MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: SUGGESTION FOR NEW RULE REQUIRING QUARTERLY REPORTING OF INFORMATION BY § 524(g) TRUSTS

DATE: SEPTEMBER 19, 2011

Currently pending before the Advisory Committee is the suggestion (10-BK-H) by the U.S. Chamber of Commerce's Institute for Legal Reform ("ILR") to amend the Bankruptcy Rules to require "greater transparency in the operation of trusts established under 11 U.S.C. § 524(g)." ILR's proposal would add a new Rule 4009 mandating the filing of quarterly reports that describe "each demand for payment the trust received during the reporting period, including exposure history, as well as each amount paid for demands during the report period." The proposal would also require each trust to provide information regarding demands for payment presented by claimants if relevant to litigation in any state or federal court. ILR stated that claimants may be making demands to asbestos trusts that are inaccurate or inconsistent with similar claims brought in the tort system, thereby seeking overcompensation and depleting trusts to the detriment of future trust claimants.

ILR's suggestion was referred to the Business Subcommittee, which recognized that the suggestion addressed an important matter that deserved serious study. The Subcommittee's preliminary evaluation raised three questions: first, whether the proposed new rule would exceed the Supreme Court's rulemaking power under the Bankruptcy Rules Enabling Act; second, whether implementation of the proposed rule would exceed the scope of bankruptcy jurisdiction;

and third, whether there was a bankruptcy need for reporting of the information sought by ILR. The Subcommittee recommended further consideration of the issues raised by these questions. In response, the Advisory Committee decided at its spring meeting this year to seek the views of a variety of knowledgeable groups and interested parties.

The chair of the Advisory Committee accordingly directed requests for comment to the following: (i) ILR; (ii) a group of approximately two dozen lawyers who appear as trust counsel on the list of § 524(g) trusts compiled in a 2010 RAND Corporation report on the subject[1]; (iii) the president of the American Bankruptcy Institute ("ABI"); (iv) the chair of the Business Bankruptcy Committee of the American Bar Association ("ABA"); and (v) the chair and vice-chair of the National Bankruptcy Conference ("NBC"). With the exception of the request to ILR, which was sent by mail, the requests were sent electronically. Each request included a March 10, 2011, memorandum from the Business Subcommittee (the "March Subcommittee Memorandum") that discussed the three areas of questions raised by the Subcommittee's preliminary evaluation. Also attached were copies of correspondence between the Advisory Committee's chair and Representative Lamar Smith, chair of the House Judiciary Committee. That correspondence explained the Advisory Committee's deliberations to date and its decision to seek the views of interested parties on ILR's proposal.

This memorandum first summarizes the responses received to the Advisory Committee's inquiries. Next, it discusses the considerations weighed during the Subcommittee's subsequent deliberations. Finally, it explains why the Subcommittee recommends against moving forward with ILR's suggestion.

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[1] LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS (2010).

Overview of Responses

The Subcommittee received responses from the following:

- ILR
- A group of thirteen asbestos trusts[2]
- DII Industries, LLC Asbestos PI Trust
- Eagle-Picher Industries, Inc. Personal Injury Settlement Trust
- Fuller-Austin Asbestos Settlement Trust
- NGC Bodily Injury Trust
- Frances Gecker, on behalf of Frank/Gecker LLP[3]
- A group of legal representatives for future asbestos personal injury claimants[4]
- Geoffrey L. Berman (president of the ABI)

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[2] The group comprises ACandS Asbestos Settlement Trust, ASARCO LLC Asbestos Personal Injury Settlement Trust, Armstrong World Industries Asbestos Personal Injury Settlement Trust, Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust, Celotex Asbestos Settlement Trust, Combustion Engineering 524(g) Asbestos PI Trust, Congoleum Plan Trust, Federal-Mogul Asbestos Personal Injury Trust, Lummus 524(g) Asbestos Personal Injury Trust, Owens Corning/Fibreboard Asbestos Personal Injury Trust, Plibrico 524(g) Trust, T. H. Agriculture and Nutrition LLC Asbestos Personal Injury Trust, and United States Gypsum Asbestos Personal Injury Settlement Trust.

[3] The firm is counsel to five active asbestos trusts: Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust, G-I Holdings Inc. Asbestos Personal Injury Trust, ARTRA 524(g) Asbestos Trust, Burns and Roe Asbestos Personal Injury Settlement Trust, and Leslie Controls, Inc. Asbestos Personal Injury Settlement Trust.

[4] The group comprises the following: Michael J. Crames, Davis Polk & Wardwell (Owens Corning/Fibreboard Asbestos Personal Injury Trust); Lawrence Fitzpatrick (ACandS Asbestos Settlement Trust); Eric D. Green (Babcock & Wilcox Company Asbestos PI Trust, DII Industries, LLC Asbestos PI Trust, Federal-Mogul Asbestos Personal Injury Trust, and Fuller-Austin Asbestos Settlement Trust); Joel Helmrich, Dinsmore & Shohl (Hercules Chemical Company, Inc. Asbestos Settlement Trust); Martin J. Murphy, Davis & Young (Kaiser Aluminum & Chemical Corporation); James L. Patton, Jr., Young Conaway Stargatt & Taylor, LLP (Celotex Asbestos Settlement Trust, Leslie Controls, Inc. Asbestos Personal Injury Trust); Walter J. Taggart (Pacor Settlement Trust, United States Mineral Products Company Asbestos Personal Injury Settlement Trust); Dean M. Trafelet (Armstrong World Industries Asbestos Trust, Plibrico Asbestos Trust, MLC Asbestos PI Trust, and United States Gypsum Asbestos Personal Injury Settlement Trust); Jerrold G. Weinberg, Weinberg & Stein (C. E. Thurston & Sons Asbestos Trust).

Although no request for comments was explicitly directed to the future claims representatives who submitted this response, presumably they were made aware of the Advisory Committee's inquiries by trust counsel for their respective trusts.

- Michael St. Patrick Baxter and Patricia Redmond (immediate past chair and chair, respectively, of the ABA Business Bankruptcy Committee)
- The NBC

Most of the comments received opposed the suggested amendment. ILR reiterated its support for the suggested amendment, and the ABA Business Bankruptcy Committee's response also supported the suggested amendment, albeit with changes. The NBC recommended against adopting the amendment, but also offered a substantially different alternative proposal. The other comments unqualifiedly opposed ILR's proposal. These comments generally reiterated the concerns raised in the March Subcommittee Memorandum about rulemaking authority, bankruptcy jurisdiction, and the lack of a bankruptcy-specific need for the suggested rule. In addition to providing greater detail about the current reporting practices of various trusts, several comments expressed concern that ILR's proposal would impose a costly administrative burden on the trusts that might benefit third parties in the tort system but do so to the detriment of future trust claimants. The adverse comments also contested the assertion that fraud or abuse in connection with asbestos trust claims is widespread. The future claims representatives in particular asserted that they serve the role of non-partisan fiduciaries, effectively assuring that trusts do not pay frivolous or fraudulent claims.

A summary of each of the comments received follows.

Summary of Responses

1. Lisa Rickard, President, on behalf of ILR

ILR reiterated its concern that trust operating practices are contrary to congressional intent, invite fraud, and may undermine payment of future claims. ILR gave the following answers to the Advisory Committee's questions.

(1) The proposal falls within the Supreme Court's rulemaking authority. The proposed amendment would not abridge, enlarge, or modify any substantive right. It would not act outside the contours of a bankruptcy case.

(2) The rule would not exceed bankruptcy jurisdiction. It would apply to entities created through the bankruptcy process and over which bankruptcy courts retain post-confirmation jurisdiction. Post-confirmation jurisdiction is appropriate because the rule would require disclosure of information on the implementation, execution, and administration of confirmed plans.

(3) The proposal serves the bankruptcy need to detect and deter fraud undermining the purpose of § 524(g). Tort cases in which trust filings have been disclosed through discovery suggest claimants present contradictory exposure information to different trusts. *See Kananian v. Lorillard Tobacco Co.* (Ohio Cuyahoga County Comm. Pl. Jan. 18, 2007). Bankruptcy courts have an interest in ensuring that improper claims are not paid. Although the Subcommittee questioned bankruptcy judges' ability to compare trust reports across multiple jurisdictions, a large community of interested parties would do so. Public accountability deters fraud. Exposure information would have medical and occupational health applications. Claims information would allow better modeling of future claims projections during the creation of new asbestos trusts. Future claimants will benefit if fraud and abuse are deterred.

2. A group of thirteen asbestos trusts (ACandS Asbestos Settlement Trust et al.)

The trusts opposed ILR's proposal, making the following points.

The proposal would shift litigation costs to asbestos victims and asbestos trusts. There is no bankruptcy justification for requiring additional post-confirmation reporting by trusts.

Discovery in non-bankruptcy cases is not a bankruptcy issue and is not properly addressed by the Bankruptcy Rules. Discovery in state courts is entirely beyond the bankruptcy power.

The proposal would exceed the scope of bankruptcy rulemaking and fall outside bankruptcy jurisdiction. ILR's proposal would operate only after a plan is confirmed. It would purport to govern discovery in non-bankruptcy cases, including state court cases, in violation of principles of federalism, and so it could be unconstitutional.

Current reporting requirements for trusts are not mandated by § 524(g) but are included in plans and trust documents to ensure the trusts qualify as settlement funds for tax purposes. Although the plans could require more detailed reports, post-confirmation reporting requirements affect substantive rights of trusts, settlors, and beneficiaries.

The provision in ILR's proposal for third-party discovery requests also exceeds rulemaking authority by purporting to govern discovery in non-bankruptcy cases. ILR contends that "mere disclosure of information" does not affect substantive rights. But these are matters of substantive law and not a proper subject of procedural rules. Even if they were procedural, they would not be a proper subject of a rule of bankruptcy procedure.

The proposal is not necessary and not good policy. Disclosing details of claims and payments will not help trusts better manage their assets. A bankruptcy court would not need the information. Its only purpose is for use in non-bankruptcy tort litigation. ILR's argument that there is a presumption of public access to information "filed in a bankruptcy case" is pretextual. A trust does not exist until a plan is confirmed at the end of a bankruptcy case. Claims filed with a trust are more akin to settlement demands in a tort case.

There is no evidence supporting ILR's assertion that duplicate or inaccurate demands are paid. The only case cited by ILR was an isolated incident involving inconsistent trust claims by

a single claimant. Trustees are fiduciaries who manage a trust solely in the best interest of beneficiaries. It is illogical for ILR to suggest that trusts overpay, and it implies that trustees are derelict in their duties. The vast majority of asbestos claims settle and are not tried to verdict. Thus, the total amount of a claim is never fixed. Even if a trust knew amounts paid in settlement by other trusts, it would not be possible to determine whether a claimant has obtained full recovery for injuries.

The proposal is an attempt to circumvent existing discovery rules. It would shift costs from tort defendants to trusts. Any data a trust has about a claimant's exposure and claims can be acquired directly through discovery from the claimant if the claimant sues a defendant in tort.

Settlement values are confidential. Solvent asbestos defendants themselves insist that settlements they reach with asbestos plaintiffs remain confidential. Courts have refused to compel discovery of settlement information, except when a claim is tried to a verdict. The proposed rule would treat trusts less favorably than solvent tortfeasors. There is no reason for this different treatment.

The proposal would not protect trust assets for future claimants. It would put upward pressure on settlement values and increase administrative expenses. Other claimants will gain insights into how trusts value claims and elect to pursue an individual review process rather than an expedited review process. That may lead to higher settlement amounts and increased costs.

3. Gregg McHugh, General Counsel, on behalf of DII Industries, LLC Asbestos PI Trust

The trust opposed ILR's proposal and expressed doubt about the rulemaking authority and bankruptcy jurisdiction needed to support the proposal.

In addition, the trust contended that the proposed rule is unnecessary because the problems asserted by ILR do not exist. Future claims representatives, trustees, and trust advisory committees use vigorous claim review procedures. Reviews, re-reviews, and audits belie the suggestion of fraud. Information sought by the proposal is generally not discoverable under bankruptcy court orders requiring the trust's establishment and under state law. The trust produces that information with a claimant's authorization or in response to a subpoena.

4. Christopher K. Kiplok, Hughes Hubbard & Reed LLP, on behalf of Eagle-Picher Industries, Inc. Personal Injury Settlement Trust

The trust opposed the proposal for four reasons.

First, there is no need for the rule in light of existing public reporting and responses to subpoenas by the trust. The trust has processed more than 574,000 claims and distributed more than $650 million to 350,777 claimants. Total assets available for beneficiaries actually increased by about $200 million over the life of the Trust, contrary to assertions by ILR. No Eagle-Picher claim has returned to the tort system.

The trust submits to the bankruptcy court a publicly available annual report and account, subject to court approval after notice and a hearing. The report includes a description of trust management and material events, audited financial statements, and a summary of claim numbers and types during the reporting period. It also includes substantial aggregate claimant information, such as data, among others, on assets distributed for valid claims, claims disallowance rates, the percentage of assets paid to claimants with malignant diseases, and claimants pursuing alternative dispute resolution. No objection has been made to these disclosures in the trust's fifteen years.

In response to subpoenas, the trust produces the claim form and claim status after notifying the claimant and charging a transaction fee. The trust has received 2,672 subpoenas in the past five years. In only two instances has a third party sought claimant-specific settlement information of the kind contemplated by the proposed rule (both were resolved without disclosure). The trust knows of no rule in any jurisdiction requiring similar disclosures.

Second, the proposal violates beneficiary confidentiality. The trust has a policy of not disclosing confidential medical and settlement information, consistent with state and federal law, trust documents, and electronic filing agreements by which claimants submit information. Because settlements are directly linked to claimant medical condition, disclosure of claimants' names and settlement amounts is equivalent to disclosure of their medical condition.

Third, the proposal would not assist the trust in processing claims. The trust has stringent exposure requirements. Claimants must submit evidence of exposure to Eagle-Picher asbestos products under penalty of perjury. The trust compares assertions of exposure against known location, time, product, occupation, and other data. The fact that a claimant may have been exposed to another manufacturer's asbestos product or paid by another trust is not meaningful. Victims of asbestos disease were often exposed to asbestos from multiple manufacturers. The trust's experience does not support ILR's assertion that claimants delay filing claims, because the trust applies applicable statutes of limitations to all claims.

Fourth, the proposal would undermine, not advance, § 524(g)'s mandate of similar treatment of similar claims over time It would introduce a new cost to the trust and deplete assets available for current and future beneficiaries. Imposing a new cost would have a greater impact on current and future claimants than on prior claimants.

5. NGC Bodily Injury Trust

In addition to the concerns raised by the March Subcommittee Memorandum, the trust opposed the proposal, giving the following reasons.

(1) The proposal abridges the substantive rights of the trust and its beneficiaries. Under Code §§ 1141(a) and 1142(a), the terms of a confirmed plan are binding on parties in interest, including any entity acquiring property under the plan and any creditor. Because the trust acquired property under and was organized for the purpose of carrying out the plan, it is bound by the plan and confirmation order. The plan confirmation order specifically requires the trust to keep all claim submissions confidential, and it directs that they "shall not be admissible or discoverable" in other court proceedings. Confidentiality encourages open settlement discussions. Approximately 300,000 claimants have relied on these confidentiality and nondiscoverability provisions. That privacy interest is a substantive right of both the claimants and the trust.

(2) The proposal violates the Bankruptcy Rules Enabling Act because it does not affect the practice and procedure in cases under title 11. It is instead designed to further discovery principally by other asbestos defendants in the tort system.

(3) The proposal violates Code § 1127(b). The proposed rule would effectively modify the plan, which § 1127(b) permits to be done only by the plan proponent or reorganized debtor. Courts have uniformly held that § 1127(b) bars modification after substantial consummation, and that occurred eight years ago with respect to the NGC trust.

(4) The proposal is contrary to congressional policy expressed in § 524(g). The statute requires that trusts provide reasonable assurances that they will be in a financial position to pay present and future claims. § 524(g)(2)(B)(ii)(V). The proposal would impose a significant cost

and time burden and detract from the trusts' congressionally mandated mission. The NGC trust pays 41% of the allowed liquidated value of each claim. Every dollar diverted to responding to discovery requests reduces funds available for compensation.

(5) The proposal is also contrary to congressional policy with respect to protecting individuals' medical information. The Health Insurance Portability and Accountability Act ("HIPA"), although not binding on the trust, articulates congressional policy to protect the privacy of personal health information. Even though the proposed Rule 4009 states that the information reported "shall not include confidential medical records," revealing the amount paid to individual claimants or the factual basis for those claims would necessarily reveal personally identifiable health information in violation of HIPA. The majority of claimants seek expedited review, which assigns baseline allowed liquidated values for various disease categories. Those values are public information. Disclosure of amounts paid to a claimant would reveal the disease of that claimant by simple mathematics.

(6) The proposal is an attempt to give asbestos co-defendants access to settlement information that is almost always unavailable under otherwise applicable non-bankruptcy law. The vast majority of states do not allow settlement information to be disclosed for allocation purposes unless the claimant has obtained a jury verdict establishing the amount of damages. Two bankruptcy judges in pending chapter 11 asbestos cases (*Garlock Sealing Technologies, LLC*, and *Specialty Products Holding Corp.*) recently denied attempts by the debtors to obtain settlement information from law firms and asbestos trusts. Those unsuccessful attempts forced the trust to expend precious resources. The proposed rule would do the same.

6. Fuller-Austin Asbestos Settlement Trust

The trust opposed the proposal. The trust was one of the trusts named in the *Specialty Products Holding Corp.* asbestos bankruptcy, in which the debtor attempted to serve discovery seeking claims information from asbestos settlement trusts. The trust endorsed the positions taken by NGC trust.

7. Frances Gecker, on behalf of Frank/Gecker LLP

The firm stated the following points in opposition to ILR's suggestion.

The Rules Committee should consider how asbestos trusts prevent payment of duplicate, inaccurate, or false claims, and how courts and trusts facilitate transfer of information to defendants in tort and insurance actions under current practices. Trusts report information according to written trust agreements. Trusts file annual reports with financial statements accompanied by auditors' opinions. The reports include a summary of the number, type, and amount of claims paid during the period.

Trusts operate under written trust distribution procedures. These require the trusts to perform an annual audit of claims paid to determine whether any should not have been paid. Trusts keep a list of doctors whose diagnoses are unreliable; trusts will not pay claims that rely on those doctors' diagnoses.

Trusts observe their fiduciary obligations to claimants, including the duty to maintain confidentiality of submissions. This is explicitly required under the trust distribution procedures except at a claimant's request or in response to a valid subpoena. None of the trusts the firm represents has been ordered to produce claimant information to defendants in tort actions. The trusts were served with discovery requests in an insurance coverage dispute, but the court in that

case limited discovery to a small sampling of claim files without access to claimant identities or other personal information. Courts where tort or insurance coverage disputes are litigated are best equipped to oversee discovery and protect the interests of trusts and their beneficiaries.

8. Future Claims Representatives

The future claims representatives ("FCRs") opposed ILR's proposal, giving the following reasons.

(1) The suggested rule would not improve fairness or transparency of the trust system. ILR's contention of overpayment or payment of fraudulent claims relies on anecdotal evidence. The proposal would harm future claimants by diverting resources from asbestos trusts' limited funds for the benefit of defendants in non-bankruptcy tort litigation. The suggested rule exceeds the Supreme Court's rulemaking power and abridges privacy rights of claimants.

(2) Section 524(g) does not create or govern asbestos trusts. Trusts are established and regulated under state law pursuant to trust agreements approved in debtors' bankruptcy cases. The statute does not require trusts to file post-confirmation reports or to aid discovery efforts by parties in non-bankruptcy litigation.

(3) There is no evidence of widespread abuse. The FCRs do not view these issues lightly, but ILR points to one case involving an isolated incident of inconsistent claims. The fact that a claimant receives payment from multiple trusts does not mean the claimant is abusing the system. Many claimants were exposed to asbestos by multiple defendants. Claimants are not necessarily able to recover fully for damages because most trusts lack funds to pay the full value of claims.

(4) Sufficient features are in place to ensure transparency and deter fraud and abuse. The trusts' governing documents are publicly available. They typically require trusts to file annual reports and to establish audit mechanisms. Trusts typically require that claims be submitted under penalty of perjury. FCRs and trustees have access to the information that would be disclosed under the suggested rule and have a fiduciary duty to prevent trust assets from being wasted on duplicative or fraudulent claims. Section 524(g) delegated the role of fiduciary for future claimants to FCRs, and the FCRs are more efficient and effective at protecting future claimants than the mechanism of the suggested rule.

(5) The suggested rule exceeds the Court's bankruptcy rulemaking power and the scope of bankruptcy jurisdiction. The suggested rule has nothing to do with "the practice or procedure" in bankruptcy cases. Trusts are created post-confirmation under state law and operate independently from any bankruptcy case. The bankruptcy courts' jurisdiction to receive and approve annual trust reports arises from requirements imposed by parties in the bankruptcy case and reflected in the plans and governing trust documents. In contrast, the detailed disclosures of the suggested rule have no relation to the implementation and administration of plans or the trusts created under them.

ILR asserts that "mere disclosure of information" does not abridge any substantive right because the Code favors public access to information filed in bankruptcy cases. But claims submitted to trusts are not filed in a bankruptcy case. To require disclosure abridges substantive rights.

The suggested rule serves no bankruptcy purpose and does not advance the purposes of the trusts. It would aid only defendants in non-bankruptcy litigation. No bankruptcy issue exists with respect to discovery in non-bankruptcy litigation and that discovery is not a proper subject

for the Bankruptcy Rules. Discovery in state court cases is beyond the scope of federal bankruptcy jurisdiction.

(6) A trust would derive no benefit from other trusts' disclosure of information under the suggested rule. Only third-party defendants would benefit. The proposed rule would shift the burden of discovery from tort-system litigants to the trusts, thereby increasing trusts' administrative costs and decreasing resources to process claims promptly.

9. Geoffrey Berman, President of the ABI (expressing his own views, and not those of the ABI, after consultation with other members of ABI's leadership)

Transparency in the administration of post-confirmation trusts is of utmost importance, but proposed Rule 4009 is ill advised. It seeks to address what are effectively state-law issues. It would apply post confirmation and not as part of the ongoing administration of the chapter 11 estate. It seems inappropriate for a rule of bankruptcy procedure to take effect only at the end of the bankruptcy case and to function as a self-implementing, ongoing, permanent interrogatory.

In light of *Stern v. Marshall*, the extent of bankruptcy courts' power over common law issues is questionable. Whether a bankruptcy court has jurisdiction to oversee discovery of non-bankruptcy court litigation is doubtful. The bankruptcy court for the District of Delaware recently issued an opinion in the ACandS bankruptcy case directly addressing this point.

The tenets of general trust law apply to § 524(g) trusts. Those include requirements for accounting and reporting to beneficiaries. Parties in interest have sufficient opportunities to include reporting provisions of the type proposed by ILR in the operative trust agreement and trust distribution procedure documents.

ILR points to problems in one trust as justification for a new rule. To the extent their goal is to enable defendants in tort actions to get information, that is for discovery in the underlying litigation. Moreover, protections of discovery may be lost if the proposal is enacted. Public disclosure would create greater opportunity for others to take advantage of beneficiaries.

Finally, the administrative costs of the proposed rule would come directly out of the trust's assets, thereby reducing monies available to beneficiaries.

10. Michael St. Patrick Baxter and Patricia Redmond (ABA Business Bankruptcy Committee)

The chair of the ABA Business Bankruptcy Committee established a task force to review and comment on ILR's proposal. The comment does not represent official policy of the ABA.

The task force supported the proposal, subject to qualifications. While most § 524(g) trusts file annual reports, the information is limited and does not include information on individual claims. Trusts have resisted requests for that information. As the system currently functions, asbestos trust claims lack the transparency the Code and Bankruptcy Rules impose on other claims. This has led to concerns, expressed by ILR and others, that trusts may inadvertently pay claims that are inconsistent with allegations made elsewhere. With $44 billion committed to asbestos trusts, the potential for abuse is important to the business community and the integrity of the bankruptcy process.

A new bankruptcy rule requiring periodic trust reports that describe the claims received, including exposure history of claimants and the amounts paid on those claims, is appropriate and consistent with § 524(g) and general bankruptcy principles. The proposal requires no more information than what is typically required in the ordinary claims-allowance process in a

bankruptcy case. The proposed rule protects privacy rights by specifically providing that reports shall not include confidential medical records or Social Security numbers.

The proposed rule will not impose significant costs or burden on the trusts. Most, if not all, trusts already maintain the data called for by the proposal. Routine report filings may reduce the trusts' costs in responding to discovery requests.

To ensure that costs are minimized, the task force recommended that the proposed rule be clarified (i) to specify that service of the reports be limited or not required, and (ii) to specify exactly when the reports shall be filed. To the extent that trusts take the view that filing these reports on a quarterly basis would be unduly burdensome, the Rules Committee should consider semi-annual reporting instead.

The portion of ILR's proposal dealing with discovery requests in third-party litigation could be modified to clarify that the proposed rule would not displace the judgment of any court in which such an action is pending with respect to the relevance and burden of producing the information. The proposed rule should take a neutral stance on discovery requests by providing that disputes regarding discovery with respect to a § 524(g) trust should be directed to a court of competent jurisdiction in accordance with otherwise applicable nonbankruptcy law. Although the task force generally agreed with ILR that rulemaking is appropriate, it did not believe the Bankruptcy Rules should displace the judgment of state or federal judges hearing underlying asbestos-related litigation with respect to discovery disputes. Accordingly, the task force proposed that the last sentence of the suggested rule be replaced with the following:

> If any court of competent jurisdiction determines that information regarding trust payments or claims or demands are relevant to litigation pending in such court and otherwise should be produced in accordance with applicable non-bankruptcy substantive or procedural law, a trust established under Section 524(g) shall provide such information to any party to such action as so directed by such court.

The task force did not believe that the three concerns raised in the March Subcommittee Memorandum make rulemaking inappropriate. With respect to the Bankruptcy Rules Enabling Act, many disclosure requirements in bankruptcy are set forth by rule rather than statute (e.g., Rule 1007, pending modifications to Rule 3001, and pending new Rule 3002.1). The fact that the suggested rule operates after a chapter 11 plan is confirmed does not remove it from the scope of the Rules Enabling Act. The task force disagreed with the characterization of the trusts as entities that, although created through the reorganization process, act outside the contours of a bankruptcy case. The allowance and payment of claims by the trusts after confirmation is very much within the contours of the bankruptcy case. The proposal does not alter any substantive rights.

The proposal does not raise jurisdictional issues. The task force recognized that the Supreme Court has limited the jurisdiction of bankruptcy courts in *Stern v. Marshall*. That decision does not affect the ability to issue proposed Rule 4009. If the bankruptcy court has jurisdiction to impose conditions on the creation of a trust and to impose requirements regarding payments from the trust, as set forth in § 524(g), it can enforce procedural rules requiring the trusts to file information relevant to whether those requirements have been properly implemented.

The task force did not believe that bankruptcy courts will need to compare various trust reports across jurisdictions for a disclosure rule to be effective. The goal of the rule may be achieved by making information available to the public so that parties in interest may review and analyze the information. Disclosure helps minimize the risk of improper actions by trusts or claimants. Disclosure would not, as the March Subcommittee Memorandum suggests, serve

only the purposes of litigants in non-bankruptcy litigation but would enhance the transparency of the trust process and the integrity of the entire system.

Although there is no publicly available comprehensive information about the function of § 524(g) trusts, examples of fraud and abuse have come to light. In addition to the case cited by ILR (*Kananian v. Lorillard Tobacco Co.*), two other cases have involved circumstances suggesting the submission of false or inconsistent claims to asbestos trusts. The federal judge presiding over the silica products multidistrict litigation found that several thousand plaintiffs had submitted medical information based on diagnoses that "ranged from questionable to abysmal." *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 622 (S.D. Tex. 2005). The same medical personnel involved in those diagnoses were involved in diagnoses submitted to asbestos trusts. In particular, several thousand claimants in the silica exposure litigation had made claims against the Manville asbestos trust, even though it is extremely rare for someone to have both silicosis and asbestosis. In the chapter 11 case of Garlock Sealing Technologies, Inc., the debtor reported that a sampling of discovery responses by asbestos plaintiffs who had sued Garlock showed significant inconsistencies in asbestos claims submissions. Of 255 Garlock plaintiffs who had had filed claims in the Pittsburgh Corning Corporation asbestos bankruptcy, only nineteen had disclosed exposure to Pittsburgh Corning asbestos in response to Garlock's discovery requests.

The task force took no position on the magnitude of fraud and abuse in connection with the submission of claims to asbestos trusts but believed there is sufficient anecdotal evidence to raise legitimate concerns about the integrity of the asbestos bankruptcy system. The additional disclosures sought by ILR's suggested rule would allow interested parties to detect fraud and

abuse or satisfy themselves (and the courts and the public) of the fairness and integrity of the system.

11. Richard Levin, Cravath, Swaine & Moore LLP, on behalf of the NBC

The NBC did not support adoption of the suggested rule largely for the reasons stated by the FCRs. There does not appear to be any bankruptcy need for post-effective date trust claim information.

If the Advisory Committee decides to proceed, the NBC suggested revisions of the proposal to address most, but not all, of the concerns raised by the FCRs. The revisions would limit the required reporting to disclosure of each claimant's name and address, and the amount (if any) paid by the trust on account of each demand for payment. The resulting reports would be available only to persons who have made a demand for payment against the trust, subject to certain restrictions, and to other asbestos defendants who provide a comparable report to the trust setting forth all asbestos claims asserted against them and amounts paid on those claims. The revisions would also provide that the ability of any party to litigation to compel the production of claims data would be governed by the applicable non-bankruptcy law governing discovery in the litigation.

Considerations Weighed by the Subcommittee

The responses received by the Subcommittee shed light on the need for rulemaking in regard to asbestos trusts but were less definitive on the questions of rulemaking authority and bankruptcy jurisdiction raised in the March Subcommittee Memorandum. The Subcommittee determined, however, that the jurisdictional question had to be determined first, because any

proposed rule cannot exceed the proper scope of a bankruptcy court's jurisdiction after the confirmation of a plan of reorganization in a chapter 11 case. The Subcommittee then considered the question whether there is a genuine bankruptcy need for rulemaking of the sort suggested by ILR. On both questions, the Subcommittee ultimately concluded that there are insufficient grounds to support the suggested rulemaking.

1. Jurisdiction

ILR's proposal touches on an uncertain area of law—the scope of post-confirmation bankruptcy jurisdiction in chapter 11 cases. The most instructive jurisdictional decisions are those rendered post-confirmation that involves trusts or other continuing entities formed through the chapter 11 process. Until recently, no court had squarely confronted in a published opinion the jurisdictional issues raised by a bankruptcy court's resolution of disputes involving requests for detailed claims-processing information from an asbestos trust. Nevertheless, the cases do establish two basic principles. First, the provision of continuing jurisdiction in a plan of reorganization is necessary but not sufficient for a court to exercise post-confirmation jurisdiction. Second, if a matter has a "close nexus" to a bankruptcy plan or proceeding—that is, if the matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated trust agreement—then post-confirmation jurisdiction is ordinarily appropriate.

The application of those guiding principles is not free from doubt, because the operation of asbestos trusts could be viewed in ways that bring them closer to, or take them farther away from, the underlying bankruptcy plan or process. On balance, however, there is reason to be concerned that ILR's proposal would stretch beyond the bounds of bankruptcy jurisdiction. A

particular concern is that rulemaking as contemplated by ILR's proposal would rest on a view of bankruptcy jurisdiction over asbestos trusts that is inconsistent with the view of the only court that has considered the question in a dispute over requests for disclosure of trusts' claims-processing information. *See In re ACandS, Inc.*, 2011 WL 3471243 (Bankr. D. Del. Aug. 8, 2011); *In re ACandS, Inc.*, 2011 WL 744913 (Bankr. D. Del. Feb. 23, 2011).

The origins of the "close nexus" test for post-confirmation bankruptcy jurisdiction, and a brief survey of the leading cases adopting it, are discussed below. The application of that test in the *ACandS* litigation, in which the Bankruptcy Court for the District of Delaware found that it lacked jurisdiction to decide a dispute over requests for trusts' claims-processing information, is also discussed. To conclude the discussion of jurisdiction, this memorandum considers the impact, if any, of *Stern v. Marshall*, 131 S. Ct. 2594 (2011), on the scope of post-confirmation bankruptcy jurisdiction.

A. The "Close Nexus" Test for Post-Confirmation Jurisdiction

i. In re Resorts International

The leading case on the scope of post-confirmation jurisdiction is the Third Circuit's *In re Resorts International*, 372 F.3d 154 (2004), which formulated the "close nexus" test for jurisdiction—a test that has been widely adopted. The plan in *Resorts* established a litigation trust to receive and prosecute claims, originally held by the debtor against third parties, for the benefit of creditors. The plan provided that the bankruptcy court would retain exclusive jurisdiction over the litigation claims, the trust, and trust assets, including jurisdiction over disputes "arising under or in connection with" the trust agreement. Almost seven years after confirmation, the litigation trust brought an adversary proceeding for professional malpractice

against its accounting firm. The bankruptcy court dismissed for lack of jurisdiction after characterizing the dispute as one between two non-debtors involving state-law claims that did not affect the administration of the estate, property of the estate, or liquidation of assets of the estate. The district court reversed on the ground that there was "related to" jurisdiction over the trust's claims. The district court reasoned that the trust represented a partial continuation of the estate and therefore the scope of bankruptcy jurisdiction over affairs of the trust was not substantially altered by plan confirmation.

The Third Circuit reversed and adopted the bankruptcy court's more limited view of post-confirmation jurisdiction. At the outset, the court of appeals found the plan's jurisdiction retention provision to be insufficient on its own to establish jurisdiction. As the court put it, neither a bankruptcy court nor the parties "can write their own jurisdictional ticket." *Id.* at 161. The court acknowledged, however, that while bankruptcy jurisdiction diminishes, it does not disappear entirely after plan confirmation. The "essential inquiry" in the court's view was whether there was a "close nexus to the bankruptcy plan or proceeding." *Id.* at 166-67. The court recognized that continuing trusts "by their nature maintain a connection to the bankruptcy even after the plan has been confirmed" such that matters affecting the "interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." *Id.* at 167.

Applying its "close nexus" test to the dispute before it, the Third Circuit found that resolution of the malpractice claims would have no effect on the estate and only an incidental effect on the reorganized debtor. Similarly, resolution of the dispute would not affect the implementation of the plan. Although the dispute would affect former creditors of the estate,

that alone did not support bankruptcy jurisdiction, because the creditors had exchanged their status as creditors of the estate to become beneficiaries of the trust. *Id.* at 169.

Although instructive, *Resorts* does not provide definitive answers to the jurisdictional questions raised by ILR's suggestion. Significantly, *Resorts* involved an assertion of "related to" jurisdiction over a state-law claim by a trust against a third party.[5] Oversight of the operation of the trust itself was not advanced as the basis for jurisdiction. Nevertheless, the cases relied on by the Third Circuit give some sense of how the "close nexus" test operates in the context of requests for disclosures of information made to an asbestos trust.

a. Bergstrom *and* Falise

To illustrate how the close nexus test should be applied, *Resorts* discussed approvingly two mass-tort bankruptcy cases in which settlement trusts were created in the reorganization process. In one, *Bergstrom v. Dalkon Shield Claimants Trust (In re A.H. Robins Co.)*, 86 F.3d 364 (4th Cir. 1996), the court upheld the exercise of post-confirmation bankruptcy jurisdiction over a fee dispute involving attorneys for trust claimants. In the other, *Falise v. American Tobacco Co.*, 241 B.R. 48 (E.D.N.Y. 1999), the court found no bankruptcy jurisdiction to hear a state-law contribution suit brought by the Manville asbestos trust against tobacco manufacturers. The Third Circuit embraced the outcome in each case by noting a key distinction between them. In *Bergstrom*, the fee dispute turned on the interpretation of plan documents, and the efforts of the trust to fulfill its obligations as contemplated by the plan (that is, to settle remaining personal injury claims) could have been affected by the calculation of the attorneys' fee award. In *Falise*, on the other hand, the state-law contribution claim required more than merely interpreting the

[5] The claim at stake in *Resorts* involved transactions that occurred after plan confirmation. Nevertheless, the Third Circuit later clarified that the "close nexus" test applies to all disputes, no matter when the conduct at issue occurred, if "related to" jurisdiction is invoked to support the exercise of post-confirmation jurisdiction. *See In re Seven Fields Development Corp.*, 505 F.3d 237, 265 (3d Cir. 2007).

plan's terms, and resolution of the dispute would have had no impact on any integral aspect of the bankruptcy plan or proceeding.

Taking *Bergstrom* and *Falise* as pole stars for the close nexus test, the jurisdictional hook for imposing more detailed disclosure requirements on asbestos trusts appears tenuous. New disclosure requirements imposed by rule would not arise from the debtor's plan or related documents—the very reason for ILR's pursuing more detailed reporting by trusts is that their governing documents do not require them (and, indeed, may forbid them) to disclose more detailed claims-related information. And, to the extent that the information sought would be used in non-bankruptcy tort or insurance-coverage litigation, that litigation involves state-law claims that do not involve questions of bankruptcy law. It could be argued that the reporting requirements have an impact on an integral aspect of the plan—that is, the orderly and equitable resolution of asbestos injury claims by a trust mechanism erected through the plan confirmation process. However, *Falise* urged caution in the face of expansive claims of jurisdiction based on that type of "trust supervision" except when a matter can be tied directly to the implementation or execution of provisions of a confirmed plan. 241 B.R. at 61-62.

b. Trusts as extensions of the bankruptcy claims-allowance process

Resorts also sheds light on the question whether the activities of asbestos trusts should be treated as extensions of the claims-allowance process in bankruptcy. If, as the ABA task force argues in its response, the asbestos trust claims resolution process is essentially an extension of the bankruptcy claims resolution process, access to claims-related information might be presumed. The trust in *Resorts* made a similar argument. It urged that bankruptcy jurisdiction was appropriate because the trust's affairs were "effectively those of the estate (or at least analogous to those of the estate) for jurisdictional purposes." 372 F.3d at 169. The Third Circuit

rejected that argument on the ground that the trust, although containing assets that were once in the estate, was not the same as the estate; the trust was created for the very purpose of cleaving estate assets in order to aid the debtor's reorganization.

The Third Circuit's embrace of a formal distinction between the estate and a continuing trust apparently came from a concern that bankruptcy jurisdiction would otherwise extend "to all matters involving litigation trusts." *Id.* Accordingly, while *Resorts* does not definitively answer the question whether asbestos trusts are best viewed as continuations of the bankruptcy claims-allowance process (and therefore reasonably subject to more intense scrutiny and supervision by the bankruptcy court), the Third Circuit's treatment of the trust's similar argument suggests caution in adopting that analogy. As a formal matter, a § 524(g) trust is not the same as the estate, and it is an entity separate from the debtor. Treating it as a continuation of the bankruptcy claims-allowance process in order to support a jurisdictional basis for the kind of rulemaking contemplated by ILR would be in tension with the teaching of *Resorts*.

*ii. Post-*Resorts *Applications of the "Close Nexus" Test*

The *Resorts* "close nexus" test is widely accepted, but courts have diverged in its application. The divergence is driven in part by how strongly courts weigh the concern that a reorganized debtor should pursue its affairs on an equal footing with other entities, without the special oversight of the bankruptcy courts. Courts have been more likely to upheld post-confirmation jurisdiction in liquidating chapter 11 cases. *See, e.g.*, *In re Boston Regional Medical Ctr.*, 410 F.3d 100 (1st Cir. 2005) (upholding jurisdiction over state-law claims brought by a debtor after confirmation of a liquidating chapter 11 plan); *In re Pegasus Gold Corp.*, 394 F.3d 1189 (9th Cir. 2005) (upholding post-confirmation jurisdiction over a suit brought by an entity created under a liquidating chapter 11 plan to resolve environmental claims); *see also In re*

Refco, Inc. Securities Litig., 628 F. Supp. 2d 432 (S.D.N.Y. 2008) (upholding jurisdiction over state-law claims brought by a litigation trust created pursuant to a liquidating chapter 11 plan). When the debtor has emerged as a reorganized going concern, however, courts have been less likely to extend post-confirmation jurisdiction. *See, e.g. Valley Historic Ltd P'ship v. Bank of New York*, 486 F.3d 731 (4th Cir. 2007) (rejecting jurisdiction over breach of contract claims brought by a debtor against a third party, even though the claims had been part of the debtor's estate).

The concern about encouraging debtors to reemerge free from the special supervision of the bankruptcy court translates imperfectly to the world of asbestos trusts. On the one hand, the debtors in § 524(g) bankruptcies reemerge to continue as entities in the marketplace. That suggests a more limited scope of post-confirmation jurisdiction. But ILR's proposal is not directed at the reorganized debtor. Instead, the subjects of the suggested amendment—the asbestos trusts formed in connection with the reorganization process—could be analogized to the continuing entities that emerge from liquidating chapter 11 cases. Asbestos trusts are not "attempting to make a go of . . . business" and their process for resolving asbestos injury claims "will directly impact the amount . . . eventually paid to" trust beneficiaries. *Boston Regional Medical Ctr.*, 410 F.3d at 107. Nevertheless, although a § 524(g) trust is created through the reorganization process, it is established separately under state law and can sue and be sued as an independent entity. *See Falise*, 241 B.R. at 62 ("A trust created to effectuate a bankruptcy plan should be treated as is any other entity with the right to sue or be sued."). Arguably, trusts—like debtors that have emerged as reorganized entities—should be assumed to act free of any special continued supervision of the bankruptcy courts.

B. In re ACandS

The closest guidance on how *Resorts* applies to the jurisdictional questions raised by ILR's proposal comes from the recent opinion in *In re ACandS, Inc*. 2011 WL 3471243 (Bankr. D. Del. Aug. 8, 2011). The ACandS Asbestos Settlement Trust brought an adversary proceeding for declaratory and injunctive relief to block third-party discovery requests for the trust's detailed claims-processing data. The defendants in the adversary proceeding were engaged in insurance coverage litigation, pending in state and federal courts in New Jersey, unrelated to the debtor's underlying bankruptcy case. The defendants subpoenaed the trust's claims agent for claims-processing information. The trust asserted that bankruptcy jurisdiction over its adversary proceeding was proper because, among other things, provisions in trust documents restricted disclosure of asbestos claimants' submissions, and those provisions, which were incorporated into the plan confirmed by the bankruptcy court, had to be interpreted to resolve the adversary proceeding.

The bankruptcy court held that there was no subject matter jurisdiction over the trust's adversary proceeding, even though resolution of the dispute required interpretation of the plan and related documents. Relying on its earlier opinion involving attempts to quash discovery requests made by debtors in other asbestos bankruptcy cases under Rule 2004, *In re ACandS, Inc.*, 2011 WL 744913 (Bankr. D. Del. Feb. 23, 2011), the court rejected the trust's assertion of "core" jurisdiction by recognizing that the underlying discovery dispute in question could occur in any type of litigation and was not one that could only arise in the context of a bankruptcy case.[6] Turning to the assertion of "related to" jurisdiction, the court judged the requisite "close nexus" to be lacking. Although the need to interpret plan documents was one factor weighing in

[6] The Third Circuit has clarified that its "close nexus" test does not apply if there is a basis for core jurisdiction. *See In re Seven Fields Development Corp.*, 505 F.3d at 264-65.

favor of post-confirmation jurisdiction, the court found other factors weighing against it. The dispute would have no effect on the now-reorganized debtor or on the debtor's estate, which had ceased to exist. The court also concluded that the dispute was "entirely collateral" to the bankruptcy and its resolution would not have "any effect on the implementation, execution, or administration of the confirmed plan." 2011 WL 3471243 at *3. Even though the burdens of the discovery sought by the insurance companies could affect assets in the trust available to pay asbestos claimants, the court cited *Resorts* for the proposition that "the mere possibility of a gain or loss of trust assets" did not suffice to confer bankruptcy jurisdiction. *Id.* Otherwise, any lawsuit involving a continuing trust would satisfy "related to" jurisdiction.[7] Finally, the court described the necessary interpretation of the trust documents as turning on general contract law and not on any integral issue of bankruptcy law. There was, in short, no reason why the courts where the litigation was pending could not competently adjudicate the matter.[8] *Id.* at *4.

ACandS recognized the circumstance-specific nature of the jurisdictional analysis in post-confirmation cases. Thus, the decision does not define the full scope of post-confirmation bankruptcy jurisdiction in cases involving asbestos trusts. The decision did not, for instance, provide an example of the kinds of plan or trust provisions that would have supported jurisdiction over the dispute. Nor did it detail the types of discovery disputes, if any, that would have the requisite close nexus for bankruptcy jurisdiction. The court did not explain the difference, for jurisdictional purposes, between the reporting requirements imposed on the trusts

[7] The court in any event considered the discovery requests' effects on the trust to be speculative, because one subpoena indicated that the trust was entitled to recover its costs of compliance. The court also read the provision of the trust distribution plan invoked by the trust to block discovery to be a forum selection clause and not a protection from discovery. In other words, even if the trust succeeded in quashing the subpoenas issued by New Jersey courts, an identical one could issue from a Delaware court. 2011 WL 3471243 at *4

[8] For similar reasons, the court found that, even if it could exercise jurisdiction over the dispute, mandatory or discretionary abstention would be appropriate under 28 U.S.C. § 1334(c)(1) and (c)(2). 2011 WL 3471243 at *5.

through the plan and trust documents and the more rigorous disclosures sought by third parties. But the overall teaching of *ACandS* seems to be that the bankruptcy courts should not be the principal forum for resolving disputes over the disclosure of detailed claims-processing information by asbestos trusts.

C. Stern v. Marshall *and Post-Confirmation Jurisdiction*

One case that did not figure prominently in the Subcommittee's consideration of these jurisdictional questions is *Stern v. Marshall*. A number of responses to the Advisory Committee's request for input referred to *Stern*, with one invoking the decision as a reason to exercise caution in pursuing rulemaking that relies on a more expansive view of bankruptcy jurisdiction. The Subcommittee does not believe that *Stern* contributes much to the jurisdictional analysis. That case involved the allocation of power between Article III and non-Article III decision makers under 28 U.S.C. § 157. The Court did not purport to decide the extent of bankruptcy jurisdiction under 28 U.S.C. § 1334, which vests original jurisdiction in the district courts. In other words, the scope of post-confirmation jurisdiction should not change if a district judge, rather than a bankruptcy judge, exercises bankruptcy jurisdiction. A district judge sitting in bankruptcy must adhere to the same limitations on bankruptcy jurisdiction as a bankruptcy judge. *See*, *e.g.*, *Falise*, 241 B.R. at 56.

Stern may demonstrate a "mood" at the Court that would be skeptical of expansive exercises of bankruptcy jurisdiction. If so, that might be further reason for caution when evaluating possible rulemaking that touches on an uncertain and unsettled area of the law of bankruptcy jurisdiction. But neither the holding of *Stern* nor its reasoning would necessarily prevent adoption of ILR's suggested amendment.

2. Bankruptcy need for rulemaking

The comments heightened the Subcommittee's concern about whether there is a bankruptcy need for rulemaking. ILR and the ABA task force raise serious questions about systemic integrity that arise from a lack of transparency in the operation of asbestos trusts. Even if the trusts themselves are not creatures of bankruptcy law and exist after the end of a bankruptcy case, there is a very good argument to be made that fraud or abuse in their operation undermines the legitimacy of the asbestos bankruptcy process and contravenes the goals of § 524(g).

Weighed against that argument, however, are the serious practical problems described by the trusts and FCRs. The most significant concern is the cost of adhering to a heightened reporting requirement and the cost of responding to discovery requests. Imposing further administrative costs on the trusts may take away limited assets that could otherwise be used for compensation. The ABA task force suggests that much of this information is already compiled by the trusts and would not be burdensome to disclose or produce. Even if true, that suggestion does not take into account the additional personnel and management effort required to compile and file more frequent reports with the court and to respond to discovery requests. It stands to reason that the number of discovery requests fielded by trusts will increase, perhaps dramatically, under the suggested rule. If those costs were necessary to prevent dissipation of trust assets from demonstrable fraud and abuse, they would be justified. But the comments have pointed only to anecdotal evidence of abuse.

To be sure, the confidentiality of the trust claims process itself makes it less likely that other incidents of abuse would easily come to light. But the Subcommittee saw no good reason

to conclude that parties to asbestos litigation could not receive pertinent information about particular claims submitted to trusts through the usual channels of discovery in state or federal court. One would expect solvent asbestos defendants, for example, to ferret out cases of inconsistent claims or the like through discovery requests directed to the claimants themselves in tort litigation. Confirmed plans do not entirely exempt asbestos trusts from the ordinary rules of third-party discovery. And even if a plan did contain a provision of that sort, a third part would not be enjoined from seeking discovery unless specifically named in the confirmation order. *See* Fed. R. Bankr. P. 3020(c)(1) ("If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation shall (1) describe in reasonable detail all acts enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction.").

A related policy concern raised by the comments is whether the suggested rule would create an unwarranted imbalance between asbestos trusts and solvent asbestos defendants. As ACandS and the group of thirteen trusts observe, solvent defendants protect settlement information from disclosure when they compromise claims in the tort system. Asbestos trusts could no longer do the same under ILR's proposal. That may lead, as the comments suggest, to a distortion in the way claims are processed, valued, and settled by asbestos trusts if claimants gain an informational advantage, through detailed claim payment disclosures, about the practices of the trusts. Similarly, solvent asbestos defendants in the tort system who seek discovery from plaintiffs must bear the costs of doing so. Under ILR's proposal, those costs would be reduced to the extent that a plaintiff is also a claimant against an asbestos trust. But the costs saved by solvent asbestos defendants would be transferred, at least in part, to asbestos trusts, and it is not apparent why they are better able to bear those costs.

*   *   *

The Subcommittee recommends that further action not be taken on ILR's proposal. ILR has brought to the Advisory Committee's attention an important topic—the proper operation of asbestos trusts. Nevertheless, the Subcommittee concludes that the suggested rule presents difficult questions of bankruptcy jurisdiction that are not offset by a clear showing of a bankruptcy-specific need for rulemaking. In light of those concerns, bankruptcy rulemaking of the type suggested is not the appropriate mechanism to address the issues raised by ILR.