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# Asbestos Bankruptcy Report

## **Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance**

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# Commentary

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By  
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*[Editor's Note: Marc C. Scarcella and Peter R. Kelso, Managers at the Washington, DC office of Bates White Economic Consulting. The views of the authors do not reflect the opinions of their respective firms, their clients, or Mealey's Publications. © 2012 by Marc C. Scarcella and Peter R. Kelso. Responses are welcome.]*

### Introduction

In the three decades since Johns Manville and UNR Industries filed the first asbestos bankruptcy cases, nearly 100 companies have filed for bankruptcy protection due, in part, to asbestos litigation.<sup>1</sup> The vast majority of these companies utilized section 524(g) of the U.S. bankruptcy code to reorganize and establish a bankruptcy trust to pay current and future asbestos claimants and channel claims away from the reorganized company. Today, many of these companies have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims. Since 2006 nearly 30 trusts have been created through bankruptcy reorganization, funding the trust system with an additional \$20 billion in assets. From 2007 through 2011 the entire trust system has paid out over \$13.5 billion to asbestos claimants, with remaining assets as of yearend totaling over \$18 billion.<sup>2</sup> In addition, there is \$11 to \$12 billion in proposed funding from bankruptcies still pending confirmation.<sup>3</sup>

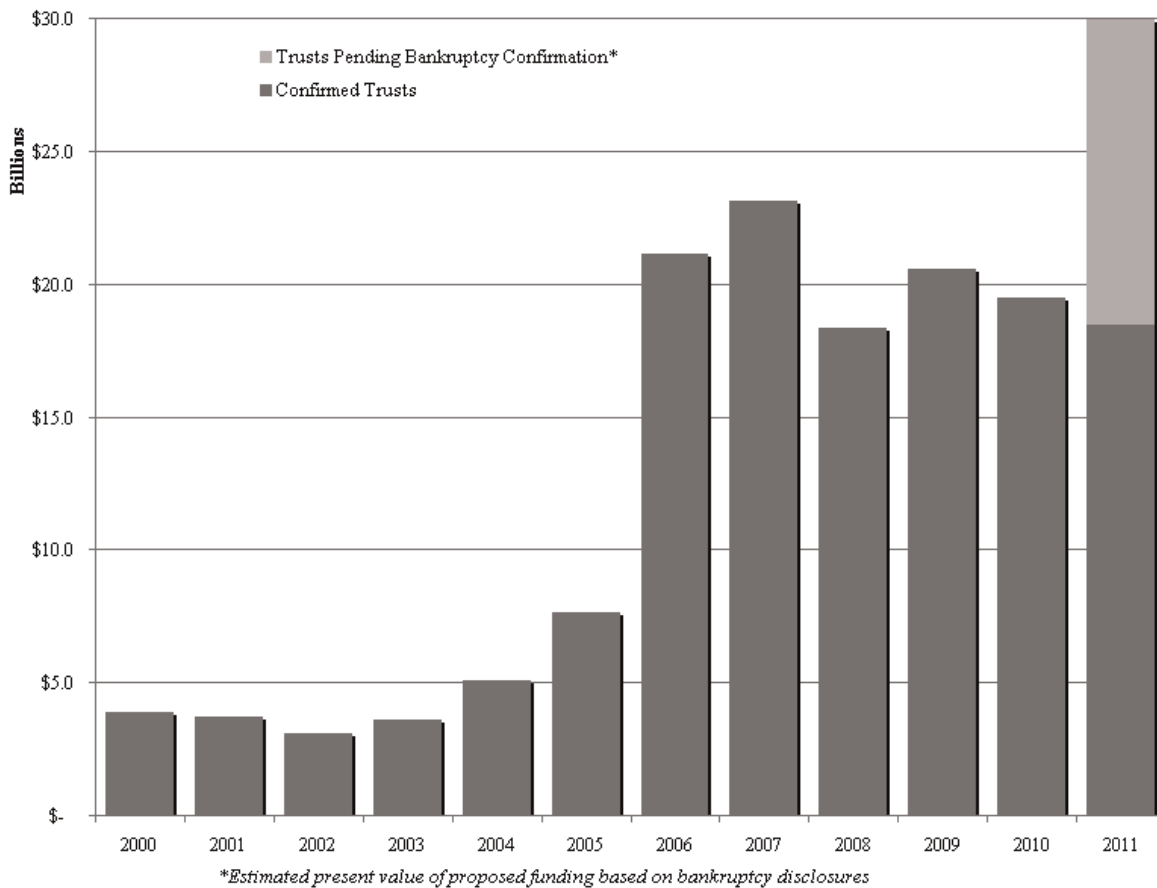
With that amount of money at stake, it is not surprising that there has been recent state and federal

legislative efforts as well as growing interest from academic researchers and the press aimed at examining the transparency of asbestos bankruptcy trusts and what is currently known about 524(g) bankruptcies. Courts in the civil justice system have recently echoed similar interest in asbestos trust transparency as those entities strive to properly allocate liability in the underlying tort litigation between both culpable solvent companies and bankruptcy trusts.

While detailed information about individual claims made to and payments made from asbestos trusts is limited, this paper intends to serve as a resource by providing a general overview of the information that is currently disclosed by the 524(g) asbestos trust compensation system. The paper will include an update on the latest financial and claim information provided by the trusts through their 2011 annual reports. It will also highlight the current governance of the asbestos trusts, changes in trust payments made to current and future asbestos claimants, the ratio of payments to malignant and non-malignant claimants, and amendments that have been approved and instituted into trust documents by the leadership of the trusts following confirmation of the plan by the bankruptcy and district courts.

Statistics and other information in this paper are derived from the publicly available documentation produced by various asbestos bankruptcy trusts established pursuant to Section 524(g) and the publicly

**Exhibit 1: Trust Yearend Assets**



available documentation produced during various Section 524(g) bankruptcy reorganizations.

**Bankruptcy trust assets**

Asbestos bankruptcy plans formed under section 524(g) of the U.S. Bankruptcy Code involve the creation of trusts designed to compensate similarly situated current and future asbestos plaintiffs in an equitable manner.<sup>4</sup> The trusts are often funded with cash, reorganized debtor stock, insurance, and other assets provided by the debtor company (or parent), and exist to expeditiously pay current and future claims. Beginning with the codification of section 524(g) in 1994 and predominantly during the years 2000-2003, nearly 70 companies filed for bankruptcy protection.<sup>5</sup> Today, over \$18 billion in assets currently reside in the trust system. Another \$11 to \$12 billion in additional assets is designated for trusts pending completion of the 524(g) bankruptcy reorganization process.<sup>6</sup> Exhibit 1 shows the growth of the trust system over time and the assets

earmarked for pending but not yet confirmed 524(g) reorganization plans.

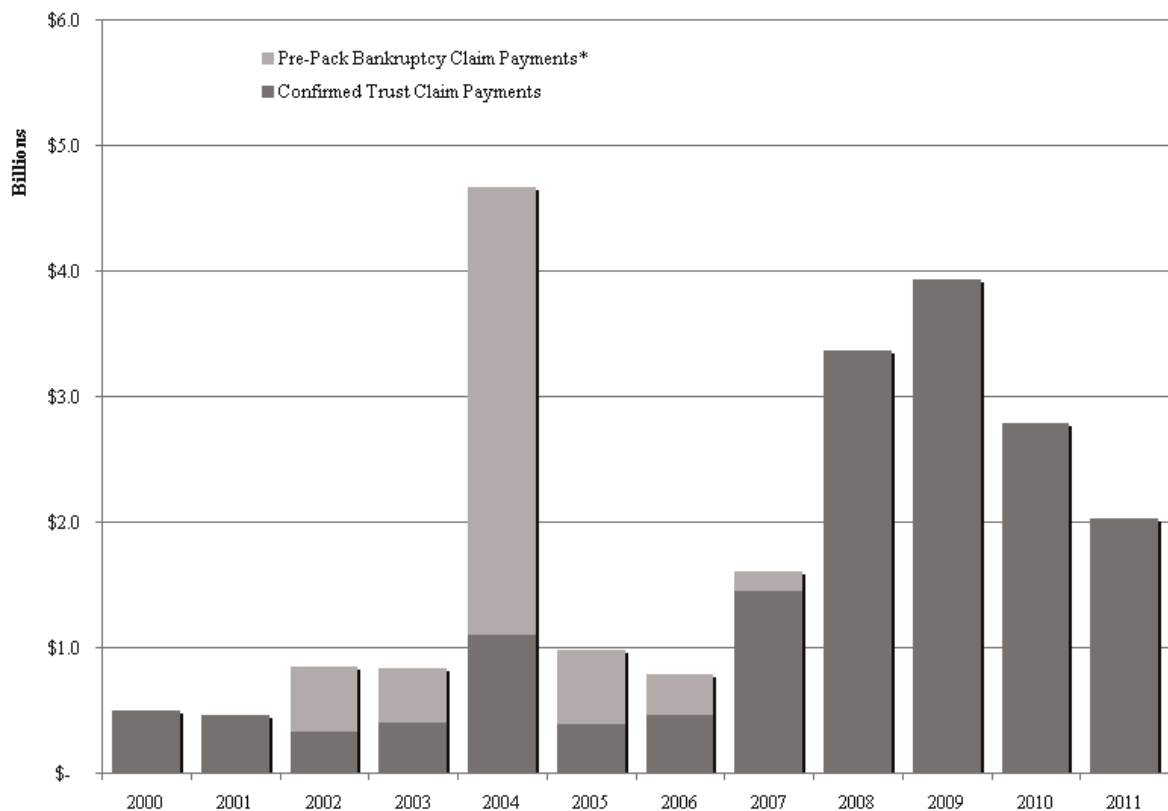
Exhibit 2 shows how rapidly the trust compensation system has grown in recent years. As of yearend 2005, the entire trust system only had \$8 billion in assets. From 2006 through 2011, asbestos trusts were funded with an additional \$20 billion in assets.

**Bankruptcy trust payments**

As the bankruptcy trusts assets have grown over time, so have payments to asbestos claimants. Beginning in 2006, dozens of trusts came “online” and distributed over \$14 billion in claim payments through 2011. This dramatic increase in claim payments was due, in part, to the resolution of substantial claim inventories that built up during the lengthy bankruptcy process, some of which dated back to the late 1990s and included tens of thousands of non-malignant claims. In the twelve years since the bankruptcy

**Exhibit 2: Confirmed Trust Annual Financial Activity** (dollars in millions)

Balance	2006	2007	2008	2009	2010	2011 <sup>7</sup>	Total
Beginning Assets	\$7,641	\$21,216	\$23,117	\$18,660	\$19,907	\$18,810	
Funding Received	\$12,081	\$2,944	\$1,055	\$3,078	\$640	\$535	\$20,333
Investment Gains/Income	\$897	\$670	(\$2,137)	\$2,363	\$1,306	\$763	\$3,861
Other Additions	\$1,223	(\$16)	\$97	\$25	(\$58)	(\$88)	\$1,183
Claim Payments	(\$463)	(\$1,450)	(\$3,360)	(\$3,927)	(\$2,779)	(\$2,036)	(\$14,015)
Trust Expenses	(\$95)	(\$132)	(\$156)	(\$147)	(\$180)	(\$173)	(\$883)
Taxes/Other Deductions	(\$68)	(\$115)	\$44	(\$145)	(\$26)	(\$78)	(\$388)
Ending Assets	\$21,216	\$23,117	\$18,660	\$19,907	\$18,810	\$17,731	
						Deferred funding and settlements <sup>8</sup>	\$740
						<b>Current Confirmed Trust Assets</b>	<b>\$18,467</b>

**Exhibit 3: Trust and Bankruptcy Pre-Pack Claim Payments**

\*Pre-pack settlement amounts for Combustion Engineering, NARCO, DII (Halliburton), Congoleum and Pfizer (Quigley). These amounts paid or committed outside of the 524(g) Trust funds total between \$5 and \$6 billion.

wave began, the trust system has paid out over \$17 billion to claimants with an additional \$5 to \$6 billion paid by certain debtors prior to confirmation as part of bankruptcy pre-packaged ("Pre-Pack") settlement negotiations. These Pre-Pack payments were not made through an operating trust. The largest contributor to Pre-Pack payments was Halliburton, which committed \$2.7 billion in Pre-Pack funds around 2004. It is more common today for Pre-Pack payments to be negotiated pre-confirmation but the assets sufficient to cover the cost of these settlements are funded to the trust post-confirmation for

immediate distribution. In these instances the Pre-Pack payments are reported on trust annual reports and accounted for in Exhibit 3 as part of Confirmed Trust Claim Payments.

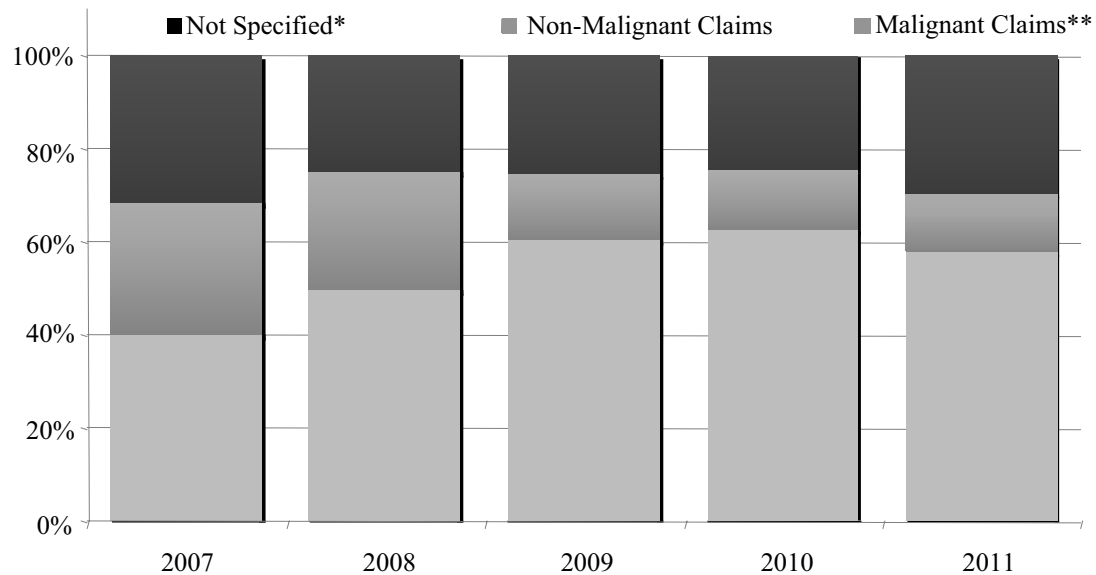
#### **Trust payments to malignant and non-malignant claims**

Of the \$18 billion in current confirmed trust assets, nearly \$16 billion is associated with twenty trusts that govern annual aggregate claim payments to malignant and non-malignant claim groups through the application of a Claims Payment Ratio. The Claims Payment

**Exhibit 4: Summary of Trust Claim Payment Ratios** (dollars in millions)

Trust	2011 YE Assets	Category A	Category B
AC&S Asbestos Settlement Trust	\$270	82.9%	17.1%
Armstrong World Industries Asbestos PI Settlement Trust	\$2,279	65.0%	35.0%
ARTRA 524(g) Asbestos Trust	\$26	65.0%	35.0%
ASARCO LLC Asbestos PI Settlement Trust	\$992	90.0%	10.0%
Babcock & Wilcox Company Asbestos PI Settlement Trust	\$683	62.0%	38.0%
Burns and Roe Asbestos PI Settlement Trust	\$170	60.0%	40.0%
Combustion Engineering 524(g) Asbestos PI Trust	\$1,025	87.0%	13.0%
DII Industries, LLC Asbestos PI Trust	\$2,094	60.0%	40.0%
Federal Mogul U.S. Asbestos PI Trust <sup>10</sup>	\$770*	62.8%	37.2%
G-I Asbestos Settlement Trust	\$746	85.0%	15.0%
J.T. Thorpe Settlement Trust	\$155	90.0%	10.0%
Kaiser Asbestos PI Trust	\$844	70.0%	30.0%
Leslie Controls, Inc. Asbestos PI Trust	\$78	80.0%	20.0%
Lummus 524(g) Asbestos PI Trust	\$30	80.0%	20.0%
Owens Corning Fibreboard Asbestos PI Trust	\$1,636	65.0%	35.0%
Plibrico Asbestos Trust	\$119	65.0%	35.0%
T H Agriculture & Nutrition Industries Asbestos PI Trust	\$524	80.0%	20.0%
Thorpe Insulation Company Asbestos PI Settlement Trust <sup>11</sup>	\$556*	84.0%	16.0%
U.S. Gypsum Asbestos PI Settlement Trust	\$2,008	85.0%	15.0%
Western MacArthur-Western Asbestos Trust <sup>12</sup>	\$793	82.5%	17.5%
<b>Total / Dollar Weighted Average</b>	<b>\$15,796</b>	<b>73.5%</b>	<b>26.5%</b>
	<b>Category A and B Funding</b>	<b>\$11,610</b>	<b>\$4,187</b>

\*Asset totals include deferred or outstanding payment commitments not currently included as part of net claimant equity on trust audited financials. See endnotes for more details.

**Exhibit 5: Trust Claim Payments by Disease Group as a Percent of Total Claim Payments<sup>13</sup>**

*\*Pre-petition and Pre-confirmation settled claims are typically not reported by trusts at the disease category level.*

*\*\*Malignant claim category may include severely disabled asbestosis claims for certain Trusts.*

Ratio mandates that a percentage of annual claim payments are made to either Category A or Category B claims as defined in the Trust Distribution Procedures.<sup>9</sup> In all cases, Category A claims include malignant disease categories, and in most cases also include severely disabling asbestosis claims. Conversely, Category B claims typically include less impaired or unimpaired non-malignant claims. For the group of twenty trusts, the Category A Claim Payment Ratio ranges from as low as 60% to as high as 90% with average of 73.5% when weighted by 2011 year end trust asset balances. At a minimum, this means that over \$4 billion in confirmed trust assets are earmarked for less impaired non-malignant asbestosis and pleural claims.

Exhibit 5 summarizes trust claim payments by disease groupings since 2007. Many trusts choose not to disclose disease or disease groups for claim payments made to pre-petition or Pre-Pack settlements that are distributed through the trust. As a result there are significant payments made to claims with no disease or disease group classification and are denoted as "Not Specified" in Exhibit 5. Absent payments made to the Not Specified group, Exhibit 5 suggests that at minimum \$2.5 billion in payments have been made since 2007 to non-malignant claims. Assuming that

the payments made to the Not Specified group were distributed at the same ratio as the malignant and non-malignant groups (-75%/25%) then the total amount paid to non-malignant claims during the period would be nearly \$3.5 billion. This number appears to be decreasing or steadying as inventory claims pending litigation prior to and during bankruptcy reorganization continue to be paid down.

#### **Payment percentages**

Trusts that are unable to pay claimants 100% of the specified claim amount as prescribed in their Trust Distribution Procedures ("TDP") will establish a "Payment Percentage" that uniformly reduces the actual payment by a fixed percentage. Exhibit 6 summarizes the changes in Payment Percentages since 2008.

To quantify the impact these changes in Payment Percentages can have on net claim payments, Exhibit 7 summarizes the net claim payment for 6 large trusts (8 potential payments) that were processing and paying claims at the Delaware Claims Processing Facility ("DCPF") as of 2008. Significant decreases in Payment Percentages result in a decline of over 30% in net claim payments to a claimant collecting all 8 potential payments across the 6 trusts.

**Exhibit 6: Summary of Payment Percentage Changes as of Yearend**

Trust	Initial Pay%	12/31 2008	12/31 2009	12/31 2010	12/31 2011	6/15 2012
A-Best Asbestos Settlement Trust	3.6%	3.6%	17.4%	17.4%	17.4%	17.4%
API, Inc. Asbestos Settlement Trust	13.5%	13.5%	55.0%	55.0%	30.0%	30.0%
ARTRA 524(g) Asbestos Trust	7.5%	7.5%	7.5%	7.5%	0.5%	0.5%
Babcock & Wilcox Company Asbestos PI Settlement Trust	34.0%	34.0%	15.0%	15.0%	11.9%	11.9%
C. E. Thurston & Sons Asbestos Trust	40.0%	40.0%	40.0%	40.0%	80.0%	25.0%
Celotex Asbestos Settlement Trust <sup>14</sup>	12.0%	14.1%*	14.1%	9.4%	9.4%	9.4%
DII Industries, LLC Asbestos PI Trust <sup>15</sup>	100%	100%	52.5%*	52.5%	52.5%	52.5%
Eagle-Picher Industries PI Settlement Trust	31.9%	38.0%	38.0%	38.0%	31.0%	31.0%
G-I Asbestos Settlement Trust	8.6%	--	8.6%	8.6%	7.4%	7.4%
H. K. Porter Asbestos Trust	4.6%	4.6%	6.3%	6.3%	6.3%	6.3%
J.T. Thorpe Settlement Trust	50.0%	40.0%	40.0%	45.0%	45.0%	45.0%
JT Thorpe Company Successor Trust	18.5%	38.0%	57.0%	57.0%	57.0%	57.0%
Kaiser Asbestos PI Trust	39.5%	39.5%	39.5%	39.5%	35.0%	35.0%
Keene Creditors Trust	1.1%	1.1%	1.1%	0.8%	0.8%	0.8%
Lummus 524(g) Asbestos PI Trust	100%	100%	100%	100%	10.0%	10.0%
Manville PI Settlement Trust	10%	7.5%	7.5%	7.5%	7.5%	7.5%
NGC Bodily Injury Trust <sup>16</sup>	55.6%	55.6%	55.6%	55.6%	18.0%	18.0%
Owens Corning Fibreboard Asbestos PI Trust - FB Subfund	25.0%	25.0%	11.0%	11.0%	9.5%	9.5%
Owens Corning Fibreboard Asbestos PI Trust - OC Subfund	40.0%	40.0%	10.0%	10.0%	10.0%	10.0%
Plibrico Asbestos Trust	1.1%	8.5%	8.5%	8.5%	1.2%	1.2%
Raytech Corporation Asbestos PI Settlement Trust	2.0%	2.0%	2.0%	2.0%	0.8%	0.8%
Shook & Fletcher Asbestos Settlement Trust	65.0%	100%	100%	100%	100%	70.0%
T H Agriculture & Nutrition Industries Asbestos PI Trust	100%	--	100%	100%	30.0%	30.0%
U.S. Gypsum Asbestos PI Settlement Trust <sup>17</sup>	45.0%	45.0%	45.0%	30.0%	30.0%	30.0%
UNR Asbestos-Disease Claims Trust	18.6%	1.1%	1.1%	1.2%	0.8%	0.8%
Western MacArthur-Western Asbestos Trust	31.5%	40.0%	40.0%	44.0%	44.0%	44.0%

*\*Amendments to TDP increasing gross payment values in conjunction with, or in lieu of a Payment Percentage change. See endnote for more detail.*

**Claims processing facilities**

Bankruptcy trusts under 524(g) are designed to compensate claimants expeditiously and at a minimal cost. Many trusts seek to accomplish this at an administrative

level by contracting with existing asbestos claim facilities such as Verus, LLC ("Verus"), or by partnering with one another to establish a multiple trust processing facility like the DCPF. These facilities reduce administrative

**Exhibit 7: Net Mesothelioma Claim Payments from DCPF trusts** (dollars in thousands)

Trust	12/31 2008	12/31 2009	12/31 2010	12/31 2011
Armstrong World Industries Asbestos PI Settlement Trust	\$26	\$26	\$26	\$26
Babcock & Wilcox Company Asbestos PI Settlement Trust	\$41	\$18	\$18	\$14
Celotex Asbestos Settlement Trust	\$18	\$18	\$12	\$12
DII Industries, LLC Asbestos PI Trust - Halliburton	\$29	\$40	\$40	\$40
DII Industries, LLC Asbestos PI Trust - Harbison-Walker	\$68	\$96	\$96	\$96
Owens Corning Fibreboard Asbestos PI Trust - FB Subfund	\$45	\$20	\$20	\$17
Owens Corning Fibreboard Asbestos PI Trust - OC Subfund	\$108	\$27	\$27	\$27
United States Gypsum Asbestos PI Settlement Trust	\$101	\$101	\$68	\$68
<b>Total Net Payment</b>	<b>\$437</b>	<b>\$346</b>	<b>\$306</b>	<b>\$300</b>

and processing expenses by leveraging overhead and other fixed costs across multiple trusts. In doing so, these facilities create a “one-stop shop” allowing plaintiff attorneys to electronically file bulk claim submissions against multiple trusts. Verus and DCPF represent the two largest facilities both on number of trusts and total assets. In fact, as of year end 2011, of the \$18.3 billion in confirmed trust assets, \$14.7 billion is associated with one of these two facilities. The two facilities were responsible for over 80% of all trust claim payments in 2011. Exhibit 8 provides a summary of these figures.

#### Trust expenses and claim review

To further expedite the processing of claims, most trusts have established presumptive medical and exposure criteria to quickly determine if a claim qualifies for payment. The resolution procedures developed to govern this process are often standardized across Trusts allowing plaintiff attorneys to utilize the same claims material for multiple trust submissions, thus minimizing their filing costs per claim. This is not a negotiated or compromising process. Our review of these procedures has shown that for

**Exhibit 8: Trust Assets and Claim Payments by Claims Administrator** (dollars in millions)

Claims Processing Administrator	No. of Trusts	2011 YE Assets	2011 Claim Payments
Delaware Claims Processing Facility	7	\$9,960	\$1,350
Verus Claims Services <sup>18</sup>	13	\$4,780	\$320
Western Asbestos Settlement Trust	3	\$1,500	\$60
Claims Resolution Management Corp. <sup>19</sup>	3	\$920	\$160
Claims Processing Facility <sup>20</sup>	4	\$470	\$40
Trust Services Inc.	3	\$330	\$80
MFR Claims Processing, Inc.	4	\$340	\$10
Other <sup>21</sup>	8	\$40	<\$5
<b>Total*</b>	<b>45</b>	<b>\$18,340</b>	<b>\$2,020</b>

\*Totals for 2011 YE Assets and Claim Payments are undervalued as a result of a few Trusts that have not made 2011 annual reports available. See endnotes 18-21 for list of Trusts and endnote 7 that provides detail on how estimates for these missing annual reports have been applied to figures in **Exhibit 2** above.



**Exhibit 9: Trust expenses category as a percent of total Trust expenses<sup>22</sup>**

Trust Expenses Category	2006	2007	2008	2009	2010	2011
Trustee Fees and Expenses	9.7%	8.7%	7.6%	8.1%	7.1%	7.6%
TAC Fees and Expenses	3.0%	1.8%	1.6%	1.4%	1.7%	1.4%
FCR Fees and Expenses	1.8%	1.7%	1.3%	1.1%	2.0%	1.6%
Legal and Professional Fees	30.9%	26.7%	25.2%	26.9%	34.9%	30.2%
Investment Fees	8.1%	19.0%	19.0%	16.3%	16.5%	18.2%
Insurance Expense	6.4%	3.5%	2.5%	2.5%	2.2%	2.4%
General Administration Expense	14.5%	10.3%	9.3%	9.5%	7.3%	7.3%
Claim Processing Costs	21.1%	28.5%	33.9%	34.7%	27.0%	31.1%
Other Expenses <sup>23</sup>	4.6%	-0.1%	-0.4%	-0.5%	1.3%	0.1%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

mesothelioma claims the minimum medical and exposure criteria are virtually the same across many Trusts. As a result, trusts spend little on claim processing costs relative to claim payments. Exhibit 2 above shows that just under \$800 million has been spent since 2008 on trust expenses. The figures in Exhibit 9 below suggests that over this same period, approximately 31% of trust expenses were associated with claim processing costs, or roughly \$250 million. When compared to the \$13.5 billion in claim payments made over that same span, it suggests that the trusts are spending approximately 2 cents to review, process, and pay \$1.00 in claim payments.

**Trust governance**

The formation of a reorganization plan and resultant trust under section 524(g) involves negotiations with representatives of asbestos personal-injury claimants, the debtor, the FCR and other creditor constituencies

with standing in the bankruptcy. Subsequent to the establishment of the trust following plan confirmation, it is often the representatives of asbestos claimants who assume the leadership roles in advising the management of trust assets and distribution of claim payments over time. These representatives make up the Trust Advisory Committee ("TAC"). Exhibit 10 summarizes the law firms that have attorneys as TAC members on the highest frequency of trusts and the recent assets held and claim payments made collectively across those trusts.

The administration of the bankruptcy trust once it becomes operational is split between the trustees, the Trust Advisory Committee ("TAC") and the representative for future claimants (FCR). The trustees are the primary trust fiduciaries and handle reporting requirements, meeting with trust investment managers, and establish, supervise and administer the trust under the

**Exhibit 10: Summary of Trust Assets and Claim Payments by TAC Firm (dollars in millions)<sup>24</sup>**

TAC Member Firm / Affiliation	No. of Trusts	2011 YE Assets	2011 Claim Payments
Kazan, McClain, Lyons, Greenwood & Harley	17	\$13,530	\$1,700
Baron & Budd, P.C.	15	\$11,670	\$1,580
Motley Rice, LLC	10	\$11,400	\$1,540
Cooney & Conway	12	\$11,240	\$1,450
Weitz & Luxenburg	13	\$10,980	\$1,460

provisions of the TDP.<sup>25</sup> The trustees must receive the consent of the TAC and FCR to change the payment ratio, change the medical/exposure criteria, or change the payment percentage of the trust, among other things. The TAC members represent the fiduciary interest of current asbestos claimants and the FCR represents the interests of future demand holders.<sup>26</sup>

### Post-confirmation amendments to trust documents

As typically outlined in the Trust Agreements that are confirmed as part of the bankruptcy Plan of Reorganization, the trustees, TAC and FCR have the ability to amend trust operating procedures and policies post-confirmation.<sup>27</sup>

In recent years several trusts have amended their TDPs post-confirmation to include a “Confidentiality” provision and a “Sole Benefit” clause. The Confidentiality provision mandates that a claimant’s submission to a respective trust and all associated information is to be treated in the course of settlement negotiations and is afforded all the applicable confidentiality privileges and protections. The Sole Benefit

clause states that evidence submitted to a respective trust to establish proof of claim is for the sole benefit of the respective trust, not third parties or defendants in the tort system.

### Example of a Confidentiality provision:

*“Confidentiality of Claimants’ Submissions. All submissions to the Asbestos PI Trust by a holder of an Asbestos PI Claim or a proof of claim form and materials related thereto shall be treated as made in the course of settlement discussions between the holder and the Asbestos PI Trust and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including, but not limited to, those directly applicable to settlement discussions. The Asbestos PI Trust will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only (a) with the permission of the holder, to another trust established for the benefit of asbestos personal injury claimants pursuant to section 524(g) and/or section 105 of the Bankruptcy Code or other applicable law, (b) to such other persons as authorized by the holder, (c) in response to a valid subpoena of such materials issued by the Bankruptcy Court, (d) as provided in Section 2.2(c) above and (e) as provided in Section 1.4(f) of the Asbestos PI Trust*

### Exhibit 11: Summary of certain post-confirmation TDP amendments

Trust	Bankruptcy Confirmation Year	Confidentiality language was originally included	Confidentiality language amended	Sole benefit language was originally included	Sole benefit language was amended
DII Industries, LLC Asbestos PI Trust	2004		YES		YES
Armstrong World Industries Asbestos PI Settlement Trust	2006		YES		YES
Babcock & Wilcox Company Asbestos PI Settlement Trust	2006	YES	YES		YES
Kaiser Asbestos PI Trust	2006		YES		YES
Owens Corning Fibreboard Asbestos PI Trust	2006	YES	YES		YES
Porter Hayden Bodily Injury Trust	2006		YES		YES
U.S. Gypsum Asbestos PI Settlement Trust	2006	YES	YES		YES
Federal Mogul U.S. Asbestos PI Trust	2007	YES	YES	YES	
AC&S Asbestos Settlement Trust	2008	YES	YES	YES	
ASARCO LLC Asbestos PI Settlement Trust	2009	YES		YES	

*Agreement. Furthermore, the Asbestos PI Trust shall provide counsel for the holder a copy of any subpoena referred to in (c) immediately upon being served. The Asbestos PI Trust shall on its own initiative or upon request of the claimant in question take all necessary and appropriate steps to preserve said privilege before the Bankruptcy Court and before those courts having appellate jurisdiction related thereto.*<sup>28</sup>

#### **Example of a Sole Benefit clause:**

*"Evidence submitted to establish proof of exposure to Kaiser products is for the sole benefit of the Asbestos PI Trust, not third parties or defendants in the tort system. The Asbestos PI Trust has no need for, and therefore claimants are not required to furnish the Asbestos PI Trust with evidence of exposure to specific asbestos products other than those for which Kaiser has legal responsibility, except to the extent such evidence is required elsewhere in the Asbestos TDP. Similarly, failure to identify Kaiser products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the Asbestos PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of the Asbestos TDP."*<sup>29</sup>

Exhibit 11 shows that for the sample of trusts reviewed, the more recent trusts are including the Confidentiality provision and Sole Benefit clause in the pre-confirmation TDPs, while earlier trusts are amending the TDPs post-confirmation.

#### **Conclusion**

It has been 30 years since Johns Manville filed for bankruptcy and 25 years since its trust began paying claimants. More than 800,000 claims later, the Manville trust continues to compensate asbestos victims and has been joined by dozens of other trusts who collectively hold over \$18 billion in current assets with an additional \$11 to \$12 billion pending bankruptcy confirmation. Efforts have been made recently by public-policy makers and other parties to integrate those trust assets into the overall asbestos compensation system and make available more detailed, "transparent" information about trust claiming and payments.

As the trust transparency issue continues to evolve and legislatures, courts, academics and other interested parties strive to learn more about the trust disclosures, we plan to update this paper going forward to provide the most current snapshot as possible of what is known about the asbestos bankruptcy trust compensation system.

#### **Endnotes**

1. "Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases," Mealey's Asbestos Bankruptcy Report, Vol. 11, No. 7 (February 2012).
2. Figures based on information gathered from Section 524(g) trust annual reports.
3. Estimated present value of proposed funding based on bankruptcy disclosures from W.R. Grace, Pittsburgh Corning, North American Refractories, Flintkote, Congoleum, Quigley, Plant Insulation, AP Green, and Durabla. There are other pending 524(g) bankruptcy reorganizations currently active but no estimates of proposed trust funding has been disclosed in publically available bankruptcy documents that we were able to find.
4. 11 U.S.C. Section 524(g)(2)(B)(i)(1); 11 U.S.C. Section 524(g)(2)(B)(ii)(V).
5. "Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases," Mealey's Asbestos Bankruptcy Report, Vol. 11, No. 7 (February 2012).
6. *Supra* 3.
7. 2011 annual reports were not available for H.K. Porter, Keene, U.S. Mineral, Rutland Fire, and M.H. Detrick Trusts. In order to estimate the aggregate balances for 2011 we applied the asset and liability flows from 2010 for these specific Trusts.
8. Deferred note payments and insurance settlements that are not included as part of net claimant equity on trust financials but are due in the future. For example, the Federal Mogul U.S. Asbestos Personal Injury Trust, T&N sub-fund has outstanding note payment due totaling \$340M that are reported in the notes of the trust annual report financial statements, but are not included in the trust accounting of Net Claimant Equity.
9. United States Gypsum Asbestos Personal Injury Settlement Trust Distribution Procedures, Section 2.5.
10. 2011 YE balance of \$430M, plus the outstanding principle on the Thornwood promissory note

- totaling \$340M as of 12/31/2011 per Note 3 of the 2011 of the trust audited financials. As of 12/31/2011, the portion of the \$430M from insurance settlements was approximately \$112M. Assuming these settlements represent the portion of trust funds associated with the FMP (Wagner) liability, then the asset weighted average Claim Payment Ratio for the T&N(60%) and FMP(79%) is 62.8% for Category A Claims and 37.2% for Category B Claims.
11. Page 10 of the Court of Appeals opinion by Judge Gould suggests that \$600M in insurance had been settled to fund the trust plus an additional \$1.75M in funding. To date, the trust has received \$198M, so for purposes of this paper we have added the difference of \$404M to the 2011 ending balance of \$152M to represent the current total of committed trust funding.
  12. Section 2.5 of the TDP allocates annual claim payments of 88.35% to Western Asbestos/Western MacArthur (CA) claims and the remaining balance for MacArthur claims from either MN or ND. The Category A Claims Payment Ratio for CA claims is 84%, and for MN and ND claims it is 71.5%, which when weighted by the 88.35%/11.65% split yields an average Category A Claims Payment Ratio for the entire trust of 82.5% with the balance of 17.5% for Category B Claims.
  13. Claim payments by disease category are sometimes reported by trusts on a payment basis as opposed to an accrual basis that is typically used in the trust financials. As a result, the claim payment commitments reported in Exhibit 2 and 3 from the trust financials may differ from claim summary level in Exhibit 4.
  14. In June 2008 the Celotex Trust increased its TDP values in lieu of increasing the Payment Percentage from 14.1% to 18.3%. Notice available on Celotex Trust website.
  15. In October 2009 the DII Trust increased its TDP values by more than double (e.g. Harbison-Walker Mesothelioma average value increased from \$68K to \$182K), prior to decreasing the Payment Percentage from 100% to 52.5%.
  16. NGC trust decreased its Payment Percentage twice in 2011 (First to 41% in July and then to 18% in November).
  17. United States Gypsum trust decreased its Payment Percentage twice in 2010 (First to 35% in April and then to 30% in November).
  18. The 2011 annual report for the H.K. Porter Asbestos Trust was not available for download. As a result the YE 2011 asset and claim payment balances in this table are underestimates.
  19. The 2011 annual report for the U.S. Mineral Products Trust was not available for download. As a result the YE 2011 asset and claim payment balances in this table are underestimates.
  20. The 2011 annual report for the Keene Creditors Trust was not available for download. As a result the YE 2011 asset and claim payment balances in this table are underestimates.
  21. The 2011 annual report for the M.H. Detrick and Rutland Fire Trusts were not available for download. As a result the YE 2011 asset and claim payment balances in this table are underestimates.
  22. Percentages based on approximately 40 Trusts that provided sufficient expense detail as part of the annual report.
  23. Other expenses may include refunds and other similar accounting entries that may create negative balances.
  24. *Supra* 18-21.
  25. United States Gypsum and Armstrong World Industries 2011 trust annual reports.
  26. *Ibid.*
  27. *See for example* Section 7.3 of the Armstrong World Industries, Inc. Asbestos PI Settlement Trust Agreement.
  28. *See for example* Section 6.5 of the Kaiser Aluminum & Chemical Corporation 3rd Amended Asbestos Distribution Procedures.
  29. *See for example* Section 5.7(b)(3) of the Kaiser Aluminum & Chemical Corporation 3rd Amended Asbestos Distribution Procedures. ■

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*edited by Emerson Heffner*

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