

REPORT

Asbestos Bankruptcy Trusts

An Overview of Trust Structure and Activity
with Detailed Reports on the Largest Trusts

Lloyd Dixon • Geoffrey McGovern • Amy Coombe

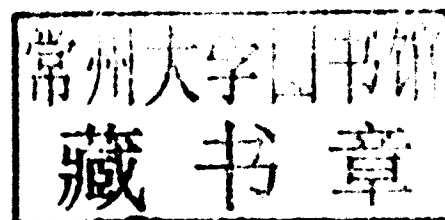


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The research described in this report was conducted by the RAND Institute for Civil Justice, a unit of the RAND Corporation. This research was supported by a coalition of asbestos defendants and insurers and by the RAND Institute for Civil Justice.

Library of Congress Cataloging-in-Publication Data

Dixon, Lloyd S.

Asbestos bankruptcy trusts : an overview of trust structure and activity with detailed reports on the largest trusts
/ Lloyd Dixon, Geoffrey McGovern, Amy Coombe.
p. cm.

Includes bibliographical references.

ISBN 978-0-8330-5037-3 (pbk. : alk. paper)

1. Bankruptcy trustees—United States. 2. Compensation (Law)—United States. 3. Personal injuries—United States. 4. Trusts and trustees—United States. 5. Asbestos—Law and legislation—United States. I. McGovern, Geoffrey. II. Coombe, Amy. III. Title.

KF1530.R3D59 2010

346.7307'8—dc22

2010029003

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Published 2010 by the RAND Corporation

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4570 Fifth Avenue, Suite 600, Pittsburgh, PA 15213-2665

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Preface

Over time, many companies with significant asbestos-related liabilities have filed for bankruptcy, and payments by trusts set up by bankruptcy courts have played an increasingly important role in the compensation of asbestos-related injuries. While the role of trusts in providing compensation to asbestos claimants has grown, information about the operating procedures and activities of these trusts is not readily available in a convenient form.

This report provides an overview of asbestos personal-injury (PI) trusts. It describes how they are created, how they are organized and governed, and how they operate. It also compiles publicly available information on the assets, outlays, claim-approval criteria, and governing boards of the leading trusts.

This report should be of interest to federal and state policymakers, lawyers, judges, and litigants concerned about the compensation of people injured by exposure to asbestos, the performance of the asbestos compensation system, and the economic impact of asbestos litigation on both defendants and the legal community. It is part of a larger research project on asbestos bankruptcy trusts. A second report will examine how trust compensation or the potential for such compensation is addressed by state liability laws and taken into consideration during court proceedings and settlement negotiations.

The research was supported by a coalition of asbestos defendants and insurers and by the RAND Institute for Civil Justice. The views in the report are those of the authors and do not necessarily reflect those of the research sponsors.

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Summary

Litigation over personal injuries due to asbestos exposure has continued for more than 40 years in the United States with hundreds of thousands of claims filed and billions of dollars in compensation paid. Many companies with significant liability for asbestos-related injuries have filed for bankruptcy, resulting in the creation of asbestos bankruptcy trusts, which pay claims on behalf of bankrupt defendants. These trusts are playing an increasingly important role in the compensation of asbestos-related injuries.

While the role of trusts in providing compensation to asbestos claimants has grown, information about the operating procedures and activities of these trusts is not readily available in a convenient form. Little research has been done on transaction costs, time to claim disposition, claimant satisfaction, and other metrics of trust performance. In addition, there is little analysis of how the trusts have affected the overall compensation that asbestos claimants receive and the asbestos liabilities of solvent defendants and their insurers.

This report provides an overview of asbestos PI trusts. It describes how they are created, how they are organized and governed, and how they operate. It also compiles publicly available information on the assets, outlays, claim-approval criteria, and governing boards of the leading trusts. This report does not attempt to evaluate trusts' performance or assess how they have affected the overall compensation of asbestos claimants. Rather, it is meant to provide a readily accessible source of information on asbestos trusts that will help interested parties better understand how trusts operate and their activities to date. This report is part of a larger research project on asbestos bankruptcy trusts. A second report will examine how trust compensation or the potential for such compensation is taken into consideration in court proceedings and settlement negotiations.

Data and Methods

Data on the trusts were abstracted from publicly available sources including bankruptcy documents, trust websites, trust annual reports, and U.S. Securities and Exchange Commission (SEC) filings. To concentrate our efforts on the largest trusts, we selected a subset of the 54 trusts that had been set up through 2009. Twenty-six active trusts were chosen that met specified cutoffs based on the magnitude of assets available to the trust when it was established and the amount of claim payments through 2008. The 26 active trusts that met the criteria accounted for more than 99 percent of the claim payments that we could identify for all trusts through 2008.

Detailed reports on the 26 selected trusts were prepared and then submitted to the relevant trusts for review. Twenty-three of the trusts were able to review the data, and the data were revised accordingly. The reports for the 26 active trusts, as well as for the three largest proposed trusts, are provided in Appendix B to this report. The overview of trust activity that follows is based on the 26 selected active trusts. Trusts do not publicly release individual claim information; thus, neither the variation of payments by a given trust across individuals nor payments by multiple trusts to the same claimant can be examined.

Findings

Number of Bankruptcies and Trusts

Figure S.1 shows the cumulative number of bankruptcies filed that involved at least some asbestos liability and the number of asbestos bankruptcy trusts that have been established. Fifty-four trusts have been established through June 2010, with a considerable acceleration in the number of trusts established in the second half of the 2000s. Nine more trusts are in the pipeline, with undoubtedly more to come.

Aggregate Claim Activity

Figure S.2 displays the cumulative number of claims paid and the claim payments for the 26 selected active trusts. Data for the years prior to 2006 are aggregated because we were not able to break down pre-2006 figures by year for some major trusts. Data on pre-2006 claim payments for two trusts are incomplete because complete records could not be located for these

Figure S.1
Cumulative Number of Asbestos-Related Bankruptcies Filed and Trusts Established as of June 2010

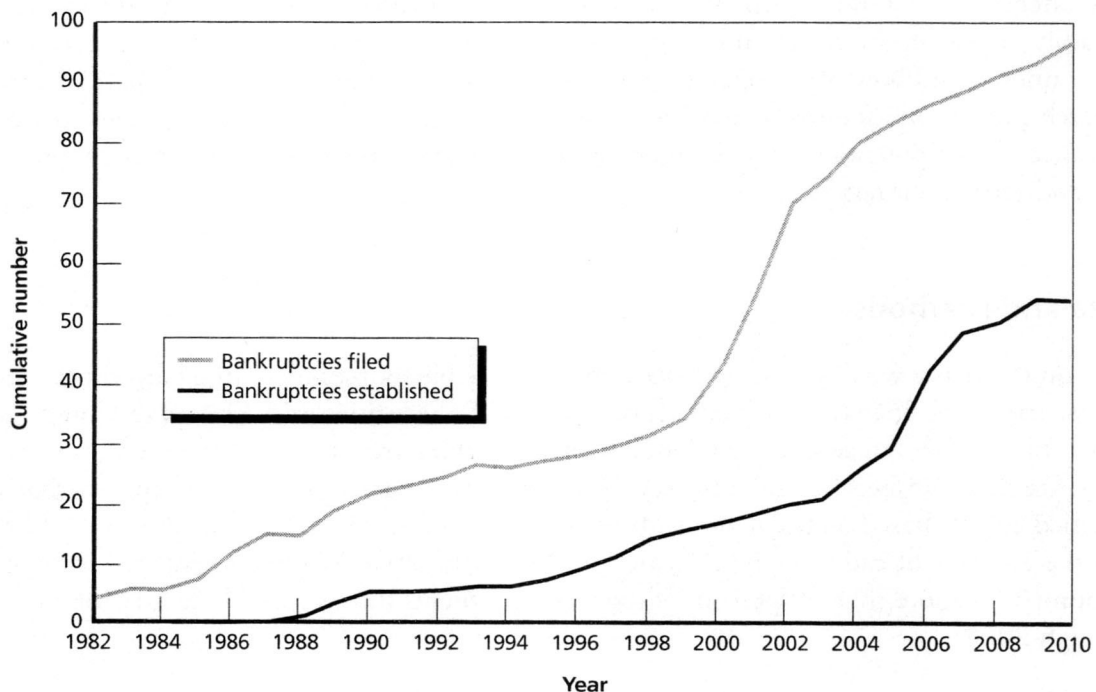
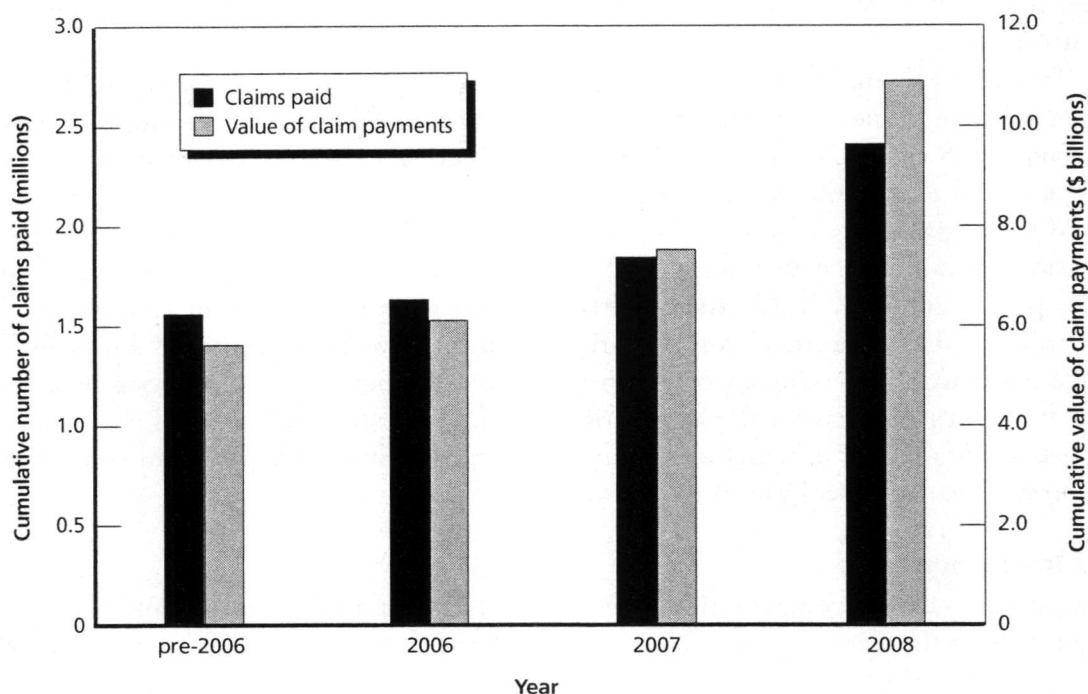


Figure S.2
Cumulative Number of Claims Paid and Value of Claim Payments at the Selected Trusts



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older trusts. Also, it appears that data on the number of paid claims are incomplete for three of the 26 trusts. Thus, the data in Figure S.2 provide lower bounds on the number of claims paid and the value of claim payments. Plaintiffs' attorneys' fees must be removed from trust payments in order to determine the amount ultimately received by claimants.

Reflecting the influx of new trusts in 2006 and 2007, both the number of claims paid and annual value of claim payments surged in 2007 and 2008. Approximately 575,000 claims were paid, for a total value of \$3.3 billion in 2008. Because multiple trusts can make payments to the same individual, the number of claims paid exceeds the number of individuals receiving compensation from the trusts, but by how much is unknown. To put these numbers in perspective, a 2005 RAND report estimated that \$7.1 billion was paid in compensation by asbestos defendants (not including asbestos trusts) in 2002 (Carroll, Hensler, et al., 2005, p. 92). Comprehensive data on which to base more-current estimates of tort compensation are not available.

Trust compensation payments have been considerable to date, and the assets under trust control indicate that significant payments will continue. As of year-end 2008, the assets of the selected active trusts totaled \$18.2 billion, and this total does not include the assets of four recently formed trusts that had not filed financial statements as of 2009. The total also does not include the estimated assets of currently proposed trusts. Estimates of the initial assets at eight of the nine proposed trusts for which information is available total \$14.5 billion.

Breakdown of Payments by Injury Type

The compensation paid to claimants with more-severe diseases relative to those with less severe diseases has been an ongoing issue in asbestos compensation. Ten of the 26 active trusts

provide separate figures on malignant and nonmalignant claims. *Malignant claims*, by and large, refers to claims involving mesothelioma, lung cancer, and other cancers. *Nonmalignant claims* refers to claims involving severe asbestosis, asbestosis and pleural disease, or other asbestos-related diseases.

Taking 2007 and 2008 together, 86 percent of the total number of claims that these trusts paid were for nonmalignant injuries. Nonmalignant claims accounted for 37 percent of 2007 and 2008 expenditures at these ten trusts, reflecting an average payment per claim that was roughly one-tenth that for malignant claims.

While legislative and judicial reforms have made it increasingly difficult to obtain compensation for nonmalignant injuries in the tort system, the large number of nonmalignant claims paid by trusts indicates that the trust system remains a source of compensation for such injuries. How the total compensation a claimant receives from the trusts for nonmalignant injuries has changed over time, however, is uncertain. On the one hand, some trusts have cut payments for the least serious nonmalignant claims. On the other hand, an increase in the number of trusts means that a claimant may be able to obtain compensation for nonmalignant claims from more trusts.

Trust Transaction Costs

Trusts strive to deliver compensation with minimal legal and other transaction costs, at least compared with the transaction costs associated with the tort system. Trust financial statements allow estimates of gross claimant compensation as a percentage of trust expenditures. The claimant compensation is gross in the sense that it includes any fees the claimant pays to his or her attorney for services related to the recovery.¹

As trust claim payments rose rapidly between 2006 and 2008, the gross claimant-compensation percentage rose from between 71 and 75 percent in 2006 to approximately 95 percent in 2008. These levels compare favorably to estimates of gross compensation as a percentage of defendant expenditures in the tort system. Carroll, Hensler, et al. (2005, p. xxvi) estimated that gross claimant compensation through 2002 amounted to 69 percent of total spending by defendants and insurers. It should be noted, however, that the gross compensation percentages for the trusts do not include the legal and other transaction costs incurred in negotiating the trust terms during the bankruptcy proceedings.

Claim Valuation Schedules

When a trust receives an asbestos PI claim, it must review the submitted claim documents and assign a value to the claimant's injuries. Trusts typically offer claimants two primary options for claim review: expedited review or individual review.

Under expedited review, claims that meet the medical and exposure criteria for the alleged disease (referred to as the disease level) will be assigned a scheduled value for the disease. According to a party that has worked closely with trusts, the scheduled value is typically set slightly above the 50th percentile of the historical settlements that the debtor paid for the particular disease before bankruptcy. We, however, have not been able to evaluate the extent to which this is actually the case.

¹ Informed parties indicated that plaintiffs' attorneys' fees typically run about 25 percent of the award.

As an alternative to expedited review, individual review provides a claimant the opportunity to receive individual consideration of his or her medical condition and of the claim's value. Individual-review claims are meant to be valued at the historical liquidated value of similarly situated claims in the tort system. We have not been able to evaluate the extent to which this is the case either. Most trusts also publish so-called average values of different disease levels. For most trusts, the average value is the trust's target for the average value assigned to claims, including claims that go through either expedited or individual review.

The top rows of Table S.1 show the scheduled and average values for mesothelioma claims for the trust-claim-class combinations at the selected trusts reporting this information.² The scheduled value for mesothelioma claims varies from \$7,000 to \$1.2 million across the 30 trust-claim-class combinations, with a median of \$126,000. The median of the average value for mesothelioma claims is \$180,000—again, with a large spread. The wide spread in both the scheduled and average values reflects, in part, the differences across debtors in the settlement values for mesothelioma claims prebankruptcy.

Most trusts do not have sufficient funds to pay every claim in full and, thus, set a payment percentage that is used to determine the actual payment a claimant will be offered. As shown in the Table S.1, the median of the payment percentage is 25 percent across the trust-claim-class combinations reporting, with the range running from 1.1 percent to 100 percent. Thus, the assets available to some trusts allow them to pay only a very small proportion of the value assigned to the claim while other trusts are fully funded and can pay the entire amount.

The bottom rows in Table S.1 show the scheduled and average values once the payment percentage has been applied. Average values for mesothelioma claims net of the payment percentage range from \$13,000 to \$238,000 across the trust-claim-class combinations.

Trusts recognize various disease levels, and scheduled and average values are usually set for each. While mesothelioma is always considered a separate disease level, the number of other

Table S.1
Mesothelioma Claim Values

Item	Minimum	Percentile			Maximum
		20th	50th	80th	
Prior to applying payment percentage					
Scheduled value (\$ thousands) (30 trust-claim-class combinations)	7	59	126	203	1,200
Average value (\$ thousands) (23 trust-claim-class combinations)	45	99	180	262	524
Payment percentage (29 trust-claim-class combinations)	1.1	9.4	25.0	46.3	100.0
After applying payment percentage					
Scheduled value (\$ thousands) (28 trust-claim-class combinations)	1	13	27	68	240
Average value (\$ thousands) (21 trust-claim-class combinations)	13	23	41	101	238

² A number of trusts set different scheduled values for the separate classes of claims they accept. We consider each of these trust-claim-class combinations separately.

disease levels varies by trust. Comparison of scheduled and average values after application of the payment percentage for trusts with comparable disease levels shows that scheduled and average values for other cancers and severe asbestosis are considerably below those for mesothelioma but substantially higher than those for asbestosis/pleural disease and other asbestos disease.

Composition of Trust Governing Bodies

Trusts are governed by trustees, who operate the trust for the benefit of claimants. Because trusts often have hundreds of thousands of beneficiaries who cannot directly control the trustees, committees are set up to represent the interests of current and future claimants. Trustees are required to obtain the consent of the trust advisory committee (TAC) (representing current claimants) and the future claimants' representative (FCR) (representing future claimants) before major actions by the trust can be taken (such as revising trust distribution procedures, or TDPs).

To better understand who is running the trusts, we determined the professional affiliations of key trust personnel. At the 26 selected trusts, we identified a total of 255 different positions for trustees, TAC members, FCRs, trust counsel, TAC counsel, and FCR counsel. There were 122 different individuals filling these 255 positions, representing 83 different organizations. While the lists assembled for trustees, TAC members, and FCRs are fairly complete, the lists for trust counsel, TAC counsel, and FCR counsel are less complete because it is more difficult to obtain the information on who is serving in these capacities.

Table S.2 shows the organizations represented at more than five different trusts. Kazan, McClain, Abrams, Lyons, Greenwood and Harley is represented at more than half of the 26 trusts, and the other firms are represented at sizable percentages. These organizations tend to be represented at the larger trusts, which can be inferred by comparing the second and left-most columns of Table S.2.³ Seven of the nine firms listed are plaintiffs' attorney firms and are represented on the TACs. Campbell and Levine is trust counsel at multiple trusts, and Caplin and Drysdale is TAC counsel at multiple trusts. The involvement of all of these firms at a sizable share of the selected trusts reflects the leading role that these firms play in asbestos litigation or in the bankruptcy process and the creation of asbestos trusts.

Limitations of Publicly Available Trust Data

The publicly available information on asbestos bankruptcy trusts is a useful resource and provides an informative overview of trust practices and activity. However, it is limited in many important ways. Data on important variables, such as the number of claims filed, are incomplete, and information for the early years of the older trusts is not readily available. Data by disease level are uneven, with less than half of the selected 26 trusts breaking out information for malignant and nonmalignant claims. Only a few trusts report data by disease level beyond the malignant/nonmalignant breakdown. In addition, disease-level categories vary across trusts, adding to the challenges of comparing claim valuations and payments by disease level across trusts. Trusts do not follow a common set of accounting principles when preparing finan-

³ Specifically, the combined assets of the trusts at which a firm is represented as a percentage of total year-end 2008 assets of the selected trusts are larger than the percentage of trusts at which the organization is represented.

Table S.2
Organizations Most Frequently Represented at the 26 Selected Trusts

Organization	Number of Trusts at Which Firm Was Represented		2008 Assets of Trusts at Which Firm Was Represented	
	Number	Percentage of Selected Trusts	Assets (\$ billions)	Percentage of Assets of Selected Trusts
Kazan, McClain, Abrams, Lyons, Greenwood and Harley	15	58	11.6	64
Baron and Budd	11	42	11.5	63
Cooney and Conway	11	42	13.3	73
Weitz and Luxenberg	11	42	13.4	74
Motley Rice	8	31	9.4	52
Bergman Draper and Frockt	6	23	5.5	30
Campbell and Levine	6	23	8.0	44
Caplin and Drysdale	6	23	10.4	57
Goldberg Persky White	6	23	10.3	57

cial statements, which makes it difficult to compare financial performance across trusts and develop measures of gross claimant compensation as a percentage of trust expenditures.

From the perspective of trying to understand the role of the trusts in the compensation for asbestos-related injuries, perhaps the most significant limitation of the publicly available data is the inability to link payments across trusts to the same individual. It is not possible to use trust-level data to determine the number of trusts providing payments to the same individual or the amount the trusts together pay to an individual claimant. This lack of information makes it difficult or perhaps impossible to evaluate the trusts' effect on the total compensation provided to individual claimants, as well as on the compensation paid by solvent defendants.

Information on individual settlements is very difficult to obtain from solvent defendants and from plaintiffs' attorneys as well. In the past, researchers have had success obtaining individual settlement data from a number of solvent defendants on a confidential basis (see, for example, Carroll, Hensler, et al., 2005). Researchers have likewise been able to obtain individual data from the Manville Personal Injury Settlement Trust in the past, although, in recent years, the Manville Trust has declined to make these data available for research purposes. Researchers have not been successful in obtaining individual asbestos compensation data from plaintiffs' attorneys.

The ability to understand the trusts' effect on overall claimant compensation and the compensation paid by solvent defendants will depend, to a large extent, on whether solvent defendants, trusts, and plaintiffs' attorneys are willing to release individual compensation information on a confidential basis for research purposes.

Acknowledgments

Many people made important contributions to this report. We would first like to thank Marc Scarcella at Bates White and Peter R. Kelso at Litigation Resolution Group for helping us access and interpret the publicly available data on the trusts that had already been collected by Bates White. We would also like to thank the 23 trusts that reviewed the information we assembled on their trusts for accuracy and completeness. The substantial time that many of them spent reviewing the data is much appreciated.

Insightful peer reviews were provided by James M. Anderson and Frank Camm at RAND. Helpful comments on the draft were provided by Charles E. Bates of Bates White; Melissa H. Brown of Georgia-Pacific; Stephen J. Carroll, recently retired from RAND; Deborah Greenspan of Dickstein Shapiro; Elihu Inselbuch of Caplin and Drysdale; Harold Kim of the U.S. Chamber of Commerce Institute for Legal Reform; John Kinney of the Hartford Financial Services Group; William M. Lynch of Liberty Mutual Group; Joseph J. O'Hara of Owens-Illinois; Thomas O'Kane of Munich Reinsurance America; and Paul D. Rheingold of Rheingold, Valet, Rheingold, Shkolnik and McCartney.

At RAND, we thank ICJ quality-assurance director Susan M. Gates for moving this document through the RAND quality-assurance process and for providing useful comments on the draft; James Dertouzos, ICJ director, for helpful advice during the course of the project; Steve Carroll for his help in scoping the project and for advice throughout the project; Lisa Bernard for skillful editing; Stephanie Lonsinger for manuscript-preparation assistance; and Fred Kipperman, ICJ associate director, and Jamie Morikawa, development director, for helping scope and secure funding for the project, as well as liaising with project sponsors.

Glossary

524(g) trust. See *asbestos personal-injury trust*.

asbestos personal-injury claim. Any claim or demand, whether against a debtor asbestos company or an asbestos personal-injury trust, that arises from harm or alleged harm due to direct or indirect exposure to asbestos or asbestos-containing products.

asbestos personal-injury trust. A trust established pursuant to Section 524(g) of the U.S. bankruptcy code to pay asbestos-related liabilities. The trust is established as part of a debtor's reorganization plan under Chapter 11 of the bankruptcy code.

asbestosis. A noncancerous lung disease caused by asbestos fibers.

average value. A monetary value that trusts use as a guide for payment amounts under a specific disease category. Over time, the combined payments offered under both expedited and individual review are expected to trend toward the average value for each disease category.

bankruptcy date. The date the debtor filed a petition for reorganization with the bankruptcy court under Chapter 11 of the bankruptcy code.

channeling injunction. An element of Section 524(g) of the bankruptcy code that shifts all asbestos-related liabilities to the newly formed asbestos personal-injury trust and bars suits against the reorganized debtor.

claim administrator. A company that asbestos trusts employ to manage claim processing in accordance with the standards of the trust distribution procedures. Some claim administrators process claims from several trusts.

claim payment ratio. A ratio that sets a limit on the percentage of the maximum annual payment that can be paid to claimants with malignancies and severe asbestosis and to claimants with less severe injuries.

claim ratio. See *claim payment ratio*.

claimant. The holder of an asbestos claim who either presently seeks or may in the future seek payment from the trust.

company exposure. A component of the exposure criteria for expedited review, company exposure requirements set the minimum time requirement for exposure to the debtor's job sites or asbestos-containing products.

confirmation date. The date the bankruptcy court confirmed the debtor's plan for reorganization in accordance with the provisions of Chapter 11 of the bankruptcy code.

debtor. The former asbestos-producing company that has sought bankruptcy reorganization and funded, in whole or in part, the asbestos personal-injury trust.

diffusing capacity of the lung for carbon monoxide (test). A pulmonary test to measure the amount of carbon monoxide absorbed by the lungs.

exigent-hardship claim. A claim classification defined by each trust that improves a settled claim's position in the payment queue. Many trusts limit exigent cases to the malignant diseases and severe asbestosis. Furthermore, trusts condition such claims on a claimant's immediate financial need that resulted from the claimant's asbestos-related disease.

expedited review. A claim-processing category available to claimants alleging certain diseases. Expedited review consists of submitting documentation on both medical and exposure criteria and is available only for disease classifications as described in the trust distribution procedures. Successful expedited review results in a fixed and certain payment in accordance with the procedures and scheduled values described in the trust distribution procedures.

extraordinary claim. Claim for which a claimant's asbestos-related exposure was predominantly the result of one specific debtor's products or manufacturing facility.

first-in, first-out principle. Claims are placed in the processing queue and the payment queue in the order in which they are received.

forced expiratory volume in one second/forced vital capacity ratio. A pulmonary test measuring the volume of air expired in the first second, expressed as a percentage of forced vital capacity.

future claimants' representative. A court-appointed representative who represents the interests of future claimants in matters of trust administration. Any changes made to the trust distribution procedures, including the payment percentage and the claim payment ratio, must receive approval from the future claimants' representative.

indirect trust claim. Claim filed against the trust by parties other than the asbestos claimholder (e.g., by a claim asserting a theory of contribution).

individual review. A claim-processing category that requires individualized review of a claimant's records to determine the extent of disease, its likely connection to asbestos exposure, and its corresponding payment amount. Some categories of disease may be compensated only through individual review (i.e., lung cancer without underlying asbestosis).

International Labour Organization reading. An interpretation of pulmonary x-rays using the International Labour Organization's International Classification of Radiographs of Pneumoconioses.

interstitial fibrosis. A scarring of the lung tissue.

latency period. The length of time between the date a claimant was first exposed to asbestos or asbestos-containing products and the date of medical diagnosis of asbestos-related disease or asbestos-related death.

liquidated claim. An asbestos claim, either in the tort system or processed through the trust, in which the monetary value of the claim has been fixed, though not necessarily paid to the claimant.

maximum annual payment. The annually determined upper limit to the amount of money the trust can pay to claimants in the aggregate for that year.

mesothelioma. A cancer of the mesothelium, a protective membrane that covers the internal organs. Mesothelioma is the most severe disease category recognized by asbestos trusts.

occupational exposure. Years on the job during which the claimant was exposed to asbestos.

payment percentage. A percentage applied to the value that a trust assigns to a claim to determine the amount that will be actually paid to the claimant. Payment percentages are initially set during the trust formation but may be changed with the consent of the trust advisory