of the settlement), Texas plaintiffs will seek to minimize the liability apportioned to such settling entities. *See* Lensing, *supra* note 252, at 1139-40 ("[T]he plaintiff's incentive after a settlement is to adopt a trial strategy that downplays the settling persons's culpability and maximizes the fact finder's assessment of proportionate responsibility against the defendants."); *see also id.* at 1151-52 (discussing § 33.012(b)).

product manufacturer, which is also being sued on the basis of strict liability, is held to the standard of an expert and is strictly liable for the harm caused.

The product manufacturer, sued under a strict liability theory, will defend by claiming that its product did not cause the harm; the product manufacturer will also want to seek to establish that the premise owner should be allocated a share of the liability because it negligently failed to follow proper workplace safety practices, such as providing adequate ventilation, isolation of workers, wet down techniques, respirators, air monitoring, etc.

Assuming that both clients have entered into retainer agreements containing conflicts waivers as described above,[264] then two issues are raised: (1) whether counsel "reasonably believes that the lawyer will be able to provide competent and diligent representation to each . . . client,"[265] and (2) whether the representation involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."[266] It would appear that under Model Rule 1.7(b)(3), the conflict is not waivable because the clients will, in effect, be asserting claims against each other. Even if the word "claim" is interpreted so literally that Rule 1.7(b)(3) does not make the conflict unwaivable, it appears unlikely that by the objective standard set forth in Model Rule 1.7(b)(1), a lawyer could reasonably believe that he or she could provide "competent and diligent" representation to both clients. It would appear that the objective standard could be met, however, if the clients had entered into an arms length joint defense agreement that included a provision that irrespective of the jury's allocation, they would, as between them, reallocate their total liability to conform to the division in their agreement.

I have been unable to determine whether joint defense agreements exist that include such a provision. Moreover, the complexity of the scenarios generating such an agreement makes conjecture difficult at best. Nonetheless, it seems unlikely, given the exigencies of asbestos litigation, that both clients would enter such a joint defense agreement that would apply to all asbestos litigation to which either or both were named as a defendant. Negotiating a joint defense agreement for each lawsuit, however, would pose substantial transactional costs.

264. *See supra* text following note 248.
265. MODEL RULES, *supra* note 17, at R. 1.7(b)(1).
266. *Id.* at R. 1.7(b)(3).

Accordingly, it seems doubtful that joint defense agreements that include allocation of liability shares are being negotiated.

2) *Two product manufacturer clients/the same cause of action/both parties named in the same action*.

Assume defense counsel represents more than one product manufacturer and that each is named as a defendant. Again, there is no conflict if the joint defense is that no disease is present. However, if plaintiff is able to prevail on the issue of whether an asbestos-caused illness occurred, than the defendants' interests conflict. Liability will then rest on those companies which produced, sold or installed products which contributed to the overall asbestos fiber dose, exposure to which brought about the disease. Therefore, to escape or at least minimize liability, it is in the best interests of each manufacturing client to argue that there was little or no exposure to its product and that in any event, any such exposure did not cause the harm; conversely, each will want to argue that there was substantial exposure to the other manufacturers' products including counsel's other client and that that was the cause of any harm to the claimant.

Here again, the conflict would appear to be nonwaivable because in the litigation, each client is effectively asserting a claim against the other.[267] However, if Rule 1.7(b)(3) was not interpreted to make the conflict nonwaivable, then waivability of the conflict depends on the reasonableness of the lawyer's belief that he or she can provide competent and diligent representation to each client. If the clients had entered into a joint defense agreement, then as per the discussion in scenario (1), the conflict would appear to waivable. Even in the absence of such an agreement, however, if each client has been fully informed of the risks of joint representation, in particular, the consequences of each failing to seek to apportion liability to the other, then it would appear that informed consent to the conflict would permit the joint representation.

However, it should be noted that while informed consent to the joint representation conflict would also insulate the lawyer from civil liability for failing to seek to apportion a share of liability on behalf of each client to the other, it would not insulate the lawyer from liability for failing to seek to apportion liability to other entities.

267. *Id.*

3) *Two premises owner clients/the same cause of action/both parties named in the same action*.

Assume defense counsel represents two (or more) premise owners and that both are named in the same action. Again there is no conflict if the joint defense is that plaintiff does not have an asbestos-caused illness. A conflict exists, however, if the plaintiff is able to prevail on whether an asbestos-caused illness is present.

Here, it is in the best interest of each client to argue that the time the plaintiff was present on its respective premises and the degree of exposure while there was insubstantial compared with the time and exposure alleged to have occurred while the claimant was on other premises, including the premises of the other client of the firm. Moreover, the conflict is exacerbated if, for example, it is plausible to argue that the industrial hygiene practices at one site more closely adhered to industry or government standards than those practiced at other sites.

Here again, Rule 1.7(b)(3) would appear to make the conflict nonwaivable because, in effect, both clients are asserting claims against each other. If, however, Rule 1.7(b)(3) was not interpreted so as to render the conflict nonwaivable, then informed consent to the conflict would permit the joint representation under the same analysis as that set forth in scenario (2).

4) *Two clients/two distinct causes of action/only one client named in the action.*

Assume that only one of the law firm's two (or more) clients is named as a defendant in Texas, then the attorney has an obligation to the named defendant to seek to have the jury allocate responsibility for the injury to other named defendants and, as well, to other manufacturers and premise owners who have not been named as defendants. However, by seeking to have the unnamed client designated as an RTP, the attorney may be exposing that second client to liability because plaintiff can then join that second client as a defendant even if the statute of limitations has run.[268] Unless that second client has previously been sued

268. By itself, the act of naming an entity as a responsible third party does not expose that entity to liability (either in the current lawsuit or in a future suit under *res judicata*). TEX. CIV. PRAC. & REM. CODE ANN. § 33.004. *See* Lensing, *supra* note 252, at 1188. However, as noted above, the RTP may incur liability if the plaintiff joins the RTP as a defendant, or if the defendant either impleads or later brings a contribution claim against the RTP. *Id.* Under § 33.015, if a defendant is found jointly and severally liable and pays more than its several share of the damages award, it is entitled to contribution from any codefendant that paid less than its several share of the damages, as well as any non-party that was held partially liable. *Id.* at 1158-59.

as a defendant by the plaintiff and can defend against a subsequent suit by the same plaintiff on the grounds of *res judicata*, then their interests conflict.

It is unclear whether Model Rule 1.7(b)(3) would preclude a waiver of the conflict. Naming the second client as an RTP does not as directly put the lawyer in the position of representing both sides in an adversarial proceeding as does the other scenarios. However, if the plaintiff then adds the second client as a named defendant, that poses the same Rule 1.7 issue as posed above. Assuming that Model Rule 1.7(b)(3) is not interpreted so as to make the conflict unwaivable, then the analysis that follows largely tracks that of the prior scenarios. If the clients had entered a joint defense agreement and agreed to reallocate their respective liabilities as determined by the jury to conform to the division in their agreement, then the conflict would appear waivable under Rule 1.7(b)(1). In the absence of both a joint defense agreement and the defense of *res judicata*, however, it is difficult to perceive of a situation where a non-party client would consent to joint representation if that meant that the lawyer would seek to add that non-party as an RTP. There is thus reason to doubt that the lawyer could meet the objective standard and, as well, that any consent was informed.[269]

VIII. CONCLUSION

Given the massive numbers of specious claims that make up the bulk of asbestos litigation[270] and the likelihood that a substantial portion of these specious claims are fraudulent,[271] it may not be surprising that plaintiff lawyers who account for the bulk of these claims appear largely immune from both legal process[272] and ethical rules. Even so, the pervasiveness of the absence of application of ethical rules to asbestos litigation and to a large extent, to asbestos bankruptcy proceedings as well, can only stand as an indictment of the courts, disciplinary authorities and indeed, the legal profession. On the defense side, the enumerated failures to seek apportionment of liability appear to be a largely underappreciated agency cost. The paucity of discussion of these

269. If the lawyer intended not to seek to designate the non-party client as an RTP and this was agreeable to the client named as a defendant because there was little basis for arguing for any appreciable share to be apportioned to the non-party client, then the objective standard could be met and the named defendant could give its informed consent.

270. *See* Brickman, *Theories of Asbestos Litigation*, *supra* note 8, at 35-41.

271. *See id.* at 41-44.

272. *See id*. at 74-76 n.120, 141 n.399, 164 n.503.

phenomena in the legal literature[273] suggests that a dense fog has descended over asbestos litigation, obscuring much of it from plain view. It remains to be seen whether piercing that fog—as I have intended to do in this article, will pave the way for others to follow.

To this point, however, rules of legal ethics remain largely inapplicable to asbestos litigation—apparently a victim of the vast sums of money that are at stake.

273. *See supra* notes 8, 36, 115, 119, 121 and 165 for a listing of the articles discussing ethical issues raised by asbestos litigation.