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Asbestos Bankruptcy Report

Pre-packaged plan of inequity: the financial abuse of future claimants in the T H Agriculture & Nutrition 524(g) asbestos bankruptcy

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Commentary

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[Editor's Note: Kirk T. Hartley and David C. Christian II, Partners in the Chicago offices of LSP Group LLC and Seyfarth Shaw LLP, respectively, provided the legal commentary for this article; Marc C. Scarcella and Peter R. Kelso, Managers at the Washington, DC office of Bates White Economic Consulting, provided the quantitative and research analyses. The views of the authors do not reflect the opinions of their respective firms, their clients, or Mealey's Publications. © 2011 by Kirk T. Hartley, David C. Christian II, Marc C. Scarcella, and Peter R. Kelso. Responses are welcome.]

Introduction

The events surrounding the T H Agriculture & Nutrition ("THAN") bankruptcy reorganization, and the resulting asbestos bankruptcy trust ("THAN Trust"), violate the equitable principles of section 524(g) of the U.S. Bankruptcy Code by providing preferential financial treatment to the current class of asbestos voting claims to the financial detriment of future asbestos claimants. Parties in the THAN bankruptcy reorganization manipulated the rules of section 524(g), resulting in current asbestos voting claims receiving a 333% premium above the amount that similarly situated asbestos claims will receive in the future. Exhibit 1 below illustrates the distortion between the pre-petition tort experience of THAN, the bankruptcy valuation process for current voting claims, and the expected payments to future claimants by the THAN Trust.¹

This case study explores what went wrong in the THAN bankruptcy, and asks, "why is the problem not being fixed?" To that end, the paper begins with background on section 524(g) rules and corresponding case law, and then presents an outline of THAN's history in the tort system, as well as facts regarding the negotiation process for the THAN prepackaged plan. The critical facts are that during the brief life of the THAN Trust, hundreds of millions of assets were paid out to current claimants at 100 cents on the dollar, and then the Trust refused to open its doors to new claims for 16 months. When the doors finally reopened, the Trust announced that new claimants would receive 70% less than the amounts paid to the current claimants. This paper will highlight how these facts arose, and raise questions regarding the mis-allocation of Trust assets that resulted in the financial abuse of future claimants.

Section 524(g) was intended to protect the rights of future claimants

Asbestos bankruptcy trusts established under section 524(g) are intended to assume the legal responsibility of the debtor's asbestos-related liability, and to compensate similarly situated present and future claims in an equitable manner.² Staying true to this fundamental directive, section 524(g) mandates the appointment of a court-approved legal representative for future claimants ("FCR").³ The job of the FCR is to advocate for, and protect the interests of, future claimants to ensure equal treatment under the plan of reorganization. Under section 524(g), in order for a plan to be

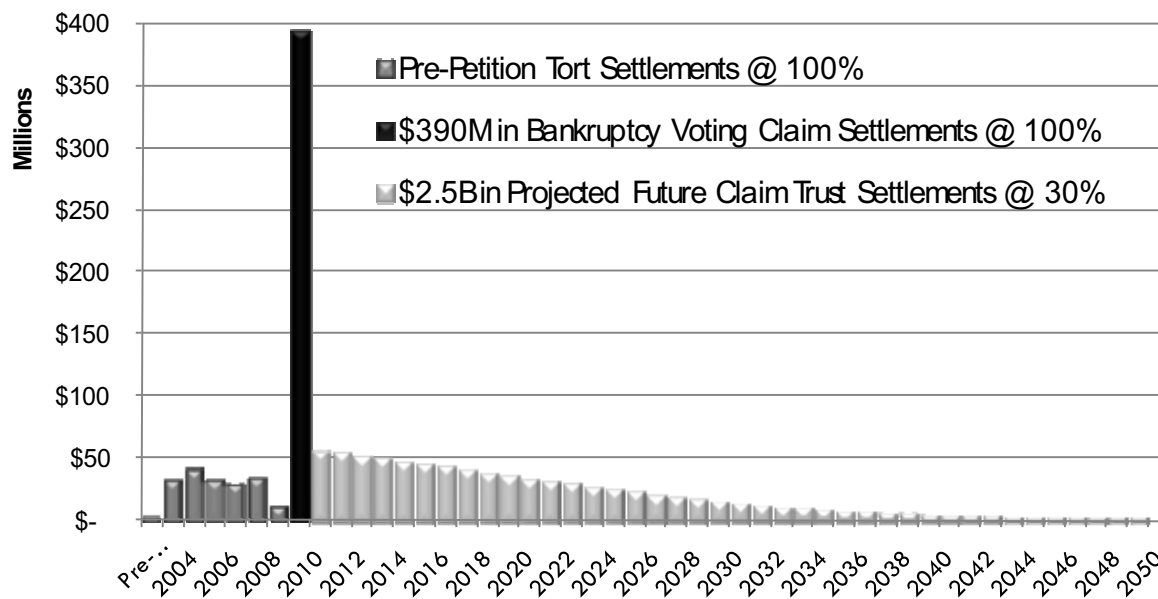


Exhibit 1: What's equitable about this picture?

confirmed, 75% of the current asbestos claimants must vote in favor of the plan.⁴ Section 524(g) also requires the approval of the FCR as a condition to obtaining plan confirmation.

In addition to statutory requirements, legal precedent established by the 3rd Circuit in *Combustion Engineering* and bankruptcy court rulings in *AC&S* have echoed concerns over inequitable treatment of claimant classes.⁵ The holdings in these two asbestos bankruptcy cases prohibit the use of a two trust system that uses one trust to provide preferential treatment to current claimants and a second trust to make lesser payments to future claimants.

Inherent conflicts exist between current and future claims under Section 524(g)

Both *AC&S* and *Combustion Engineering* involved efforts to use pre-packaged ("Pre-Pack") plans of reorganization in an attempt to shorten the bankruptcy process. Pre-packs are used in many types of bankruptcy cases. In the context of chapter 11 petitions involving asbestos and section 524(g), the process typically involves extensive pre-petition negotiations between the debtor and attorneys representing the majority of current asbestos claimants. When abused, these negotiations can incentivize egregious settlements with current asbestos claimants in an attempt to secure the 75% vote necessary for confirmation.

When mass tort claimants seek money from a limited pool of funds, there is an inherent conflict between classes of claimant creditors.⁶ Current claimants want money immediately, and as much as they can get. Future claimants, on the other hand, want current payouts limited to ensure that future claims are paid equitably. This conflict of interest pervades 524(g) asbestos bankruptcies because the totality of claims is not immediately known due to the 20–60 year latency of asbestos diseases. Instances such as *AC&S* and *Combustion Engineering* illustrate how questionable circumstances follow when current claimants join with tort defendants to negotiate a plan, and the current claimants understandably seek more money, while the tort defendant (soon debtor) needs votes for confirmation of its plan.⁷

THAN represents the next iteration of this bargain by presenting a more subtle approach to the abuse of future claimants. Unlike earlier Pre-Packs, two trusts were not used in THAN. Instead, the abuse of the future claimants occurred through one trust and the "bait and switch" tactic of paying off current voting claimants in full and then delaying the process of opening the doors to the trust for new claims. In short, claimants arriving early were paid well for their votes, and claimants arriving later were and will continue to be financially abused. And, as is detailed below, that financial abuse has occurred without public disclosure of information that

would explain the 70% reduction in payments to future claimants.

The story behind THAN's pre-packaged bankruptcy

THAN was a peripheral defendant in the civil tort system

As of its chapter 11 filing, THAN was a wholly owned subsidiary of Philips Electronics North America Corporation ("PENAC"). Prior to its filing, THAN's primary business consisted of managing its asbestos litigation, as its only revenue-generating enterprise consisted of owning and managing one piece of commercial real estate property.⁸ THAN's asbestos litigation stems from its distribution of asbestos fiber during the 1960s and 1970s, primarily providing fiber to joint compound manufacturers.⁹ Prior to 2003, THAN had only paid approximately \$2 million to asbestos plaintiffs.¹⁰ Beginning in 2003, however, THAN paid out approximately \$32 million per year on average to asbestos plaintiffs through 2006, with a peak of just over \$39 million in 2004.¹¹ This dramatic increase in settlement demands and subsequent payments resulted in THAN considering bankruptcy protection.

THAN began Pre-Pack negotiations 18 months before bankruptcy filing

Despite its position as a peripheral asbestos defendant in the tort system, PENAC and THAN began Pre-Pack discussions in March 2007 with attorneys representing a majority of THAN's current asbestos-related claims ("Asbestos Claimants Group"). The Asbestos Claimants Group then retained bankruptcy counsel and a claims valuation expert. The next month, an FCR was selected, who in turn hired counsel and selected a claims valuation expert.¹²

In February 2008, at the request of the Asbestos Claimants Group, THAN retained Verus Claims Services, LLC ("Verus") to administer a Pre-Effective Date Claim Review process for current asbestos personal injury voting claims ("Asbestos PI Voting Claims"). Verus was charged with reviewing these claims based on the presumptive criteria outlined in the proposed Trust Distribution Procedures ("TDP").¹³ Those Asbestos PI Voting Claims that satisfied the TDP requirements would be approved by Verus and qualify for payment following plan confirmation ("Qualified Asbestos PI Voting Claims").

The Pre-Pack process created settlements with Qualified Asbestos PI Voting Claims that exceeded total pre-petition civil tort settlements by 230%

Much had changed by the time THAN formally filed for bankruptcy in the U.S. Bankruptcy Court for the Southern District of New York on November 24, 2008. As of the petition filing date, a former peripheral defendant that never took a verdict in the tort system, never paid more than \$39 million in any one year to asbestos plaintiffs, and had only 14,000 tort claims pending emerged with a Pre-Pack plan with proposed Trust assets of \$900 million and over 90,000 Asbestos PI Voting Claims. At that same time, Verus had already approved \$270 million in Qualified Asbestos PI Voting Claim settlements based on the proposed TDP qualification criteria and valuation parameters.¹⁴ The amount of approved claims would eventually balloon to over \$390 million by the end of the Pre-Effective Date Claim Review process.¹⁵ Moreover, each Qualified Asbestos PI Voting Claim would receive 100% of its full liquidated value ("Payment Percentage") from the THAN Trust.¹⁶

Plan proponents assured the Bankruptcy Court that the \$900 million in Trust assets would be sufficient to pay all current and future claims in an equitable manner

In May 2009, plan proponents convinced New York Bankruptcy Judge Robert E. Gerber that a plan based on a \$900 million liability estimate would fully pay all current and future claimants 100% of their claim under the TDP. At THAN's final confirmation hearing, THAN bankruptcy counsel John Bae told Judge Gerber that:

"This plan is, in essence, a global resolution of THAN-related asbestos claims. The plan contemplates a contribution in cash of \$900 million to an asbestos trust that will be established to pay all present claims in the amount—expected amount of 100 percent of the value of the claim as set forth in the trust distribution procedures, and also to—and expected to make full payment to future claimants as they show up."¹⁷

Mr. Bae's statement was supported by both the FCR and his claims valuation expert, each of whom submitted a declaration in support of the plan asserting confidence that future claimants would be treated in an equitable manner relative to current claimants and

paid 100% of TDP values.^{18,19} As a result, the THAN plan was approved in October 2009. Soon thereafter, the THAN Trust went Effective on November 30, 2009, and immediately began distributing payments to Qualified Asbestos PI Voting Claims at 100% of TDP values.

As is detailed below, the first phase of payouts to current claimants were far too rich, and that massive overpayment resulted in the THAN Trust inequitably paying individual future claimants only 30% of the amounts paid to the current claimants who voted. Thus, in THAN, a new process was used to achieve the forbidden “two trust” outcome of overpaying current claimants, but that result was achieved with only one trust.

Trust 1: The THAN Trust paid Qualified Asbestos PI Voting claims at 100% of TDP values

Upon going effective on November 30, 2009, the THAN Trust immediately began distributing payments at 100% of TDP values to Qualified Asbestos PI Voting Claims. By the end of 2009, the Trust had paid out over \$325 million, with additional settlements paid out during 2010.²⁰ However, during that time no new “future” claims were even allowed to file with the Trust. This despite the fact that Verus had already established systems and procedures necessary to administer Trust claims during the Pre-Effective Date Claims Review Process.

Trust 2: The THAN Trust waited 16 months before allowing new asbestos PI claims to file, at which time the Payment Percentage was reduced to 30% of TDP values

According to the Trust, time was spent in 2010 developing and finalizing the claims submission materials by which future claims could be submitted to the Trust for processing, and consulting with claim forecast and valuation experts to determine if the initial Payment Percentage of 100% could be maintained for future claimants.²¹ In fact, the Trust didn't allow Verus to open its doors to receive future claims until April 1, 2011, and when the doors finally did open, the payments were reduced to far below 100%.

Instead, after over a year of reviewing the pre-petition and Pre-Pack claim data, it was determined that in order for the THAN Trust to remain solvent decades into the future, it was “necessary” to reduce the payout to future

claimants to 30%.²² Conveniently, all of the approved Asbestos PI Voting Claims were paid at 100% prior to this revelation.

The public record should reveal how the conclusion to drop the payment percentage to 30% was reached so soon after the plan proponents told Judge Gerber that \$900 million would be sufficient to pay all current and future claims at 100%. There should also be a public record of when and how the Trustees decided to reduce the payments to future claimants—after all, it is more than fair to ask if 2010 payments should have been made to current claimants at 100% if it was then suspected that the Payment Percentage to future claims would have to be reduced.

The new Payment Percentage of 30% which the THAN Trust adopted in 2011 for all future claims, implies that in addition to the \$390 million Qualified Asbestos PI Voting claims valued under the TDP, the Trust is anticipating an additional \$2.5 billion in future claim liability (present value of nearly \$1.6 billion).²³ That's nearly \$2.9 billion in total liability for a defendant that historically paid just over \$170 million in indemnity in the tort system, and only \$2 million prior to 2003.²⁴

How the THAN Trust assets should have been allocated to current and future claims

It is not uncommon for Trusts to change Payment Percentages over time. In fact, many Trusts have reduced Payment Percentages after processing and paying claims for a few years. Most recently, the Owens Corning Trust reduced its Payment Percentage from 40% to 10% in June 2009 after processing and paying claims for two years. Likewise, the Fibreboard, Babcock & Wilcox, United States Gypsum, and Kaiser Aluminum and Chemical Trusts all lowered their Payment Percentages within the first few years of processing and paying claims. In fact, TDPs require that the Trustees and advisors reconsider the appropriateness of their Payment Percentages periodically. A letter from the Owens Corning Trust notifying claimant counsel of the new Payment Percentage, dated June 4, 2009, describes this requirement:

“...the Trustees are required under Section 4.2 of the Trust Distribution Procedures to reconsider the payment percentage for either Sub-Account at least every three years, commencing on January 1, 2010 or at shorter intervals upon

the request of the Trust Advisory Committee or the Future Claimant's Representative."²⁵

The critical distinction between THAN and those Trusts is that in each case cited above the Trusts determined that a new, lower Payment Percentage was required in response to either greater than anticipated claim payments, devaluation of assets held in equity holdings, or both. For example, the letter notification from Owens Corning referenced above goes on to explain:

*"The Trustees, upon the advice of their advisors, determined to reconsider the payment percentage in response to greater than anticipated claims payments and the effect of the changes and volatility of the value of the Trust's assets [emphasis added]."*²⁶

In the case of THAN, there is no indication from Trust Annual Reports and web site notices that any new claim activity took place between the Effective Date of November 30, 2009 and April 1, 2011 when the Trust finally opened its doors to new claims. The entire stock of Qualified Asbestos PI Voting Claims had been valued prior to THAN's Effective Date, and the claims data which had been maintained by Verus was available for the advisors and experts to analyze. The THAN Trust also did not experience an unexpected decline in Trust Assets. In fact, according to the 2010 THAN Trust Annual Report, the Trust earned over \$18 million in investment income, realized capital gains, and unrealized capital gains.²⁷

In the absence of any new, substantial claim filing or precipitous drop in Trust assets, it begs the question; what made the Trustees and advisors so concerned about the appropriateness of the 100% Payment Percentage in 2010, that they didn't already know in November 2009 prior to the Trust distribution of over \$325 million in Qualified Asbestos PI Voting Claims? Further, if they were so concerned about the ability of the Trust to pay all future claims at 100%, then why during 2010 did they continue to distribute an additional \$58 million to Qualified Asbestos PI Voting Claims at 100 cents on the dollar?

In the end, had the Trust waited to make these Qualified Asbestos PI Voting Claim payments, and taken the time to properly assess its future solvency, then the resulting Payment Percentage to ALL current and future claims

would have been approximately 43% instead of the distorted reality that paid current claimants 100 cents on the dollar to the mere 30 cents now offered to future claims.²⁸

Exhibit 2 below illustrates what an equitable allocation of assets to current and future claims should have been, given the implied value of \$2.9 billion for all current and future liability as determined by Trust claims valuation experts.²⁹ The timing of the current payments to Qualified Asbestos PI Voting claims is based on the actual distribution of Trust funds between the end of 2009 and the beginning of 2011.³⁰ The timing of the future payments assumes that the Trust opened its doors to process new claims on January 1, 2010 instead of waiting until April 1, 2011.

The THAN players are all veterans who know the rules

One might like to think that the end-result of THAN is an aberrant outcome arising from inexperienced participants and unforeseen facts. But that line of thought does not square with the facts—many of the players in THAN are multi-year veterans of numerous asbestos bankruptcies, and are leaders of the asbestos plaintiff's bar. Specifically, the Asbestos Claimants Group in THAN included several prominent plaintiff attorneys who also held or hold similar positions in other 524(g) asbestos bankruptcies, including *Combustion Engineering*, *AC&S*, and *W.R. Grace*, to name a few.³¹ The THAN Trust is also currently overseen by Trustee Alfred M. Wolin, a former district court judge who once ruled on the viability of *Combustion Engineering's* plan.³²

The claim valuation experts are also experienced. The Asbestos Claimants Group hired the law firm of Frank / Gecker LLP as its bankruptcy counsel, and Dr. Mark A. Peterson as its claims valuation expert. Dr. Peterson has testified for current asbestos claimants in virtually every asbestos bankruptcy of the last decade, and his experience stretches back to researching asbestos litigation for the RAND Institute during the 1980s. The FCR hired Dr. Francine Rabinovitz, a widely-respected veteran of many asbestos estimates for bankruptcies and for other purposes. With so much experience in place, how did the claim predictions and values end up so far off base?

The facts also raise another question: why aren't we seeing the FCR, the U.S. Trustee, or others filing

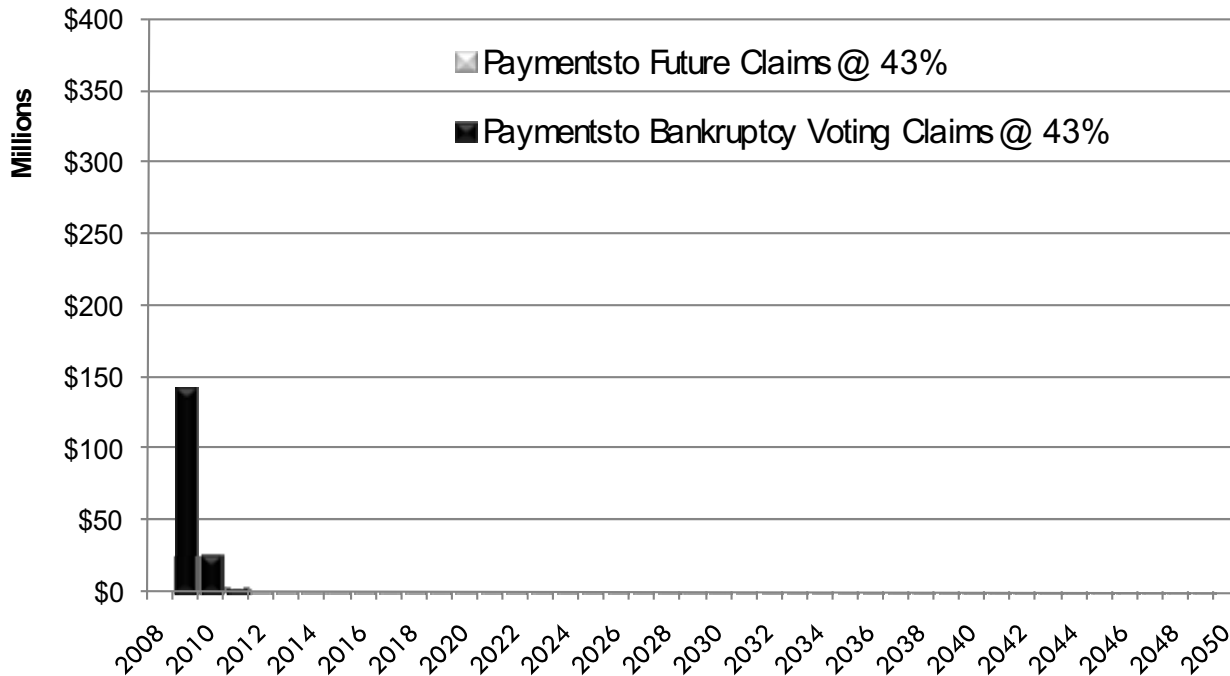


Exhibit 2: What current and future claims should have been paid

motions or papers in the public record demanding answers about how \$ 900 million of claims suddenly morphed into \$2.5 billion of claims, after \$ 390 million was paid out? The numbers above prove the material financial abuse of the future claimants. During the THAN proceedings, however, the FCR in THAN’s case, Samuel Issacharoff, swore to his belief that the future claimants were well protected. Indeed, in his declaration, the FCR said, at paragraph 31:

“Based on the analyses provided by my professionals as well as my own experience in this process, I believe that the Asbestos PI Trust Distribution Procedures are fair and equitable in all respects and ensures that holders of future Demands will be treated in substantially the same manner as holders of similar current Asbestos PI Claims.”³³

In a declaration by the FCR’s claims valuation expert, at paragraph 35:

“Although there is always uncertainty in forecasting into the future, my estimates indicate that the anticipated Asbestos PI Trust funding will allow the Asbestos PI Trust to pay 100% of the value of each Asbestos PI Claim for the life of the Asbestos PI Trust.”³⁴

Obviously the FCR and other experienced professionals were wrong—way wrong. Now the question is: why? The answer would appear to be that thousands of claims were suddenly manufactured and voted on. But to date, section 524(g) and the rights of the future claimants have been abused without the FCR or any other party in the case raising any complaint or question in any document filed on the public docket.

Questions concerning THAN’s abuse of 524(g)

The facts of THAN raise many questions about who knew what, and when they knew it. It is yet another glaring example of the need for transparency in section 524(g) cases. Given the facts associated with the stark contrast of THAN’s tort and Trust asbestos liability and disproportionate payments to current and future claimants, one would think that inquiring minds would be asking themselves the following questions, among others:

1. If the TDP qualification criteria and valuation parameters applied by Verus during the Pre-Effective Date review of Asbestos PI Voting Claims was intended to mimic the pre-petition settlement history of the Debtor in the civil tort

system, then how could nearly \$400 million in Pre-Pack settlements be approved when THAN only paid \$170 million in pre-petition settlements, never took a verdict, and only had 14,000 claims pending prior to bankruptcy?

2. Moreover, if the TDP qualification criteria and valuation parameters appropriately mimic the pre-petition tort settlement history of THAN, then how could current Trust estimates project an additional \$2.5 billion in future claim settlements?
3. Why were 93,331 current asbestos personal-injury claimants allowed to vote on the POR in November 2008 when as of October 2008 only 5,370 Asbestos PI Voting Claims were qualified under the Pre-Effective Date Claim Review process? Ultimately, as of the Effective Date, only 12,486 were qualified.³⁵
4. Given that Verus already had systems and procedures in place to administer the Pre-Effective Date Claims Review Process, why did the Trust refuse to open its doors for another 16 months before finally allowing Verus to accept new claim filings on April 1, 2011?
5. The public record shows that no new Trust claims were allowed to be filed prior to April 1, 2011. In the absence of new claims, what additional information did the Trust rely on in determining the new 30% Payment Percentage for future claims? And, was that decision based on any new data that the bankruptcy parties didn't have prior to the Effective Date? If so, what was that data, who provided it, and when?

Conclusion

The facts of the THAN bankruptcy proceedings show that a prohibited two-trust system was created "de facto" to overpay the pre-packaged settlement claimants to the material financial detriment of future asbestos claimants. In essence, the wool was pulled over the eyes of the bankruptcy judge and U.S. Trustee by the failure of anyone to disclose until long after plan confirmation that the Trust was not in a position to pay all present and future claimants at 100% based on the proposed TDP. In doing so, the parties circumvented the basic

524(g) tenet that "similarly situated asbestos claimants must be treated equally."

Given the hundreds of millions of dollars at stake, the outcome in the THAN case should attract questions and careful attention from the judiciary and public policy makers presiding over and examining the asbestos bankruptcy trust process. The lack of transparency and oversight in a multi-billion dollar bankruptcy trust system has been the topic of judicial and legislative debate over the past few years as those bodies continue to struggle with how to effectively integrate trust payments into the tort system. The THAN case underscores the need for transparency in the trust system, and that transparency needs to apply both before and after plan confirmation. The THAN facts prove that transparency is vital after plan confirmation because a plan is just that—a plan. Facts change, and everyone interested in tort law and mass claims should be able to see and understand how, when and why facts changed in connection with a trust operated under the supposed supervision of a U.S. federal bankruptcy court and U.S. Trustee.

It is our hope that the THAN case study and the facts associated with it will raise attention to the inequities of the asbestos bankruptcy system and the lack of transparency to display those inequities. THAN is yet another example of how section 524(g) has been perverted over time by the conflicting economic incentives of current versus future claimants, as well as the lack of transparency of the trust system. Simply put, the facts in THAN and other asbestos bankruptcies continue to fail the smell test. We hope that exposing the facts of THAN will help judges, legislators, and other public policy-makers understand the need for real, meaningful transparency when billions of dollars are to be paid out of trusts created as adjuncts to federal courts. Policymakers should also see that THAN illustrates the need for better processes, procedures and intersections between state court systems and any bankruptcy or fund involving mass tort claims.

Timeline

The remainder of this paper further outlines the timeline of the THAN Pre-Pack bankruptcy and subsequent THAN Trust. For more information on the THAN Trust, visit <http://thanasbestostrust.com/>.

Date	Source	Description
March 2007 Prepackage discussions with the plaintiff's bar begin	Disclosure Statement, page 20	<ul style="list-style-type: none"> • Counsel for THAN and counsel for PENAC began discussions with plaintiff's counsel to explore the feasibility of a prepackaged chapter 11 POR. • Counsel for the holders of the majority of current asbestos-related Claims began meeting as a group (the "Asbestos Claimants Group"). The members of this group include James F. Early, Esq. (Early, Ludwick, Sweeney & Strauss), Matthew Bergman, Esq. (Bergman & Frockt), John D. Cooney, Esq. (Cooney & Conway), Peter A. Kraus (Waters & Kraus, LLP), Steve Baron, Esq. (Baron and Budd, P.C.), Tim Porter, Esq. (Porter & Malouf, P.A.), Patrick Malouf, Esq. (Porter & Malouf, P.A.), Steve Kazan, Esq. (Kazan, McClain, Abrams, Lyons & Greenwood, PLC), and Robert Phillips, Esq. (SimmonsCooper LLC). • The Asbestos Claimants Group selected the law firm of Frank / Gecker LLP as its counsel. • The Asbestos Claimants Group also selected Dr. Mark A. Peterson as its Claims valuation expert.
April 2007 FCR is selected	Disclosure Statement, page 20	<ul style="list-style-type: none"> • THAN selects Samuel Issacharoff, Esq. as Futures Representative for potential prepackage chapter 11 POR. • The Futures Rep selects his bankruptcy counsel (Sander Esserman), litigation counsel (Brune & Richard LLP), insurance consultant (Claro Group, LLC), finance consultant (Duff & Phelps, LLC), and liability estimation expert (Hamilton, Rabinovitz, & Alschuler, Inc.).
August 2007 Bankruptcy counsel is retained	Disclosure Statement, page 20	<ul style="list-style-type: none"> • THAN retained bankruptcy counsel.
February 2008 Prepackage claim review process is initiated with the hiring of Verus	Disclosure Statement, page 21	<ul style="list-style-type: none"> • At the request of the Asbestos Claimants Group, THAN retained Verus Claims Services, LLC to review the Asbestos PI Claims and approve for payment those claims that meet the presumptive criteria outlined in the proposed Trust Distribution Procedures. • THAN's national asbestos counsel turned over all pending Asbestos PI Claims to Verus for its review. As of August 29, 2008, THAN had 14,024 pending claims.
March 2008 Plaintiff firms are notified of the Prepackage review processes and claim submissions are solicited	Disclosure Statement, page 21	<ul style="list-style-type: none"> • THAN also notified all members of the Asbestos Claimants Group of the retention of Verus and requested that the members submit claims information by March 21, 2008 to be included in the review process. • In addition, on or about March 7, 2008, THAN, through its national asbestos litigation counsel, sent a letter to all known attorneys for the holders of all asbestos-related personal injury and wrongful death claims asserted against THAN, inviting such counsel to submit claims information in order to have their clients' Asbestos PI Claims considered in the review process. • Although the letter set a deadline of March 21, 2008 for the submission of claims, Verus nevertheless considered Asbestos PI Claims that were submitted after such deadline. Verus continues to accept Asbestos PI Claims and will continue to review any Asbestos PI Claims submitted through to the Effective Date, at which time the Asbestos PI Trust will be established. • Approximately 45,490 Asbestos PI Claims in total were submitted to Verus (some of which were claims previously asserted in litigation filed against THAN, PENAC or Elementis).

April 2008 FCR conducts due diligence on Verus	Disclosure Statement, page 22	<ul style="list-style-type: none"> On April 16, 2008, counsel to the Future Claimants' Representative met with representatives of Verus and counsel to THAN to discuss the Verus Asbestos PI Claims review process. Counsel to the Future Claimants' Representative thoroughly questioned the Verus representatives regarding the Asbestos PI Claims review process, with particular attention paid to how the process worked technically, how the criteria for judging Asbestos PI Claims was developed and from what information/sources, how Asbestos PI Claims were reviewed and whether it was typical of other cases, and many other areas. In addition, the representatives from Verus produced several documents to counsel created in connection with the Asbestos PI Claims review process, and demonstrated how Verus would review a representative sample of Asbestos PI Claims. 																																																							
October 2008 Disclosure Statement drafted with statistics on claim review	Disclosure Statement, page 23	<ul style="list-style-type: none"> As of the Disclosure Statement (dated October 10, 2008), Verus reviewed the claims below. The Estimated Approved Value is calculated by multiplying the number of Approved claims by the Average Value specified in the proposed TDP. 																																																							
		<table border="1"> <thead> <tr> <th>Disease</th> <th>Reviewed</th> <th>Approved</th> <th>TDP Average Value</th> <th>Estimated Approved Value</th> </tr> </thead> <tbody> <tr> <td>Meso</td> <td>3,425</td> <td>879</td> <td>\$238,000</td> <td>\$209,202,000</td> </tr> <tr> <td>LC1</td> <td>4,377</td> <td>342</td> <td>\$89,900</td> <td>\$30,745,800</td> </tr> <tr> <td>LC2</td> <td>564</td> <td>100</td> <td>\$20,000</td> <td>\$2,000,000</td> </tr> <tr> <td>OTHC</td> <td>1,196</td> <td>133</td> <td>\$50,000</td> <td>\$6,650,000</td> </tr> <tr> <td>Sev Asb</td> <td>496</td> <td>13</td> <td>\$67,600</td> <td>\$878,800</td> </tr> <tr> <td>Asb/Plu III</td> <td>11,686</td> <td>704</td> <td>\$8,600</td> <td>\$6,054,400</td> </tr> <tr> <td>Asb/Plu II</td> <td>23,266</td> <td>3,188</td> <td>\$4,200</td> <td>\$13,389,600</td> </tr> <tr> <td>Other</td> <td>79</td> <td>11</td> <td>\$500</td> <td>\$5,500</td> </tr> <tr> <td>Unknown</td> <td>418</td> <td>0</td> <td>--</td> <td>--</td> </tr> <tr> <td>Total</td> <td>45,507</td> <td>5,370</td> <td></td> <td>\$268,926,100</td> </tr> </tbody> </table>	Disease	Reviewed	Approved	TDP Average Value	Estimated Approved Value	Meso	3,425	879	\$238,000	\$209,202,000	LC1	4,377	342	\$89,900	\$30,745,800	LC2	564	100	\$20,000	\$2,000,000	OTHC	1,196	133	\$50,000	\$6,650,000	Sev Asb	496	13	\$67,600	\$878,800	Asb/Plu III	11,686	704	\$8,600	\$6,054,400	Asb/Plu II	23,266	3,188	\$4,200	\$13,389,600	Other	79	11	\$500	\$5,500	Unknown	418	0	--	--	Total	45,507	5,370		\$268,926,100
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May 2009 Bankruptcy Confirmation	Court docket	<ul style="list-style-type: none"> First Amended POR is confirmed by bankruptcy court. 																																																							
October 2009 District Court Confirmation	Court docket	<ul style="list-style-type: none"> First Amended POR is confirmed by district court. 																																																							
November 2009 Trust Effective Date and Prepackage payments out the door at 100%	2009 Trust Annual Report, page 4	<ul style="list-style-type: none"> The T H Agriculture & Nutrition, L.L.C. Asbestos Personal Injury Trust is created and funded with \$900 million in assets on November 30, 2009. THAN provided the Trust with a certified schedule of 12,486 Qualified Asbestos PI Claims with an aggregate value of \$391,750,100, to be paid by the Trust as soon as practicable pursuant to the Plan. On the same date the Trust was created, it distributed \$254,178,900 by wire transfer and \$22,600,800 by checks. 																																																							
December	2009 Trust	<ul style="list-style-type: none"> Following the Trustees' meeting on December 14, 2009, the Trust paid 																																																							

<p>2009</p>	<p>Annual Report, page 4</p>	<p>Qualified Asbestos PI Claims totaling \$41,717,500; and following the meeting on December 21, 2009, the Trust paid \$10,068,600. In 2009, the Trust paid Qualified Asbestos PI Claims totaling \$328,565,800. The Trust resumed paying Qualified Asbestos PI Claims following the meeting on January 4, 2010.</p> <ul style="list-style-type: none"> • The Trustees began developing and drafting claims submission materials by which the holder of an Asbestos PI Claim may submit his or her claim to the Trust for processing and payment.
<p>April 2011</p>	<p>Trust web site http://thanasbestostrust.com/Files/20110321_THAN_Comment_Notice.PDF</p>	<ul style="list-style-type: none"> • Effective April 1, 2011, the T.H. Agriculture and Nutrition, LLC Asbestos Personal Injury Trust ("the Trust") will commence accepting asbestos personal injury claims. The Trust was established as the result of the Chapter 11 reorganization of T.H. Agriculture and Nutrition, LLC ("THAN"), in order to fairly and equitably resolve all asbestos personal injury claims arising as a result of THAN activities. The Trust has established procedures for processing and paying claims on an impartial, first-in-first-out basis, <i>with the goal of paying all claimants over time as equivalent a share as possible of the value of their claims.</i>* Pursuant to Sections 2.3 and 4.2 of the Trust Distribution Procedures, the Payment Percentage has been set at 30%. [*emphasis added]. • Note that no new information regarding either THAN's historical claims or the Qualified Asbestos PI Claims that wasn't already available in 2009 was available in 2011. From 2009 until April 1, 2011 the THAN trust only processed and paid Qualified Asbestos PI Claims, a group of claims whose size and dollar value was known at confirmation.

Endnotes

1. The trend of future payments is based on the KPMG/Nicholson incidence curve.
2. 11 U.S.C. Section 524(g)(2)(B)(i)(1); 11 U.S.C. Section 524(g)(2)(B)(ii)(V).
3. 11 U.S.C. Section 524(g)(4)(b)(i).
4. 11 U.S.C. Section 524(g)(2)(b)(ii)(iv)(bb).
5. See 3rd Circuit Decision, In re Combustion Engineering Inc., No. 03-3392 et al., 3rd Cir., Dec. 2, 2004; See Order by Bankruptcy Judge Newsome, In re AC&S Inc., No. 02-12687, D. Del. Bkcy., Jan. 23, 2004.
6. See generally, "The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts," New York University Annual Survey of American Law 62, no. 2 (2006): pp. 271-328.
7. In re Combustion Engineering Inc., No. 03-10495, D. Del. Bkcy; In re AC&S Inc., No. 02-12687, D. Del. Bkcy.
8. Disclosure Statement with Respect to a Prepackaged Plan of Reorganization of T H Agriculture & Nutrition, L.L.C. Under Chapter 11 Of The Bankruptcy Code, In re T H Agriculture & Nutrition L.L.C., No. 08-14692-reg, S.D. N.Y. Bkcy., p. 3.
9. Ibid., p. 2.
10. Ibid., p. 4.
11. Ibid., pp. 4-5.
12. Ibid., p. 20.
13. Ibid., p. 21.
14. Ibid., p. 23.
15. Annual Report, Financial Statements and Results of Operations of the T H Agriculture & Nutrition,

- L.L.C. Asbestos Personal Injury Trust for Fiscal Year Ended December 31, 2009, April 29, 2010, p. 4.
16. Supra 8, p. 4 of the *Summary of the Plan of Reorganization and the Asbestos PI Trust Distribution Procedures* Defines Payment Percentage as; *The Payment Percentage is the percentage of the full liquidated value of a claim that claimants will receive from the Asbestos PI Trust. The claimant will receive a payment equal to the Payment Percentage multiplied by the liquidated value of the claim.*
 17. In re T H Agriculture & Nutrition L.L.C., N.Y. Bkcy., Transcript of Final Confirmation Hearing, May 21, 2009, at p. 26.
 18. Declaration of Samuel Issacharoff in Support of Confirmation of First Amended Prepackaged Plan of Reorganization of T H Agriculture & Nutrition, L.L.C. Under Chapter 11 of the Bankruptcy Code, p. 11, ¶ 31.
 19. Declaration of Francine F. Rabinovitz in Support of Confirmation of First Amended Prepackaged Plan of Reorganization of T H Agriculture & Nutrition, L.L.C. Under Chapter 11 of the Bankruptcy Code, p. 13, ¶ 35.
 20. Supra 15.
 21. Annual Report, Financial Statements and Results of Operations of the T H Agriculture & Nutrition, L.L.C. Asbestos Personal Injury Trust for Fiscal Year Ended December 31, 2010, Dated April 29, 2011, at 5.
 22. Commencement of claim filing with the T H Agriculture & Nutrition, L.L.C. Asbestos Personal Injury Trust, March 14, 2011. Available at: http://thanasbestostrust.com/Files/20110321_THAN_Commencement_Notice.PDF.
 23. Per the THAN Trust 2010 Annual Report, the Net Claimants' Equity as of YE 2010 was \$522M. Assuming that future Trust expenses (non-claim payments) will total as net present value of approximately \$50M, the assets available to pay future claimants is approximately \$472M. A 30% Payment Percentage implies that the present value of future Trust liability is \$1.6 billion (\$472 million/0.30 = ~ \$1.6 billion). When extrapolated into the future based on the KPMG/Nicholson incidence curve the nominal value is approximately \$2.5 billion. When combined with the \$390 million in Qualified Asbestos PI Voting Claims it yields a total implied liability of nearly \$2.9 billion for current and future claims.
 24. Supra 8.
 25. Owens Corning Payment Percentage Update, 6/4/2009, published on the Owens Corning/Fibreboard Asbestos Personal Injury Trust website: http://www.ocfbasbestostrust.com/files/DOCS110683v6-Notice_to_Claimants_Counsel_6_09.pdf.
 26. Ibid.
 27. Supra 21, Exhibit A, p. 3.
 28. Per calculation in supra 22, estimated present value of future Trust liability is \$1.6 billion. When added to the present value of the Qualified Asbestos PI Claims it yields a total present value liability for all current and future claims of just under \$2 billion. With initial assets of \$900 million, and assuming that future Trust expenses (non-claim payments) will total as net present value of approximately \$50M, then the equitable Payment Percentage for all current and future claims should have been ~43% (\$850 million/\$2 billion = ~43%).
 29. Supra 1.; Supra 21; Supra 23.
 30. Supra 15 and 20.
 31. THAN Trust Annual Reports for years ending 2009 and 2010 disclose a total of \$392,678,300 in Qualified Asbestos PI Claim settlements with \$328,565,800 being paid out in 2009 and \$58,342,400 being paid out in 2010. We have assumed that the remaining balance of \$5,770,100 was paid in 2011. At a Payment Percentage of ~43%, those annual payments would have been ~\$140 million in 2009, ~\$25 million in 2010, and ~\$2.5 million in 2011.
- The members of the THAN Asbestos Claimants Group are James F. Early, Esq. (Early, Ludwick,

- Sweeney & Strauss), Matthew Bergman, Esq. (Bergman Draper & Frockt), John D. Cooney, Esq. (Cooney & Conway), Peter A. Kraus (Waters & Kraus, LLP), Steve Baron, Esq. (Baron and Budd, P.C.), Tim Porter, Esq. (Porter & Malouf, P.A.), Patrick Malouf, Esq. (Porter & Malouf, P.A.), Steve Kazan, Esq. (Kazan, McClain, Abrams, Lyons & Greenwood, PLC), and Robert Phillips, Esq. (SimmonsCooper LLC).
32. *In re Combustion Engineering Inc.*, No. 03-10495, D. Del. Bkcy, Aug. 8, 2003.
33. Supra 18.
34. Supra 19.
35. Declaration of James Sean McGuire Certifying Tabulation of Ballots Regarding Vote on Debtor's Prepackaged Plan of Reorganization, November 24, 2008, at 6. According to the voting summaries, 93,331 valid Class 4 Asbestos Claimants voted. However, according to the Disclosure Statement (Ibid. 4, p. 23) as of October 2008 only 5,370 Asbestos PI Voting claims were qualified for compensation under the TDP. According to the Trust 2009 annual report (Ibid.9) as of the Effective Date, only 12,486 Asbestos PI Voting claims were qualified for compensation under the TDP. ■

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