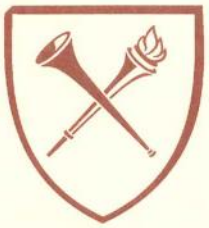

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FUTURE CLAIMANT TRUSTS AND "CHANNELING INJUNCTIONS" TO RESOLVE MASS TORT ENVIRONMENTAL LIABILITY IN BANKRUPTCY: THE MET-COIL MODEL*

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INTRODUCTION

This Article describes a new legal model for resolving mass tort claims against a company as a result of environmental contamination. The new model involves the use of a future claimant trust and a channeling injunction in a chapter 11 bankruptcy proceeding. The model, adapted from the commonly-employed 11 U.S.C. § 524(g) asbestos future claimant trust, offers significant advantages to companies and claimants in other mass tort situations in which the universe of future claims is uncertain but potentially overwhelming.

After spending more than $18 million on a rash of personal injury litigation brought by residents in the neighborhoods surrounding one of its facilities (the "Lockformer Site") where trichloroethylene ("TCE") was spilled onto the soil, allegedly contaminating the groundwater supply in the area,[1] Met-Coil Systems Corporation ("Met-Coil" or the "Debtor") filed for bankruptcy, with numerous lawsuits pending. After less than a year of negotiations among the Debtor, its parent, Mestek, Inc. ("Mestek"), and a court-appointed legal

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* This Article was written with the assistance of Sean T. Greecher, an associate at Young Conaway Stargatt & Taylor, LLP. Much of the factual information about the *Met-Coil* case appearing in this Article consists of direct and unquoted portions of the record, including the Disclosure Statement *infra* at note 1, the Confirmation Order *infra* at note 3, and the affidavit of Eric D. Green *infra* at note 5.

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1 Fourth Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the Chapter 11 Plan of Reorganization Proposed by Met-Coil Systems Corp. and Mestek, Inc., as Co-Proponents, at 18, *In re* Met-Coil Sys. Corp., No. 03-12676 (Bankr. D. Del. June 22, 2004) (No. 967) [hereinafter Disclosure Statement].

representative for future claimants, Eric D. Green (the "FCR"),[2] the Bankruptcy Court for the District of Delaware approved Met-Coil's plan of reorganization (the "Plan").[3] The Plan provided funding for the clean-up of the contaminated area, the costs associated with connecting area residents to a municipal water supply,[4] and a personal injury trust (the "TCE PI Trust") to compensate future personal injury claimants who, over the next forty-five years, allege their exposure to TCE released from the Debtor's facility is the cause of cancer or other diseases.[5]

The Plan also included as its keystone a "channeling injunction," which protects the reorganized Met-Coil, Mestek, and other related parties (namely insurers) from personal injury liability arising from the TCE allegedly emanating from the Lockformer Site.[6] The bankruptcy court issued Met-Coil's channeling injunction pursuant to 11 U.S.C. § 105(a), which authorizes the court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the U.S. Bankruptcy Code ("Code").[7]

The Plan and TCE PI Trust were modeled after the plans of reorganization and future claimant trusts first developed in the context of asbestos claims[8] and other mass torts.[9] The Met-Coil Plan adapted these earlier models to create a

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[2] Met-Coil filed its voluntary petition for relief under chapter 11 on August 26, 2003. *In re* Met-Coil Sys. Corp., No. 03-12676 (Bankr. D. Del. Aug. 26, 2003) (No. 1). Eric Green was appointed on October 20, 2003. Disclosure Statement, *supra* note 1, at 26.

[3] Findings of Fact, Conclusions of Law and Order Confirming the Fourth Amended Chapter 11 Plan of Reorganization for Met-Coil Systems Corp., *In re* Met-Coil Sys. Corp., No. 03-12676 (Bankr. D. Del. Aug. 16, 2004) (No. 1216) [hereinafter Confirmation Order].

[4] Disclosure Statement, *supra* note 1, at 83.

[5] *See* Affidavit of Eric D. Green in Support of Confirmation of Fourth Amended Chapter 11 Plan of Reorganization Proposed by Met-Coil Systems Corp. and Mestek, Inc., as Co-Proponents, at 50, *In re* Met-Coil Sys. Corp., No. 03-12676 (Bankr. D. Del. July 23, 2004) (No. 1132) [hereinafter Green Affidavit]. The TCE PI Trust is funded by a collateralized stream of cash payments, with an aggregate present value of no less than $24,500,000, to satisfy the claims of holders of future TCE-related personal injury claims as well as the costs of establishing the trust, and an additional $6,510,000 to satisfy all personal injury claims for which settlements were reached either prior to or during the pendency of the bankruptcy case. *Id.* at 16.

[6] *See* Disclosure Statement, *supra* note 1, at 54.

[7] 11 U.S.C. § 105(a) (2000).

[8] *See, e.g.*, *In re* Johns-Manville Corp., 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986) (holding the bankruptcy court had the authority to issue, as part of the reorganization plan, a channeling injunction that diverted all asbestos-related claims away from the debtor to trusts set up to compensate these claimants), *rev'd on other grounds*, 78 B.R. 497 (S.D.N.Y. 1987).

[9] *See, e.g.*, Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989) (approving a reorganization plan containing a channeling injunction that created a future claimant trust for personal injury claims resulting from use of Dalkon Shield intra-uterine devices ("IUDs")).

future claimant trust that fits the problem of environmental contamination.[10] The Met-Coil Plan provides a viable and equitable model for dealing with environmental contamination through bankruptcy.

In discussing the Met-Coil model, this Article will: (1) outline the process by which the Met-Coil Plan was developed, (2) briefly discuss the history of future claimant trusts in bankruptcy on which the Met-Coil plan and trust was based, (3) examine subsequent opinions that have shaped and will continue to shape the conduct of mass-tort bankruptcies, and (4) discuss the potential future applications of future claimant trusts in bankruptcy.

I. "TOXIC TORT BANKRUPTCY"—AN OVERVIEW OF THE PROCESS

A. *Liabilities Driving the Decision to File for Bankruptcy*

In 1976, Congress passed the Toxic Substances Control Act ("TSCA"),[11] which authorizes the Environmental Protection Agency ("EPA") to catalog "chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards."[12] The EPA has cataloged approximately 75,000 chemicals that fall into the category of posing an "imminent hazard" to the environment.[13] These industrial chemicals are generally used for a wide variety of purposes.[14] Thirty years after the passage of TSCA, however, very little is known about the environmental risks of the vast majority of these chemicals.[15]

For companies that used potentially toxic chemicals, the risk those chemicals will cause significant personal injury is a costly one. As further scientific inquiry and epidemiological study reveals the effects of exposure to these chemicals, the likelihood that injured individuals will seek recovery from the companies increases. Toxic tort litigation, and the looming threat of future litigation, can cripple a business. The costs of settlements and jury awards, not

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[10] Green Affidavit, *supra* note 5, at 17–22.

[11] 15 U.S.C. §§ 2601–2629 (2000).

[12] *Id.* § 2601(b)(2).

[13] EPA, What is the TSCA Chemical Substance Inventory, http://www.epa.gov/oppt/newchems/pubs/invntory.htm (last visited Nov. 29, 2005).

[14] *Id.*

[15] ROBERT V. PERCIVAL ET AL. ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 374–75 (3d ed. 2000).

to mention the accompanying transaction and litigation costs, can be exponential.[16] Equally challenging in assessing potential future mass-tort or other environmental liability is identifying who the individual claimants may be and when each claimant may manifest injuries. Both issues may factor into a company's calculation and financial reporting of the present value of such litigation liabilities.

B. *The Bankruptcy Process—Resolving Future Claims Through Equitable Channeling Injunctions*—In re Johns-Manville

Bankruptcy provides a means by which companies saddled with potential future liabilities—liabilities that by their nature are not capable of being known with any certainty—can address these liabilities in a comprehensive and equitable manner and obtain a "fresh start."[17] Chapter 11 reorganizations are generally preferable to chapter 7 liquidations,[18] especially from the perspective of future claimants in mass tort contexts.[19] To provide a true "fresh start," however, the bankruptcy process must provide companies with a means to create a plan that resolves all of their current liability and provides some assurance that no future liability is carried past the conclusion of the bankruptcy case.

To encourage capital contributions into a reorganized enterprise, investors must be confident their financial commitments will not be threatened by future liability arising from prepetition activity. Without a quantifiable and fixed measure of liability, principals and investors in the reorganized enterprise

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[16] *See, e.g., In re* UNR Indus., 725 F.2d 1111, 1113 (7th Cir. 1984) (noting UNR, one of the first companies to file for bankruptcy based on asbestos liabilities, was a defendant in over 17,000 asbestos suits and expected to be sued by anywhere from 30,000 to 120,000 new asbestos victims).

[17] *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) ("[a] central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.") (citations omitted).

[18] *See* Bonner Mall P'ship v. U.S. Bancorp Mortgage Co. (*In re* Bonner Mall P'ship), 2 F.3d 899, 916 (9th Cir. 1993).

> [W]hile the protection of creditors' interests is an important purpose under Chapter 11, the Supreme Court has made clear that successful debtor reorganization and maximization of the value of the estate are the primary purposes. Chapter 11 is designed to avoid liquidations under Chapter 7, since liquidations may have a negative impact on jobs, suppliers of the business, and the economy as a whole.

Id.(citations omitted); *see also* Toibb v. Radloff, 501 U.S. 157, 163–64 (1991); United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983).

[19] *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 418–19 (J.P.M.L. 1991).

would continue to operate under the specter of future claims destroying the company, and therefore would be reluctant to contribute to a reorganized enterprise or a settlement trust for future claimants.[20]

The business objective of discharging liabilities for future claims, however, can conflict with notions of due process.[21] A party holding a claim against a debtor on account of trade receivables, for example, has an opportunity to fully participate in the bankruptcy process, and if the debtor attempts to discharge the creditor's claim, the creditor must be given notice.[22] Future claims are unlike existing claims because the debtor is unable to give the future claimants notice; obviously, the identity of the future claimants is unknown. Indeed, the discharge provisions of the Code do not operate to resolve liabilities that have yet to ripen into a "claim" (under state law).[23]

In the context of a bankruptcy reorganization involving future claims, were the debtor to simply continue operations outside of bankruptcy and defend itself against litigation as it arose, later tort claimants risk litigating against a company with depleted or nonexistent resources. Similarly, were a company to liquidate its assets in bankruptcy, individuals with no present claims against the debtor at the time of liquidation might have no recourse. Thus, reorganization strikes an equitable balance between current and future claimants by eliminating the inequity that results from a piecemeal dismemberment through inexorable litigation or outright liquidation of a company, processes which favor earlier claimants over later claimants.[24]

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[20] *See, e.g.*, *In re* Am. Family Enters., 256 B.R. 377, 408 (D.N.J. 2000) (noting without a channeling injunction, creditors would face a "serious risk" of no recovery).

[21] *See* Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?*, 78 AM. BANKR. L.J. 339 (2004).

[22] FED. R. BANKR. P. 3007.

[23] To determine whether a potential liability is a claim, various jurisdictions have used various tests, including: (1) the "conduct test" (*see, e.g.*, Grady v. A.H. Robins Co. (*In re* A.H. Robins Co.), 839 F.2d 198, 201 (4th Cir. 1988) (claims arise based on time when acts giving rise to alleged liability were performed)); (2) the "preconfirmation relationship test" (*see* Epstien v. Official Comm. Of Unsecured Creditors (*In re* Piper Aircraft Corp.), 58 F.3d 1573, 1578 (11th Cir. 1995) (recognition of claim requires prepetition breach and preconfirmation contact, privity, or other relationship between debtor and creditor)); (3) the "prepetition relationship test" (*see, e.g.*, United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1000 (2d Cir. 1991) (holding that recognition of claim requires prepetition act or omission and prepetition contact privity or other relationship)); and (4) the "accrued state law claim test" (*see In re* M. Frenville Co., 744 F.2d 332, 337 (3d Cir. 1984) (holding a claim is not cognizable in bankruptcy if not yet cognizable under state law)).

[24] Bankruptcy reorganization serves important policy goals in the area of future claims because

> [i]t stops the 'race to the courthouse,' where the early victims whose injuries have manifested themselves are paid in full while later claimants receive nothing after all the debtor's assets have been exhausted. Reorganization also preserves the going concern value of the business—

The competing goals of (1) providing companies with a comprehensive resolution of their liabilities and (2) protecting the interests of future claimants can both be satisfied by an injunction that channels future claims not subject to discharge away from the debtor (and potentially the debtor's affiliates and insurers) into a trust that resolves the claims. This mechanism of establishing a trust for future claimants, referred to as a "channeling injunction," was first employed in the context of bankruptcy proceedings in 1986 in *In re Johns-Manville Corp.*[25]

Johns-Manville expected thousands of future victims of asbestos exposure would have claims far exceeding the estimated net worth of the existing company.[26] The Bankruptcy Court for the Southern District of New York was determined to treat both present and future asbestos claims in the same manner.[27] By establishing two future claimant trusts, the *Johns-Manville* plan sought to compensate more potential victims than would have been possible had the company not declared bankruptcy.[28] Through the use of channeling injunctions, the *Johns-Manville* plan preserved a healthy, functioning company, which in turn provided additional value for the trusts (which owned the stock of the reorganized company) and future claimants.[29]

To preserve the value of the reorganized company, the *Johns-Manville* court issued an injunction that "effectively channel[ed] all asbestos related claims and obligations away from the reorganized entity and target[ed] it towards the [trusts] for resolution."[30] The *Johns-Manville* court relied on its equitable powers for authority to issue the channeling injunction[31] and

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> principally its ability to generate a cash flow from which future claims or cleanup claims may continue to be paid as they arise.

Richard L. Epling, *Separate Classification of Future Contingent and Unliquidated Claims in Chapter 11*, 6 BANKR. DEV. J. 173, 173–74 (1989).

[25] *In re* Johns-Manville Corp., 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986).

[26] *Id.* at 636.

[27] *Id.* at 628.

> From the outset, it should be noted that in a very real sense, both from the point of view of the Debtor and from that of the asbestos victims, a distinction between 'present' and 'future' victims is, at best, nominal. The Trust does not make this nominal distinction and is designed to satisfy the claims of all victims, whenever their disease manifests.

Id.

[28] *Id.* at 621–22.

[29] *Id.* at 635.

[30] *Id.* at 624.

[31] *Id.* at 625 (citing Cont'l Ill. Nat'l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648 (1935)).

specifically recognized that § 105 of the Code "codified" the court's "equitable power" and "allow[ed] a bankruptcy court to enjoin proceedings in other courts to ensure the efficient administration of an estate."[32]

Apart from the question of statutory authority, the *Johns-Manville* court also grappled with due process concerns arising from the plan's proposed treatment of future claimants.[33] Because the plan limited suits against the reorganized debtor by those who would discover, post-confirmation, that they had developed an asbestos-related illness, objectors argued that the injunction would "unconstitutionally bind future claimants to an impairment of their rights without appropriate notice."[34] The court rejected this argument, writing that "[d]ue process . . . does not and has never, mandated personal, actual notice"[35] but instead requires only notice "reasonably calculated" to "apprise interested parties of the pendency of the action."[36] The *Johns-Manville* court's ruling recognizes the inherent limitations in providing notice under circumstances where claimants whose rights may be affected are unknown and unknowable while additionally recognizing the general benefits (both to the debtor company and to the future claimants) of resolving future claims through the bankruptcy process.

In an effort to safeguard the rights of future claimants, the *Johns-Manville* court appointed a legal representative for future claimants.[37] The court endowed the future claimants' representative with "the full panoply of statutory rights and duties of representation available to an official committee under the Code."[38] The court noted "binding unknown parties in interest to the outcome of judicial procedures in which they have been represented by a trustee [or] legal representative . . . is not a novel phenomenon in the law."[39] In fact, the court found that the "goal of the Plan and the purpose of the Injunction [was] to preserve the rights and remedies of those parties, who by

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[32] *Id.* at 625. The authority the *Johns-Manville* court adduced from § 105(a) to issue channeling injunctions was subsequently codified in § 524(g) of the Code for asbestos-related bankruptcy cases. *See* 11 U.S.C. § 524(g) (2000).

[33] *In re Johns-Manville*, 68 B.R. at 626.

[34] *Id.*

[35] *Id.* The debtor had undertaken "an extensive campaign designed to provide the maximum amount of publicity" which included "national television and radio advertisements, newspaper advertisements in the six leading U.S. and Canadian newspapers and in the largest circulation daily newspaper in each state, the District of Columbia and each Canadian province." *Id.*

[36] *Id.* at 626 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

[37] *Id.* at 626–27.

[38] *Id.*

[39] *Id.* at 626–27.

an accident of their disease cannot even speak in their own interest."[40] The court thus found due process was better served by confirming the plan and issuing the channeling injunction because disallowing the plan and injunction on the basis of due process concerns would "deny asbestos victims justice and equity" by preventing any future claims from being compensated at all.[41]

C. *The Future Claimants' Representative—Fiduciary Duties*

As illustrated by the *Johns-Manville* reorganization, because a channeling injunction dramatically impacts the rights of future mass-tort claimants, the appointment of a representative to protect the interests of future claimants is an essential component of resolving future claims in the bankruptcy process.[42] In *Met-Coil*, the FCR appointed by the bankruptcy court[43] primarily focused on determining whether the Plan, trust agreement, and trust distribution procedures would treat holders of future TCE claims fairly and equitably.[44] The FCR's negotiations with the Debtor and Mestek resulted in a Plan the bankruptcy court deemed fair and equitable in its treatment of future claimants and representative of a reasonable resolution of the Debtor's and its affiliates' liabilities for current and future TCE-related personal injury claims.[45] The bankruptcy court also found the TCE channeling injunction was necessary to ensure sufficient funding of the TCE PI Trust, which allowed for the fair and equitable treatment of future claimants.[46]

Before bringing the Plan before the bankruptcy court for confirmation, the FCR considered, among other things, the following: the number of future claims expected to be asserted against Met-Coil, the expected timing of such claims, the appropriate method by which future claims would be paid through a settlement trust, the level of funding required to satisfy all future claims, and whether the trust structure as a whole would inure to the benefit of the class of future claimants.[47]

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[40] *Id.*

[41] *Id.*

[42] *See id.* at 618; *see, e.g.*, *In re* Combustion Eng'g, Inc., 391 F.3d 190, 204 n.8 (3d Cir. 2004). When a trust is established through bankruptcy in favor of future claimants, the Code requires "the court appoint[] a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands" against the trust. 11 U.S.C. § 524(g)(4)(B)(i) (2000).

[43] Order Authorizing the Appointment of Eric D. Green as Legal Representative for Future Claimants, *In re* Met-Coil Sys. Corp., No. 03-12676 (Bankr. D. Del. Oct. 20, 2003) (No. 205).

[44] Green Affidavit, *supra* note 5, at 6.

[45] *See* Confirmation Order, *supra* note 3, at 30.

[46] *Id.*

[47] *See infra* notes 48–102 and accompanying text.

D. Identifying the Potential Universe of Claims

To fulfill its responsibilities as a fiduciary to future claimants, a future claimants' representative generally must undertake a substantial amount of due diligence to assess the likelihood, number, and value of potential future claims.[48] In the context of negotiating an appropriate level of funding to satisfy future claims in mass-tort bankruptcies, the future claimants' representative must draw from a number of different sources to reach an estimate of the final projection of future liability. In *Met-Coil*, the FCR employed experts in hydrology, epidemiology, toxicology, and econometrics to calculate an appropriate level of funding for the TCE PI Trust.[49]

In assessing the likelihood and value of future TCE-related personal injury litigation, the FCR considered, among other things, the levels of TCE detected in the vicinity of the Lockformer Site, the potential health effects of exposure to TCE, the size of the potentially affected population, the Debtor's and Mestek's history with TCE-related personal injury claims, and information on settlements and judgments involving TCE claims nationwide.[50] The FCR also examined the Debtor's and Mestek's ability to satisfy future TCE-related personal injury claims.[51]

1. Creating a "Footprint" of Contamination

As a first step in determining the number of potential future TCE claims, the FCR directed a hydrologist, Dr. Jonathan F. Sykes, to map out a "footprint" of the contamination released in the vicinity of the Lockformer Site to determine where the TCE contaminants might have migrated.[52] Dr. Sykes' analysis was based on samples from wells around the Lockformer Site, geological characteristics of the area, and a review of water usage records.[53] Dr. Sykes used this data to determine whether significant draws had been made from the surrounding aquifer, to plot the general migration of the TCE

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[48] *Id.*; *see also* Application of Met-Coil Systems Corp. Pursuant to 11 U.S.C. §§ 105 and 1109 for the Appointment of Eric D. Green as Legal Representative for Future Claimants, *In re* Met-Coil Sys. Corp., No. 03-12676 (Bankr. D. Del. Sept. 22, 2003) (No. 110).

[49] *See* Confirmation Order, *supra* note 3, at 22.

[50] *Id.*

[51] *See* Green Affidavit, *supra* note 5, at 6.

[52] *Id.* at 8.

[53] *Id.*

contaminants in the groundwater from the date of first contamination to the present, and to estimate the levels of contamination in the affected locations.[54]

Upon determining whether and when certain areas might have been contaminated, Dr. Sykes identified a geographic area where TCE-contaminated groundwater might be present (defined in the Plan as the "Designated Area") and identified the level of exposure at various points within the Designated Area.[55] Dr. Sykes' analysis circumscribed the area where TCE contamination likely had already spread and could potentially spread in the future, which served as one of the cornerstones for the FCR's evaluation of the appropriate funding levels for the trust.[56]

2. Calculating the Effects of TCE Exposure

The next step was to determine how the observed levels of TCE in the Designated Area could affect the health of the individuals exposed to it.[57] Based on estimated well water contamination levels in the Designated Area, Dr. Jeffrey Mandel and Dr. Abby Li of Exponent determined the levels of TCE to which humans in the Designated Area might have been exposed.[58] They then assessed how these levels of exposure might affect the incidences of cancerous and non-cancerous diseases in the exposed population.[59]

Because it is imperative a future claimant trust be sufficiently funded, Exponent made conservative assumptions.[60] As a result, the FCR could be confident the funding levels provided to the trust would be sufficient to protect the enterprise from collateral attack on the basis of insufficient funding.[61]

Relying on its own TCE-exposure level assessment, Exponent estimated the increased risk to the exposed population of developing non-cancerous and

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[54] *Id.*

[55] *Id.*

[56] *Id*

[57] *Id.* at 8–9.

[58] *Id.* Exponent is an engineering and scientific consulting firm. Exponent, Inc., http://www.exponent.com (last visited Dec. 3, 2005).

[59] *See* Green Affidavit, supra note 5, at 8–9. Exponent considered water, air, and soil as potential pathways of exposure to humans. *Id.* at 9.

[60] *Id.*

[61] *Id.* For example, Exponent assumed the level of TCE existing at each tested source within the Designated Area was the measurement corresponding to the 95% upper confidence limit of the mean TCE measurement for each source. *Id.* This means statistically there is only a 2.5% likelihood that the true mean measurement would exceed the measurement actually used by Exponent in its calculations. *Id.*

cancerous diseases.[62] For non-cancer risk, Exponent determined threshold levels of concern by examining reference doses[63] proposed by the EPA along with recent scientific literature. Exponent determined the levels of exposure to TCE detected in the Designated Area were well below the threshold levels[64] necessary to cause any increased risk of non-cancerous diseases.[65]

Although the excess risk of cancer resulting from TCE exposure in the Designated Area was determined to be either non-existent or very low,[66] Professor Green asked Exponent to determine the specific cancers associated with TCE exposure in published scientific literature.[67] His reason was twofold. First, the quantum of proof necessary in a courtroom may not be the same as what is necessary to demonstrate causation to a peer-reviewed medical journal.[68] So long as a claimant can provide sufficient evidence that there *may* be a correlation between the defendant's actions and the claimant's injury, that evidence may be sufficient for the case to survive a motion for summary judgment and for a fact finder to rule in favor of the claimant.[69] Second, while a number of scientific studies consider the connection between TCE exposure and cancer in humans, the science is still relatively nascent.[70] For example, there was very little, if any, scientific literature forty years ago suggesting the dangers of asbestos exposure.[71] Today, the dangers and potential effects of asbestos exposure are nearly universally agreed upon.

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[62] *Id.*

[63] A reference dose is the level of daily intake that is acceptable without causing an appreciable increased risk of illness. EPA, IRIS Glossary of Terms, http://www.epa.gov/iris/gloss8.htm (last visited Nov. 28, 2005).

[64] A threshold level is the average concentration beyond which human health may likely be threatened. *Id.*

[65] *See* Green Affidavit, *supra* note 5, at 9–10.

[66] *Id.* at 9–10.

[67] *Id.* at 10.

[68] *See* Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996) ("When scientists testify in court [the legal system requires that] they adhere to the same standards of intellectual rigor that are demanded in their professional work. If they do, their evidence (provided of course that it is relevant to some issue in the case) is admissible even if the particular methods they have used in arriving at their opinion are not yet accepted as canonical in their branch of the scientific community.") (citations omitted).

[69] Green Affidavit, *supra* note 5, at 10. This reality of litigation was certainly not unfamiliar to Met-Coil. Met-Coil and Mestek had reached settlements with certain claimants and had obtained unfavorable trial verdicts against other claimants who alleged injuries relating to TCE exposure, even though the available scientific literature did not necessarily support the validity of those claims. Confirmation Order, *supra* note 3.

[70] *Trichloroethylene* CAS # 79-01-6 (Agency for Toxic Substances & Diseases Regisrty, Atlanta, Ga., July 2003), *available at* http://atsdr1.atsdr.cdc.gov/tfacts19.pdf.tfacts19.pdf.

[71] The first lawsuit relating to asbestos exposure is believed to have been filed in 1966. Asbestos & Libby Health, History, http://www.umt.edu/LibbyHealth/introduction/background/asbestos_timeline.htm (last visited Dec. 1, 2005).

The trust had to address both of these concerns. Therefore, the FCR insisted upon estimating the value of claims based upon (1) the potential claimants could make a compelling case as a matter of law, even if not as a matter of science; and (2) the potential that future scientific studies would find future claimants' allegations of injury relating to TCE exposure were more compelling than scientific knowledge would suggest.[72] Based on the strength of Exponent's research findings,[73] the FCR identified specific cancers (the "Scheduled Diseases") for which claimants might be able to sustain a cause of action based on exposure to TCE.[74]

3. *Estimating the Population Within the Footprint that Might Become Diagnosed with a Scheduled Disease*

After identifying the types of injuries that could be associated with exposure to TCE, the FCR's team turned to identifying the size of the potentially exposed population and projecting the incidence of TCE-associated diseases likely to manifest in the exposed population.[75] Analysis Research Planning Corporation ("ARPC"), retained by the FCR to serve as econometricians and consultants, provided the FCR with analysis of the timing and volume of future claims that could be expected in personal injury actions.[76] ARPC estimated the number of individuals in the Designated Area who might eventually be diagnosed with one of the Scheduled Diseases.[77] ARPC used Dr. Sykes' footprint of estimated TCE contamination to develop a database of residential properties within the Designated Area where residents may have been exposed to TCE.[78]

ARPC estimated the number of individuals who potentially resided in the residential properties that fell within the Designated Area during the periods of TCE contamination.[79] For each of the properties in the database, ARPC

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[72] *See* Green Affidavit, *supra* note 5, at 8.

[73] Exponent explained, while the published scientific literature does not conclusively support TCE as being causally related to any type of cancer, some studies found statistical associations between certain cancers and TCE exposure.

[74] Green Affidavit, *supra* note 5, at 10.

[75] *Id.*

[76] *Id.* at 12.

[77] *Id.*

[78] *Id.* at 10. A property was included in this analysis if it met all three of the following criteria: (1) the property was within the Designated Area, (2) the property was situated in an area where some of the residents used private residential wells for drinking water, and (3) the property was listed as residential or leased on the DuPage County Assessor's database. *Id.*

[79] *Id.* at 11–12.

provided an estimate of the number of individuals who resided in each household, based on current and historical data.[80] ARPC then estimated the number of individuals who moved into and out of the homes in the Designated Area (the "Turnover Rate"). By applying the Turnover Rate to the age-specific population in the Designated Area, ARPC was able to estimate how many residents in each age category moved into the Designated Area each year during the possible exposure time period.[81]

4. Calculating an Estimated Value of Future TCE-Related Claims

After identifying the potential universe of future claims, the FCR was faced with the task of determining an appropriate monetary value to satisfy them.[82] The FCR developed a range of values attempting to ensure a fair recovery for all potential future claimants.[83] To estimate the value of a future TCE-related claim, the FCR attempted to determine the potential recovery a claimant might expect to receive in a hypothetical tort action against the Debtor, taking into account the dose and duration of exposure for any given claimant.[84]

The FCR considered, among other things, relevant data from recent TCE-related judgments and the limited number of published settlements involving TCE-related cancer claims.[85] To "market check" the estimated values, the FCR contacted attorneys with significant experience in litigating similar mass-tort related personal injury actions for their opinion on the reasonableness of the estimated values.[86]

The FCR then considered the anticipated incidences of each of the Scheduled Diseases and the estimated value of these claims to arrive at the estimated aggregate liability of the TCE PI Trust with respect to the Scheduled Diseases.[87] This amount of estimated aggregate liability was slightly increased to allow for modest payments to individuals who claimed harm from their exposure to TCE from the Lockformer Site, but who have not been diagnosed

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80 *Id.* at 11.

81 *Id.* at 12.

82 *Id.*

83 *Id.*

84 *Id.* at 12–13.

85 *Id.* at 10.

86 *Id.* at 13. The attorneys who participated in the survey were presented with a hypothetical case based on the facts of *Met-Coil*, and they were asked whether the estimated claim values being considered by the FCR for the Scheduled Diseases were reasonable and within the range of settlements for similar personal injury litigation. *Id.*

87 *Id.*

with one of the Scheduled Diseases (the "Exposure-Only Claimants").[88] Allowing some recovery for Exposure-Only Claimants provides the TCE PI Trust with a means to avoid litigation over alleged injuries outside of the Scheduled Diseases and compensates claimants for tort claims relating to the fear of developing cancer.[89] Finally, the calculation was increased to include an estimated amount necessary for the costs of administering the TCE PI Trust, such as the cost of processing and litigating claims.[90]

E. Anticipating the Timing of Future Claims

In establishing the TCE PI Trust, the parties essentially reduced the value of anticipated claims over the next decades to present-day value.[91] To determine the present day funding requirements for the trust, the FCR needed to determine when future claims were likely to be asserted.[92] The FCR estimated the number of expected diagnoses for the exposed surviving population for the Level I and Level II Scheduled Diseases identified by Exponent.[93] Using data from the National Cancer Institute, ARPC identified the background cancer rates for the various Scheduled Diseases and applied the age-conditional probabilities of being diagnosed from 2003 (the year Met-Coil filed its bankruptcy case) through 2048 (the year the trust terminates) to estimate the expected number of occurrences of each Scheduled Disease.[94]

F. Negotiating Trust Funding Levels

In many cases, negotiations regarding an appropriate level of funding for a settlement trust are a battle of experts. When calculation of the trust's liability depends on the estimated value of future claims, many variables come into play: the number of people potentially affected by the toxic trigger, the extent

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[88] *Id.*

[89] *Id.* In Illinois, where the Lockformer Site is located, fear of a future harm is a legally cognizable tort. *See, e.g.*, Wetherill v. Univ. of Chi., 565 F. Supp. 1553, 1560 (N.D. Ill. 1983) (discussing the standards for proving a compensable injury based upon the fear of developing cancer in the future); Doe v. Nw. Univ., 682 N.E.2d 145, 151–52 (Ill. App. Ct. 1997) (discussing the standards for proving a compensable injury based upon the fear of contracting AIDS).

[90] Green Affidavit, *supra* note 5, at 13.

[91] *Id.* at 16.

[92] *Id.* at 12.

[93] *Id.*

[94] *Id.* ARPC excluded projected incidences of cancer arising prior to 2003 because any claims based on incidences of cancer would be subject to the bankruptcy deadline for filing proofs of claim; thus, only individuals with pre-2003 cancer claims who filed a proof of claim that was allowed by the court would be eligible to recover from the TCE PI Trust. *Id.*

of the individuals' contact with the trigger, the expected severity of the illness contracted, and the propensity of such individuals to pursue legal action. Reasonable minds can substantially disagree as to the final estimate.

In *Met-Coil*, the FCR engaged in extensive negotiations with the Debtor and Mestek to determine the level of funding required by the TCE PI Trust to satisfy future TCE-related claims.[95] To ensure the trust would have adequate assets, the forecast of liability assumed that every claimant who could qualify for a payment under the trust's criteria would file claims against the TCE PI Trust.[96] However, experience with respect to claims filing patterns in similar contexts indicates something less than the maximum number of potential claimants actually file claims.[97]

The Debtor and Mestek engaged their own experts to analyze potential levels of exposure.[98] This process served as a "peer review" of sorts for the FCR experts' analysis, forcing the FCR's team to defend its analyses and assessments of potential exposure, damages, and liability.[99] During the negotiations between the FCR, the Debtor, and Mestek regarding the appropriate level of funding for the TCE PI Trust, the parties investigated and debated the conclusions underlying the FCR's estimate.[100] The conclusions included the actual size of the population exposed to TCE allegedly from the Lockformer Site, population turnover, epidemiological analysis, claiming behavior, and the amount at which the trust should value claims arising from various diseases.[101] In the end, the Debtor and Mestek agreed to contribute $24,500,000 to the trust.[102]

II. BEYOND *JOHNS-MANVILLE*: PRODUCTS LIABILITY MASS TORTS AND FUTURE CLAIMANT TRUSTS

Since 11 U.S.C. § 524(g) went into effect in 1996, courts have continued to issue channeling injunctions in cases not involving asbestos based on the broad

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95 *See id.* at 14–15.
96 *Id.* at 15.
97 An example of these types of contexts is asbestos-related personal injury settlement trusts.
98 Green Affidavit, *supra* note 5, at 15.
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* at 16.

grant of authority stemming from § 105(a).[103] For example, the *A.H. Robins* case established a trust for future claimants injured through the use of the Dalkon Shield IUD[104] and set the standard for future claimant trusts in non-asbestos products liability cases. The following sections discuss *A.H. Robins* and other cases in which bankruptcy courts relied upon § 105(a) for the channeling injunction and future claimant trust structure.

A. *Establishing the "Future-ness" of Future Claims*—In re Piper Aircraft

The primary consideration in determining whether a channeling injunction and trust are necessary to resolve a debtor's liability is whether the subject liability has ripened into a claim and is therefore subject to final resolution by a bankruptcy court's discharge.[105] With respect to personal injury or other tort-related liabilities, most courts adhere to the rule a liability is a claim[106] that can be dealt with and discharged through bankruptcy if the conduct giving rise to the liability occurred prepetition.[107] On the other hand, if the liability has not yet ripened into a claim, it cannot be discharged through the bankruptcy case.

The leading case on whether a liability is a claim or a future demand in bankruptcy is *Piper Aircraft*.[108] Prior to declaring bankruptcy, Piper was faced with product liability claims in connection with airplane crashes.[109] The company sought either to cut off future claims or funnel them into a trust through bankruptcy.[110] Piper attempted to achieve these goals by seeking a channeling injunction in its bankruptcy reorganization plan, likening its

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[103] The enactment of § 524(g) was not intended to modify the rights of bankruptcy courts to issue equitable injunctions pursuant to § 105(a). *See* 140 CONG. REC. H10752–01, H10766 (1994). Section 524(g) "is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan [of] reorganization .... The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved." *Id.*

[104] Menard-Sanford v. Mabey (*In re* A.H. Robins, Inc.), 880 F.2d 694, 700 (4th Cir. 1989).

[105] 11 U.S.C. § 1141(d)(1)(A) (2000) ("The confirmation of a plan ... discharges the debtor from any debt that arose before the date of such confirmation.")

[106] A claim is defined, in part, as any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or, unsecured." 11 U.S.C. § 101(5)(A).

[107] *See, e.g.*, Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1274–78 (5th Cir. 1994); *In re* UNR Indus., Inc., 20 F.3d 766, 770–71 (7th Cir. 1994); Cal. Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 930–31 (9th Cir. 1993) (per curiam); *In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 974 F.2d 775, 782–86 (7th Cir. 1992); United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1005 (2d Cir. 1991); Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir. 1988). *Contra* Jones v. Chemetron Corp., 212 F.3d 199, 206 (3d Cir. 2000); Frenville v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332, 336–37 (3d Cir. 1984).

[108] *In re* Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D. Fla. 1994).

[109] *Id.* at 621.

[110] *Id.*

circumstances to those presented in the bankruptcy of A.H. Robins, the manufacturer of the Dalkon Shield IUD.[111] The *Piper* court rejected this analogy and declined to issue a channeling injunction with respect to future liability that, while likely to arise, remained purely hypothetical.[112] In the case of the Dalkon Shield IUD, all liability-producing events, other than the manifestation of symptoms, occurred prior to the petition date.[113] Although the total number of users and their identities were vague and undocumented, the information was estimated from sales and distribution records.[114] In the case of liability for any defect in Piper's airplanes, however, those contemplated as the "future claimants" had not even purchased tickets on the planes at the time of the bankruptcy petition and may not yet have been born.[115] The court found "there is no way to identify who the victims will be or to identify any particular prepetition contact, exposure, impact, privity or other relationship between Piper and these potential claimants that will give rise to these future damages."[116] The court declined to consider the future victims of plane crashes within a future claimant trust even though the court said "some planes in the existing fleet of Piper aircraft will crash, and . . . there may be injuries, deaths and property damage as a result. . . . Piper, if it remain[ed] in existence, would be liable for some of [the] damages."[117]

As in *Piper*, the mass tort alleged against Met-Coil was one that did not lend itself to a discrete catalog of present personal injury claims; the total effect of the alleged wrongdoing likely would not be known until well into the future.[118] Unlike *Piper*, however, in *Met-Coil* there were specific acts that occurred prepetition (i.e., the discharge of TCE) that created specific prepetition contact, exposure, impact, privity, or other relationships between Met-Coil and potential claimants.[119] Indeed, in *Met-Coil*, all of the elements that gave rise to its TCE liability, other than the manifestation of an injury, existed prior to the initiation of the bankruptcy case.[120]

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111 *See id.* at 624.

112 *Id.* at 625.

113 A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1011 (4th Cir. 1986). The products had been manufactured, distributed, purchased and used all before the filing of the bankruptcy petition. *Id.*

114 *In re Piper Aircraft*, 162 B.R. at 625.

115 *Id.*

116 *Id.* at 627.

117 *Id.*

118 *See* Green Affidavit, *supra* note 5, at 12.

119 *See* Disclosure Statement, *supra* note 1, at 16.

120 *See id.*

Environmental liability lends itself to resolution through bankruptcy because all of the acts that trigger potential liability generally occur prepetition; it is only the effect of acts that occur in the future. In fact, the environmental contamination often creates precisely the sort of prepetition relationship the *Piper* court contemplated.[121] Further, chapter 11 reorganization with a channeling injunction and trust structure presents the only viable means to bring finality to future demands arising from long-tailed environmental (and other) liabilities.[122] As the Supreme Court noted in *Ortiz v. Fibreboard Corp.*,[123] the potential to create a settlement trust to resolve both present and possible future claims does not exist under the class action model, and as such, class actions are not a viable option for "a fund and plan purporting to liquidate actual and potential [asbestos] tort claims."[124] The *Ortiz* court, however, left open the possibility of using bankruptcy as a mechanism.[125] The Met-Coil model implements the only available mechanism after *Ortiz* to accomplish this result.

B. Extension of § 105 Injunctions to Non-debtors—In re Dow Corning

The extension of the channeling injunction under Code § 105 to Met-Coil's parent, Mestek, and to certain insurers of the Debtor and Mestek, is a significant element of the Met-Coil Plan. The seminal case regarding the use of § 105 to extend protections to non-debtors in the context of mass tort bankruptcies is *Dow Corning*.[126] In *Dow Corning*, the court addressed the issue of whether § 105 provided sufficient authority for a bankruptcy court to enjoin claims against a non-debtor if the injunction facilitated a reorganization plan under chapter 11.[127] Under the plan proposed by Dow, a settlement trust fund was established from money contributed by Dow's products liability insurers, Dow's shareholders, and Dow's own cash reserves.[128] As a condition

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[121] *In re Piper Aircraft*, 162 B.R. at 626 (citing United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1004–05 (2d Cir. 1991). In *In re Chateaugay Corp.*, the Second Circuit Court of Appeals held that the EPA had a dischargeable prepetition claim for cleanup costs that would not be incurred by the debtor until after confirmation of the debtor's chapter 11 plan because the cleanup costs concerned environmental hazards caused by the prepetition conduct of the debtor. 994 F.2d 997, 1005 (2d Cir. 1991).

[122] FED. R. CIV. P. 23.

[123] 527 U.S. 815, 864 (1999).

[124] *Id.* at 864.

[125] See *id.* at 846.

[126] Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002).

[127] *Id.* at 653.

[128] *Id.* at 654.

to the funding by the third party insurers and shareholders, the plan released these parties from all existing and future liability on personal injury claims.[129] The court held while § 105(a) alone cannot serve as authority for granting a permanent injunction in favor of a non-debtor, such relief is available by reading §§ 1123(b)(6) and 105(a) in tandem.[130]

The *Dow Corning* court noted the issuance of such an injunction was appropriate only in "unusual circumstances."[131] Specifically, the court enunciated several factors used to determine whether an injunction for the benefit of third parties is appropriate:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> (2) The non-debtor has contributed substantial assets to the reorganization;
>
> (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
>
> (4) The impacted class, or classes, has overwhelmingly voted to accept the plan;
>
> (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
>
> (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and;
>
> (7) The bankruptcy court made a record of specific factual findings that support its conclusions.[132]

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[129] *Id.*

[130] *Id.* at 656–57. Section 1123(b)(6) states a plan of reorganization may include any "appropriate provision not inconsistent with the applicable provisions of [the bankruptcy code]." *Id.* at 656. The court in *Dow Corning* interpreted § 1123(b)(6) broadly as providing "the bankruptcy court, as a forum for resolving large and complex mass litigations, has substantial power to reorder creditor-debtor relations needed to achieve a successful reorganization." *Id.*

[131] *Id.* at 658 (citing SEC v. Drexel Burham Lambert Group, Inc. (*In re* Drexel Burnham Lambert Group, Inc.), 960 F.2d 285, 293 (2d Cir. 1992)); Manard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989); MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 93–94 (1988).

[132] *Id.* at 658 (citing *In re A.H. Robins*, 880 F.2d at 701–02; MacArthur, 837 F.2d at 92–94); Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 214 (3d Cir. 2000).

Met-Coil's bankruptcy and plan of reorganization met the "extraordinary circumstances" standards enunciated in *Dow Corning*.[133] There was an identity of interests between the Debtor and Mestek.[134] The debtor was wholly owned by Mestek and the only Mestek liability absolved under Met-Coil's plan was liability alleged as a result of Mestek's ownership in Met-Coil.[135] Mestek did not even own Met-Coil at the time the TCE contamination allegedly occurred at the Lockformer Site.[136] Similarly, the settling insurers, who were also protected by Met-Coil's channeling injunction, had an identity of interest with the debtor by virtue of their indemnity relationship.[137]

The contributions made by Mestek and the settling insurers provided significant value to the TCE PI Trust and sufficient capital to the reorganized entity such that the bankruptcy court determined the parties' contributions warranted the extension of the channeling injunction to those parties.[138] In addition, the court determined a reorganization of Met-Coil would not have been possible without the parties' contributions.[139] The Plan satisfied the remaining factors enunciated in *Dow Corning* through the establishment of the TCE PI Trust, which provided a mechanism (the "TCE PI Trust Distribution Procedures") to pay all TCE-related claims (the class of claims impacted by the channeling injunction).[140] Under the Plan and TCE PI Trust Distribution Procedures, claimants not satisfied with their treatment retain their right to independently sue the TCE PI Trust.[141] Finally, 100% of the affected class voted in favor of the Plan.[142]

C. *Sharpening the Contours of § 105(a) Injunctions*—In re Combustion Engineering

A recent case that addresses the application of § 105(a) to channeling injunctions is the decision in *Combustion Engineering* rendered by the Third Circuit Court of Appeals in December 2004.[143] In *Combustion Engineering*,

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133 Confirmation Order, *supra* note 3, at 26–30.
134 *Id.* at 26.
135 *Id.*
136 *Id.*
137 *Id.* at 27.
138 *Id.*
139 *Id.* at 28.
140 *Id.*
141 *Id.*
142 *See* Confirmation Order, *supra* note 3, at 28.
143 *In re* Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004).

the bankruptcy court approved a plan of reorganization that proposed to channel the asbestos liabilities of the debtor, and two related non-debtor companies, to a settlement trust.[144] Funding for the settlement trust was to be supplied jointly by the debtor and the non-debtor companies in exchange for the issuance of channeling injunctions in their favor pursuant to § 524(g).[145] Certain insurers and asbestos claimants objected to the issuance of the channeling injunction, arguing § 524(g) prohibits including the asbestos-related liabilities of non-debtors within the scope of a bankruptcy court channeling injunction where the liabilities have no relationship to the debtor.[146]

The bankruptcy court recommended confirmation of the plan, including the issuance of a channeling injunction in favor of the non-debtor parties pursuant to § 105(a), as opposed to § 524(g).[147] The bankruptcy court found that three of the *Dow Corning* factors were satisfied, however, two factors were not.[148] The district court affirmed the bankruptcy court's issuance of a § 105(a) channeling injunction in favor of the non-debtors.[149]

On appeal, the circuit court rejected the bankruptcy and district courts' recommendations and held the bankruptcy court lacked "related to" jurisdiction[150] over the independent claims against the non-debtors (those claims unrelated to the non-debtors' relationship with the debtor) and therefore could not enjoin independent claims against the non-debtors in the context of the debtor's plan of reorganization.[151] The circuit court found that the claims against the non-debtors did not threaten to tie up bankruptcy estate assets

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[144] *Id.* at 204. The two non-debtor companies, ABB Lummus Global, Inc. and Basic, Inc., were affiliates of the debtor's parent company. *Id.* at 201.

[145] *Id.* at 206–07.

[146] *Id.* at 208-09.

[147] *Id.* at 210. A § 524(g) injunction bars actions against a third party only when such third party is "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor." 11 U.S.C. § 524(g)(4)(A)(ii) (2000).

[148] *In re* Combustion Eng'g, Inc., 295 B.R. 459, 481 (Bankr. D. Del. 2003). Specifically, the court found factors four (the impacted class, or classes, has voted overwhelmingly to accept the plan) and five (the plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction) were not clearly established on the record. *Id.* at 484. The court found, however, remedial actions could cure these defects. *Id.*

[149] *In re Combustion Eng'g*, 391 F.3d at 213.

[150] Bankruptcy courts have jurisdiction over actions both "arising under" and "related to" title 11. 28 U.S.C. § 1334(b) (2000). The test for whether a proceeding is "related to" a case under title 11 is "whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy." Pacor, Inc. v. Higgins (*In re* Pacor, Inc.), 743 F.2d 984, 994 (3d Cir. 1984) (emphasis omitted).

[151] *In re Combustion Eng'g*, 391 F.3d at 224.

because they arose from separate products, materials, and markets.[152] The circuit court held "[a] corporate affiliation between lateral, peer companies in a holding company structure, without more, cannot provide a sufficient basis for exercising federal subject matter jurisdiction."[153]

The court rejected the equitable argument that the channeling injunction in favor of non-debtors was integral to the plan because it increased the amount of assets available to the settlement trust, stating "[a]lthough the Plan proponents argue that it is efficacious to use § 105(a) to extend injunctive relief in favor of non-debtors in order to create a 'bigger pot' of assets for all of the asbestos claimants, the exercise of bankruptcy power must be grounded in statutory bankruptcy jurisdiction."[154] In the court's view, the simple fact that the structure of the plan depended on the issuance of a channeling injunction to non-debtors did not by itself extend "related to" jurisdiction to claims held independently against the non-debtors.[155]

Further, the circuit court stated, in dicta, the Code precludes the use of § 105(a) as a basis to extend a channeling injunction to non-derivative[156] actions against a non-debtor in the case of asbestos claims because such claims are specifically governed by § 524(g).[157] The non-debtors in *Combustion Engineering* were precluded from obtaining an injunction under § 524(g)(4)(A) for asbestos liabilities that arose independent of the relationship with the debtor.[158] Thus, under *Combustion Engineering*, § 105(a) cannot extend relief in instances where the availability of relief is explicitly circumscribed elsewhere in the Code—namely, into the established boundaries for application of channeling injunctions in asbestos-related litigation under § 524(g).[159]

Combustion Engineering highlights the distinctions between authority to channel liabilities under § 524(g) and authority to obtain injunctions under the general equitable authority of § 105. *Combustion Engineering* clarified the bankruptcy court's power to take whatever action appropriate or necessary in

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152 *Id.* at 230–31.

153 *Id.* at 228.

154 *Id.* at 225.

155 *Id.*

156 The claims addressed in *Combustion Engineering* as "non-derivative" were claims for which no nexus was established between the debtor and the liability of the non-debtors. *Id.* at 224.

157 *Id.* at 236–37. As a procedural matter, the circuit court held the bankruptcy court did not make findings of fact sufficient to support the holding that it had subject matter jurisdiction, and therefore the plan was not confirmable. *Id.* at 219.

158 *Id.* at 235–38.

159 *Id.* at 233–34.

aid of the exercise of its jurisdiction should not be confused with the power to take whatever action appropriate or necessary to aid the confirmation of a plan of reorganization.[160]

A critical distinction between *Combustion Engineering* and *Met-Coil* was clarity in the records. In *Met-Coil* the record was clear that (1) any reorganization of the debtor necessarily had to address the alleged liability of Met-Coil's parent and (2) the non-debtor liability subject to the proposed channeling injunction was directly related to the debtor's conduct. If the liabilities of Mestek were not resolved through the bankruptcy, there would be no trust funding, no feasible plan, and less money available for all claimants.[161] The court in *Combustion Engineering* did not have such certainty in the record before it.[162] Indeed, the record indicated "the asbestos-related personal injury claims asserted against Combustion Engineering, Basic and Lummus arise from different products, involved different asbestos-containing materials, and were sold to different markets."[163] The *Combustion Engineering* court held a meaningful and feasible plan of reorganization could be confirmed absent third-party injunctions because no evidence indicated that failure to enjoin claims and future demands against the non-debtor third parties would cause the reorganized entity to fail.[164] The holding in *Combustion Engineering* suggests that although § 105 affords bankruptcy courts ample authority to enjoin claims and demands against non-debtor parties in cases dealing with liabilities other than asbestos liabilities, such authority may only be exercised under circumstances where, because of the relationship between the non-debtor and the debtor, a resolution of the liability of the non-debtor is essential to *any* reorganization of the debtor.[165]

The court in *Combustion Engineering* did *not*, as a general principle, seek to eliminate bankruptcy courts' equitable authority to craft injunctions pursuant to § 105(a).[166] The circuit court focused its opinion on the fact that in *Combustion Engineering*, the non-debtors sought to cleanse themselves of asbestos-related personal injury liability without meeting the requirements of § 524(g).[167] The *Combustion Engineering* plan proponents relied upon cases

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160 *Id.* at 226–27.
161 Confirmation Order, *supra* note 3, at 9–11.
162 *See In re Combustion Eng'g*, 391 F.3d at 227–28.
163 *Id.* at 231.
164 *Id.* at 237–38.
165 *Id.* at 238.
166 *Id.*
167 *Id.*

such as *Drexel Burnham Lambert*[168] and *A.H. Robins*[169] to support their argument that § 105(a), irrespective of § 524(g), provided ample authority for the court to enter injunctions in favor of non-debtor parties.[170] The court distinguished *Combustion Engineering* from these cases because Combustion Engineering sought to resolve asbestos liabilities and, as such, the parties were bound to the explicit requirements of § 524(g). The ruling was not based upon a view that courts' latitude in issuing a § 105(a) injunction should be restricted in general, rather, the distinction was § 105(a) is limited in applicability where the action proposed to the bankruptcy court is otherwise subject to an enumerated provision of the Code.[171]

III. WHAT DOES THE FUTURE HOLD FOR FUTURE CLAIMANT TRUSTS?

As *Met-Coil* demonstrates, the use of future claimant trusts in mass-tort-driven bankruptcies is a viable structure for the resolution of environmental mass tort liabilities. Where a company anticipates an ongoing stream of litigation that threatens to cripple—if not destroy—the company's prospects to continue as an ongoing, profitable entity, a mass-tort bankruptcy provides an opportunity to preserve the company as an enterprise in the long term. The transaction costs related to a bankruptcy case are likely far less than the aggregated costs of litigating tort claims individually over time. By bringing finality to its long-term liabilities, a company can gain increased access to capital markets and refocus its management on running a business rather than handling an avalanche of mass tort claims.

The varieties of mass-tort litigation that could potentially trigger a bankruptcy filing are as vast as science (and, cynics may say, the plaintiffs' bar) can reach. In many circumstances in which past or current activities of a company could give rise to vast and persistent tort liability, a company may choose to address both the costs and uncertainty of litigation through a

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168 SEC v. Drexel Burnham Lambert Group, Inc. (*In re* Drexel Burnham Lambert Group, Inc.), 960 F.2d 285, 293 (2d Cir. 1992).

169 Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

170 *In re Combustion Eng'g*, 391 F.2d at 237 n.50.

171 *See id.* at 236–37. The argument as to whether the *Combustion Engineering* court was correct that § 524(g) affects the right of a bankruptcy court to issue a § 105(a) equitable injunction remains open for debate. *See* Bankruptcy Reform Act of 1994, Pub. L. 103-394, § 111(b), 11 U.S.C. § 524 note. Indeed, the debtor in *Combustion Engineering* sought rehearing before the circuit court on precisely this issue. *See* Appellees' Combined Petition for Rehearing and Rehearing En Banc, *In re Combustion Eng'g*, 03-3392 (3d Cir. Dec. 15, 2004). However, the petition for rehearing was denied. *In re Combustion Eng'g*, 391 F.3d at 190.

settlement trust established through bankruptcy. All types of companies, from the world's largest multinational corporations facing a massive docket of tort litigation[172] to smaller, regional companies facing what to them is an overwhelming number of pending and threatened future suits,[173] can benefit from a mass-tort bankruptcy filing.

By way of example, recent studies have begun to assess the extent to which industrial influences on the environment can cause dramatic weather events.[174] Climatologists, in examining the extreme and deadly heat wave that struck Europe during the summer of 2003, have estimated it is very likely that human factors at least doubled the risk of a heat wave of the magnitude observed in that year[175] and, based on their best estimate, humans contributed 75% of the increased risk of such a heat wave.[176] The primary cause cited for this increased risk is the proliferation of greenhouse gases, such as carbon dioxide, in the atmosphere.[177]

Greenhouse gases released from manufacturing plants persist for an average of 100 years in the atmosphere.[178] As such, the release of greenhouse gases today may impact the environment well into the future. The United States accounts for approximately 25% of global greenhouse gas emissions[179] and certain large corporations in specific sectors of the economy are the principal sources of most of these emissions.[180]

In fact, litigation regarding the role of corporations in contributing to unhealthy climate change has already begun. One significant example is the suit filed by eight states[181] and New York City against five North American

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172 *See, e.g.*, *In re* Mid-Valley, Inc., No. 03-35592(JKF), 2004 Bankr. LEXIS 1553 (Bankr. W.D. Pa. July 20, 2004) (Halliburton).

173 *See, e.g.*, *In re* The Muralo Co., 301 B.R. 690, 699 (Bankr. D.N.J. 2003).

174 *See* Myles R. Allen & Richard Lord, *The Blame Game: Who Will Pay for the Damaging Consequences of Climate Change?*, NATURE, Dec. 2, 2004, at 551.

175 Peter A. Stott et al., *Human Contribution to the European Heatwave of 2003*, NATURE, Dec. 2, 2004, at 610.

176 *Id.* at 612.

177 *Id.* at 610.

178 DOUGLAS G. COGAN, CORPORATE GOVERNANCE AND CLIMATE CHANGE: MAKING THE CONNECTION (2003), at 10, *available at* http://www.ceres.org/pub/docs/Ceres_corp_gov_and_climate_change_0703.pdf.

179 *Id.* at 63.

180 *See, e.g.*, *id.* at 65–110 (detailing disclosures of certain large corporations in the automobile, electric power, oil and gas, metal, chemical, and other industries).

181 California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin.

power companies.[182] The plaintiffs allege the defendants, the five largest emitters of carbon dioxide in the United States who account for approximately 10% of all man-made carbon dioxide emissions in the country,[183] are contributing to an ongoing public nuisance (global warming), and that their greenhouse gas emissions threaten to shift the global average temperature by a conservative estimate of 2.5 degrees Fahrenheit.[184] This shift would have a number of potential effects, including increased heat deaths, increased suffering from asthma and respiratory diseases, and danger to human life relating to intensified weather events.[185] As of the publication date of this Article, the case remains pending.

As the science of climatology continues to expand and evolve, and science is able to discern with ever greater confidence the impact certain companies' emissions have on public health, the potential for significant litigation will follow close behind. As the litigation history of Met-Coil demonstrates, a definitive causal relationship between claimants' TCE exposure and the claimants' development of cancer cannot, as a matter of scientific certainty, be established. What is compelling to juries and the courts, however, is the science indicating TCE exposure significantly enhances the risks of developing cancer. Likewise, one can imagine, while an individual's death as a result of climatic events could not be definitively linked to the release of greenhouse gases by a manufacturing plant, science could provide enough evidence that, more likely than not, the manufacturer's actions increased the risk of the individual's death.

The impact of this litigation would be colossal. Estimates have placed the number of individuals who died in Europe between August 1 and August 15, 2003 as a result of heat-related illness between 22,000 and 35,000.[186] The number of deaths in fifteen days in Europe is more than the number of asbestos-related personal injury lawsuits pending against Johns-Manville on the day it filed for bankruptcy.[187] If current greenhouse gas emissions do indeed have an effect on global climates over the next 100 years, the number of potential litigants could be staggering.

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[182] Connecticut v. Am. Elec. Power Co., No. 04-Civ-05669-LAP, 2005 Dist. LEXIS 19964, at *1 (S.D.N.Y. Sept. 19, 2005).

[183] Plaintiffs' Complaint, Connecticut v. Amer. Elec. Power Co., at 26, No. 04-Civ-05669 (S.D.N.Y. July 22, 2004).

[184] *Id.* at 25.

[185] *Id.* at 25–26.

[186] Christoph Schär & Gerd Jendritzky, *Hot News from Summer 2003*, NATURE, Dec. 2, 2004, at 559.

[187] See Kane v. Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988).

But even on a much smaller and more focused scale—communities exposed to toxic chemical releases, product liability mass torts, pharmaceutical exposures—a carefully constructed chapter 11 future claimant trust with a channeling injunction can be an effective and fair procedure to handle a litigation epidemic.