CONQUERING THE CHAOS OF UNCERTAINTY: THE EVOLVING ROLE OF LEGAL REPRESENTATIVES IN PROTECTING THE DUE PROCESS RIGHTS OF FUTURE CLAIMANTS IN MASS TORT CASES

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Traditional chapter 11 bankruptcy proceedings are not adequately equipped to handle mass tort liabilities arising from latent injuries. A solution has emerged from section 524(g) of the Bankruptcy Code and related precedent in the form of the future claimants' representative or "FCR." The FCR acts as a representative for future claimants who would otherwise be unable to seek recovery through bankruptcy proceedings. This article argues that the FCR—along with the establishment of a channeling injunction and settlement trust—is an effective and elegant solution for both future claimants and debtors in mass tort bankruptcies.

Companies facing viability-threatening mass tort liability and a seemingly unending stream of litigation may seek protection by filing for bankruptcy.[1] However, injuries arising in asbestos and certain other mass tort cases can have a long latency period between exposure to or use of a defective product and manifestation of harm.[2] As a result, future claimants (*i.e.*, individuals who have been exposed to a defective product but have not yet manifested injury) may be unaware that they hold a claim for their injury at the time that a company files for bankruptcy. The number of these future claimants and the magnitude of their claims often proves difficult to estimate.[3]

In these cases, companies must address future claims to ensure that their reorganizations are meaningful such that they receive an effective extinguishment of current and future claims. In order to address future claims, a company must provide adequate protection for their holders, even though doing so is often in tension with the competing bankruptcy policy of providing the debtor with a fresh start.[4] Appointing a legal representative to protect the interests of

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1. *See* Alan Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2046 (2000).

2. *Id.* at 2046.

3. Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcy*, 98 NW. L. REV. 1435, 1435 (2004).

4. *See In re* W.R. Grace & Co., 13 F.4th 279, 283 (3d Cir. 2021) ("Section 524(g) . . . enables bankruptcy courts to establish a trust for future claimants as part of a debtor company's reorganization plan, and, through the resulting channeling injunction, diverts all claims against the debtor to the trust. This ensures both that future claimants are assured restitution, and that debtor companies can survive bankruptcy without the threat of future asbestos suits.); *In re* Energy Future Holdings Corp., 949 F.3d 806, 811 (3d Cir. 2020) (noting the "poor fit between our bankruptcy law and asbestos litigation" in that "the long latency period for asbestos-related disease is incompatible with the 'public policy of affording finality to bankruptcy judgments'"); *In re* W.R. Grace & Co., 729 F.3d 311, 320 (3d Cir. 2013) ("By removing that uncertainty and allowing the debtor to emerge from bankruptcy free of all asbestos liability, § 524(g) facilitates the company's ongoing viability, which in turn provides the trust 'with an evergreen source of funding to pay future claims.' . . . The statute thus furthers two goals: ensuring the equitable resolution of present and future asbestos

future claimants, often called a future claimants' representative or "FCR," has emerged as a means to reconcile this conflict in the mass tort context. The role of an FCR focuses on protecting the due process rights of future claimants.

The ability to provide a final resolution of claims has been especially challenging in the context of asbestos liabilities. In the early 1980s, Manville and UNR, both large producers and suppliers of asbestos-containing products, filed for bankruptcy while facing thousands of lawsuits from asbestos-related deaths and injuries.[5] Pioneers at the time, both of these companies sought to address future claims through use of a channeling injunction, a settlement trust, and the appointment of an FCR.[6] Yet, even with the appointment of a legal representative and the confirmation of the *Manville* and *UNR* chapter 11 plans, there remained uncertainty whether these resolutions would endure, given the courts' untested authority to bind future asbestos claimants.

Then, in 1994, Congress enacted section 524(g) of title 11 of the United States Code (the "Bankruptcy Code"), which confirmed the use of the *Manville* and *UNR* model for other debtors facing asbestos liability.[7] This specialized Bankruptcy Code section was implemented to ensure the "fair and equitable distribution" of an estate's assets to both existing and future claimants.[8] For instance, section 524(g) provides for the resolution of mass asbestos liabilities consistent with due process by authorizing courts to confirm a plan that establishes a permanent injunction channeling all current and future claims to the settlement trust so long as the court appoints an FCR to protect the interests of future claimants during the bankruptcy case.[9] Section 524(g) also conditions issuance of the channeling injunction on multiple additional requirements, such as certain findings about the debtor's liability and other protections for future claimants.[10]

This Article addresses the development of the role of an FCR in mass tort bankruptcy cases.[11] Section II provides an overview of the due process concerns raised when a company seeks to discharge a future or unknown claim in bankruptcy. It also examines the reasons why future claimants need their own legal representation. Section III traces the development of the FCR's role through the *Manville* and *UNR* bankruptcies, the uncertainty of this early model, and the enactment of section 524(g) in response. It also considers how courts have interpreted the role of the FCR. Section IV addresses other ways the legal system has attempted to address future claims in mass tort class actions and bankruptcy,

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claims, and 'enabling corporations saddled with asbestos liability to obtain the "fresh start" promised by bankruptcy.'" (quoting *In re* Combustion Eng'g, Inc., 391 F.3d 190, 234 (3d Cir. 2005) and *In re* Federal-Mogul Glob., Inc., 684 F.3d 355, 359 (3d Cir. 2012))); Wright v. Owens Corning, 679 F.3d 101, 106 (3d Cir. 2012), *cert. denied*, 568 U.S. 1157 (2013) ("Consideration of the treatment of unknown future claims involves two competing concerns: the Bankruptcy Code's goal of providing a debtor with a fresh start by resolving all claims arising from the debtor's conduct prior to its emergence from bankruptcy; and the rights of individuals who may be damaged by that conduct but are unaware of the potential harm at the time of the debtor's bankruptcy."); *In re* RailWorks Corp., 621 B.R. 635 (Bankr. D. Md. 2020) (noting the "often-harsh" reality of balancing the debtor's rights with those of creditors).

5. *See In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 751 (E.D.N.Y. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (1992), *modified*, 993 F.2d 7 (2d Cir. 1993); *In re* UNR Indus., Inc., 71 B.R. 467, 472 (Bankr. N.D. Ill. 1987).

6. *See In re* Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd sub nom. In re* Johns-Manville Corp., 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub. nom.* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988); *In re* UNR Indus., Inc., 46 B.R. 671 (Bankr. N.D. Ill. 1985).

7. 11 U.S.C. § 524(h), enacted at the same time as section 524(g), sanctioned the trust model utilized by debtors like Johns-Manville and UNR prior to enactment of section 524(g).

8. *See* 11 U.S.C. § 524(g)(4)(B)(ii).

9. 11 U.S.C. §§ 524(g)(1)(B), (4)(B)(i).

10. 11 U.S.C. § 524(g)(2)(B)(ii).

11. Section 524(g) by its terms applies only to liability for asbestos. This Article argues that the policy behind and the framework set forth in section 524(g) can and should be applied to other "mass torts."

and why they have been largely unsuccessful in providing certainty for those facing mass tort liability. Section V argues that the use of FCRs in non-524(g) mass tort bankruptcy cases serves the same goals that Congress prioritized in section 524(g) and provides additional contexts in which the appointment of an FCR is appropriate moving forward.

Use of section 524(g) as a framework, buttressed by the bankruptcy court's equitable powers to address other liabilities, has made reorganizing under the Bankruptcy Code an appealing pathway for companies struggling with mass tort liabilities that include future claims.[12] In addition to providing fair treatment for both current and future claimants, the trust model has been effective in reducing problems in mass tort litigation, like transaction costs and attorneys' fees.[13] This Article argues that following the section 524(g) model of appointing an FCR, establishing a settlement trust, and employing an injunction to channel liabilities to that trust for resolution is the only proven way to address due process concerns for future claimants in asbestos and non-asbestos mass tort cases. While this model does not fit every case, it is supported by more than twenty-five years of precedent, protects the interests of future claimants in the long term by ensuring equitable treatment and a source of compensation, and offers a level of certainty for the reorganizing debtor that seeks a fresh start free of crippling mass tort liabilities.

I. CHALLENGES WITH DISCHARGING FUTURE CLAIMS IN A CHAPTER 11 REORGANIZATION

Often in chapter 11 cases, a bar date for the filing of proofs of claim is set, and claims filed before the bar date receive treatment under the terms of a proposed plan of reorganization.[14] Upon confirmation of that plan, any claims that arose prior to confirmation are discharged, and any attempts to collect from the debtor or against the debtor's property on account of such claims are enjoined.[15] While this framework typically provides finality to a debtor, it presents unique challenges when dealing with future claims.

A future claim in the bankruptcy context is a claim for which some seed that will ultimately lead to a compensable injury has been sown, but the fruit has not yet ripened. A future claimant is, generally, a person whose claim is not capable of being fairly addressed because it is not fully developed at the time a court is addressing the liability of the debtor and, potentially, other third parties that have been alleged co-liable with the debtor. The majority of future claims arise under two types of situations: (1) where a defective product has been put into the stream of commerce, but the claimant does not come into contact with it and experience injury until after confirmation of the plan of reorganization; and (2) where the claimant has been exposed to the defective product before, but the injury does not manifest until after, confirmation of such plan.[16]

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12. *See In re* Federal-Mogul Glob., Inc., 684 F.3d 355, 359 (3d Cir. 2012) ("A consequence of the failure to create a comprehensive resolution to asbestos litigation has been a reliance on the Bankruptcy Code to provide some predictability and regularity in addressing mass tort liability. Bankruptcy has proven an attractive alternative to the tort system for corporations because it permits a global resolution and discharge of current and future liability, while claimants' interests are protected by the bankruptcy court's power to use future earnings to compensate similarly situated tort claimants equitably.").

13. *Id.* at 362 (noting that other problems, like "reconciling competing interests of present and future claimants, are not limited to the creation of § 524(g) trusts, but extend to the current state of asbestos and mass tort litigation generally").

14. *See In re* Energy Future Holdings Corp., 949 F.3d 806, 811 (3d Cir. 2020).

15. *See* 11 U.S.C. §§ 524(a), 1141(d)(1)(A).

16. The dischargeability of such future claims is of questionable constitutionality at best. *See* Rosemary Reger Schnall, *Extending Protection to Foreseeable Future Claimants Through Delaware's Innovative Corporate Dissolution Scheme—In re Rego Co.*, 19 DEL. J. CORP. L. 141, 141–43 (1994); *Treating Latent Medical Tort Claims in Bankruptcy*, 21 AM. BANKR. INST. J. 18, July/August 2002.

Whether a debtor and related third parties can obtain protection from future claims in the form of discharge, release, or a channeling injunction upon confirmation of a company's chapter 11 plan of reorganization generally turns on two things: (1) whether the future claim existed at the time of the bankruptcy proceeding[17] and (2) whether such protection comports with future claimants' due process rights.[18]

A. When Did the Future Claim Arise Under the Bankruptcy Code?

While the Bankruptcy Code purposefully defines "claim" broadly,[19] such breadth is not unlimited. Moreover, confirmation of a chapter 11 plan only discharges claims that arose before the date of confirmation.[20] Therefore, to determine if a debtor's liability for a future claim will be discharged upon plan confirmation, a determination must first be made as to when the future claim arises under the Bankruptcy Code.

It is not easy to delineate precisely when a claim arises in the context of determining if the future claim is subject to administration and discharge in the bankruptcy, because injuries arising due to asbestos and certain other mass torts can have a long latency period between exposure to or use of a defective product and manifestation of harm.[21] To make this determination, courts typically employ some variation of either (i) the conduct test, which focuses on a claimant's exposure to the debtor's product or conduct, or (ii) the pre-petition relationship test, which focuses on the claimant's relationship with the debtor at the time of exposure to the debtor's product or conduct. Regardless of which test is employed, for a future personal injury claim to be considered a claim under the Bankruptcy Code, courts generally require that a claimant have been exposed pre-petition or pre-confirmation to the debtor's product or other conduct that gives rise to the injury.

1. Conduct Test

Under a strict application of the conduct test, a claim arises at the "moment the conduct giving rise to the alleged liability occurred."[22] Arguably, if a debtor introduced a defective product into the marketplace pre-petition, even persons that did not use or have exposure to the defective product until years after the debtor exited bankruptcy would

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17. Morgan Olson L.L.C. v. Frederico (*In re* Grumman Olson Indus., Inc.), 467 B.R. 694, 696-97 (S.D.N.Y. 2012) ("If a particular cause of action does not fall under the definition of 'claim,' then, for example, it would fall outside the Code provision that 'property dealt with by the plan [of reorganization] is free and clear of all claims.'" (quoting 11 U.S.C. § 1141(c))).

18. *See* JELD-WEN, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 125–26 (3d Cir. 2010) (*en banc*) (stating that claims that otherwise are subject to discharge are not discharged if "fundamental principles of due process" have not been satisfied).

19. *See* 11 U.S.C. § 101(5) (defining a claim as "(A) 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; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.").

20. *See* 11 U.S.C. § 1141(d)(1)(A). There is no discharge if the company fails to engage in business after the plan is consummated. *See id.* § 1141(d)(3)(B). In cases where there is a lag between confirmation of the plan and the effective date of the plan, the Third Circuit held that the language of section 1141(d)(1) permits the plan or confirmation order to provide that claims that arise after confirmation but prior to the effective date are subject to discharge. *See* Ellis v. Westinghouse Elec. Co., LLC, 11 F.4th 221, 238 (3d Cir. 2021).

21. *See In re Grumman*, 467 B.R. at 696–97 (noting that the purposefully broad scope of "claim" as defined by Congress, "points us in the right direction, but provides little indication of how far we should travel").

22. *See* Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1275 (5th Cir. 1994).

have their claims discharged under a conduct test because the introduction of the defective product into the marketplace is what gave rise to a claim.

However, courts utilizing the conduct test often apply it more narrowly and require that the harmed person have been exposed pre-petition to the product or conduct that gives rise to an injury, but not that the injury have manifested pre-petition.[23] The Third Circuit adopted this approach in *JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.)*,[24] where it rejected its long-standing adoption of the accrual test from *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*.[25]

In *Grossman's*, the Third Circuit held that the bankruptcy court erred by holding that a plaintiff's asbestos-related tort claims were not discharged, because they had arisen after the effective date of the plan.[26] Twenty years before the company's bankruptcy filing in 1997, the plaintiff purchased products from the company that allegedly contained asbestos.[27] The plaintiff did not file a proof of claim in the bankruptcy case, however, because she was not yet aware of any claim and had not yet manifested any symptoms linked to asbestos exposure. It was not until ten years after the debtors' plan was confirmed that the plaintiff was diagnosed with mesothelioma.[28]

After her diagnosis, she filed, among other things, a tort claim action in state court against the debtors' successor-in-interest, which then sought a determination in bankruptcy court that the asserted claims had been discharged by the debtors' confirmed plan.[29] Agreeing with the plaintiff that the claims were not discharged, the lower courts relied on the *Frenville* accrual test, under which a claim in bankruptcy arose when the underlying state law cause of action accrued (*i.e.*, when the injury manifested).[30] Thus, under *Frenville*, the plaintiff's claims could not have been discharged, as the plaintiff did not manifest symptoms until ten years after plan confirmation.[31] While recognizing that the lower courts properly applied *Frenville*, the Third Circuit stated that the *Frenville* accrual test defined "claim" under the Bankruptcy Code too narrowly. Instead, overruling *Frenville*, the Third Circuit pronounced that, "a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code."[32]

That the plaintiff had claims under the Bankruptcy Code, however, was not the end of the inquiry on whether such claims were discharged.[33] Whether the plaintiff's claims were discharged turned on whether she was accorded due process. The Third Circuit noted that, "the determination when a claim arises has significant due process implications," because, "[i]f potential future tort claimants have not filed claims because they are unaware of their injuries, they might challenge the effectiveness of any purported notice of the claims bar date."[34] While "Congress took account of the due

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23. *In re Grossman's*, 607 F.3d at 125.

24. *Id.*

25. Avellino & Bienes v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332 (3d Cir. 1984).

26. *In re Grossman's*, 607 F.3d at 118.

27. *Id.* at 117.

28. *Id.*

29. *Id.* at 117–18.

30. *Id.* at 337.

31. *Id.* at 119–20.

32. *Id.* at 125.

33. *Id.*

34. *Id.* at 122.

process implications of discharging future claims of individuals whose injuries were not manifest at the time of the bankruptcy petition" when it enacted section 524(g), the debtors in *Grossman's* did not utilize the section 524(g) safeguards.[35] The Third Circuit therefore remanded the case to the district court to determine if discharge of the claims would comport with due process.[36]

2. Pre-Petition Relationship Test

Under the pre-petition relationship test, the conduct test gets applied only if there was a specific and identifiable relationship pre-petition between the claimant and debtor.[37] Without such a relationship, courts are often concerned with issues concerning adequate notice and due process that could arise.[38] An often-cited example from the Second Circuit articulates the challenges of addressing any future claimant who does not come into contact with the defective product until after the bankruptcy case:

> Consider, for example, a company that builds bridges around the world. It can estimate that of 10,000 bridges it builds, one will fail, causing 10 deaths. Having built 10,000 bridges, it becomes insolvent and files a petition in bankruptcy. Is there a "claim" on behalf of the 10 people who will be killed when they drive across the one bridge that will fail someday in the future? If the only test is whether the ultimate right to payment will arise out of the debtor's pre-petition conduct, the future victims have a "claim." Yet it must be obvious that enormous practical and perhaps constitutional problems would arise from recognition of such a claim. The potential victims are not only unidentified, but there is no way to identify them. Sheer fortuity will determine who will be on that one bridge when it crashes. What notice is to be given to these potential "claimants"? Or would it suffice to designate a representative for future victims and authorize the representative to negotiate terms of a binding reorganization plan?[39]

This hypothetical inquiry regarding potential future victims and whether they have dischargeable claims was the actual issue before the Court of Appeals for the Eleventh Circuit in *In re Piper Aircraft Corp.*[40] The debtor in *Piper*, a manufacturer and distributer of planes and spare parts, filed for bankruptcy protection after being named in several lawsuits alleging that its aircraft and parts were defective.[41] The debtor pursued a sale of the company, but because it had more than 50,000 planes still in operation, the potential purchaser required that the debtor seek appointment of a legal representative to represent the interests of future claimants so that future product liability claims could be addressed in

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35. *Id.* at 126–27.

36. *Id.* at 127–28.

37. *See Lemelle.*, 18 F.3d at 1276 .

38. *See, e.g.*, *In re Grumman*, 467 B.R. at 705; Cantu v. Schmidt (*In re* Cantu), 784 F.3d 253, 258 (5th Cir. 2015).

39. *In re* Chateaugay Corp., 944 F.2d 997, 1003 (2d Cir. 1991).

40. Epstein v. Off. Comm. of Unsecured Creditors of the Est. of Piper Aircraft Corp. (*In re* Piper Aircraft Corp.), 58 F.3d 1573 (11th Cir. 1995), *aff'g* 168 B.R. 434 (S.D. Fla. 1994).

41. *Id.* at 1575.

the bankruptcy.[42] The court appointed an FCR, who filed on behalf of the future claimants a proof of claim that was objected to on the grounds that the future claimants did not have claims under the Bankruptcy Code.[43]

The Eleventh Circuit adopted a pre-petition relationship test and held that the future claimants did not have claims.[44] Under this test, an individual has a claim if "(i) events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's pre-petition conduct in designing, manufacturing and selling the allegedly defective or dangerous product."[45] Because a pre-confirmation connection between the future claimants and the debtor could not be established, the Eleventh Circuit held that the future claimants did not have claims that could be administered in the bankruptcy case.[46]

The *Piper* test, however, is not precise, as is evident in contexts with latent injuries. Because latent injuries were not an issue in *Piper*,[47] the test did not address whether a party endangered by a defective product pre-petition but having an injury that did not manifest itself until after the bankruptcy has a dischargeable claim. In such cases, the pre-petition relationship test requires more than just the tortious conduct by the debtor and a pre-petition relationship. Because of due process concerns, there at least has to be a general knowledge at the time of the bankruptcy that the debtor's conduct causes injury.[48]

The cases that consider whether there was a pre-petition relationship between the debtor's conduct and the claimant illustrate the difficulty in providing due process for future claimants and ensuring a fresh start for the debtor. Absent due process, future claims cannot be discharged through plan confirmation, and debtors face additional litigation and liability.

B. Was Due Process Afforded to the Future Claimant?

Due process protects an individual from "deprivation of an 'individual interest that is encompassed within the Fifth and Fourteenth Amendments' protection of life, liberty, or property' and the absence of procedures that 'provide due process of law.'"[49] The ability to pursue a legal claim is a protected, cognizable property interest.[50]

Due process generally requires two elements: notice and a hearing.[51] In the bankruptcy context, it is well established that the Due Process Clause requires that a creditor receive adequate notice of the bankruptcy proceeding

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42. *Id.*

43. *Id.*

44. *Id.* at 1577–78.

45. *Id.* at 1577.

46. *Id.* at 1578.

47. *See In re* Piper Aircraft Corp., 168 B.R. 434, 438 (S.D. Fla. 1994) ("There is absolutely no evidence in the record, nor can the Court conceive of circumstances wherein a prepetition exposure to an allegedly defective Piper aircraft or parts will result in a prepetition injury that does not manifest itself until postpetition.").

48. *See, e.g.*, United States Pipe & Foundry Co., 577 B.R. 916, 924–25 (Bankr. S.D. Fla. 2017) (holding that toxic tort claims were not discharged because the prepetition tortious conduct was not discovered until after the chapter 11 plan was confirmed).

49. *See In re* Energy Future Holdings Corp., 949 F.3d 806, 822 (3d Cir. 2020) (quoting Hill v. Borough of Kutztown, 455 F.3d 225, 234 (3d Cir. 2006)); *In re* Motors Liquidation Co., 829 F.3d 135, 158 (2d Cir. 2016).

50. *See In re Energy Future*, 949 F.3d at 822; *In re Motors Liquidation*, 829 F.3d at 158.

51. *Id.*

before it can be bound by a plan of reorganization.[52] If a creditor was not provided adequate notice consistent with due process, then the creditor may be able to successfully pursue its claim years after the debtor purportedly discharged the claim in bankruptcy.

The adequacy of notice must be decided on the unique facts of each case.[53] The type of notice required to satisfy due process depends on whether a creditor is "known" or "unknown."[54] A known creditor is "one whose identity is either known or 'reasonably ascertainable by the debtor.'"[55] "Reasonably ascertainable" means the debtor can identify the creditor using "reasonably diligent efforts."[56] The debtor is not required to exercise "impracticable and extended searches" or to "search out each conceivable or possible creditor and urge that person or entity to make a claim against it"; instead, the search should focus on the debtor's books and records.[57] Whether the identities of known creditors are reasonably ascertainable must be decided based on the facts of each case.[58]

The debtor must provide a known creditor with actual written notice of the bar date.[59] A defect in issuing actual notice, like an incorrect address, weakens but does not necessarily rebut the presumption that a known creditor has received notice.[60]

In contrast, an unknown creditor is "one whose 'interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to [the debtor's] knowledge.'"[61] For unknown creditors, "constructive notice of the claims bar date by publication satisfies the requirements of due process."[62]

While constructive notice by publication in national newspapers generally is sufficient to satisfy the requirements of due process, the adequacy of notice "depends on the circumstances of a particular case."[63] The length of

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52. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (noting "the due process principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process'" (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940))); Jones v. Chemetron Corp., 212 F.3d 199, 209 (3d Cir. 2000) ("[I]f a potential claimant lacks sufficient notice of a bankruptcy proceeding, due process considerations dictate that his or her claim cannot be discharged by a confirmation order."); Morgan Olson L.L.C. v. Frederico (*In re* Grumman Olson Indus., Inc.), 467 B.R. 694, 706 (S.D.N.Y. 2012) ("Courts have held in general that, for due process reasons, a party that did not receive adequate notice of bankruptcy proceedings could not be bound by orders issued during those proceedings.").

53. *See* JELD-WEN, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 127 (3d Cir. 2010) (*en banc*). To satisfy due process, notice must be "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Wright*, 679 F.3d at 108 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

54. *Wright*, 679 F.3d at 103 n.3

55. *Id.* (quoting Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. 1995), *cert. denied*, 517 U.S. 1137 (1996)).

56. *Chemetron*, 72 F.3d at 346.

57. *Id.* at 347.

58. PacifiCorp v. W.R. Grace, 2006 WL 2375371, at *8 (D. Del. Aug. 16, 2006).

59. *Wright*, 679 F.3d at 103 n.3.

60. *PacifiCorp*, 2006 WL 2375371, at *16.

61. *Wright*, 679 F.3d at 103 n.3 (quoting *Chemetron*, 72 F.3d at 346).

62. *Chemetron*, 72 F.3d at 348.

63. *Wright*, 679 F.3d at 108; *see also In re* Energy Future Holdings Corp., 949 F.3d 806, 822 (3d Cir. 2020) (finding that multi-million-dollar notice program that included publication "in seven consumer magazines, 226 local newspapers, three

time between publication of notice and the confirmation hearing can be a factor in determining whether notice was adequate.[64] Additionally, adequacy of notice turns on what the debtor knew or reasonably could have discovered. Thus, the debtor cannot fraudulently conceal information about claims and use notice as an excuse for discharge.[65]

The difference between known and unknown creditors is significant for understanding the due process concerns for future claimants in a bankruptcy proceeding.[66] "If potential future tort claimants have not filed claims because they are unaware of their injuries, they might challenge the effectiveness of any purported notice of the claims bar date. Discharge of such claims without providing adequate notice raises questions under the Fourteenth Amendment."[67] In *Grossman's*, the Third Circuit identified factors relevant to determining whether a bankruptcy confirmation's discharge of a claim was consistent with due process, where the claim was based on pre-petition conduct that resulted in an injury that manifested years after confirmation. Those factors include:

> the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).[68]

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national newspapers, forty-three Spanish-language newspapers, eleven union publications, and five Internet outlets" and resulted in 10,000 proofs of claim filed by latent claimants was consistent with the requirement that unknown claimants are entitled only to publication notice and was constitutionally sufficient).

64. *See In re* New Century TRS Holdings, Inc., 528 B.R. 251 (D. Del. 2014), *vacated and remanded*, 612 Fed. App'x. 147 (3d Cir. 2015) (finding notice insufficient when published a single time in one national newspaper 39 days before relevant deadline); Muldrow v. Brookstone, Inc., 2015 WL 1523886, at *3 (D.N.J. Apr. 2, 2015) ("[T]he short period of twenty-six days between notice publication and confirmation hearing in this case may have deprived potential claimants of any realistic opportunity to file claims.").

65. *See In re* Motors Liquidation, 829 F.3d at 159 ("If a debtor reveals in bankruptcy the claims against it and provides potential claimants notice consistent with due process of law, then the Code affords vast protections. Both § 1141(c) and § 363(f) permit 'free and clear' provisions that act as a liability shield. These provisions provide enormous incentives for a struggling company to be forthright. But if a debtor does not reveal claims that it is aware of, then bankruptcy law cannot protect it."); *In re* Geo Specialty Chems. Ltd., 577 B.R. 142, 190 (Bankr. D.N.J. 2017) ("'[W]hen a party conceals the necessary facts upon which a claim is about to be made, that party cannot benefit from publication by notice. Due process does not allow a debtor who has actively concealed facts necessary to the presentation of certain claims to notify by publication those persons adversely affected by the active concealment.'" (quoting Tillman *ex rel.* Est. of Tillman v. Camelot Music, Inc., 408 F.3d 1300, 1308 (10th Cir. 2005))).

66. *See, e.g.*, *In re* UNR Indus. Inc., 725 F.2d 1111, 1119 (7th Cir. 1984) (discussing the court's concern with insuring that future claimants receive "constitutionally adequate notice").

67. *In re Grossman's*, 607 F.3d at 122.

68. *Id.* at 127–28. Courts in the Second Circuit consider "whether the party giving notice acted reasonably in selecting means likely to inform persons affected, and most courts hold that 'for unknown creditors whose identities or claims are not reasonably ascertainable, and for creditors who hold only conceivable, conjectural or speculative claims, constructive notice of the bar date by publication is sufficient' to satisfy due process." Sweeney v. Lafayette Pharmaceuticals, Inc., 2020 WL 2079283, at*3 (D.N.J. Apr. 30, 2020) (quoting *In re* Chateaugay Corp. Reomar, Inc., 2009 WL 367490, at *5 (Bankr. S.D.N.Y. Jan. 14, 2009)).

While publication notice to unknown creditors weighs in favor of finding that discharge comports with due process,[69] it is uncertain whether publication notice is adequate for claimants with latent injuries.[70] Notably, such due process concerns are not implicated when a debtor utilizes section 524(g) of the Bankruptcy Code.[71]

C. Future Claimants Need Independent Representation to Protect Their Due Process Rights

As described above, by virtue of their status as unknown claimants and the latent nature of their injuries, it is difficult to provide future claimants with adequate notice.[72] Not only can the liable party not identify the future claimants to be given actual notice, but the future claimants may be incapable of understanding the implications of any notice and thus appreciating that they have a claim to pursue.[73] Without effective notice, future claimants are unable to represent, and be heard on, their own interests.

No other constituency in a bankruptcy case adequately represents future claimants, because no other party's interests fully align with future claimants' interests on all issues.[74] The conflict with official committees that represent current claimants exists to the extent that current and future claimants are competing for compensation from a limited

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69. *See* Davis v. Grubb, 2013 WL 2297185, at *8 (E.D. Pa. May 23, 2013) (finding that publication of the bankruptcy in *USA Today* notified unknown claimants and complied with due process).

70. *See* Sweeney v. Alcon Labs., 856 Fed. App'x. 371, 375–76 (3d Cir. 2021) (not precedential), *cert. denied sub nom.* Sweeney v. Eastman Kodak Co., 142 S. Ct. 565 (2021) (holding that publication to unknown non-asbestos latent claimant was sufficient to discharge claims but noting that claimant did not make argument that publication notice was not enough because the claims were not only unknown to the debtor but also the creditor); *In re* Energy Future Holdings Corp., 949 F.3d 806, 822 (3d Cir. 2020) (recognizing that latent claimants may be able to have claims reinstated because of lack of due process pursuant to Bankruptcy Rule 3003 even though debtors launched multimillion-dollar notice plan that included publication notice); Williams v. Placid Oil Co. (*In re* Placid Oil Co.), 753 F.3d 151, 157-58 (5th Cir. 2014) (holding that asbestos claims were discharged because publication of bar date in newspaper of national circulation satisfied due process); Wright v. Owens Corning, 679 F.3d. 101, 108-09 (3d Cir. 2012) (stating that due process was not afforded in a non-524(g) case by publication notice to asbestos claimants who did not understand at the time of the notice that they held claims); Jones v. Chemetron Corp., 212 F.3d 199, 210 (3d Cir. 2000) (holding that a claim of a yet-to-be-born claimant who was incapable of receiving notice when it was issued was not discharged); *In re* RailWorks Corp., 621 B.R. 635, 653–54 (Bankr. D. Md. 2020) (holding that publication in national edition of *Wall Street Journal* was sufficient to provide notice to unknown asbestos claimants).

71. *See In re* W.R. Grace & Co., 729 F.3d 311, 323–24 ("As we explained in *Combustion Engineering*, and again in *Grossman's*, § 524(g) includes a number of requirements that 'are specifically tailored to protect the due process rights of future claimants,' such as the 'fair and equitable' provision and the mandatory seventy-five percent approval requirement. Therefore, as long as a court correctly determines that § 524(g)'s requirements are satisfied, present and future claims can be channeled to a § 524(g) trust without violating due process.") (internal citations omitted).

72. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) (recognizing the difficulties of providing adequate notice to future asbestos claimants); Ortiz v. Fibreboard Corp., 527 U.S. 815, 844 (1999) (same).

73. *See In re* Placid Oil Co., 753 F.3d 151, 164 (5th Cir. 2014) (Dennis, J., dissenting) (noting that unknown future claimant was "functionally incompetent" to receive notice because she was unable to recognize the effect of notice on her rights when no injury had manifested). The latency problem of asbestos is exacerbated by the fact that some victims may have been exposed unknowingly and indirectly, such as by laundering the clothes of a family member who was occupationally exposed to asbestos. *See In re Placid Oil*, 753 F.3d at 153 (majority).

74. *See Ortiz*, 527 U.S. at 856 (noting inherent conflict between current and future claimants giving rise to need for separate representation); *In re* UNR Indus., Inc., 46 B.R. 671, 675 (Bankr. N.D. Ill. 1985) (stating that future claimants not adequately represented by current claimants); *In re* Johns-Manville Corp., 36 B.R. 743, 749 (Bankr. S.D.N.Y. 1984) (same).

fund.[75] If future claimants do not have their own representation in a bankruptcy case, there is a high risk they will receive less favorable treatment than current claimants will attain.[76] Because a claim can be discharged through bankruptcy only if the claimant received adequate notice, future claimants present a distinct issue for companies seeking to resolve mass tort liabilities through a reorganization. The use of an FCR in asbestos cases under section 524(g) of the Bankruptcy Code is a statutorily sanctioned solution to this due process concern for future claimants that also can be and has been a model for other mass tort cases to provide debtors with greater certainty regarding their ability to remain going concerns.[77]

II. ESTABLISHMENT OF THE FCR'S ROLE TO PROTECT FUTURE CLAIMANTS' INTERESTS

An FCR may be appointed to represent the interests of the currently unidentifiable personal injury victims who may seek compensation for their injuries after a plan of reorganization is confirmed. Appointing an FCR is typically the most effective mechanism utilized to address future claims consistent with due process.[78] The FCR does not, however, represent any persons who have or could have asserted a claim prior to plan confirmation. Nor does the FCR represent any known individuals, because to do so would create a conflict of interest.[79]

As a general matter, the FCR advocates for the future claimants' rights by participating in proceedings and overseeing the notice process for unknown claimants. Moreover, the FCR's participation in proceedings usually suffices to vicariously satisfy the due process requirement to provide a claimant an opportunity to be heard. Appointing an FCR emerged as a solution to the due process challenges associated with future claimants in asbestos cases in the *Manville* and *UNR* bankruptcies, and eventually was codified by Congress through the enactment of section 524(g) of the Bankruptcy Code in 1994. This historical development of the FCR will be discussed below.[80]

A. Asbestos Bankruptcy Cases Form the Model for Resolving Future Claims While Protecting the Due Process Interests of Future Claimants

In the early 1980s, two companies with asbestos liabilities used bankruptcy proceedings to reorganize and channel their asbestos liability to settlement trusts for resolution. Their early experience demonstrates not only the potential and challenges of the FCR model, but also the uncertainty that remained for reorganizing debtors before Congress enacted section 524(g).

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75. *See* Georgine v. Amchem Prods. Inc., 83 F.3d 610, 630–31 (3d Cir. 1996) (recognizing that the inherent conflict between existing claimants who desire immediate, unlimited recovery and latent claimants who desire that recovery be capped or delayed to ensure that existing claimants will not deplete funds precludes the use of one representative for both groups), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

76. *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 242 (3d Cir. 2005) (finding that future claimants received "demonstrably unequal" treatment under deal struck before FCR was appointed).

77. *See* Sweeney v. Alcon Labs., 856 Fed. App'x. 371, 375 n.7 (3d Cir. 2021) (recognizing that, in non-asbestos case with latent injuries, creation of trust and appointment of a future claims representative may be warranted).

78. *See* Miller v. Chrysler Grp., LLC, 2012 WL 6093836, at *4 (D.N.J. Dec. 7, 2012). Likewise, due process may be satisfied where a committee has represented the claims and ensured certain rights were preserved to them. *See id.*

79. *See In re* UNR Indus., Inc., 71 B.R. 467, 479–80 (Bankr. N.D. Ill. 1987).

80. Again, while the application of section 524(g) itself is limited to asbestos, the policy and framework of section 524(g) are applicable to other mass torts.

1. The *Manville* Bankruptcy Case

a. Early Proceedings Led to the Appointment of an FCR

The bankruptcy of Johns-Manville Corp. and its affiliated companies (collectively, "Manville"), among the largest suppliers of asbestos products, was the first to involve the appointment of an FCR.[81] On August 26, 1982, facing lawsuits arising from approximately 16,500 asbestos-related deaths and injuries, Manville filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code.[82]

A co-defendant of Manville filed a motion seeking appointment of a legal representative for future claimants.[83] The court noted that it was "abundantly clear" that the case had to address future claimants to safeguard their "compelling interest."[84] The court defined "future asbestos claimants" to include "all persons or entities who, on or before August 26, 1982 [the petition date], came into contact with asbestos or asbestos-containing products mined, fabricated, manufactured, supplied or sold by Manville and who have not yet filed claims against Manville for personal injuries or property damage."[85] The court noted these persons, "may be unaware of their entitlement to recourse against Manville due to the latency period of many years characterizing manifestation of all asbestos related diseases."[86]

The court based on three factors its conclusion that future claimants had "at the very least a cognizable interest in this reorganization" sufficient to be considered parties in interest entitled to appear and be heard under section 1109(b) of the Bankruptcy Code. First, the statistical data on the likely numbers and values of future claims against Manville demonstrated that, as a practical matter, any plan that did not address the interests of future claimants would not serve the interests of the debtors or creditors, because Manville would be forced back into bankruptcy.[87] Second, section 1109(b) was broad enough to "embrace the interests of future claimants as affected parties."[88] Future claimants were "undeniably parties in interest" who required a representative, separate and distinct from the existing committees in the case, to give those claimants a voice in formulating the plan.[89] Third, because case law demonstrated that mere exposure to asbestos can trigger insurance coverage, the court concluded that that same exposure justified a determination that future claimants were parties in interest in the bankruptcy case.[90] The court reserved decision on the question of whether future claims were dischargeable.[91] But the "unprecedented, extraordinary nature of" Manville's

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81. *See In re* Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984).

82. *See In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 751 (E.D.N.Y. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (1992), *modified*, 993 F.2d 7 (2d Cir. 1993).

83. *In re Johns-Manville Corp.*, 36 B.R. at 744.

84. *Id.*

85. *Id.* at 744–45.

86. *Id.* at 745.

87. *Id.* at 746.

88. *Id.* at 748–49.

89. *Id.* at 749.

90. *Id.*

91. *Id.* at 754.

bankruptcy cases required that future claimants have a legal representative "to act independently and impartially where appropriate in the case," which was important in the development of a plan and claims estimation procedures.[92]

The exact terms and role of the FCR were left for later determination, but the court suggested the role could be based on other forms of legal representation, like guardian ad litem, amicus curiae, and examiner.[93] The court cited its equitable powers, including under section 105(a) of the Bankruptcy Code, in making the appointment.[94] The *Manville* court suggested that every court has inherent power to appoint a representative for unknown parties in interest.[95]

Later, the bankruptcy court appointed an FCR and redefined future claimants as persons who "have been exposed to asbestos or asbestos products mined, manufactured or supplied by Manville [pre-petition] and have manifested or will manifest disease post-petition and who are not otherwise represented in these proceedings."[96] The FCR was given the same powers and duties as a committee under section 1103 of the Bankruptcy Code, subject to reduction or enlargement by the bankruptcy court.[97] On appeal by two committees and a putative future claimant who challenged the FCR's appointment, the district court affirmed, stating that providing the FCR with powers similar to those of a committee ensured that the future claimants "will have a meaningful opportunity to be heard and to participate."[98] Likewise, compensating the FCR from the estate was "wholly appropriate" in light of the importance of having adequate representation for future claimants.[99]

In 1986, the bankruptcy court issued orders (the "1986 Orders") confirming Manville's plan of reorganization, which implemented three unique features: (i) appointment of a legal representative for future claimants (an FCR); (ii) establishment of a claims resolution trust with funds to satisfy future claims; and (iii) issuance of a channeling injunction, which required future claimants to seek satisfaction of their claims from the trust.[100]

In so doing, the court overruled objections that the plan violated the due process rights of future claimants.[101] The court noted that due process "does not and has never, mandated personal, actual notice" but instead "requires notice 'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[102] The debtor's notice plan "was designed to inform as many future asbestos claimants as possible . . . and give them a voice in these proceedings."[103] In addition, the FCR, who was active in the case, became "the catalyst for, if not the architect of[,]" the plan and was endowed with rights and duties available

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92. *Id.* at 757.

93. *Id.* at 758–59.

94. *Id.* at 758.

95. *Id.*

96. Robinson v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 52 B.R. 940, 942 (S.D.N.Y. 1985).

97. *Id.*

98. *Id.* at 942, 944.

99. *Id.* at 944.

100. The Bogdan Law Firm *ex rel.* Parra v. Marsh USA, Inc. (*In re* Johns-Manville Corp.), 319 F. Supp. 3d 633, 636 (S.D.N.Y. 2018), *rev'd*, 802 F. App'x 20 (2d Cir. 2020).

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

102. *Id.* at 626 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

103. *Id.* (stating that the noticing plan included national television and radio advertisements and newspaper advertisements in six U.S. and Canadian papers and the largest circulated daily paper in each state).

to an official committee.[104] The court chastised the objectors, pointing out that the "impossible version of due process" they requested would effectively destroy—instead of preserve—the rights and remedies of future claimants.[105] The court also noted that it need not determine whether the future claimants held cognizable claims because their claims would not be discharged but instead would be funneled by the injunction to the same trust as the present claims.[106]

b. Later Proceedings Explored Whether the FCR Had Represented Certain Types of Claims Against Manville's Insurers

Manville's litigation experience after reorganizing demonstrates the significant role of an FCR in determining whether a future claimant was accorded due process and the future claim was discharged in bankruptcy. This is evident from the divergent outcomes for the parties in the cases discussed below. On one hand, a non-settling insurer was found not to have been represented by the FCR during the bankruptcy proceeding, and therefore, its claims were not discharged because it did not receive due process. On the other hand, because the FCR represented future asbestos victims, an individual claimant was found to have been accorded due process, and therefore, his claim was found to have been discharged during the bankruptcy proceeding.

The *Manville* settlement trust faced financial trouble soon after it was established. As a result, plaintiffs began to sue Manville's insurers for allegedly independent torts in order to avoid the channeling injunction. The insurers then sought to have the channeling injunction enforced to bar such suits.[107] That litigation led to Manville's principal insurer reaching a settlement in 2003 to pay additional amounts into a separate fund, conditioned on a ruling that the claims were covered by the 1986 Orders.[108] Over the FCR's objection, the bankruptcy court issued that clarification.[109]

A non-settling insurer appealed this decision and sought to preserve its right to pursue contribution and indemnity claims against a settling insurer.[110] On appeal, the Supreme Court held that the 1986 Orders had become final and challenges to them were barred by issue preclusion.[111] The Supreme Court further held that the 1986 Orders channeled even non-derivative claims against insurers that were based on their coverage of Manville, but parties that did not receive due process leading up to the 1986 Orders were not precluded from challenging the bankruptcy court's jurisdiction.[112]

On remand, the Second Circuit concluded that the non-settling insurer's claims were *in personam* and not channeled to the trust.[113] Looking to due process principles applied in class action settlements, the court found the non-settling insurer, Chubb, had not been adequately represented in the 1986 proceedings as the FCR represented asbestos

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104. *Id.* at 626–27.

105. *Id.* at 627.

106. *Id.* at 628.

107. *In re* Johns-Manville Corp., 319 F. Supp. 3d 633, 637 (S.D.N.Y. 2018), *rev'd*, 802 F. App'x 20 (2d Cir. 2020).

108. *Id.* at 636–37.

109. *Id.*

110. *Id.* at 637.

111. *Id.*

112. *Id.*

113. *Id.*

victims and not insurers, and the non-settling insurer had not received adequate notice because it could not have foreseen that the bankruptcy court overstepped its jurisdiction.[114]

In a subsequent case, *The Bogdan Law Firm* ex rel. *Parra v. Marsh USA, Inc.*, an individual claimant sued Manville's primary insurance broker in state court, alleging that the broker knew of the dangers of asbestos and conspired with Manville and others to prevent that information from being disclosed.[115] The broker filed a motion to enforce the 1986 Orders against the individual claimant.[116] The bankruptcy court held the claims were barred, and the district court affirmed but remanded to develop the record as to whether the FCR had provided adequate representation of the claim to satisfy due process.[117] On remand, the bankruptcy court found the FCR had provided adequate representation consistent with due process.[118] In addition, as directed by the district court, the bankruptcy court considered whether denial of due process would have prejudiced the claimant and concluded there would have been no prejudice, because the claimant was able to file a claim with the *Manville* trust.[119]

On a second appeal, the district court disagreed with both of the bankruptcy court's findings on remand. First, the district court held that because the claims brought by the individual claimant were outside of the bankruptcy court's jurisdiction in 1986, the FCR could not have represented them at all, let alone adequately.[120] Second, the district court found that the FCR did not provide adequate representation of the individual's claims because no one believed the bankruptcy could bind future claimants with respect to non-derivative claims against third parties, and the FCR may have advocated differently had he thought he represented such claims.[121]

In the subsequent appeal to the Second Circuit, the parties disagreed whether the claimant had received sufficient due process during the 1986 bankruptcy proceedings to bind him to the 1986 Orders.[122] In issue was whether the FCR had represented all potential *in personam* actions, and not just *in rem* actions, that the future claimants may have had against the settling insurers and insurance brokers.[123]

The Second Circuit noted that, in 1985 and later, the FCR had argued in written pleadings and at hearings that the 1986 Orders should apply only to *in rem* claims.[124] The FCR did so because he believed the bankruptcy court lacked jurisdiction to issue an order channeling *in personam* claims.[125] While the FCR's argument was not ultimately successful, the fact that he had advocated for future claimants with respect to potential *in personam* claims supported the conclusion that the FCR had provided the individual claimant with adequate representation.[126]

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114. *Id.*

115. *Id.*

116. *Id.* at 638.

117. *Id.*

118. *Id.*

119. *Id.* at 642–43.

120. *Id.* at 641–42.

121. *Id.* at 643.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 24.

126. *Id.*

Reversing the district court, the Second Circuit reinstated the bankruptcy court's ruling that the individual's claim against the broker was barred due to the FCR's representation. The Second Circuit concluded that the claimant had received constitutionally sufficient notice based on the circumstances of the *Manville* case.[127] Those circumstances included the appointment of the FCR, as well as a publicity campaign designed to reach as many future asbestos claimants as possible, including through national television, radio, and newspaper advertisements.[128] The Second Circuit declined to opine as to what notice would be required under other circumstances, including if a potential claimant was not represented by an FCR.[129]

2. The *UNR* Bankruptcy Case

UNR Industries, Inc. and certain affiliates (collectively, "UNR"), facing thousands of asbestos-claim lawsuits, filed for bankruptcy protection in 1982.[130] The court recognized that if future claimants were not bound by the bankruptcy orders, the reorganized debtor would be subject to eventual financial devastation caused by future asbestos liabilities, and that any meaningful plan of reorganization therefore needed to account for future claimants. UNR's reorganization plan relied on the same principles as those established in *Manville*: the creation of a trust, the issuance of an injunction prohibiting claimants from suing UNR or the insurers, and the appointment of a legal representative for future asbestos claimants.

a. Early Proceedings Debated the Necessity of an FCR

In an effort to account for future claims, UNR petitioned the bankruptcy court to appoint a representative to participate, on behalf of its unknown future claimants, in the negotiation of a plan to resolve all the asbestos claims against UNR.[131] The district court had declined to appoint a representative on the basis that uninjured persons did not have claims to address in the bankruptcy case.[132] But the Seventh Circuit suggested that such persons may be able to file claims in the bankruptcy case because the bankruptcy court had equitable powers potentially broad enough to provide for future claims in confirming a plan. The Seventh Circuit nonetheless expressed no opinion on whether future claimants could be represented in the case similarly to how they are represented in class actions.[133]

Thirteen months later, no putative future claimants had requested the appointment of an FCR.[134] The debtors filed a motion for reconsideration of the district court's refusal to appoint an FCR, to which the district court responded by authorizing the bankruptcy court to address the motion.[135]

While the Seventh Circuit had left open whether putative future claimants were creditors entitled to assert claims against UNR, the bankruptcy court concluded that the question need not bar the appointment of an FCR for the

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127. *Id.*

128. *Id.*

129. *Id.* at 25.

130. *In re* UNR Indus., Inc., 725 F.2d 1111, 1113 (7th Cir. 1984).

131. *Id.*

132. *Id.* at 1114.

133. *Id.* at 1119.

134. *In re* UNR Indus., Inc., 46 B.R. 671, 674 (Bankr. N.D. Ill. 1985).

135. *Id.*

interests of such claimants.[136] Citing its powers in equity and the flexibility of the Bankruptcy Code, the bankruptcy court agreed with the *Manville* court that future, "[p]utative asbestos disease victims have a stake in the outcome of these proceedings, which entitles them to party-in-interest status."[137] The bankruptcy court found that the circumstances of the case warranted appointment of an FCR because the putative victims were not representing themselves, nor was anyone else, and the proceedings had reached such an advanced stage that an FCR was needed to "act as *amicus curiae* regarding matters of vital and immediate importance to these people."[138]

Seemingly under the belief—shared by the Seventh Circuit—that the putative victims were identifiable, the bankruptcy court delineated the "primary task" of the FCR as "to advise putative asbestos disease victims of the pendency of and their interest in these bankruptcy proceedings."[139] Further, the court directed that the FCR could be heard with respect to any proposed plan of reorganization or a motion to convert the case, must seek leave of court to get involved in any other litigation in the case, but otherwise "shall exercise the powers and responsibilities of an official creditors' committee as set forth in section 1103 of the Bankruptcy Code."[140]

The court stated that its decision to appoint an FCR was intended to remove the economic barrier for putative victims to participate in the case, but it left for another day the question of those victims' larger rights:

> The determination of whether putative asbestos disease victims are creditors of these estates, or whether their interests could be represented in these proceedings in a manner analogous to a class action, or whether these parties would be entitled to vote on a plan of reorganization, or whether their claims might be discharged in this bankruptcy proceeding, are all questions which can properly be addressed after putative asbestos disease victims commence actual participation in these cases.[141]

b. Later Proceedings Defined the Scope of the FCR's Representation

A later decision further refined the scope of the FCR's representation, making it clear that the FCR did not represent individual future claimants.[142] Two persons claiming to be putative asbestos victims filed proofs of claim based on possible future injuries they may develop from asbestos exposure.[143] The debtors objected and asked the court to direct the FCR to represent and assist the two claimants, who were unable to afford counsel.[144] The FCR, the committee of present claimants, and the U.S. Trustee opposed the request.[145]

The *UNR* court observed that, because the case was likely to result in a confirmed plan that would establish a trust to provide payment to future claimants when they became sick, the FCR would not be required to take a position

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136. *Id.*

137. *Id.* at 675.

138. *Id.*

139. *Id.*

140. *Id.* at 675–76.

141. *Id.* at 676.

142. *In re* UNR Indus., Inc., 71 B.R. 467, 472 (Bankr. N.D. Ill. 1987).

143. *Id.* at 469.

144. *Id.*

145. *Id.*

on whether future claimants were creditors.[146] The debtors, however, wanted the question resolved so that the reorganized debtor was protected because future claimants would be bound by the plan's discharge.[147] Thus, the debtors encouraged the two putative claimants to file claims and then objected to such claims.[148]

The FCR argued that his appointment order prohibited him from representing individual claimants, just as a person representing a committee cannot represent another entity in the same case.[149] While the appointment order gave the FCR powers similar to those of a committee, the FCR was not a committee, and his powers and responsibilities were prescribed and could be altered by the court.[150] The court agreed with the FCR, concluding that:

> The Legal Representative represents future claimants, *i.e.*, those people who have been exposed to asbestos, who have not yet shown any signs of asbestos-related disease, but who in fact will eventually suffer asbestos-related disease in the future as a result of their exposure to UNR's product. The reason for this conclusion is clear. It is the future claimants who need the Legal Representative's protection. The putative claimants, *i.e.*, all those who have been exposed to UNR's asbestos but have yet to get sick as a result of that exposure, will only be entitled to damages from UNR if and when they contract an asbestos-related disease. It is hard to see what claim those who were exposed to UNR's product but who never will suffer an asbestos-related injury as a result have against UNR or its assets now or at any time in the future.[151]

While *Manville* and *UNR* cleared the path to appointment of an FCR, much uncertainty remained as to when an FCR was required, what role the FCR should play, and how to define future claimants.[152] The congressional enactment of section 524(g) of the Bankruptcy Code in 1994 sought to provide more certainty to debtors, as well as existing and future claimants, in asbestos bankruptcy cases.

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146. *Id.*

147. *Id.* at 473–74.

148. *Id.*

149. *Id.* at 478.

150. *Id.* at 478–79.

151. *Id.* at 479 (internal citation omitted).

152. *See In re* Amatex Corp., 755 F.2d 1034, 1042–44 (3d Cir. 1985) (finding that regardless of whether future claimants had cognizable claims in the bankruptcy case, "such individuals clearly have a practical stake in the outcome of the proceedings" and were deserving of their own spokesperson); Locks v. U.S. Trustee, 157 B.R. 89, 94 (W.D. Pa. 1993) (finding that current claimant's representative is not proper party to seek FCR appointment); *In re* Eagle-Picher Industries, Inc., 144 B.R. 69 (Bankr. S.D. Ohio 1992) (addressing scope of future claimants).

B. The Enactment of Section 524(g) of the Bankruptcy Code to Expressly Protect Future Claimants in Asbestos Cases

In 1994, Congress codified in section 524(g) of the Bankruptcy Code the model adopted in *Manville* and *UNR* for addressing future claims, confirming the propriety of the structure used in those cases and making it available for other debtors facing asbestos-related liabilities.[153] While section 524(g) is not a panacea, the Third Circuit has described it as "perhaps the best vehicle for addressing" due process rights of future claimants.[154]

1. Section 524(g) Channels Future Claims

Under section 524(g), the court issues an injunction that prohibits actions against certain protected parties for claims or demands[155] that are "to be paid in whole or in part by a trust."[156] The injunction will be "valid and enforceable," and no successor or transferee of the debtor's assets is liable for a claim or demand against the debtor if certain criteria are met. Establishment of the trust is high among those criteria. In addition to meeting other funding requirements, the trust assumes the liabilities of a debtor that has been named as a defendant of personal injury, wrongful death, or property-damage claims based on exposure to asbestos.[157] In issuing the injunction, the court must make certain findings with respect to future demands, voting on the plan, and the proposed payment mechanism.[158] The channeling injunction can "include any right to or demand for payment that arises from the debtor's underlying asbestos liabilities, regardless of when that right or demand arises, whether it was raised during the bankruptcy proceeding or is contingent on a future event."[159]

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153. *See* H.R. REP. NO. 103-835 (1994); *In re* Fairbanks Co., 601 B.R. 831, 837 (Bankr. N.D. Ga. 2019) ("The legislative history of § 524(g) shows that Congress intended § 524(g) to 'offer similar certitude to other asbestos trust-injunction mechanisms that meet the same kind of high standards with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering cases [*Johns-Manville* and *UNR Industries*].'" (quoting H.R. REP. NO. 103-835, at 40 (1994))).

154. *In re* Energy Future Holdings Corp., 949 F.3d 806, 812–13 (3d Cir. 2020). In *In re Energy Future*, where the debtors eschewed using section 524(g) and instead chose to set a bar date that covered latent claims, the Third Circuit Court of Appeals lamented that decision as a "cautionary tale for debtors attempting to circumvent § 524(g)" because of its adverse impact on claimants and substantial use of resources for notice and back-end litigation. *Id.* at 825.

155. What we colloquially call "future claims," the statute defines as "demands," meaning "a demand for payment, present or future, that . . . was not a claim during the proceedings leading to the confirmation" of the plan, arises out of the same conduct or events as the other claims addressed by the injunction, and is to be paid by the trust. *See* 11 U.S.C. § 524(g)(5).

156. 11 U.S.C. § 524(g)(1)(B).

157. 11 U.S.C. § 524(g)(2)(B).

158. *See* 11 U.S.C. § 524(g)(2)(B)(ii) (requiring the consideration of whether (1) the debtor is likely to be subject to substantial future demands for the same conduct or events addressed in the injunction; (2) "the actual amounts, numbers, and timing of such future demands cannot be determined"; (3) pursuit of demands aside from the structure established by the plan threatens the plan's ability to equitably address claims and future demands; (4) the current claimants are in a separate class and vote by at least 75 percent of those voting in favor of the plan; and (5) the trust will have mechanisms that "provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner").

159. *In re* W.R. Grace & Co., 729 F.3d 311, 321 (3d Cir. 2013).

Section 524(g) strives to ensure fair treatment for future claims.[160] As a result, there are two specific requirements to protect future claimants. First, the statute requires appointment of an FCR for the purposes of protecting future claimants' rights.[161] Second, the court must determine that the identification of the debtor and other persons to be protected by the injunction "is fair and equitable" with respect to future claimants in light of the benefits provided by the trust on behalf of the protected persons.[162]

2. Section 524(g) Provides for, but Does Not Delineate, the Role of an FCR

The statute requires the appointment of an FCR but does not delineate how the FCR carries out that role.[163] Nonetheless, the statute provides guidance in that it directs the court to make certain determinations before issuing an injunction under section 524(g).[164]

Section 524(g) expressly contemplates that a trust will be established to pay claims, but for the trust to protect future claimants, there needs to be a level of certainty that it will be a source of compensation for the future claimants.[165] As the future claimants' fiduciary who must be appointed in the proceedings leading to the injunction,[166] the FCR has an inherent role to ensure that there is factual support for the court to make the required determinations and to ensure that the injunction and trust (including its funding) are fair to the future claimants.[167]

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160. *Id.* at 323 ("Congress wanted to cover the whole set, and it did. The distinction, to the extent there is one, between a 'claim' and a 'demand' is therefore unimportant to the scope of the channeling injunction; the relevant question is instead whether an action seeks recovery that stems from the debtor's asbestos-related liabilities. If it does, then it falls somewhere within the broad category of "any claim or demand," and can be subject to a channeling injunction."); *In re* Flintkote Co., 486 B.R. 99, 127 (Bankr. D. Del. 2012) ("Whether referred to as 'future demand holders' or 'future claimants,' the bottom line is that without a channeling injunction in place and an FCR appointed to protect their interests, by the time their injuries manifest there will be a high probability that the debtor will lack funds to provide them with just compensation.").

161. 11 U.S.C. § 524(g)(4)(B)(i).

162. 11 U.S.C. § 524(g)(4)(B)(ii).

163. The statute does not expressly identify a role for the FCR after the injunction issues, but it is common practice for the trust to include an FCR role and for the person who was the FCR in the bankruptcy case to continue in that position post-confirmation. This is fully consistent with the purposes of section 524(g) in that the FCR balances the role of the trust advisory committee, which represents current claimants, in ensuring that the protections approved as part of the bankruptcy case are maintained in a manner that continues to provide the necessary assurances of fair and equitable treatment for future claimants. Section 524(g) also is silent as to the process for appointing an FCR. *See, e.g.*, Vara v. Duro Dyne Nat'l Corp. (*In re* Duro Dyne Nat'l Corp.), 2019 WL 4745879 (D.N.J. Sept. 30, 2019); *In re* Fairbanks Co., 601 B.R. 831, 838 (Bankr. N.D. Ga. 2019).

164. *See supra* note 158 and accompanying text for a description of the findings required to issue an injunction under section 524(g).

165. *See In re* W.R. Grace & Co., 729 F.3d 332, 343 (3d Cir. 2013).

166. An FCR can be appointed to address personal injury claims or property damage claims. *Id.* at 341.

167. *See id.* at 330 ("[O]ne way to evaluate the equities is to consider the amount being contributed to the trust in comparison to the liability exposure of the protected parties"); *In re* Plant Insulation Co., 734 F.3d 900 (9th Cir. 2013), *cert. denied*, 572 U.S. 1062 (2014) ("[B]efore it may issue an injunction under § 524(g), a court must ensure that the remedy [will] be 'fair and equitable' to future asbestos plaintiffs (the parties to be enjoined) when viewed in comparison to the benefits provided by the bankrupt and its insurers (the parties to be benefitted by the injunction)."); *see also In re Fairbanks*, 601 B.R. at 838–39 ("Section 524(g)(4)(B)(ii) requires the Court to determine that a channeling injunction under a plan is 'fair and equitable' with regard to future claimants before confirming it. Because confirmation of a plan and issuance of a channeling injunction depend on compliance with this standard, the terms of both are necessarily a subject of negotiation and litigation in which the FCR must advocate the interests of

To carry out that role, the FCR must conduct appropriate diligence on the debtor's asbestos liabilities, the parties to be protected by the injunction, and the assets available to fund the trust, as well as be involved in the negotiation of the documents that will govern the trust and set forth the mechanisms for how present and future claims will be treated.[168] The FCR has a fiduciary obligation to represent the interests of future claimants, but that duty extends only to legitimate future claimants, whose claims are based on reliable evidence and not on fraudulent evidence or no evidence at all.[169]

Section 524(g) confers upon an FCR the power to veto the issuance of a channeling injunction. Although when read in isolation, section 524(g) does not explicitly provide for this veto power, sections 524(g) and (h), taken together, condition the enforceability of a channeling injunction upon the FCR's consent to the confirmation of any plan that contains such an injunction.[170] Absent the power to block the injunction, the FCR would be assigned the constitutionally mandated task of protecting the due process rights of unknown future claimants but would be denied any authority by which to accomplish this task. Indeed, if future claimants each could somehow have their own vote in an asbestos debtor's bankruptcy proceeding, given their superior numbers in most cases, no plan that imposed a channeling injunction could be approved in the face of their opposition. The FCR, as the proxy for all future claimants in this matter, is similarly empowered.

Congress originally enacted section 524(g) to provide the bankruptcy courts with a mechanism to manage asbestos liability during a reorganization and allow debtors to emerge having addressed potential future claims in a meaningful way. Enactment of section 524(h) also confirmed the propriety of the *Manville* and *UNR* models of reorganization, which relied on an FCR, a channeling injunction, and a settlement trust. This certainty for debtors is important to those companies facing mass tort liability beyond the asbestos context. As described in Section IV, other means to address these kinds of future claims have not provided the same level of certainty.

C. Courts Have Defined the Duties and Scope of the FCR

The role of the FCR has developed over time, and the scope of the role continues to be refined by the courts. While section 524(g) requires the appointment of an FCR "as part of the proceedings leading to issuance of [the]

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future claimants. The 'fair and equitable' statutory language is meaningful only if the FCR is an objective and effective advocate for the unknown claimants whose interests the statute protects. Limiting a court's consideration of the appointment of an FCR to whether the candidate is 'disinterested' and facially qualified ignores the statutory purpose of the FCR, which is to provide an effective advocate for otherwise unrepresented future claimants."); *In re* Pittsburgh Corning Corp., 2013 WL 2299620, at *21 (Bankr. W.D. Pa. May 24, 2013), *aff'd*, Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp., 518 B.R. 307, 314, 327 (W.D. Pa. 2014) ("[T]he FCR [was appointed] to ensure that future claimants were treated fairly and equitably in the process of developing the Plan and related documents.").

168. *See In re Fairbanks*, 601 B.R. at 838–39 ("The essence of due process is the right to participate in judicial proceedings that affect property interests. Because future claimants, by definition, cannot participate in the process of negotiating the terms of the plan, trust, and channeling injunction, they must have a representative."); Order Approving and Authorizing the Appointment of Lawrence Fitzpatrick as the Future Claimants' Representative, Nunc Pro Tunc to July 11, 2013, at ¶ 3, *In re* Rapid-Am. Corp., No. 13-10687 (SMB) (Bankr. D. Del. Sept. 03, 2013), ECF No. 129 ("The Future Claimants' Representative shall have the duty to participate in the confirmation process, act as the spokesperson for Future Claimants, represent the Future Claimants for purpose of binding the Future Claimants to all orders as part of such process and perform the functions of a legal representative for those Future Claimants that might assert Demands against the Debtor or its estate[.]").

169. *Pittsburgh Corning*, 518 B.R. at 327.

170. *See* 11 U.S.C. § 524(g)(4)(B) (providing that validity and enforceability of the injunction against future claimants is subject to subsection (h), which confirms the validity of an injunction entered before section (g) was enacted so long as the legal representative did not object to confirmation of the plan or issuance of the injunction).

injunction," it does not detail how the FCR carries out that role.[171] We will next examine the current precedent clarifying the role of the FCR as an advocate whose authority to bind future claimants is limited.

1. Recent Opinions in Asbestos Cases Have Construed the FCR's Role as an Advocate

In re Fairbanks Co. was the first in a series of rulings where the court focused on the standard applicable to the appointment of an FCR.[172] In the context of a dispute over the process for selecting an FCR, the United States Bankruptcy Court for the District of Georgia discussed the necessary qualifications and qualities of an FCR. The court explained that an FCR "must perform fiduciary-like duties in his or her very special role of negotiating for individuals who will be required to participate in a claim-resolution procedure (the trust via the channeling injunction) that they had no say about."[173] Consequently, an FCR must be "eminently qualified and knowledgeable[,]" as well as "objective, reasonable, and fair" and capable of being a zealous advocate for future claimants.[174] The court linked these qualities to "[c]onsiderations of due process and the statutory provisions of § 524(g)[,]" finding that a court must "examine a proposed future claimants' representative's capabilities beyond qualification and disinterestedness."[175]

The *Fairbanks* court opined that the FCR must be more than "merely a representative" and "do more than merely provide 'adequate' representation."[176] The FCR "must be an advocate because other parties (primarily the present claimants) have adverse interests in the same property. Due process is meaningless if their representative is unwilling to advocate their interests diligently, competently, and loyally."[177] The court described future claimants as "substantially similar to minors or incapacitated adults in that they are incapable of representing themselves."[178] These future claimants have "very real" property rights in the asbestos trust assets that they themselves cannot protect.[179] The court recognized that the FCR "cannot 'bind' a specific future claimant in the usual sense of the word," but because the confirmed plan and channeling injunction will bind those claimants, they require a legal representative.[180] The court determined that the section 524(g) FCR fulfills a role akin to a guardian *ad litem*.[181] Similarly,[182] the Third Circuit requires that an FCR

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171. *See* 11 U.S.C. § 524(g)(4)(B)(i).

172. 601 B.R. 831 (Bankr. N.D. Ga. 2019).

173. *Id.* at 838.

174. *Id.*

175. *Id.* at 838–39.

176. *Id.*

177. *Id.* at 839.

178. *Id.* at 840.

179. *Id.*

180. *Id.*

181. *Id.* at 840–41 ("Just as a guardian ad litem must represent the interests of a ward in litigation determining the ward's rights and duties, an FCR must advocate on behalf of unknown future claimants in the negotiation of the terms of the plan, trust, and channeling injunction and in the confirmation process to protect future claimants' rights and give them the best possible opportunity to recover. In summary, a future claimants' representative effectively undertakes the role of a guardian ad litem.").

182. *In re* Imerys Talc Am., Inc., 38 F.4th 361, 374 (3d Cir. 2022).

"act in accordance with a duty of independence from the debtor and other parties in interest in the bankruptcy, a duty of undivided loyalty to the future claimants, and an ability to be an effective advocate for the best interests of the future claimants."[183]

Other courts that have assessed the role of the FCR often looked to *Manville* and *UNR*. In *In re Duro Dyne National Corp.*,[184] the United States District Court for the District of New Jersey discussed the roles and responsibilities of an FCR, in overruling the U.S. Trustee's objections to the debtor-nominated FCR.[185] While the objections raised to the proposed FCR focused on whether he was capable of being an independent and effective advocate during the bankruptcy case, the district court focused its analysis on the role provided for the FCR post-confirmation in the asbestos trust agreement.[186] The court went on to describe how the FCR's duties, albeit with respect to the section 524(g) trust, were similar to the powers and duties provided for in *Manville* and *UNR*.[187]

2. The FCR's Powers, as Established by the Court, Include Limited Authority to Bind Future Claimants

The court plays a significant role in defining the scope of an FCR's role in any given case. The order appointing an FCR often grants the FCR powers similar to those that a committee holds under section 1103 of the Bankruptcy Code.[188] Indeed, the FCR's role in some respects is to counterbalance that of the committee of current

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183. *Id.*

184. 2019 WL 4745879, at *1 (D.N.J. Sept. 30, 2019).

185. *Id.* at *6.

186. *Id.* at *9 ("[T]he role of the future claimants' representative is to consider the best interests of the future claimants, consult with and advise the trustee on the best course of action, and ultimately consent or object to the Trustee's choices. Should the future claimants' representative object, it is the Trustee who has the upper hand in resolving the dispute. Although the future claimants' representative is an essential role in the asbestos trust, his powers do not permit him to bind absent parties.").

187. *Id.* at *8 ("The proposed Asbestos Trust Agreement provides that the future claimants' representative 'shall serve in a fiduciary capacity, representing the interests of the holders of future Asbestos Claims for the purpose of protecting the rights of such persons.' But the future claimants' representative's power is limited to consulting with the trustee and consenting to certain actions proposed by the trustee; the future claimants' representative may not unilaterally bind absent persons in the way a guardian ad litem might. For example, it is the trustee who may propose changes to the payment percentage or the claims payment ratio, but no changes may be made without the consent of the future claimants' representative and current claimants' committee. Where the trustee must obtain the future claimants' representative's consent, the future claimants' representative does not have the unilateral ability to enact or veto changes. The future claimants' representative is not required to consent to the trustee's proposals, but 'may not withhold his or her consent unreasonably.' If the future claimants' representative does not timely inform the trustee of his consent or objections, his 'consent shall be deemed to have been affirmatively granted.' If the future claimants' representative continues to object and withhold consent, the trustee and future claimants' representative would enter an alternative dispute resolution process, where the burden of proof would be on the future claimants' representative to show that withholding consent was valid.") (Internal record citations omitted).

188. *See, e.g.*, *In re Imerys Talc Am., Inc.*, 38 F.4th at 377–78 (finding the role of an FCR to be analogous to a creditors' committee and stating that the FCR "functions, in effect, as a 'creditors' committee' of one"); *In re Duro Dyne*, 2019 WL 4745879, at *8 ("In *Johns-Manville*, the legal representative for future claimants had powers similar to a committee under 11 U.S.C. § 1103, which are nonbinding but would allow future claimants a 'meaningful opportunity to be heard and to participate.' . . . [T]he legal representative in UNR similarly exercised the powers of a committee under § 1103." (citations omitted)).

claimants.[189] But the FCR's power to bind future claimants is limited. For example, while the FCR represents the future claimants' interest in the bankruptcy case, the future claimants are not bound by the bankruptcy court's jurisdiction, because they have not submitted proofs of claim (and thus have not consented to jurisdiction) or surrendered their rights to a jury trial.[190]

While the FCR typically is provided broad powers to act as required to serve the interests of future claimants, the FCR may need to seek authority from the court to take certain action, such as litigating matters relating to the bankruptcy case. For example, one bankruptcy court found it was appropriate for the FCR, upon obtaining approval from the court, to intervene as a coplaintiff in an avoidance action the asbestos claimants committee had initiated against the debtor's principal stockholder.[191] The court found that nothing in section 524(g), its legislative history, or *Manville* and *UNR* suggested an intent to limit the FCR's role to plan-formation issues—particularly because the facts of each case will dictate the FCR's role, many aspects of the case can be essential to protecting due process, and the court has equitable powers under section 105(a) to shape the FCR's powers.[192] The district court hearing the avoidance action agreed that it was appropriate for the FCR to intervene.[193]

Later cases made clear that an FCR appointed in a section 524(g) case could not be used as an involuntary proxy to bind future claimants in litigation that sidestepped the requirements of the Bankruptcy Code and the Federal Rules of Civil Procedure on class actions.[194] For example, in one bankruptcy case the debtor and related entities tried to use the Declaratory Judgment Act to resolve future asbestos liabilities by making the FCR a defendant.[195] The court observed that the FCR's "function is not clearly established[,]" that section 524(g) provides no direction for the FCR's role in bankruptcy proceedings, and that the term "legal representative" is not used in the Bankruptcy Code outside of that section.[196]

While the court had approved the FCR's role in the avoidance action, due process concerns prevented the debtor and related entities from conscripting the FCR to be a defendant in a non-bankruptcy action to determine liability issues.[197] That was because section 524(g) is a specific framework for addressing mass asbestos liabilities, with "statutory prerequisites [that] are 'specifically tailored to protect the due process rights of future claimants.'"[198] Those prerequisites include appointing an FCR as "one of the many procedural safeguards that protect future claimants, who will be bound by terms of the channeling injunction."[199] The FCR's "[m]ere participation" would not bind future

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189. *See In re* Federal-Mogul Glob., Inc., 684 F.3d 355, 361 n.10 (3d Cir. 2012) ("Although there are usually more representatives of current than future claimants [in the governance of the trust], they possess equal authority and must both consent to substantial modifications of the trust.").

190. *In re* W.R. Grace & Co., 729 F.3d 332, 346 (3d Cir. 2013).

191. *In re* G-I Holdings, Inc., 292 B.R. 804, 806–07 (Bankr. D.N.J. May 8, 2003).

192. *Id.* at 814.

193. *See* Official Committee of Asbestos Claimants of G-I Holding, Inc. v. Heyman, 2003 WL 22790916 (S.D.N.Y. Nov. 25, 2003).

194. *In re* G-I Holdings, Inc., 328 B.R. 691 (D.N.J. 2005).

195. *Id.* at 694.

196. *Id.* at 695.

197. *Id.*

198. *Id.*

199. *Id.* at 696–97.

claimants to the outcome of the declaratory judgment action.[200] The debtor and related entities could not bypass the due process safeguards of both class action Rule 23 and section 524(g), and require the FCR to participate in the action.[201] Moreover, the FCR was not "a guardian ad litem with the power to bind future claimants."[202]

While FCRs do not have unlimited power to bind future claimants, they do play an important role in safeguarding the due process rights of future claimants who will be bound by an injunction that channels their claims to a trust.

III. EFFORTS TO ADDRESS FUTURE CLAIMS WITHOUT AN FCR RESULT IN INCREASED UNCERTAINTY

Debtors facing mass tort liability want to achieve a global settlement of claims with certainty that claimants, current or future, will be curtailed from later pursuing them. Before and after the enactment of section 524(g), debtors have sought global settlements by means other than section 524(g) with poor results. Because future claims are by definition not fully developed, attempts to resolve them with finality and without an FCR face certain due process challenges that leave the door open for claimants still to have recourse on account of future claims.

A. Resolving Claims Through Class Actions

Prior to and early after enactment of section 524(g), companies struggling with asbestos liability attempted to achieve finality through class-action settlements pursuant to Rule 23 of the Federal Rules of Civil Procedure. Class-action settlements provide an opportunity for defendants to resolve mass liabilities without the risk of a class trial.[203] However, a class-action settlement structure that affords absent future class members due process and resolves future claims with finality has remained elusive.[204]

The Supreme Court decisions *Amchem Products, Inc. v. Windsor*[205] and *Ortiz v. Fibreboard Corp.*[206] exemplify the difficulties in structuring a mass tort settlement class action that complies with Rule 23 and provides due process to future claimants. In *Amchem*, the Court affirmed the Third Circuit's decertification of a settlement class that included current and future asbestos-related claimants, holding that the class certification did not comply with Rule 23 because

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200. *Id.* at 697.

201. *Id.*

202 *Id.*; *see In re* Imerys Talc Am., Inc., 38 F.4th 361, 374 n.9 (3d Cir. 2022) (stating that, unlike a guardian *ad litem*, an FCR does not have the ability to bind future claimants). Just as the FCR could not serve as a defendant to bind individual future claimants, the committee also could not bind individual present claimants. *In re* G-I Holdings, Inc., 2008 WL 11513187, at *8–9 (D.N.J. May 30, 2008). Considerations of fairness and due process prohibited the use of non-bankruptcy proceedings to bind present and future claimants by naming the committee and FCR as proxy defendants. *Id.* at *16.

203. *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. U. L. REV. 951, 952 (2014).

204. For a class action to be certified, an individual suing on behalf of all members of a class must satisfy the prerequisites of Rule 23(a) by showing numerosity, commonality, typicality, and adequacy of representation with other class members. *See* FED. R. CIV. P. 23(a); Joseph W. Gelb et al., *Class Action Settlements in the Aftermath of Amchem Products and Ortiz*, 55 BUS. LAW. 1439, 1439–40 (2000). For a class action that seeks monetary damages, the individual must also show that the action is maintainable under Rule 23(b)(1) or (3). *See* FED. R. CIV. P. 23(b); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (recognizing that Rule 23(b)(2) is limited to actions seeking declaratory or injunctive relief).

205. 521 U.S. 591 (1997).

206. 527 U.S. 815 (1999).

the settlement class failed to satisfy the requirement under Rule 23(b)(3) that common issues predominate over individual issues and the prerequisite under Rule 23(a)(4) of adequacy of representation.[207]

The Court dismissed the district court's reliance on class members' exposure to asbestos products supplied by the defendants as being sufficient to satisfy Rule 23(b)(3)'s predominance requirement.[208] The Court made clear that the predominance requirement of Rule 23(b)(3) is "far more demanding" than the commonality requirement in Rule 23(a) and highlighted the many class cohesion issues within the settlement class.[209] Not only did the Court recognize the disparities between current claimants and future claimants, but it also noted the disparities among the future claimants themselves.[210]

The Court also held that the settlement class failed to provide fair and adequate representation for the future claimants in the class as required by Rule 23(a)(4).[211] Rule 23(a)(4) serves to guard against conflicts of interests and requires that a class representative be a member of the class and share the same interests and injury as the class members.[212] The Court recognized that the interests of those in the single class were not aligned.[213] Notably, some of the class members had current injuries with an interest in receiving "generous immediate payments," while the exposure-only plaintiffs with potential future claims had an interest in "an ample, inflation-protected fund for the future."[214] The Court found that there was "no structural assurance of fair and adequate representation for the diverse groups and individuals affected," as each named party represented the entire constituency and not its respective subgroups.[215]

Two years later, in *Ortiz v. Fibreboard Corp.*,[216] on a "limited fund" rationale the Court reversed a decision from the Fifth Circuit affirming certification of a settlement class, which included current and future asbestos claims, under Rule 23(b)(1)(B).[217] A proposed global settlement was negotiated between certain asbestos plaintiffs' attorneys, Fibreboard, and two of Fibreboard's insurers that provided for a fund to be established from contributions from the two insurers and Fibreboard, with almost all of Fibreboard's contribution coming from other insurance proceeds.[218]

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207. *See Amchem Prods.*, 521 U.S. at 628.

208. *See id.* at 623–24. The district court had certified the class under Rule 23(b)(3), which has two prerequisites for certification beyond those required by Rule 23(a): (i) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (ii) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See id.* at 597; FED. R. CIV. P. 23(b)(3).

209. *Amchem Prods.*, 521 U.S. at 624.

210. *See id.* at 624 ("'The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.'") (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 618 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997)).

211. *See Amchem Prods.*, 521 U.S. at 625.

212. *See id.* at 626.

213. *See id.*

214. *See id.*

215. *Id.* at 627.

216. 527 U.S. 815 (1999).

217. *See id.* at 830.

218. *See id.* at 824–25.

To implement the global settlement, certain plaintiffs filed an action seeking certification of a mandatory settlement class under Rule 23(b)(1)(B) based on a limited fund theory.[219] As explained by the Court,

> mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution.[220]

The Court held that the settlement class in *Ortiz* was improperly certified because certification under a limited fund theory requires that the scarcity of funds be the result of more than just the parties' agreement.[221] The Court also took issue with Fibreboard's listing of its entire net worth in the total amount available for claimants, while retaining all but $500,000 of such value for itself.[222] The Court noted that allowing such a class-action settlement could undermine the creditor protections provided by the Bankruptcy Code and further noted that section 524(g) of the Bankruptcy Code provided the ability to channel future asbestos claims.[223]

The Court also found that class certification was not appropriate because the proposed distribution of the fund among the class was not fair.[224] The Court held that the class did not comply with *Amchem*, because the class included holders of present and future claims, whose conflicting interests required division of the class into homogeneous subclasses with separate representation.[225] The Court found that this failure to classify future claimants separately violated the equitable obligations under Rule 23(b)(1)(B) and the prerequisite of adequacy of representation under Rule 23(a)(4).[226] The Court also found that those class members exposed to asbestos prior to the expiration of applicable insurance had more valuable claims and should not have been in the same class as those exposed after such insurance expired.[227]

The uncertainty involved with resolving future mass tort claims in a class-action settlement make it an increasingly untenable option. The viability of resolving mass tort claims through class certification under Rule 23(b)(1) has effectively been eliminated, and it is unclear whether putting future claimants together in a subclass (or multiple subclasses) can ever satisfy Rule 23(b)(3)'s predominance standard. Even if a class-action settlement could be structured to satisfy Rule 23(b)(3), great uncertainty remains about if (and how) the interests of future claimants can be adequately represented and protected in accordance with Rule 23(a) and due process requirements.

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219. *See id.* at 825–27.

220. *Id.* at 841.

221. *See id.* at 821.

222. *See id.* at 859–60.

223. *See id.* at 860 n.34.

224. *See id.* at 855.

225. *See id.* at 856–57.

226. *See id.* While the district court had appointed a guardian *ad litem* to assess the settlement on behalf of future claimants, the court did not address the propriety of such appointment in its opinion. *See id.* at 827.

227. *See id.* at 857.

B. Discharging Claims with a Claims Reinstatement Option

Although there is some precedent for leaving future claimants the option of reinstating their discharged claims against a debtor's estate under Federal Rule of Bankruptcy Procedure 3003(c), such a "solution" provides insufficient recourse.

In *In re Energy Future Holdings Corp.*,[228] the Third Circuit addressed the propriety of claims reinstatement in determining "whether and under what circumstances a bankruptcy debtor's Chapter 11 plan of reorganization may discharge the claims of latent asbestos claimants."[229] While facing asbestos liabilities that cost several million dollars per year, the debtors did not pursue a reorganization under section 524(g).[230] Instead, they pursued a sale structure that was conditioned upon plan confirmation, pursuant to which the buyer proposed to pay all asbestos claims filed by the bar date and leave discharged claims to follow a post-confirmation reinstatement process under Rule 3003(c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").[231]

The Third Circuit affirmed the bankruptcy court's determination that the debtor's plan could discharge latent claims "so long as the claimants receive an opportunity to reinstate their claims after the debtor's reorganization that comports with due process."[232] The Third Circuit found that the process for latent claimants to have their claims reinstated under Bankruptcy Rule 3003(c), while not facially inadequate, nonetheless afforded claimants the opportunity to argue that, under the *Grossman's* factors, permanent discharge would not comply with due process.[233] Despite upholding the process, the Third Circuit expressed its regret that the debtor even asked for a bar date. [234] The court stated that the case "serves as a cautionary tale" to those not following the section 524(g) model because while the process produced a similar result to that afforded by a trust—satisfying claims for those who filed claims or did not receive proper notice—it did so with "added and unnecessary back-end litigation."[235]

C. Barring Claims Through "Free and Clear" Sales Under Section 363 of the Bankruptcy Code

As discussed above, future claims cannot be discharged under a plan of reorganization unless future claimants are afforded due process. Likewise, assets cannot be sold "free and clear," and a purchaser will not be shielded from successor liability for future claims, unless due process is afforded to future claimants.[236] However, it is far from clear whether adequate due process for latent claimants can ever be satisfied in the context of a section 363 sale.

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228. 949 F.3d 806 (3d Cir. 2020).

229. *Id.* at 811.

230. *Id.* at 813.

231. *Id.* at 814.

232. *Id.* at 811.

233. *Id.* at 822–25.

234. *Id.* at 825.

235. *Id.*

236. *See, e.g.*, Schall v. Suzuki Motor of Am., Inc., 2020 WL 1542388, at *6 (W.D. Ky. March 31, 2020) (finding that "a non-debtor plaintiff's successor liability claim against the debtor's asset purchaser is not extinguished by a § 363 sale where the plaintiff did not receive constitutionally adequate notice").

In a section 363 sale, the same issues discussed in Section II above concerning providing notice to known and unknown claimants arise.[237] However, in contrast to chapter 11 reorganization cases, sale cases under section 363, because they are outside of a plan, do not have the stand-alone ability to follow the long-standing section 524(g) model that is premised on a channeling injunction and a trust established through a chapter 11 plan. Therefore, whether due process can be afforded to future claimants in such sale cases even if an FCR is appointed remains uncertain.[238]

IV. EXPANDING THE FCR FRAMEWORK BEYOND ASBESTOS AFFORDS FAIRNESS AND FINALITY IN OTHER MASS TORT CONTEXTS

As discussed *supra*, when a company foresees an ongoing stream of litigation that places its future in jeopardy, bankruptcy provides an opportunity to preserve the company in the long term. However, the reorganizing process is meaningful to companies facing mass tort liabilities only if they can address long-term future claims that will arise after plan confirmation. Thus, due process concerns for future claimants must be addressed. To that end, in several non-asbestos mass tort cases, the courts have approved of plans to follow a structure similar to that of the section 524(g) model, including appointment of an FCR.[239]

Offering twenty-five years of precedent, the section 524(g) model and the appointment of an FCR form the most proven way to address due process concerns for future claimants while providing certainty for reorganized debtors. The expansion of the use of FCRs into other types of mass tort cases, such as those involving environmental, sexual abuse, or opioid claims, reinforces the benefits of this model and suggests that FCRs should be used in additional contexts to account for the significant interests of both future claimants and reorganizing debtors.

A. Personal Injury Claims Based on Environmental Liability

While the future claims of individuals exposed to asbestos are the only mass tort claims that can explicitly be managed under section 524(g), mass tort liabilities resulting from exposure to other substances should follow that model. For companies that utilized potentially toxic chemical substances, the risk that they may cause personal injury is high.[240] Given the uncertainty caused by the often long latency periods between exposure to chemical substances and the

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237. *See In re* Motors Liquidation, 829 F.3d 135, 161 (2d Cir. 2016) (finding that successor liability claims were not barred because sale notice was deficient due to inadequate notice to vehicle owners based on debtor's failure to provide actual notice not just publication notice when the debtor knew or reasonably should have known about the vehicle defect prior to the bankruptcy); *Schall*, 2020 WL 1542388, at *7 (finding that claim was not barred by sale order because claimant had not received adequate notice because no one could have known at the time of the bankruptcy case claimant would ever have a claim); Morgan Olsen L.L.C. v. Frederico (*In re* Grumman Olson Indus. Inc.), 467 B.R. 694, 696–97 (S.D.N.Y. 2012) (same).

238. *See In re Grumman*, 467 B.R. at 711 ("The Court does not decide whether or not there may be circumstances under which a Section 363 sale order could extinguish the claims of future claimants who, because they were not injured before the close of the bankruptcy, had no way to receive notice of the bankruptcy proceedings. And the Court does not reach any conclusion regarding whether use of a future claims representative can always address the due process concerns of unknown future claimants, nor whether use of such a representative would have been possible or appropriate in the bankruptcy proceedings here.").

239. In non-asbestos cases, bankruptcy courts appoint FCRs using their equitable powers. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *In re* Motors Liquidation Co., No. 09-50026 (Bankr. S.D.N.Y. April 8, 2010), ECF No. 5459 (order granting debtors' motion to appoint an FCR pursuant to sections 105 and 1109 to resolve future asbestos claims outside of the section 524(g) framework); *In re* Met-Coil Sys. Corp., No. 03-12676 (Bankr. D. Del. Oct. 20, 2003), ECF No. 206 (order appointing FCR for holders of future personal injury claims based on exposure to trichloroethylene); *In re* CBC Framing, Inc., No. 09-20610 (Bankr. C.D. Cal. Feb. 19, 2010), ECF No. 228 (order appointing FCR for holders of claims not discovered before effective date of framing-contractor debtor's plan).

240. Eric D. Green et al., *Future Claimant Trusts and "Channeling Injunctions" to Resolve Mass Tort Environmental Liability in Bankruptcy: The Met-Coil Model*, 22 EMORY BANKR. DEVS. J. 157, 159 (2007).

manifestation of injury, ongoing and future toxic tort litigation has the potential to create insurmountable financial difficulties for a company.

For example, Met-Coil Systems Corporation spent $18 million before filing bankruptcy defending and paying personal injury lawsuits by residents of a neighborhood it allegedly contaminated with trichloroethylene.[241] Following the model of section 524(g), the Met-Coil bankruptcy case involved the appointment of an FCR, the establishment of a post-confirmation settlement trust to which the future liabilities were funneled under the confirmed plan, and the entry of a channeling injunction pursuant to section 105(a) of the Bankruptcy Code[242] Met-Coil's success with the section 524(g) model demonstrates that the use of an FCR could be beneficial in other cases involving the release of toxic chemicals into the environment.[243]

B. Sexual Abuse Claims

As latency issues featured prominently in asbestos litigation, victims of sexual abuse may also suffer from a delay between when an injury occurred and when the injury manifests because of age or a psychological or cognitive response that represses the injury. The American Counseling Association reports that children make up the majority of sexual abuse victims in the United States.[244] Approximately 28–33% of women and 12–18% of men were victims of childhood sexual abuse.[245] The scope of childhood sexual abuse is difficult to estimate as 73% of children do not report for at least a year, 45% of children do not report for at least five years, and some never report at all.[246] Being a victim of childhood sexual abuse is associated with greater levels of depression, self-blame, guilt, shame, eating disorders, harmful associative patterns, denial, repression, sexual problems, and relationship issues.[247] Some of these injuries may not manifest immediately, and some survivors may repress or dissociate from the abuse, making it difficult to address at the time of the injury.[248] The nature of sexual abuse and the latency period between the injury and its manifestation present issues similar to those posed by liability arising from exposure to asbestos.

An FCR has been appointed in several bankruptcy cases involving the claims of persons who were sexually abused, typically while the claimants were children.[249] For example, in the case involving the Roman Catholic Archdiocese of Portland, Oregon, the Bankruptcy Court for the District of Oregon discussed the role of the FCR in the context of bankruptcies concerning sexual abuse allegedly perpetrated by priests.[250] The FCR, called the Unknown

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241. *Id.* at 157.

242. *Id.* at 158.

243. *Id.* at 181–83.

244. Melissa Hall & Joshua Hall, *The Long-Term Effects of Childhood Sexual Abuse: Counseling Implications* at 2, AM. COUNSELING ASS'N: VISTAS ONLINE (2011), https://www.counseling.org/docs/disaster-and-trauma_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf.

245. *Id.* at 1.

246. *Child Sexual Abuse Facts & Resources*, CHILD'S ASSESSMENT CTR., https://www.cachouston.org/sexual-abuse/child-sexual-abuse-facts/ (last visited July 16, 2020).

247. Hall, *supra* note 244, at 2.

248. *Id.* at 2–4.

249. *See In re* Roman Cath. Archbishop of Portland, 2005 WL 148775, at *1 (Bankr. D. Or. Jan. 10, 2005); Order Appointing James L. Patton, Jr., as Legal Representative for Future Claimants, Nunc Pro Tunc to the Petition Date, *In re* Boy Scouts of Am., C.A. No. 20-10343 (LSS) (Bankr. D. Del. Apr. 24, 2020), ECF No. 486 [hereinafter BSA Appmt. Order].

250. *In re Roman Cath. Archbishop of Portland,* 2005 WL 148775, at *1.

Claims Representative in that case, was appointed to protect the interests of "certain unknown individuals holding claims against debtor who will fail to formally assert those claims by the bar date."[251]

The parties agreed that the FCR's role was to "represent the interest of individuals who are currently minors and whose parent or legal guardian does not file a timely claim (hereinafter 'minors') and those with repressed memory who have no knowledge of the wrongful conduct resulting in their claim against debtor," but they disagreed as to whether the scope of his representation should be broader.[252] The court cited approvingly an earlier chapter 11 case involving the Catholic Diocese of Tucson, in which the Unknown Claims Representative was given wide-ranging duties, including the authority to file a proof of claim on behalf of the class he represents. This class was composed of "those persons who are of adult age whose claims currently exist but who do not realize and will not realize, prior to the April 15, 2005, deadline for filing claims, that they have claims against the estate."[253]

Likewise, the court cited *Manville* approvingly, noting that the approach taken in the Portland and Tucson diocese cases was "consistent with that taken in the 'mass tort' asbestos bankruptcy cases."[254] The court highlighted the "important factual similarity" of a "possibility of a long latency period before which injury becomes manifest" in both the sexual abuse cases and the asbestos cases.[255] As with asbestosis and related diseases, the court noted that "when childhood sexual abuse causes an injury, the injury may not be manifest for many years."[256]

Similarly, in *In re Boy Scouts of America*, another case involving the alleged sexual abuse of minors, the bankruptcy court appointed an FCR under sections 105(a) and 1109(a) of the Bankruptcy Code[257] to represent the interests of future claimants.[258]

While the protections of section 524(g) are not explicitly provided to victims of sexual abuse, the courts have recognized the key role that an FCR can serve in protecting the due process rights of future claimants in these cases. By utilizing an FCR and following the section 524(g) model of a settlement trust and channeling injunction, these debtors are also less likely to face additional litigation after reorganizing. Companies seeking bankruptcy protection in the future to address liabilities arising from sexual abuse should consider the value of having an FCR appointed.

C. Defective Consumer Products

When a widely distributed consumer product is defective, estimating the number and magnitude of claims is subject to great uncertainty, and providing notice to potential claimants is difficult. Depending on the nature of the

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251. *Id.*

252. *Id.*

253. *Id.* at *3 (internal citations omitted).

254. *Id.*

255. *Id.*

256. *Id.*

257. Debtors' Motion for Entry of an Order Appointing James L. Patton, Jr., as Legal Representative for Future Claimants Nunc Pro Tunc to the Petition Date, *In re* Boy Scouts of Am., No. 20-10343 (LSS) (Bankr. D. Del. Feb. 18, 2020), ECF No. 223.

258. BSA Appmt. Order, *supra* note 249, at ¶ 4 (defining, without prejudicing the right of the debtors, the FCR, or the court to seek to modify the definition in conjunction with plan confirmation, future claimants as "individuals holding a claim based on abuse that occurred prior to the Petition Date, but who have not filed a proof of claim by the applicable bar date and who, as of the date immediately preceding the Petition Date: had not attained eighteen (18) years of age, or were not aware of such Abuse Claim as a result of 'repressed memory,' to the extent the concept of repressed memory is recognized by the highest appellate court of the State or territory where the claim arose").

product, there may not be records of ownership, and, even in instances where original ownership may be known, identifying potential claimants can be complicated by the transient nature of consumer products. In such cases, adopting the FCR model can be an effective strategy to achieve a fair and final resolution for future claims.

The Takata bankruptcy provides a good example. [259] Approximately 67 million vehicles with Takata airbags have been recalled because long-term exposure to humidity and heat can cause the air bags to explode when deployed, causing injury and death.[260] As a result, in June 2017, Takata Americas, TK Holdings, Inc., and certain affiliates sought bankruptcy protection due to the enormous cost associated with the airbag safety crisis.[261] During the *Takata* bankruptcy proceedings, the court appointed an FCR with respect to future claims related to certain defective airbag inflator components.[262]

Takata proposed, and the court ultimately confirmed, a chapter 11 plan to effectuate a sale of substantially all of its assets, other than those related to the defective inflator components, and, modeled on section 524(g), to channel to a trust all claims related to the defective components.[263] In support of confirmation of the chapter 11 plan, the FCR submitted a declaration similar in structure to FCR declarations filed in support of section 524(g) plans.[264] The FCR declared that he found the plan to be fair and equitable in its treatment of future claims that would be channeled to the trust, and that the trust's distribution procedures provided reasonable assurance that the trust would value and be able to pay claims, "in a fair, objective, reasonable, and efficient manner."[265]

Takata filed for bankruptcy because of the massive liabilities associated with defective airbags in the present and in the future, and a prospective buyer was not willing to take the risk of future claims. A plan of reorganization with a sale of substantially all the assets would be attractive to a buyer only if it accounted for future claimants that may have Takata airbags in their cars but have not yet suffered injury. An FCR was beneficial in this case, as in other mass tort cases, because the FCR could advocate on behalf of future claimants and ensure that their right to due process was protected while also providing some sense of certainty for the business moving forward. This model would be similarly effective in other mass tort cases.

D. Opioid Claims

From 1999 to 2020, more than 564,000 people in the United States died from drug overdoses involving an opioid.[266] The first wave of the opioid epidemic is considered to have begun in the 1990s with the increased use of

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259. *In re* TK Holdings Inc., No. 17-11375 (BLS) (Bankr. D. Del. June 25, 2017).

260. *Takata Recall Spotlight*, NHTSA, https://www.nhtsa.gov/equipment/takata-recall-spotlight (last visited Oct. 14, 2022).

261. Jethro Mullen, *Takata, Brought Down by Airbag Crisis, Files for Bankruptcy*, CNN BUS. (June 26, 2017), https://money.cnn.com/2017/06/25/news/companies/takata-bankruptcy/index.html.

262. *See In re* TK Holdings Inc., No. 17-11375 (BLS), 2018 WL 1306271, at *6 (Bankr. D. Del. Mar. 13, 2018); Order Appointing Roger Frankel as Legal Representative for Future Personal Injury Claimants Nunc Pro Tunc to July 20, 2017, *In re* TK Holdings Inc., No. 17-11375 (BLS), 2018 WL 1306271 (Bankr. D. Del. Mar. 13, 2018), ECF No. 703.

263. *See In re* TK Holdings Inc., No. 17-11375 (BLS), 2018 WL 1306271 (Bankr. D. Del. Mar. 13, 2018).

264. *See* Declaration of Roger Frankel, the Future Claimants' Representative, in Support of Confirmation of the Fourth Amended Joint Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *In re* TK Holdings Inc., No. 17-11375 (BLS) (Bankr. D. Del. Feb. 14, 2018), ECF No. 2067.

265. *Id.*

266. *Opioid Data Analysis and Resources*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/opioids/data/analysis-resources.html (last reviewed Aug. 8, 2023).

prescribed opioids for pain management.[267] Gradually, the nature of the opioid epidemic has changed over the years to a reliance on heroin and other synthetic opioids.[268] As of 2019, more than 30 states and almost 1,500 counties and cities have filed civil suits against pharmaceutical companies, manufacturers, pharmacies, and wholesalers for their role in the opioid crisis.[269] Experts believe these lawsuits are likely to lead to marketing restrictions for the drugs and the largest settlement since "Big Tobacco" paid out $250 billion in 1998.[270]

Facing the growing liabilities for opioid misuse, opioid manufacturers have sought to reorganize under the Bankruptcy Code. While two prior bankruptcies filed by opioid manufacturers did not entail the appointment of an FCR or a broad scheme for addressing future claimants (other than for certain claims of minor children), a third bankruptcy case did.[271]

In that case, the debtors sought and obtained the appointment of an FCR.[272] The debtors initially moved for the appointment of an FCR shortly after the petition date but faced objections from creditors' groups representing opioid personal injury victims on the basis that the appointment of an FCR was unnecessary or inappropriate for the opioid claims. Those groups suggested that future claims (as well as present claims) should be addressed as part of the process of establishing a claims bar date.[273]

The debtors argued that appointment of an FCR is appropriate if *any* future claimants exist, to ensure an effective discharge of all opioid claims.[274] Further, the debtors distinguished their case from the opioid cases that had not retained FCRs.[275] Based upon the months-long supply chain for the debtors' products reaching the market and years-

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267. *Id.*

268. *Id.*

269. Erin Quinn-Kong, *An Introduction to Opioid Litigation*, JURIST (Feb. 4, 2019), https://www.jurist.org/commentary/2019/02/an-introduction-to-the-opioid-litigation/.

270. *Id.*

271. *See In re* Insys Therapeutics, Inc., No. 19-11292 (KG) (Bankr. D. Del. June 10, 2019); *In re* Purdue Pharma L.P., No. 19-23649 (RDD) (Bankr. S.D.N.Y. Sept. 15–16, 2019).

272. Order Appointing Roger Frankel, as Legal Representative for Future Opioid Personal Injury Claimants, Effective as of the Petition Date, *In re* Mallinckrodt PLC, No. 20-12522 (JTD) (Bankr. D. Del. June 11, 2021), ECF No. 2813 [hereinafter MNK Final Appt. Order].

273. Motion of Debtors for Entry of an Order Appointing Roger Frankel, as Legal Representative for Future Claimants, Effective as of the Petition Date, *In re* Mallinckrodt (Bankr. D. Del. Oct. 13, 2020), ECF No. 189; Objection of Ad Hoc Group of Personal Injury Victims to Motion of Debtors for Entry of an Order Appointing Roger Frankel, as Legal Representative for Future Claimants, Effective as of the Petition Date, *In re Mallinckrodt* (Bankr. D. Del. Nov. 28, 2020), ECF No. 657; The Official Committee of Opioid Related Claimants' (I) Request for Adjournment of or, in the Alternative, Objection to Motion of Debtors to Appoint Future Claimants Representative and (II) Cross-Motion to Compel Debtors to Establish Bar Date and Noticing Program for Opioid Claimants *In re Mallinckrodt* (Bankr. D. Del. Nov. 28, 2020), ECF No. 658; The Ad Hoc Committee of NAS Children's Objection and Joinder to the Official Committee of Opioid Related Claimants' (I) Request for Adjournment of or, in the Alternative, Objection to Motion of Debtors to Appoint Future Claimants Representative and (II) Cross-Motion to Compel Debtors to Establish Bar Date and Noticing Program for Opioid Claimants, *In re Mallinckrodt* (Bankr. D. Del. Nov. 28, 2020), ECF No. 659.

274. Debtors' Omnibus Reply in Support of Motion of Debtors for Entry of an Order Appointing Roger Frankel, as Legal Representative for Future Claimants, Effective as of the Petition Date, *In re Mallinckrodt* (Bankr. D. Del. Dec. 7, 2020), ECF No. 744.

275. *Id.*

long shelf-life, the debtors asserted that "it is entirely unknown when thereafter the product may be ingested, or may be alleged to cause harm."[276]

In further support of the appointment of an FCR, the non-tort creditors' committee agreed that having "[a]n FCR provides the greatest degree of certainty that opioid claims in these bankruptcy cases will be resolved through the chapter 11 process."[277] While the committee qualified its support for the appointment of an FCR by maintaining that a bar date process could also be effective, it nevertheless stated that leaving the door open for future claims to challenge the plan based on ineffective due process would harm the unsecured creditors by depressing the reorganized debtors' enterprise value and increasing costs.[278]

The court granted the debtors' motion and appointed an FCR. In the final appointment order, the court delineated the FCR's role as being "to protect the rights of a Future Opioid PI Claimant which is a holder of either a Future Opioid PI Claim or a PI Opioid Demand as such terms (and any related terms) shall be defined in the confirmed plan of reorganization, with the reasonable consent of the Debtors, the Future Claims Representative," and certain other parties involved in plan negotiations.[279] The order also provided the FCR with standing as a party in interest, powers and duties similar to those of a committee to the extent appropriate for an FCR, the right to receive notice, the authority to engage professionals, and the ability to seek compensation.[280]

Notably, the order expressly stated that it was not addressing any allocations or procedures for a trust to be established under a proposed plan of reorganization.[281] Likewise, the order made no determination, and did not constitute an admission by any party, that any Future Opioid PI Claimants or Future Opioid PI Claims even existed in the case.[282]

While issues related to future claimants in the context of opioid cases are evolving, *Mallinckrodt* demonstrates that the unique facts and circumstances of a case might warrant the appointment of an FCR and, further, that courts and participating parties have great flexibility in delineating the parameters of the FCR role and its impact on the case.[283]

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276. Declaration of Stephen A. Welch in Support of Motion of Debtors for Entry of an Order Appointing Roger Frankel, as Legal Representative for Future Claimants, Effective as of the Petition Date at 3–4, *In re Mallinckrodt* (Bankr. D. Del. Dec. 7, 2020), ECF No. 745.

277. MNK Final Appt. Order, *supra* note 272.

278. *Id.*

279. MNK Final Appt. Order, *supra* note 272, at ¶ 4. The court previously appointed the FCR on a provisional basis. *See* Order Provisionally Appointing Roger Frankel as Legal Representative for Future Claimants, *In re Mallinckrodt* (Bankr. D. Del. Mar. 1, 2021), ECF No. 1747.

280. MNK Final Appt. Order, *supra* note 272, at ¶ 5(a).

281. *Id.* ¶ 7.

282. *Id.* ¶ 8. The definition of Future Opioid PI Claims was resolved as part of plan confirmation. *See* Findings of Fact, Conclusions of Law, and Order Confirming Fourth Am. Joint Plan of Reorganization (with Technical Modifications) of Mallinckrodt PLC and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code, *In re Mallinckrodt* (Bankr. D. Del. Mar. 2, 2022), ECF No. 6660.

283. The record for using a model similar to that of section 524(g) is also evolving as to the appropriate scope of non-debtor third parties eligible for protection by a channeling injunction or other non-consensual release of liability.

This issue recently came to a head in *Purdue Pharma,* where the bankruptcy court confirmed the debtors' reorganization plan that included non-consensual releases of certain non-debtors, including Sackler family members named as defendants in thousands of opioid litigation suits, in exchange for a $4.3 billion plan contribution. *See* Findings of Fact, Conclusions of Law, and Order Confirming the Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, at ¶ II, *In re Purdue Pharma L.P.,* No. 19-23649 (Bankr. S.D.N.Y. Sept. 17, 2023), ECF No. 3787. In vacating the confirmation order on appeal to the district court, Judge Colleen J. McMahon concluded that while the bankruptcy court had subject-matter

V. CONCLUSION

While there is no perfect solution for the issues posed by mass torts and future claims arising from latent injuries, the section 524(g) framework, with the appointment of an FCR, is a superior option, which provides the best possible balance between the competing bankruptcy policies of ensuring a fresh start for the debtor and fair treatment for creditors. Future claimants raise significant due process concerns for debtors attempting to discharge their claims through plan confirmation or a section 363 sale.

The *Manville* and *UNR* model was adopted by Congress as the mechanism for dealing with asbestos liabilities in bankruptcy in section 524(g). Because numerous companies have used section 524(g) to reorganize, there are more than twenty-five years of precedent to provide insight into the role and duties of an effective FCR. The FCR must be an advocate for future claimants to protect their due process rights, but a debtor seeking to discharge future claims during the bankruptcy process also benefits from the participation of an effective FCR. Appointing an FCR and following the section 524(g) model, even for debtors not facing asbestos liability, forms the only confirmed path to address due process for future claimants. This model should be considered in more mass tort contexts moving forward as it provides long-term recovery options for future claimants and greater certainty for debtors seeking finality in a reorganization.

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jurisdiction to address the release of claims against non-debtor third parties, it lacked statutory authority to approve a plan that non-consensually provided for such a release. *See In re Purdue Pharma L.P.,* 2021 WL 5979108, at *38 (S.D.N.Y. Dec. 16, 2021). However, the Second Circuit reversed Judge McMahon's decision on further appeal, holding that the Bankruptcy Code does permit such releases under sections 105(a) and 1123(b)(6) upon certain factual findings and satisfying certain equitable concerns. *See In re* Purdue Pharma L.P., 69 F. 4th 45, 68–69, 75–78 (2d Cir. 2023). That decision is now stayed pending oral argument after the Supreme Court granted certiorari to consider the following question: "Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent." See Harrington v. Purdue Pharma L.P., 2023 WL 5116031 (mem) (U.S. Aug. 10, 2023).

We further note that in a bankruptcy case not involving mass-tort liabilities, a Virginia district court cited Judge McMahon's decision in *Purdue Pharma* when it vacated the plan-confirmation order of Mahwah Bergen Retail Group, Inc. (f/k/a Ascena Retail Group, Inc.) and its debtor affiliates because the order contained "shocking[ly]" broad non-debtor releases. *Patterson v. Mahwah Bergen Retail Grp.,* 636 B.R. 641, 655 (E.D. Va. 2022) (E.D. Va. 2022). To ensure that such releases are appropriate and constitutional, the court suggested that a bankruptcy court should issue a report and recommendation to the district court—a process not unlike what section 524(g) prescribes for an effective injunction. *Id.* at 676; 11 U.S.C. § 524(g)(3)(A) (providing that a channeling injunction is valid and enforceable if the order confirming a plan "was issued or affirmed by the district court").

Purdue Pharma, or perhaps some progeny of *Ascena,* likely will carve the next landmark in the landscape regarding the scope of third-party claims that can be released in non-524(g) cases.