**United States Senate Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights**
**Committee on the Judiciary**

**Hearing on "Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy"**

**Mr. Maclay's Responses to Written Questions of Senator Thom Tillis**

1. *Tell me about how the system works for people who might discover their injury a few years down the road. Does the current Chapter 11 process allow for injured people to access compensation right away as well as in the future if it takes them a while to discover their injury? Or are they out of luck if they don't get in to file a claim right away?*

Someone who discovers in the future that he or she has been injured by asbestos can seek compensation from the companies responsible for that injury. Such a person is often called a "future claimant." If a future claimant later discovers that he or she was injured by a company, the claimant can sue that company in court. The company either settles that lawsuit or decides to fully litigate it, which can either result in a dismissal, or a trial where it is decided by a jury. In the tort system, trials are relatively rare. Most cases are settled or dismissed.

If the future claimant discovers he or she was injured by a company that has filed for bankruptcy, whether he or she gets compensation, how much that compensation is, and when that compensation will be paid are all uncertain. To help explain why, I will provide some overview of the Chapter 11 process as it relates to asbestos cases.

**The Unique Characteristics of Asbestos Bankruptcies**

Chapter 11 of the Bankruptcy Code enables business debtors to work with their creditors to negotiate a plan of reorganization that restructures the debtors' balance sheets or business operations, eases their financial distress, and preserves the going-concern value of the business in an effort to maximize creditor recoveries.

In an ordinary bankruptcy, existing unsecured claims of banks and trade creditors are liquidated. If there are tort claims, they are usually few in number and can be resolved individually or sent back to state court for trial. Typically, there are no future claims.[1] The plan of reorganization deals with all claims in existence as of the petition date, pays those claims amounts as stipulated in the plan, and discharges the claims.[2] The assumption is that the company, once its debt has been reduced and its capital structure improved, will be able to go on as a viable business and handle subsequent obligations as they arise.[3]

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1 Elihu Inselbuch, *Some Key Issues in Asbestos Bankruptcies*, 44 S. TEX. L. REV. 1037, 1039 (2003).

2 *Id.*

3 *Id.*

However, asbestos is not a normal tort.[4] There can be a long latency period before the disease manifests.[5] Thus, in asbestos bankruptcies, one issue is dealing with the thousands of unliquidated present and future asbestos claims to fairly allocate the insufficient limited assets among various creditor groups.[6] Often, the business enterprises that file for bankruptcy are viable businesses seeking bankruptcy protection for the sole reason of resolving asbestos liabilities resulting from the exposure of their employees and customers to asbestos over many decades.[7]

Future asbestos claims represent a contingent liability that gradually becomes concrete, confronting the reorganized debtor with the same litigation that precipitated its first trip to bankruptcy court.[8] If asbestos bankruptcies only resolved asbestos claims that had already manifested, each reorganization would be followed by another mass of asbestos claims, triggering further reorganizations extending indefinitely into the future.[9] For these reasons, it is impossible to reorganize a company with serious asbestos problems unless the plan of reorganization somehow deals with future claims.[10]

To resolve this conundrum, the concept of a trust dedicated to payment of asbestos claims was developed in *Johns-Manville*.[11] The trust, rather than the debtor, would have the responsibility to pay all asbestos claimants, present and future.[12] Future claimants would be enjoined from seeking recovery from the reorganized company, and instead would be required to seek recovery only from the trust.[13] Thus, a so-called "channeling injunction"—an injunction that channeled future claimants to the trust and so protected the reorganized debtor—was an essential element of the *Johns-Manville* solution.[14]

Thereafter, Congress codified the *Johns-Manville* trust mechanism in the Bankruptcy Reform Act of 1994. *See In re Federal-Mogul Glob. Inc.*, 684 F.3d 355, 359 (3d Cir. 2012). And for the nearly three decades since, chapter 11 bankruptcies "have employed a statutory mechanism created by 11 U.S.C. § 524(g) to resolve massive asbestos liability and to evaluate claims and allocate payments to current and future asbestos claimants. When this provision's requirements are satisfied, the bankruptcy court may issue an injunction channeling all current and future claims based on the debtor's asbestos liability to a personal injury trust." *Id.* at 357. In other words, "the § 524(g) injunction aims to 'control the future litigation of all asbestos-related claims against the parties it protects' by preventing 'any entity from taking legal action to collect a claim or demand

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4 *Id.* at 1038.

5 *Id.*

6 *See id.*

7 Inselbuch, *supra* note 1, at 1038.

8 *Id.* at 1039.

9 *Id.*

10 *Id.*

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

12 Inselbuch, *supra* note 1, at 1039.

13 *Id.*

14 *Id.*

that is to be paid in whole or in part by a trust created through a qualifying plan of reorganization.'" *In re Thorpe Insulation Co.*, 677 F.3d 869, 877 (9th Cir. 2012) (quoting COLLIER ON BANKRUPTCY ¶ 524.07).

There are several statutory prerequisites imposed by § 524(g) which are "specifically tailored to protect the due process rights of future claimants." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 n.45 (3d Cir. 2004), *as amended* (Feb. 23, 2005).

> Under . . . [§ 524(g)], the bankruptcy court may grant a channeling injunction only if (1) the debtor is subject to substantial and uncertain future asbestos liability, (2) the trust owns a majority of the voting shares of the debtor or corporate parent, (3) seventy-five percent of current claimants vote to approve the plan, and (4) the trust operates through mechanisms that assure the plan will pay "present claims and future demands . . . in substantially the same manner." 11 U.S.C. § 524(g)(2)(B). The injunction may bind future claimants only if a future claims representative is appointed during the reorganization and the bankruptcy court determines the injunction is "fair and equitable" with respect to future claimants. *Id.* § 524(g)(4)(B).

*Federal-Mogul Glob. Inc.*, 684 F.3d at 359 n.9 (alteration in original).[15] As such, at least under a § 524(g) plan, a future claimant can be assured that at some point he or she will receive compensation in substantially the same manner as a current claimant would. How much that compensation will be in absolute terms, and when that compensation might be paid, is not determined by § 524(g).

**Bankruptcy Cases Can Take Years During Which Claimants Generally Cannot Receive Compensation**

As I mentioned in my prior written testimony, when a debtor files for chapter 11 bankruptcy, the Bankruptcy Code provides certain benefits to debtors to facilitate negotiations and ultimately a successful reorganization. The principal benefit to debtors is the automatic stay,[16] which provides a statutory, nationwide, and indefinite stay of litigation, collection actions, and enforcement proceedings against the debtor. The automatic stay typically remains in effect during the entirety of the bankruptcy, which can last for many years. The automatic stay has two primary purposes: first, it provides the debtor with a pause from litigation to work out financial difficulties and to begin the process of reorganization; and, second, it prevents a race to the courthouse by creditors to sue the debtor, which can impact an orderly reorganization process.[17]

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[15] Some additional requirements of a § 524(g) channeling injunction include: "the trust must be funded in whole or in part by the securities of at least one debtor and by the obligation of the debtor to make future payments" and "the trust must own, or be entitled to own, a majority of the voting shares of the debtor, its parent corporation, and any subsidiary." *Thorpe Insulation Co.*, 677 F.3d at 877.

[16] 11 U.S.C. § 362(a).

[17] *See, e.g.*, *Dean v. Trans World Airlines, Inc.*, 72 F.3d 754, 755-56 (9th Cir. 1995).

Meanwhile, it can take years for a bankruptcy case to reach the point of a § 524(g) plan of reorganization being proposed, voted upon by asbestos creditors, and confirmed by the bankruptcy court. Because of the complexities of mass-tort bankruptcies, the bankruptcy process can be a lengthy one even in cases where the chapter 11 debtor and the asbestos claimants' representatives reach a consensual deal on the terms of a plan relatively quickly. For example, in the *Sepco* bankruptcy, a case where a consensual deal was reached relatively quickly, the duration between the chapter 11 filing and the plan's effective date was four years.[18] In another similar case, the *Fairbanks* bankruptcy, the duration between chapter 11 filing and the plan's effective date was three years.[19] And the *Duro Dyne* bankruptcy, which involved a chapter 11 plan that was negotiated and agreed to by the debtors and the claimants' representatives *before* the chapter 11 filing, took two years.[20]

Asbestos mass-tort bankruptcies that are more contentious can take even longer to resolve. For example, the *Pittsburgh Corning* case lasted over 16 years, including approximately 13 years after the debtor and the asbestos claimants reached a consensual deal.[21] The *W.R. Grace* bankruptcy lasted almost 13 years.[22] *Garlock* lasted for over 7 years.[23] All the while in these cases, asbestos claimants were forced to wait and did not receive even a penny of compensation due to the automatic stay. And these claimants included not only those who had lawsuits pending on the date of the chapter 11 filing, but also those who manifested asbestos-related diseases and whose tort claims accrued after the chapter 11 filing.

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[18] Petition, *In re Sepco Corp.*, No. 16-50058 (Bankr. N.D. Ohio Jan. 14, 2016), ECF No. 1; Notice of (A) Entry of Confirmation Order, (B) Effective Date of the Plan, (C) Substantial Consummation of the Plan, and (D) Bar Date for Administrative Expense Claims, Including Professional Fee Claims, *In re Sepco Corp.*, No. 16-50058 (Bankr. N.D. Ohio June 8, 2020), ECF No. 749.

[19] Petition, *In re Fairbanks Co.*, No. 18-41768 (Bankr. N.D. Ga. July 31, 2018), ECF No. 1; Notice of (I) Entry of Order Confirming the First Amended Plan of Reorganization of the Fairbanks Company Under Chapter 11 of the Bankruptcy Code, (II) Occurrence of Effective Date, (III) Issuance of Asbestos Channeling Injunction, and (IV) Issuance of Insurance Policy Injunction, *In re Fairbanks Co.*, No. 18-41768 (Bankr. N.D. Ga. Aug. 27, 2021), ECF No. 844.

[20] Petition, *In re Duro Dyne Nat'l Corp.*, No. 18-27963 (Bankr. D.N.J. Sept. 7, 2018), ECF No. 1; Order Closing Chapter 11 Cases Effective as of December 31, 2020 and Directing Entry of Final Decree, *In re Duro Dyne Nat'l Corp.*, No. 18-27963 (Bankr. D.N.J. Dec. 29, 2020), ECF No. 1367.

[21] Petition, *In re Pittsburgh Corning Corp.*, No. 00-22876 (Bankr. W.D. Pa. Apr. 16, 2000), ECF No. 1; Disclosure Statement to Accompany the Plan of Reorganization Dated April 30, 2003 Jointly Proposed by Pittsburgh Corning Corporation, the Official Committee of Asbestos Creditors and the Future Claimants' Representative, *In re Pittsburgh Corning Corp.*, No. 00-22876 (Bankr. W.D. Pa. Apr. 30, 2003), ECF No. 2065; Notice of Effective Date of Modified Third Amended Plan of Reorganization of Pittsburgh Corning Corporation Dated January 29, 2009, as Amended, *In re Pittsburgh Corning Corp.*, No. 00-22876 (Bankr. W.D. Pa. Apr. 26, 2016), ECF No. 10616.

[22] Petition, *In re W.R. Grace & Co.*, No. 01-01139 (Bankr. D. Del. Apr. 2, 2001), ECF No. 1; Notice of Satisfaction or Waiver of Conditions to Occurrence of Effective Date of Plan, *In re W.R. Grace & Co.*, No. 01-01139 (Bankr. D. Del. Feb. 3, 2014), ECF No. 31700.

[23] Petition, *In re Garlock Sealing Techs. LLC*, No. 10-31607 (Bankr. W.D.N.C. June 5, 2010), ECF No. 1; Notice of Occurrence of Effective Date, *In re Garlock Sealing Techs. LLC*, No. 10-31607 (Bankr. W.D.N.C. July 31, 2017), ECF No. 6099.

Even after a § 524(g) plan of reorganization is confirmed by the bankruptcy court, that plan may be appealed by objecting parties, first to the district court (or in some jurisdictions the Bankruptcy Appellate Panel), and often to the circuit level. *See, e.g.*, *Federal-Mogul Glob. Inc.*, 684 F.3d 355; *In re Kaiser Gypsum Co.*, No. 16-31602, 2021 WL 3239513, at *1 (W.D.N.C. July 28, 2021) (currently pending on appeal before the Fourth Circuit). Those appeals can be lengthy.

Tragically, time is not on the side of asbestos claimants. Most cases of mesothelioma are "fatal within 12 to 18 months following diagnosis." *Sebright v. Gen. Elec. Co.*, 525 F. Supp. 3d 217, 227 (D. Mass. 2021).[24] As such, it is highly likely that those suffering from these terminal diseases at the start of these cases will not live to see the cases' conclusion. In fact, in two recent Texas Two-Step bankruptcies, *In re Bestwall LLC* and *In re DBMP LLC*, several asbestos victims sitting on the respective committees died from mesothelioma while the bankruptcies remain pending with no signs of a confirmable plan on the horizon in either case.[25] In *Bestwall*, five different committee members who had previously filed tort claims died while their claims were automatically stayed.[26]

**Setting up the Trust Takes Time**

Even after the confirmation of the plan of reorganization, the plan may not become effective, meaning the provisions of the plan cannot actually go into effect, for a substantial period of time. Often, "the effective date of the plan will be tied to the absence of any successful appeals from the order of confirmation, or the satisfaction of conditions contained in the plan."[27] Consequently, there is often a significant delay between confirmation and the effective date of the plan.

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[24] *See also* British Thoracic Society Standards of Care Committee, *BTS statement on malignant mesothelioma in the UK, 2007*, 62 Thorax (Suppl II) ii1-ii19 (2007), http://dx.doi.org/10.1136/thx.2007.087619 (noting that life expectancy in malignant mesothelioma is poor, with the median survival varying between 8 and 14 months).

[25] Motion of the Official Committee of Asbestos Claimants of Bestwall LLC to Substitute Committee Member, *In re Bestwall LLC*, No. 3:17-bk-31795 (Bankr. W.D.N.C. Oct. 5, 2018), ECF No. 270 (Committee member Cresante Perreras passed away due to mesothelioma); Second Motion of the Official Committee of Asbestos Claimants of Bestwall LLC to Substitute Committee Member, *In re Bestwall LLC*, No. 3:17-bk-31795 (Bankr. W.D.N.C. Feb. 21, 2018), ECF No. 648 (Committee member Stephen F. Lanphear passed away due to mesothelioma); Third Motion of the Official Committee of Asbestos Claimants of Bestwall LLC to Substitute Committee Member, *In re Bestwall LLC*, No. 3:17-bk-31795 (Bankr. W.D.N.C. June 4, 2021), ECF No. 1812 (Committee member Jeffrey A. Watts passed away due to mesothelioma); Fourth Motion of the Official Committee of Asbestos Claimants of Bestwall LLC to Substitute Committee Member, *In re Bestwall LLC*, No. 3:17-bk-31795 (Bankr. W.D.N.C. June 4, 2021), ECF No. 1813 (Committee member Richard S. Trumbull passed away due to mesothelioma); Fifth Motion of the Official Committee of Asbestos Claimants of Bestwall LLC to Substitute Committee Member, *In re Bestwall LLC*, No. 3:17-bk-31795 (Bankr. W.D.N.C. Nov. 22, 2021), ECF No. 2246 (Committee member Linda Hofferber passed away due to mesothelioma); Motion of the Official Committee of Asbestos Claimants to Substitute Committee Member, *In re DBMP LLC*, No. 20-30080 (Bankr. W.D.N.C. Nov. 22, 2021), ECF No. 1229 (Committee member Michael D. Nuzzolese passed away due to mesothelioma).

[26] *See* sources cited *supra* note 25.

[27] 7 COLLIER ON BANKRUPTCY ¶ 1129.06[1][e] (Alan N. Resnick Henry J. Sommer, eds. rev. 15th ed. 2004).

The trust agreement, a document approved as part of the plan, governs the terms of the asbestos trust, pursuant to which the asbestos trust assumes liability and responsibility for all asbestos claims, and, among other things: (a) directs the processing, liquidation and payment of asbestos claims in accordance with the plan, the trust distribution procedures ("TDP"), and the debtors' confirmation order; (b) preserves, holds, manages, and maximizes the assets of the asbestos trust for use in paying and satisfying asbestos claims; and (c) qualifies at all times as a qualified settlement fund under the QSF Regulations. Moreover, the trust agreement establishes that the asbestos trust is to use the asbestos trust's assets and income to pay holders of asbestos claims in accordance with the terms of the trust agreement and the TDP.[28]

Asbestos personal injury trusts established by § 524(g) plans of reorganization "have Trust Distribution Protocols (TDPs) to govern how claims are processed and compensated. These procedures are approved as part of the bankruptcy reorganization plan but may later be modified." *Federal-Mogul Glob. Inc.*, 684 F.3d at 360-61.

> TDP procedures are similar across most trusts . . . . Claimants generally select between expedited or individual review. Under expedited review, a claimant presents evidence to satisfy pre-established medical and exposure criteria. Once met, the claim is liquidated according to a compensation grid based on eight disease levels that provide the highest payment to those suffering from mesothelioma and other malignant diseases. If a claimant seeks individual review—mandated when medical and exposure criteria are not satisfied, but also used to assess whether special circumstances might warrant greater compensation—the processing facility determines whether the claim would be compensable in the tort system, with valuation based on historical tort awards for similarly situated plaintiffs. In the event of a dispute, claims are submitted to nonbinding arbitration, or, if that fails, to the courts, although such resolutions are reportedly rare. Finally, after valuation, claims are paid based on a payment percentage on a first-in-first-out basis, subject to an annual cap on total compensation and, in some trusts, a claim ratio that reserves a certain percentage of annual compensation to claimants with the most serious diseases. Under the TDPs, few trusts pay the full value of submitted claims: current payment percentages range widely, but the median is 25%, with most trusts paying between ten and forty-six percent of a claim's liquidated value.

*Id.* at 360 n.12 (internal citations omitted).

Once the plan is effective, the trust is funded and the process for opening the trust can begin. Claim forms and systems must be developed, claims review processes must be established, and a variety of other important governance and administrative tasks must be accomplished. As a

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[28] *See, e.g.*, Third Amended Joint Plan of Reorganization of Kaiser Gypsum Co., Inc. and Hanson Permanente Cement, Inc., *In re Kaiser Gypsum Co.*, No. 16-31602 (Bankr. W.D.N.C. Oct. 21, 2019), ECF No. 1868; Second Amended Plan of Reorganization as Modified, for Sepco Corporation Under Chapter 11 of the Bankruptcy Code, *In re Sepco Corp.*, No. 16-50058 (Bankr. N.D. Ohio Dec. 15, 2019), ECF No. 664.

result, there is also some delay between the effective date of the plan and the date that the trust becomes operable.

**Filing a Claim with a Trust Takes Time**

Once the trust is up and running, claimants must file their claims with the trust to receive payment on claims that qualify for payment under the subject TDP. A statute of limitations is typically established pursuant to the TDPs, and claimants usually have to file their proofs of claim by a certain date that is determined based on whether their diagnosis date was before or after the Petition Date. *See, e.g.*, Sepco Asbestos Personal Injury TDP § 5.1(a)(2).

Filing a claim with the trust begins the process that finally determines whether and how much a claim is paid. The answer may depend on whether an asbestos claimant seeks expedited review or individual review. In an expedited review process, a claimant, upon making certain exposure and medical showings, can obtain a standard settlement amount, an amount typically based on the disease from which the claimant is suffering.[29] Under the individual review process, a claimant may elect to have his or her asbestos claim reviewed either for purposes of determining whether the claim would be valid in the applicable tort system even though it does not meet the presumptive medical and exposure criteria or to assess whether the claim might warrant greater compensation than would be provided under the expedited review process.[30] The former is faster, but may result in a lower payout. In contrast, an individual review could take longer, including arbitration or a return to the tort system, but might result in a larger payment if the claim meets the presumptive medical and exposure criteria for the relevant disease level.[31]

In sum, a future claimant who discovers he or she was injured by a company that has filed for bankruptcy faces significant uncertainty about when and how much he or she will obtain from an asbestos trust. If the company that injured the claimant filed for bankruptcy just before she discovered her injury, her compensation could be delayed by bankruptcy for many years, during which time it is not clear how much compensation she might receive.

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[29] *See, e.g.*, Sepco Asbestos Personal Injury TDP § 5.3(a), http://sepco.mfrclaims.com/Resources/Sepco%20-%20Trust%20Distribution%20Procedures.pdf (explaining the expedited review process) ("Sepco TDP"); Owens Corning/Fibreboard Asbestos Personal Injury TDP § 5.3(a), http://www.ocfbasbestostrust.com/wp-content/uploads/2015/12/OC-FB.-Amended-TDP.12.2.2015-C0463534x9DB18.pdf (same) ("Owens Corning TDP"); Babcock & Wilcox Asbestos PI Settlement TDP § 5.3(a), http://www.bwasbestostrust.com/wp-content/uploads/2015/12/BW.-Amended-TDP.12.2.2015-C0463536x9DB18.pdf (same) ("B&W TDP").

[30] *See, e.g.*, Owens Corning TDP § 5.3(b) (explaining the individual review process); B&W TDP § 5.3(b) (same).

[31] *See supra* note 30.

2. *Do you have a sense of how the turnaround time for compensation under one of these funds compares with the turnaround time in a personal injury lawsuit through the courts? I mean, it seems like a compensation fund might be quicker? And isn't a lawsuit kind of a gamble compared to a fund that is already set aside?*

Even setting aside the years of delay imposed by a bankruptcy case, it is difficult to say whether a claim to a trust or a personal injury lawsuit in court would result in a quicker payment. The turnaround time for both types of claim resolution depends on numerous factors.

The time it takes a claimant to receive payment from a trust depends on factors including but not limited to: (i) whether the claimant pursues expedited review or individual review; (ii) the status of the claimants' own discovery of the facts needed to make a claim, which in turn can depend on developments in litigation activity elsewhere such as discovery of witnesses, and availability of product information; (iii) the review time by the relevant claims processor and relevant claim backlogs by processors; (iv) the expediency with which claim deficiencies are identified by a trust and are then cured; (v) when a trust delivers an offer and then the timing of the acceptance or rejection of any offer from the trust; (vi) whether a claimant invokes alternative dispute resolution, or an exit to the tort system to liquidate their claim; (vii) how quickly a release is sent by the trust and then executed and returned; and (viii) whether limits on the amount a given trust can pay in a given year are reached. Depending on these and other factors, it may take months or even years to be paid by a trust even after it is up and processing claims.

Similarly, timing of payment for a claim in the tort system is dependent on numerous factors. Is the claim on an *in extremis* docket or subject to some other expedited court process? Have the defendants and third parties provided the necessary discovery to identify witnesses, product information, and the like? Is the defendant choosing to settle the claim or instead trying it to verdict? If a verdict is obtained, will an appeal be taken by either side? These and various other things can impact the length of a case. If on an *in extremis* or other special docket, a trial could be set within a year. There is, of course, no inherent delay in compensation if the defendant companies settle the cases.

With respect to whether a lawsuit may be a "gamble" compared to a trust claim, it is important to remember that an injured person who has a claim against a company does not get to choose whether that company is in bankruptcy or remains outside of bankruptcy and is able to be sued. That is a strategic decision the company makes, not the claimant.

Of course, if a company remains in the tort system and a claimant has to file a lawsuit, that lawsuit is itself a gamble in the sense that both sides are uncertain how a judge or jury will evaluate a case. But that is an inextricable part of the American justice system, which determines which claims are meritorious against a particular defendant and the value of those claims. Settlement

eliminates the uncertainty for both the plaintiff and the defendant, and many cases in the tort system settle.[32]

*a. The plaintiffs' bar claims delay, but isn't that entity the sole source of delay in all of the divisional merger cases, to the point, in most cases, of even refusing to start a negotiation?*

The source of delay in Texas Two-Step cases is the Texas Two-Step strategy itself. It is a bankruptcy tactic designed to avoid the normal economic pressures and incentives that motivate corporate debtors to come to the negotiating table in good faith and attempt to quickly achieve a fair bargain with their creditors in the form of a consensual chapter 11 plan. With bankruptcy stays in place shielding BadCo's entire enterprise group—i.e., BadCo, GoodCo, and their affiliates—GoodCo and the affiliates enjoy a principal benefit of bankruptcy without actually being in bankruptcy, i.e., an indefinite, nationwide stay of tort claims.[33] Creditor representatives have been forced to address this inequity. The alternative—to simply concede that a corporation can one-sidedly place its unwanted creditors in limbo until they will accept any price to escape—is unrealistic and contrary to fundamental bankruptcy principles.

The Texas Two-Step allows GoodCo and its affiliates to be free of the obligations normally required of a chapter 11 debtor—obligations that constitute essential creditor protections. First, GoodCo is not required to file schedules of its assets and liabilities, a statement of financial affairs, and monthly operating reports, thereby foreclosing any transparency regarding GoodCo's financial condition. Second, GoodCo can layer on debt that is senior in priority to its obligations under the funding agreement and can engage in transactions outside the ordinary course of business, including transferring its entire value, without any notice to tort creditors and without first obtaining the bankruptcy court's approval. Third, GoodCo can continue to pay its non-tort creditors in the ordinary course of its business and outside of a court-approved chapter 11 plan. By contrast, tort claimants trapped in BadCo's bankruptcy are not treated the same, as they are not getting paid, and it is not clear when, if ever, they will be. Fourth, GoodCo need not respect the "absolute priority rule"; while tort creditors in BadCo's bankruptcy remain uncompensated, GoodCo can distribute its substantial earnings to its direct and indirect parent companies and shareholders, which effectively renders GoodCo "cash-poor" while it is allegedly on the hook to pay BadCo under the funding agreement. And in bankruptcy, all creditors are supposed to be paid before shareholders.

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[32] *In re Plant Insulation Co.*, 734 F.3d 900, 912-13 (9th Cir. 2013) (noting that most tort claims against the debtor settle prior to trial and thus, do not proceed to trial); Bruce Mattock, Andrew Sackett, and Jason Shipp, *Clearing Up the False Premises Underlying the Push for Asbestos Trust "Transparency,"* 23 WIDENER L.J. 725, 751-52 (2014) ("[P]ractically no asbestos cases go to trial." (citation omitted)); CONGRESSIONAL BUDGET OFFICE, THE ECONOMICS OF U.S. TORT LIABILITY: A PRIMER 6 (2003), https://www.cbo.gov/publication/14835 ("The vast majority of all [state] tort cases are disposed through some form of settlement, with only 3 percent of all tort matters resulting in a jury trial.'" (alteration in original)).

[33] As in my written testimony, I will occasionally refer to the predecessor entity as "AceCo" and the post-divisional merger entities as "GoodCo" and "BadCo."

This stands in stark contrast to appropriate bankruptcy cases, where all the debtor's assets and liabilities are in bankruptcy. There, a debtor's non-asbestos creditors, like bondholders, vendors, and customers, are exerting pressure on the debtor to seasonably exit from bankruptcy to remove uncertainty and reorganize the business. However, under the Texas Two-Step regime, those stakeholders are entirely unaffected by the bankruptcy, and there is not a business to reorganize, as the debtor is simply a shell manufactured solely to be eligible for chapter 11 relief.[34] Moreover, AceCo's equity holders risk nothing as they are not subject to the "absolute priority rule"; in other words, they can still retain the value of their equity interests and receive dividends ahead of creditors, something that would not be the case in a non-Texas Two-Step bankruptcy.

Thus, without the economic incentives and pressures that encourage a debtor to make a seasonable exit from chapter 11, Texas Two-Step debtors can idle in chapter 11 as long as they want, with little downside due to the stay of tort litigation against their enterprise groups, and can thus delay the resolution of their chapter 11 cases until the tort creditors knuckle under and agree to a substantial discount on the value or recovery of their claims. In fact, the Court found that in planning for the Texas Two-Step in *Aldrich*, "team members expected and planned for a long-term bankruptcy prior to the 2020 Corporate Restructuring, which they estimated would last for five or more years."[35]

Placing the blame on representatives of asbestos victims in Texas Two-Step bankruptcies is misplaced. Each of the Texas Two-Step debtors has chosen a contentious litigation approach instead of one focused on consensual negotiations. Each of the Texas Two-Step debtors has successfully pursued a preliminary injunction enjoining tort claimants from suing the debtors' affiliates (and sometimes other parties such as insurers and distributors). Those Texas Two-Step debtors whose cases are farther along have pursued estimation of claims, bar dates, and personal injury questionnaires, among other litigation strategies. Each of these forms of litigation not only takes months or years, but are designed to give asbestos defendants more leverage to make as small a payout to their tort claimants as possible. Official committees' refusal to knuckle under and agree to a substantial discount by accepting a low-ball offer is by no means embracing delay.

*b. In one current divisional merger case, the debtors and the future claimants representative representing 80+% of asbestos claims have negotiated a deal for over half a billion dollars for claimants. Yet even in that case, the plaintiffs' bar refuses even to engage and continues to delay payment to claimants. Don't examples like these refute the various statements that the debtor is causing delay or trying to avoid providing compensation?*

I infer from the question that you are referring to *Aldrich*, a case in which I serve as co-lead counsel for the *Aldrich* Committee. As counsel for the *Aldrich* Committee, my answer is

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[34] *In re Aldrich Pump LLC*, No. 20-30608 (JCW), Adv. No. 20-03041 (JCW), 2021 WL 3729335, at *16 (Bankr. W.D.N.C. Aug. 23, 2021) ("Creating two companies with no employees evidences the fact that Aldrich and Murray were simply inert vessels designed to carry their predecessors' asbestos liabilities into bankruptcy.").

[35] *Id.* at *9, *20 (citations omitted).

constrained by confidentiality, privilege, and ethical principles. With those in mind, I can make the following observations.

As stated previously, the Texas Two-Step strategy itself is the source of delay in payments to asbestos victims. The course of action pursued by the *Aldrich* debtors is the same litigation strategy pursued by the other Texas Two-Step debtors. Indeed, their litigation strategy was even more aggressive, as it extended to nominating, and getting approved by the bankruptcy court, a specific candidate for the FCR position over the Committee's objections.[36]

Second, as I have stated publicly in open court in my role as counsel for the *Aldrich* Committee, the *Aldrich* Committee is and always has been open to talking with the debtors and others.[37]

3. *Can you explain how the compensation funds come together? What's the process and what kind of oversight do the funds have? And who has a seat at the table in the negotiation when these funds are put together? Is it just the current creditors or do people who might make a future claim have any representation to protect their rights in these discussion?*

Compensation trusts established through bankruptcy are formed by the negotiation among participants in the bankruptcy process as reflected in the confirmed plan of reorganization. In the context of asbestos trusts formed pursuant to § 524(g), those participants include debtors, the official committees, and the Future Claimants' Representatives appointed by the bankruptcy court. The terms of the bankruptcy plans and the associated plan documents, including trust agreements and TDPs, are highly scrutinized by bankruptcy courts, require the approval of district courts, and oftentimes are subject to circuit court review.

Management and operation of the trust is overseen by a qualified panel of one or more independent, non-conflicted trustees. The trustees have included retired state court judges, retired district court judges, former practitioners and practicing lawyers, and business people. In managing the trusts, trustees have engaged highly qualified professionals on behalf of the trust, including executive directors supported by management consulting firms with statistical and econometric expertise; financial advisors who oversee the selection and performance of the managers of the trust's investment portfolio; claims processing facilities that receive, organize and review the electronically submitted claims; and independent certified public accounting firms. In

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[36] The law recognizes that asbestos debtors are "profoundly adverse" to both current and future asbestos claimants: "[T]he 'claimants wish to receive as much as possible' and the . . . debtors 'wish to hold their payment obligations to a minimum.'" *In re Leslie Controls, Inc.*, 437 B.R. 493, 501 (Bankr. D. Del. 2010).

[37] *See, e.g.*, Transcript of Hearing at 131:3-9; 21-24, *In re Aldrich Pump LLC*, No. 20-30608 (Bankr. W.D.N.C. Mar. 3, 2022) ("The Committee has never refused to talk to the debtor, has never refused to talk to the FCR, and, in fact, just recently in discussions over the PIQ and bar date, as I mentioned, I think we had five committee members on that call talking with other parties. I have never enunciated nor has the Committee ever stated that it was unwilling to negotiate. . . . [T]hat, of course, is what we have said before and what I'm repeating today. The Committee is willing to negotiate. It's always been willing to negotiate. We haven't—no offer has been made to the Committee.").

addition, each trust has an advisory committee ("TAC"), which represents the interests of present claimants, and an FCR, who represents the interests of future claimants.

The trustees are the fiduciaries to the trust in accordance with the provisions of the trust agreement and the plan of reorganization.[38] The trustees administer the trust and the trust assets in accordance with the trust agreement.[39] The TAC members serve in a fiduciary capacity representing all holders of present trust claims,[40] and the FCR also serves in a fiduciary capacity, representing the interests of the holders of future trust claims.[41] The trustees are required to consult with the TAC and FCR on certain matters identified in the trust agreement and trust distribution procedures, and must obtain their consent on certain other matters.[42] Among other things, the trustees may retain and/or consult with counsel, accountants, appraisers, auditors, forecasters, experts, financial and investment advisors, and other parties deemed by the trustees to be qualified as experts on the matters submitted to them.[43]

Asbestos trusts have a series of oversight mechanisms built into the trust through trust distribution procedures and trust agreements. First, the trustee or trustees are obligated to provide an annual report to the applicable bankruptcy court that includes audited financial statements as well as a report summarizing the number and type of claims processed in the preceding year. That annual report is also made publicly available for inspection.[44] Under the operative plans of reorganization, the bankruptcy court retains a supervisory role over the trust with respect to certain enumerated trust matters that may arise post-effective date.

With respect to auditing procedures, asbestos trusts have the power to: (1) audit the reliability of medical and exposure evidence provided by claimants and (2) penalize claimants or claimants' attorneys for providing fraudulent information.[45] For example, many trusts participate in a "cross-trust" audit program that includes a comparison of asbestos claims filed with the trust against claims filed with all other asbestos trusts that participate in the cross-trust audit program.[46] The audit results have significant consequences. For example, the Sepco TDP states as follows:

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[38] *E.g.*, Owens Corning/Fibreboard Asbestos Personal Injury Trust Agreement § 2.1.

[39] *Id.*

[40] *Id.* § 5.2.

[41] *Id.* § 6.1.

[42] *See id.* § 2.2.

[43] *Id.* § 4.8(a).

[44] *Id.* § 2.2(c).

[45] *E.g.*, Sepco TDP § 5.7; Kaiser Gypsum Asbestos Personal Injury TDP § 5.10, http://www.kaisergypsumtrust.org/assets/documents/resources/3_B_Trust_Distribution_Procedures.pdf ("Kaiser TDP"); Fairbanks Asbestos Personal Injury TDP § 5.8, *In re Fairbanks Co.*, No. 18-41768 (Bankr. N.D. Ga. Apr. 29, 2021), ECF No. 721-2 ("Fairbanks TDP"); Owens Corning TDP § 5.8; Amended and Restated WRG Asbestos PI Trust TDP § 5.8, http://www.wrgraceasbestostrust.com/wp-content/uploads/2019/12/WRG-Amended-and-Restated-Trust-Distribution-Procedures-Revised-September-26-2019-C1076870x9DB18.pdf ("W.R. Grace TDP"); B&W TDP § 5.8.

[46] *See, e.g.*, Sepco TDP § 5.7; Kaiser TDP § 5.10.

> Further, in the event that an audit reveals that fraudulent information has been provided to the Asbestos Trust, the Asbestos Trust may penalize any claimant or claimant's attorney by rejecting the Asbestos Claim or by other means including, but not limited to, requiring the source of the fraudulent information to pay the costs associated with the audit and any future audit or audits, reordering the priority of payment of all affected claimants' Asbestos Claims, raising the level of scrutiny of additional information submitted from the same source or sources, refusing to accept additional evidence from the same source or sources, seeking the prosecution of the claimant or claimant's attorney for presenting a fraudulent claim in violation of 18 U.S.C. § 152, and seeking sanctions from the Bankruptcy Court.[47]

*a. Given that the lion share of the money spent in tort cases goes to lawyers and not asbestos claimants, and that a large percentage of those claims are ultimately dismissed after proving to be frivolous or fraudulent, wouldn't that money better be redirected to a trust system for all legitimate current and future claimants?*

I first want to address some misimpressions contained in the question. In the tort system, defendants determine how much they want to spend on their counsel defending the lawsuits brought against them. Historically, defendants in asbestos litigation have taken a variety of approaches. Some spend heavily on defense attorneys, which can result in lower payments to claimants as a whole. Others adopt an early settlement approach, which results in lower defense costs and a relatively higher proportion of money going to claimants. The *Aldrich* debtors were paying approximately $70 million per year in indemnity payments and $25 million per year in defense costs in the tort system.[48] DBMP's informational brief failed to split out defense costs versus indemnity costs, simply stating it spent $80 million to over $160 million in defense and indemnity costs per year from 2002 to 2019.[49] On the plaintiffs' part, personal injury plaintiffs are usually represented by lawyers under a contingent fee arrangement. They are paid only if they win the case for their client, and then receive only an amount limited by their contracts and state law. In short, how much money goes to lawyers rather than claimants is largely up to the defendants.

Further, there is no evidence that a large percentage of asbestos claims are frivolous or fraudulent claims. They may ultimately be claims that are not compensable, but that is different. In asbestos cases, discovering what sources of asbestos exposure contributed to an individual's asbestos disease can be difficult work. Many people were exposed to asbestos in industrial and commercial settings decades earlier. Witnesses and documents establishing the claim have to be found and developed. While some cases may ultimately be dismissed due to insufficient evidence, this is largely because a plaintiff is unable to obtain sufficient evidence, including evidence from

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[47] Sepco TDP § 5.7; *see also* Kaiser TDP § 5.10; Fairbanks TDP § 5.8; Owens Corning TDP § 5.8; W.R. Grace TDP § 5.8; B&W TDP § 5.8.

[48] Informational Brief of Aldrich Pump LLC and Murray Boiler LLC, at 37, *In re Aldrich Pump LLC*, No. 20-30608 (Bankr. W.D.N.C. June 18, 2020), ECF No. 5.

[49] Informational Brief of DBMP LLC, at 22, *In re DBMP LLC*, No. 20-30080 (Bankr. W.D.N.C. Jan. 23, 2020), ECF No. 22.

asbestos defendants themselves, to establish that an asbestos defendant's products existed at given locations and times.

As to whether asbestos defendants would agree to contribute funds that they would have spent on defense counsel to a trust, recent developments suggest that is unlikely. The Texas Two-Step strategy appears to be designed not to facilitate more money being put into trusts, but as a way to force claimants to accept less—a "bankruptcy discount."[50]

4. *A court recently found rampant fraud perpetrated by plaintiff lawyers in the tort system on corporate defendants that necessitated a RICO lawsuit against those lawyers. Is that a concern given the calls to favor that system in these divisional merger cases?*

I know of no case that fits that description. I believe you may be referring to the *Garlock* case, which is neither recent (the estimation decision was issued on January 10, 2014) nor found rampant fraud (indeed, the decision never even mentions the word "fraud"). *See generally In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014). When discussing the alleged withholding of exposure evidence, the court noted that it "makes no determination of the propriety of that practice." *See id.* at 86-87. Nor could the court have made any such findings, because no plaintiffs' law firms or asbestos victims were parties to the estimation proceeding. *See generally id.* I believe that is among the reasons why the successor judge in *Garlock* later noted about the estimation decision: "It's interesting to me, as I watched him when he did this, Judge Hodges' ruling was written narrowly, but has been read broadly and it is, admittedly, based on a fairly [] limited number of instances of suppression of evidence by plaintiffs' firms, only 15."[51] Moreover, the *Garlock* opinion itself recognizes that those 15 cases were cherry-picked, as "they are not purported to be a random or representative sample" of Garlock's experience in the tort system. *See id.* at 85. This was a tiny fraction of the many thousands of claims pending against Garlock.

The *Garlock* estimation process lasted years and cost the debtors' estates more than $120 million in professional fees—a number that fails to include or account for the additional expenses imposed on Garlock's asbestos victims during that time period. While the *Garlock* estimation decision concluded that Garlock's aggregate liability for present and future mesothelioma claims

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[50] *See, e.g.*, *In re Aldrich Pump LLC*, 2021 WL 3729335, at *20 ("Manlio Valdes, a member of both boards, admitted that, after the May 29, 2020 joint meeting of the boards, he thought it was 'a probability' that the Trane entities would end up paying less to asbestos claimants in bankruptcy."); *id.* at *21 ("Nor were these actions undertaken for the benefit of the asbestos claimants. Rather, these bankruptcies were designed to isolate the asbestos claimants from the overall corporate enterprise and strand them in bankruptcy until such time as they agree to a Section 524(g) plan."); *see also In re DBMP LLC*, No. 20-30080, Adv. No. 20-03004, 2021 WL 3552350, at *6 (Bankr. W.D.N.C. Aug. 11, 2021) ("Seeking a less expensive way of dealing with these tort liabilities, in 2019, Old CertainTeed engaged in a series of transactions (described herein and collectively referred to as the 'Corporate Restructuring') which led to the Debtor's creation and its chapter 11 filing."); *id.* at *26 ("[I]t appears that the Divisive Merger had a material, negative effect on the asbestos creditors' ability to recover on their claims.").

[51] Transcript of Hearing at 51:13-17, *In re Kaiser Gypsum Co.*, No. 16-31602 (Bankr. W.D.N.C. Sept. 4, 2019).

totaled $125 million,[52] the final settlement number jointly negotiated by the Committee, the debtor, and the FCR bore no resemblance to that number, but was $500 million.[53]

Because the parties settled, the methodology employed by the *Garlock* court was never reviewed on appeal. Given that the court's methodology conflicted with the methodology used in all other asbestos cases where estimation was contested, there is a high likelihood that the *Garlock* opinion would have been overruled on appeal, as is also supported by the fact that the settlement number was four times higher. And notably, the RICO lawsuits were voluntarily dismissed at the time of the settlement.[54]

It is also important to know that, unlike tort-system defendants, the asbestos trusts concede what they know and publish lists of work sites where past litigation showed that their predecessor's products were in use. Many claims are submitted to trusts relying on proof that the claimant worked at a site on the applicable trust's published work site list in an occupation that typically involved asbestos exposure.

5. *I have introduced, alongside Senators Grassley and Cornyn, legislation designed to promote transparency and accountability in asbestos bankruptcies and trusts funds created to compensate asbestos victims. The PROTECT Asbestos Victims Act would require the appointment of independent, non-conflicted fiduciaries and allow the Department of Justice to audit bankruptcy trust funds. Do you believe that Congress, if it considers any modification to bankruptcy courts' consideration of divisive mergers and non-debtor releases, should also consider reforms that would promote equitable distribution of funds and deter waste, fraud, and abuse that may limit victims' access to compensation?*

In my opinion, curbing debtor abuse of the bankruptcy process via the Texas Two-Step should not be contingent on or otherwise tied to Congress considering proposed legislation such as the PROTECT Act. The former concerns ensuring that a debtor's pre- and post-petition conduct does not fundamentally disrupt the bankruptcy system and creditors' rights; whereas the latter concerns a proposed extension of federal oversight to post-confirmation trusts governed by state law. The two issues are not related in such a way that one must, or even should, follow the other.

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[52] *Garlock Sealing Techs., LLC*, 504 B.R. at 97.

[53] *See* Disclosure Statement for Modified Joint Plan of Reorganization of Garlock Sealing Technologies LLC, et al. and OldCo, LLC, Proposed Successor by Merger to Coltec Industries Inc., at ii, *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C. July 29, 2016), ECF No. 5444.

[54] The RICO suits were dismissed pursuant to a settlement articulated in § 8.4.4 of the Garlock Joint Plan, which provides that, with respect to the actions pending against the law firms, "such actions and any claims, counterclaims, or countersuits the respective parties asserted or could have asserted therein shall be dismissed with prejudice in exchange for mutual general releases and mutual waivers of costs and attorneys' fees." Modified Joint Plan of Reorganization of Garlock Sealing Technologies LLC, et al. and OldCo, LLC, Successor by Merger to Coltec Industries Inc., *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C. May 14, 2017), ECF No. 5951-1.

Moreover, I have reviewed the PROTECT Act as proposed and do not believe it would be beneficial. The bill's apparent premise, that federal governmental intervention into the administration and operation of asbestos settlement trusts operating under state law is necessary to protect the interests of trust beneficiaries (*i.e.*, asbestos victims) from "fraudulent claims," is, to the best of my knowledge, unsubstantiated.[55] I am not aware of any trusts or asbestos victims that have called for such "protection." I am not aware of any indication that the trustees appointed to manage the trusts have not done so consistent with their fiduciary obligations. And I am not aware of any indication that the trusts' existing procedures for identifying and responding to any potential fraud perpetrated on the trusts are inadequate. To the contrary, it is my understanding that the majority of the trusts that my firm works with have implemented sophisticated audit programs designed to ensure that the carefully drawn trust procedures are being properly implemented and enforced. In my opinion, the bill, and any similar measure, is a solution in search of a problem, and would only harm the very asbestos victims it is intended to help.

Apart from being unnecessary to "protect" trusts' or their beneficiaries' interests, the PROTECT Act would potentially undermine those interests. The PROTECT Act contains a provision requiring the trust to provide *any* defendant in an asbestos-related legal action with any information relating to a payment or demand for payment from the trust upon written request.[56] Neither trusts nor their beneficiaries benefit from third parties gaining unfettered access to asbestos victims' confidential settlements and sensitive medical information. Indeed, the only beneficiaries would be the apparent primary supporters of the PROTECT Act and similar legislation: the asbestos defense bar. Further, the asbestos defense bar already has access to the information they could receive under the PROTECT Act, but currently they must obtain it through traditional legal process that is designed to protect the rights of those from whom such information is sought. A Government Accountability Office report regarding the asbestos settlement trusts confirmed that litigants in the tort system can readily obtain information from the trusts regarding claimants, such as their exposure to a particular company's asbestos-containing product, pursuant to court-issued subpoenas.[57] Moreover, defendants can obtain such information directly from tort claimants themselves in discovery.[58]

It is also my opinion that the PROTECT Act would likely authorize bankruptcy courts to take on matters beyond their appropriate jurisdiction. Indeed, the PROTECT Act appears to contemplate bankruptcy courts having unending plenary post-confirmation jurisdiction over trusts and, potentially, reorganized debtors. For example, it proposes the mandatory reopening of a

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[55] *See* PROTECT Asbestos Victims Act of 2021, S. 574, 117th Cong. at 1 (2021).

[56] *Id.* at 4-5.

[57] *See* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS (2011), https://www.gao.gov/assets/gao-11-819.pdf ("Other information in the possession of a trust, such as an individual's exposure to asbestos, is generally not available to outside parties but may be obtained, for example, in the course of litigation pursuant to a court-ordered subpoena.").

[58] *See id.* at 26 ("Judges may require that a claimant or trust disclose trust claim forms during the discovery phase, which may include statements of work history, asbestos exposure, and medical diagnosis, for claims previously submitted to trusts.").

closed bankruptcy case at any time to enable the United States Trustee[59] to conduct an investigation into any aspect of the administration and operation of a trust, even a trust created prior to the bill's enactment.[60] Furthermore, once the case is reopened, the bill provides that the court may issue "any order" it deems necessary or appropriate relating to the trust.[61]

In general, bankruptcy courts have limited jurisdiction, which is further diminished once a bankruptcy plan has been confirmed.[62] Post-confirmation, bankruptcy courts only have jurisdiction over matters with "a close nexus to the bankruptcy plan or proceeding."[63] The fact that a trust was formed as part of a bankruptcy proceeding does not mean that any issue regarding the trust fits into that exacting standard.[64]

In sum, I do not believe that Congress should consider enacting the PROTECT Act.

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[59] It is unclear that providing a United States Trustee with sweeping authority to oversee and investigate trusts formed under state law is warranted or would be consistent with their authority or expertise.

[60] S. 574, *supra* note 55, at 8.

[61] *Id.* at 6-7.

[62] *See, e.g.*, *In re Resorts Int'l, Inc.*, 372 F.3d 154, 165 (3d Cir. 2004) ("[T]he scope of bankruptcy court jurisdiction diminishes with plan confirmation."); *Guccione v. Bell*, No. 06 CIV. 492(SHS), 2006 WL 2032641, at *4 (S.D.N.Y. July 20, 2006) ("Courts generally agree that . . . [bankruptcy] jurisdiction . . . shrinks once bankruptcy plan confirmation has occurred.").

[63] *In re Resorts Int'l, Inc.*, 372 F.3d at 167.

[64] *Id.* (holding claim involving trust was not within bankruptcy court's jurisdiction); *see also Falise v. Am. Tobacco Co.*, 241 B.R. 48, 58 (E.D.N.Y. 1999) (finding trust is not a continuation of the bankruptcy estate and claimants to trust are not creditors of estate, but those with rights to make claims against the trust).