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Lisa A. Rickard
President

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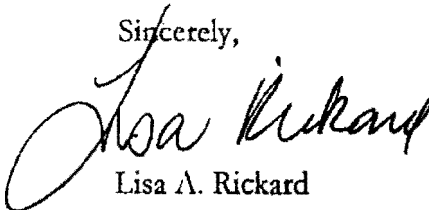
Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Dear Mr. McCabe:

The Institute for Legal Reform hereby submits a proposal for a new rule of bankruptcy procedure to address the pressing need for greater transparency in the operation of trusts established under 11 U.S.C. § 524(g). We have enclosed a brief description of the background and need for the new rule as well as draft Rule and draft Form.

If you have any questions regarding this proposal, please contact Harold Kim at (202) 463-5599.

Sincerely,



Lisa A. Rickard

Enclosures

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1. The Institute for Legal Reform

The U.S. Chamber Institute for Legal Reform (ILR) is a national organization that represents the nation's business community in a critical mission – to make America's legal system simpler, fairer and faster for all stakeholders. To that end, ILR is committed to ensuring that the asbestos litigation and claims process environment is fair and transparent.

2. Need for Rule: Greater Transparency for 524(g) Trusts Will Ensure Equal Access for All Claimants

In the 2007 case, Kananian v. Lorillard Tobacco Company, No. CV 442750 (Ohio Cuyahoga County Comn. Pl. Jan. 18, 2007) (Appendix A), a state court in Ohio uncovered a pattern of demands to trusts for payment for asbestos-related injuries that contradicted similar claims made in the tort system. In that case, a plaintiff alleged numerous contradictory theories as to a decedent's asbestos exposure. Had this effort been successful, several trusts could have made duplicate payments for the same injury, based on contradictory exposure claims. Moreover, according to at least one court, plaintiffs may purposefully delay filing demands with 524(g) trusts until the tort litigation has concluded to avoid disclosing any information related to trust demands to litigation opponents. See e.g., Coulter v. Asten Johnson, 2008 WL 4103199 (Wash. Sup. Ct. 2008). Thus, there is a clear record, from unbiased courts, demonstrating that the lack of transparency could cause 524(g) trusts to pay duplicate demands or demands that are not accurate. These courts have clearly had to address attempts to utilize contradictory and incompatible allegations regarding asbestos exposures to obtain recoveries. Perhaps most importantly, these courts have faced attempts to avoid tort system allocation rules – established by these states' legislatures – by delaying trust claims filings.

The legislative history that led to the establishment of Section 524(g) clearly and unambiguously demonstrates that Congress intended the asbestos trust system created by Section 524(g) to ensure that all present and future asbestos claimants have equal access to payments for asbestos-related injuries. In the debate accompanying the amendments which created Section 524(g), the Judiciary Committee specifically stated that asbestos trusts must "operate in a structure and manner necessary to give reasonable assurance that the trust will value, and be able to pay, similar present and future claims in substantially the same manner." See 140 Cong. Rec. H 10765, 10766 (Oct. 4, 1994). Of course, depleting 524(g) trusts by making duplicate payments, based on incompatible exposure claims, will only serve to harm future claimants in derogation of clear Congressional intent.

There has also been recent attention paid to the need for greater transparency in the press and in scholarly publications. On December 3, 2009, the Wall Street Journal reported that independent experts, who study asbestos trusts, believe the lack of transparency endangers the ability to pay future claimants fairly. Norman Koppel, New Fight Erupts Our Asbestos Claim, WSJ, Dec. 3, 2009. In addition, a recent article in the Norton Journal of Bankruptcy Law, described how the interrelationship between 524(g) trusts and current tort litigation can result in inaccurate overpayments by the trusts. See Shelley, et al. "The Need for Transparency Between the Tort System at Section 524(g) Asbestos Trusts," 17 Norton Journal of Bankruptcy Law and Practice

257 (2008) (Appendix B). Finally, the well-regarded Rand Corporation has released a report addressing the lack of access to information on the operation of 524(g) trusts. See Appendix C.

Given this record, ILR proposes a new Rule of Bankruptcy Procedure that will require reporting of claims information and exposure allegations, and cooperation with state or federal tort actions related to asbestos exposure. The proposed rule and accompanying form (Reproduced in Appendix D and E respectively) applies only to the trusts themselves, not to a plaintiff or claimant, thereby ensuring that no person seeking compensation will have his or her rights affected. The proposed rule is also not intended to require trusts to publicly disclose confidential medical records or individual social security numbers. The rule ILR proposes would read:

“In addition to performing other duties prescribed by the Code and the rules, a trust established under Section 524(g) shall file periodic reports, available to the public and in a form prescribed by the Judicial Conference, on a quarterly basis. Such reports shall describe, with particularity, 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. Such reports shall not include confidential medical records or claimant social security numbers. If trust payments or demands are relevant to an action in any state or federal court, the trust established under Section 524(g) shall provide information related to demands and payments to any party to such action, upon written request and subject to protective orders as appropriate.”

This proposed rule would simply impose reasonable reporting requirements on 524(g) trusts. Specifically, such trusts would be required to report on demands for payment, the exposure allegations upon which demands are based and amounts paid for those demands. Trusts would also be required to cooperate with tort litigants and provide information regarding trust claims that are relevant to the litigation.

ILR believes this narrow, targeted proposal will increase fairness, transparency and ensure that 524(g) trusts pay present and future claims as Congress intended.

3. Statutory Basis of Rule

The Rules Enabling Act authorizes the Judicial Conference to establish rules that facilitate the operation of the bankruptcy laws so long as the rules do not modify existing substantive rights for any party. See 28 USC 2705. Mere disclosure of information as contemplated by proposed Rule 4009 in no way impacts any substantive right created under Section 524(g).

In general, because bankruptcy courts exercise equitable powers, the Bankruptcy Code establishes a presumption in favor of public access to information filed in a bankruptcy case. See 11 USC 107. ILR believes that the present lack of transparency undermines the intent of Section 524(g).

Greater public access to information about specific demands, and payments for those demands, is necessary to guarantee that trusts will be in a position to pay present and future claims equitably. Greater public access to trust information will ensure that Section 524(g) works as Congress intended.

4. Conclusion

There is a demonstrated need for greater transparency in the operation of 524(g) trusts. Without proposed Rule 4009, and the attached proposed Model Form, there will continue to be erroneous payments that deplete the trusts, to the detriment of future claimants, contrary to the intent of Congress. In addition, transparency will help ensure that asbestos tort litigation outside of the bankruptcy context is fair, equitable and accurate.