

September 2011

ASBESTOS INJURY COMPENSATION

The Role and Administration of Asbestos Trusts

**This Report Is Temporarily Restricted Pending
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U.S. Government Accountability Office





Highlights of [GAO-11-819](#), a report to the Chairman, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

Asbestos litigation arose out of millions of Americans' lengthy occupational exposure to asbestos which is linked to malignant and nonmalignant diseases. To date, about 100 companies have declared bankruptcy at least partially due to asbestos-related liability. In accordance with Chapter 11 and § 524(g) of the federal bankruptcy code, a company may transfer its liabilities and certain assets to an asbestos personal injury trust, which is then responsible for compensating present and future claimants. Since 1988, 60 trusts have been established to pay claims with about \$37 billion in total assets.

GAO was asked to examine asbestos trusts set up pursuant to § 524(g). This report addresses: (1) How much asbestos trusts have paid in claims and how trusts are administered, (2) How trust claim and payment information is made available to outside parties, and (3) Stakeholder—plaintiff and defense attorneys, trust officials, and other interested parties—views on whether more trust and claimant information should be made available to outside parties and efforts to change the trust system and processes. GAO analyzed trust agreements for 44 of 60 trusts and trust distribution procedures for 52 of 60 trusts, as well as financial reports for 47 of 60 trusts for 2009 and 2010. GAO also interviewed U.S. Bankruptcy Court judges and the trustees, general counsels, or directors from 11 trusts.

View [GAO-11-819](#) or key components. For more information, contact William O. Jenkins, Jr., at (202) 512-8757 or jenkinswo@gao.gov.

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What GAO Found

From 1988 through 2010, GAO's analysis of available trust payment data show that trusts have paid about 3.3 million claims valued at about \$17.5 billion and that each trust has trust distribution procedures (TDP) that govern its administration and establish the process for assessing and paying claims. Typically, TDPs include sections related to the intake and evaluation of claims, payment processes, and audit programs. Claims that meet the TDP's criteria for a particular disease are paid in the amount specified in the TDP.

Most asbestos trusts we reviewed publish for public review annual financial reports and generally include total number of claims received and paid. Other information in the possession of a trust, such as an individual's exposure to asbestos, is generally not available to outside parties but may be obtained, for example, in the course of litigation pursuant to a court-ordered subpoena. The 44 trust agreements GAO reviewed all required that trusts submit annual financial reports to the U.S. Bankruptcy Court of jurisdiction. Although TDPs typically provide that the trusts will make claim and payment information available to claimants and other parties, each trust ultimately determines what information it will make available. Of the 47 trust annual financial reports for 2009 and 2010 that GAO reviewed, all included the total amount of payments made and most included the total number of claims received and paid. One trust's financial report contained claimant names and amounts paid to these individuals. Of the 52 trust TDPs GAO reviewed, 33 (64 percent) included sections related to protecting the confidentiality of claimants' information and these sections often state that the trusts will only disclose information to outside parties with permission of the claimant or in response to a valid subpoena.

Views differ on whether more trust and claimant information should be made available and there have been efforts to change the trust system. Plaintiff attorneys and trusts oppose proposals that would require additional disclosure of claimant information, such as amounts paid to individual claimants, stating that such information is available to the defense through subpoenas and that disclosure otherwise could compromise the confidentiality of claimants' private information. Defense attorneys support additional disclosure, stating that such information could be used to offset asbestos defendants' settlements in court and reduce fraudulent claims. In recent years, there have been various proposals to require additional disclosure of claimant information. One of these proposals was recently brought before the Judicial Conference of the United States, the primary policy making body of the U.S. courts.

In commenting on a draft copy of this report, the Department of Justice and the Administrative Office of the U.S. Courts provided technical clarifications, which GAO incorporated where appropriate.

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G A O

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

September 23, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
House of Representatives

Dear Chairman Smith:

Asbestos litigation has been the longest-running mass tort litigation in U.S. history and arose out of millions of Americans' lengthy and widespread occupational exposure to asbestos, which has been linked to malignant and nonmalignant diseases.¹ Asbestos is a term used to describe naturally occurring silicate minerals that had wide industrial, commercial, and household usage in the United States during the 20th century because of its flame-retardant and insulating properties. Even with U.S. asbestos consumption peaking in 1973 and dropping over the next 3 decades, estimates of the number of individuals exposed to asbestos in the U.S. range from approximately 27 million to 100 million.

Asbestos-related diseases have a relatively long latency period, meaning it usually takes decades from the time of exposure to asbestos or asbestos-containing products and the date of medical diagnosis of asbestos-related disease or asbestos-related death. As early as 1900, asbestos was recognized as a cause of occupational disease—namely asbestosis, a nonmalignant respiratory disease characterized by scarring of the lung tissue that may progress to impairment and death. By 1960, the connection between asbestos and mesothelioma—a cancer of the lining of the lungs, chest, or abdomen that typically causes death within 1 or 2 years of diagnosis—was established.² Mesothelioma was not

¹A tort is a civil wrong that results in an injury or harm and that is recognized by law as grounds for a lawsuit by the injured party; a mass tort is one that injures many people. The primary aim of tort law has been described as providing relief for the damages incurred and deterring others from committing the same harms. For purposes of this report, “malignant diseases” refer to those involving mesothelioma, lung cancer or other cancer while “nonmalignant diseases” refer to asbestosis and pleural diseases.

²Mesothelioma is a cancer of the mesothelium, a protective membrane that covers the internal organs. Mesothelioma is the most severe disease category recognized by asbestos trusts.

recorded as a separate cause-of-death category on death certificates until 1999 and is not recorded as a cause of death in all states or municipalities. Although lung cancer is reported as a cause of death, lung cancer caused by asbestos is not differentiated from other forms of lung cancer. In addition to potentially increasing the risk of mesothelioma, asbestos exposure has been linked to lung cancer and may be associated with other non-respiratory cancers, according to the Centers for Disease Control and Prevention and the National Cancer Institute at the National Institutes of Health. As a result of an incomplete history of asbestos-related diseases and because of the long latency period of these diseases, it is difficult to estimate the future trends of these diseases. Although estimating the number of past and future mesothelioma incidence is difficult, experts believe that the mesothelioma epidemic is receding with the peak number of incidence per year reaching approximately 2,500 in the United States in the early 2000s.³

To date, approximately 100 companies have declared bankruptcy at least partially due to asbestos-related liability. The large and unpredictable asbestos-related liability due to the number of individuals exposed and the number of asbestos related lawsuits filed in the tort system are factors that may contribute to the decision by companies facing asbestos-related liability to file for bankruptcy. Generally, filing for bankruptcy halts civil lawsuits and other actions against the debtor company (the company filing for bankruptcy) for the duration of the bankruptcy process.⁴ For those companies seeking to reorganize pursuant to Chapter 11 of the federal bankruptcy code, 11 U.S.C. § 524(g) affords the debtor company an opportunity to channel (by way of a channeling injunction) all future asbestos-related liabilities to an asbestos personal injury trust established as part of the company's reorganization and in accordance with § 524(g)⁵ Pursuant to § 524(g), the asbestos personal injury trust assumes the debtor company's asbestos-related liabilities while assets of

³RAND Corporation, *Asbestos Litigation*, RAND Institute for Civil Justice, MG-162 (2005) and Bertram Price and Adam Ware, *Mesothelioma Trends in the United States: An Update Based on Surveillance, Epidemiology, and End Results Data for 1973 and 2003*, volume 159, number 2 (2004).

⁴See 11 U.S.C. § 362.

⁵See 11 U.S.C. §§ 1101-46 (Chapter 11, Reorganization); 11 U.S.C. § 524(g) (allowing for the issuance of an injunction against future claims of liability for asbestos-related injuries against the debtor company if the confirmed plan for reorganization establishes a trust that assumes the liabilities of the debtor).

the debtor company are transferred to the asbestos trust for investment and management. The trusts then pay present and future asbestos-related claims, thus relieving the reorganized company of all present and future asbestos-related liabilities. Postbankruptcy, the trusts implement a nonadversarial administrative process—independent of the court system—to review claimants’ occupational and medical histories before awarding compensation. The trusts operate without judicial or federal government oversight, but generally provide annual financial reports to the U.S. bankruptcy court of jurisdiction in accordance with provisions set forth in each trust’s trust agreements (the instruments that establish a trust).

In the last decade, with the number of asbestos-related bankruptcies increasing, the number of asbestos personal injury trusts increased from 16 trusts with a combined total of \$4.2 billion in assets in 2000 to 60 with a combined total of over \$36.8 billion in assets in 2011. In addition to companies that have reorganized through the bankruptcy process, there are other solvent companies that remain vulnerable to asbestos-related lawsuits as defendants in the tort system. These companies, as well as their insurance carriers whose policies are often responsible for paying amounts awarded by settlement or verdict to asbestos victims, are interested in amounts paid to individuals by trusts because these amounts may be used to offset the amounts owed to prevailing plaintiffs by solvent companies.

In this overall context, you asked us to conduct a review of asbestos trusts set up in accordance with Chapter 11 and § 524(g) of the federal bankruptcy code. Specifically, this report addresses:

1. How much asbestos bankruptcy trusts have paid in claims and how those trusts are administered,
2. How trust claim and payment information is made available to outside parties, and
3. Stakeholder—plaintiff and defense attorneys, trust officials, and other interested parties— views on whether more trust and claimant information should be made available to outside parties and recent efforts to change the current trust system and processes.

To conduct our work, we obtained and analyzed publicly available documents related to asbestos trusts. To find these documents, we searched individual trust websites and the Public Access to Court

Electronic Records (PACER) database.⁶ We obtained and analyzed trust agreements (TA) for 44 of the 60 trusts as well as trust distribution procedures (TDP) for 52 of 60 trusts established from 1988 to 2011 to determine how these trusts are structured and operated, and how they assess and pay asbestos claims. We also reviewed TDPs and TAs to determine trusts' policies for sharing information with, or making information available to, outside parties. We obtained and analyzed 47 of 56 annual financial reports for 2009 and 47 of 58 annual financial reports for 2010 that trusts submitted to U.S. bankruptcy courts and were available through PACER to determine the total number of claims paid by these trusts and the amounts paid out in claims. However, the reports we obtained for some trusts did not include the number of claims paid. Therefore, we were not able to determine the total number and value of claims paid for all of the trusts for which we obtained documentation.⁷

In addition, we interviewed trust officials, including trustees, general counsels, and executive directors representing 11 of the 60 asbestos bankruptcy trusts to discuss how these trusts operate and how they assess and pay claims, and to obtain their views on the availability of trust-related information to outside parties. We selected 8 of the 11 trusts with which we conducted interviews because they were the largest, each with initial assets in of \$2 billion or more. In total, these 8 trusts had over \$18 billion in initial assets (about half of the total initial assets for the 60 trusts). We selected the remaining 3 trusts randomly from the remaining trusts with initial assets of less than \$2 billion to understand the operations of selected smaller trusts and to include their perspectives. Although the results of the interviews are not generalizable to all 60 trusts, they provided explanations of trust documents and insights into trust administration and operations.

⁶PACER is an electronic public access service that allows users to obtain case and docket information from federal appellate, district, and bankruptcy courts, and the PACER Case Locator via the Internet.

⁷We did not obtain 9 trusts' 2009 annual financial reports and 11 trusts' 2010 annual financial reports. These annual financial reports may not be readily available because trusts' may file reports under seal to the Bankruptcy Court to protect the interests and competitiveness of the reorganized company and, thus, are not publicly available, according to U.S. Bankruptcy Court judges we interviewed. Four of the trusts did not have 2009 annual reports because the trusts were newly established or were established in 2010 or 2011 and, thus, the trust population in 2009 totaled 56. Two of these trusts also did not have 2010 annual reports available because the trusts were newly established or were established in 2011 and, thus, the trust population in 2010 totaled 58.

We also interviewed officials from the Administrative Office of the U.S. Courts, the Department of Justice's U.S. Trustees Program, and the Federal Judicial Center. We also interviewed four U.S. Bankruptcy Court judges referred to us by the Administrative Office of the U.S. Courts because of the judges' experience in presiding over asbestos-related bankruptcy cases to discuss the role that the federal government, including the courts, plays in the establishment, administration, and oversight of asbestos trusts. In addition, we discussed these officials' views on the extent to which trust and claimant information is made available to outside parties. We interviewed two professors of law, who have published and are well-known experts in the areas of asbestos litigation and bankruptcy trusts, and two researchers. We learned of these academic experts through our literature searches and discussions with court officials and others. In addition, we interviewed representatives from two associations for both plaintiff and defense attorneys to discuss their constituents' views on the availability of individual claimant information and the extent to which trust information is available. We learned of these attorneys through our discussions with academic experts and others. While the results of these interviews are not generalizable to all parties involved in the establishment and administration of trusts, they provided insight into the views of these various parties. In addition, we observed a conference on asbestos bankruptcy proceedings and trust operations which included expert panel discussions led by plaintiff and defense attorneys, researchers, and bankruptcy judges on emerging trends and the discovery of trust and claimant information.⁸ We used information from a 2010 RAND Corporation study to determine the number of claims and amounts paid by trusts prior to 2009 and to understand trust operations and claimant compensation processes.⁹ We also drew upon information from a 2011 RAND Corporation study to describe the varying positions on trusts providing claimant information beyond what is presently available in annual reports and through the judicial system.¹⁰

⁸Discovery" may be described as the pretrial phase of a lawsuit during which the relevant parties seek production of information that relates to the litigation or that may be reasonably calculated to lead to the discovery of admissible evidence. Rules of practice and procedure generally govern the scope of discovery within each jurisdiction. See, e.g., Fed. R. Civ. P. 26.

⁹ RAND Corporation, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND Institute for Civil Justice, TR-872-ICJ (2010).

¹⁰RAND Corporation, *Asbestos Bankruptcy Trusts and Tort Compensation*, RAND Institute for Civil Justice, MG-1104 (2011).

We determined that the scope and methodology of the RAND reports were sufficient for us to rely on their results. We also reviewed various applicable legislative and other proposals, as well as other actions intended to change the current asbestos trust and compensation systems and require additional disclosure of claimant information.

We conducted this performance audit from October 2010 through September 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

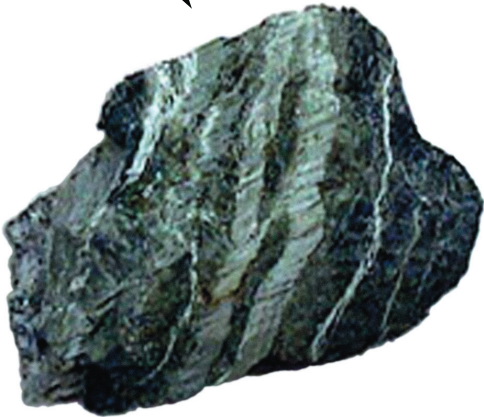
Background

History of Asbestos Use and Litigation

Asbestos is a naturally occurring silicate mineral that was widely used in the United States in the 20th century for industrial, commercial, and residential purposes primarily for its flame-retardant and insulating properties. Examples of products containing asbestos included roofing shingles, ceiling and floor tiles, paper and cement products, and friction products such as automobile clutch, brake and transmission parts. Figure 1 below provides an illustrative example of asbestos and some of the products in which asbestos was used.

Figure 1: Asbestos Mineral and Examples of Products That Contained Asbestos

Serpentine rock with vein of asbestos in its natural form



Products that have contained asbestos.

- Attic and wall insulation.
- Steam pipes, boilers, and furnace ducts insulated with an asbestos blanket or asbestos paper tape.
- Vinyl floor tiles and the backing on vinyl sheet flooring and adhesives.
- Asbestos paper, millboard, or cement sheets used to protect walls and floors around woodburning stoves.
- Door gaskets in furnaces, wood stoves, and coal stoves.
- Soundproofing or decorative material sprayed on walls and ceilings.
- Patching and joint compounds for walls and ceilings, and textured paints.
- Asbestos cement roofing, shingles, and siding.
- Artificial ashes and embers sold for use in gas-fired fireplaces.
- Fireproof gloves, stove-top pads, ironing board covers, and certain hairdryers.
- Automobile brake pads and linings, clutch facings, and gaskets.

Asbestos is a sound absorption and fire resistance fibrous mineral.

Source: Environmental Protection Agency.

As asbestos became increasingly linked as the cause of certain diseases, plaintiffs began bringing asbestos-related personal injury claims against asbestos product manufacturers as well as purchasers of asbestos products, insurers, and businesses that used asbestos or asbestos-containing products. With the Occupational Safety and Health Act (OSHA) of 1970, the federal government imposed regulations governing workplace safety including standards related to reducing occupational

asbestos exposure.¹¹ In 1973, the U.S. Court of Appeals for the Fifth Circuit issued the first appellate opinion upholding a product-liability judgment against a manufacturer of asbestos-containing products in *Borel v. Fibreboard*, finding that the asbestos manufacturers were liable to workers injured as a result of exposure to their asbestos-containing products.¹² In the course of the first successful personal injury lawsuits against asbestos manufacturers, plaintiffs' attorneys introduced evidence that these manufacturers had known but concealed information about the dangers of asbestos exposure or that such dangers were reasonably foreseeable.

Section 524(g) and the Establishment of Personal Injury Trusts

Asbestos personal injury trusts, established in accordance with the federal bankruptcy code, implement compensation plans that, in general, recognize and protect the interests of present and future claimants, prioritize more seriously ill claimants, and establish processes for resolving disputes between the claimants and the trusts. A 1994 amendment to § 524 of the federal bankruptcy code in effect codified an approach for addressing a debtor company's asbestos-related liabilities while eliminating the possibility of that company being found liable for future asbestos-related personal injury claims.¹³ Pursuant to § 524(g) debtor companies that face asbestos-related liability and file for bankruptcy under Chapter 11 may establish an asbestos personal injury trust that, by way of a channeling injunction, assumes the asbestos-related liabilities of the debtor company that will compensate present and future asbestos claimants. Filing for bankruptcy halts all civil lawsuits and

¹¹See, e.g., 29 C.F.R. §§ 1910.1001 (addressing occupational exposure to asbestos in all industries covered by OSHA, except as otherwise provided); 1915.1001 (regulating asbestos exposure in shipyard employment work); and 1926.1101 (regulating asbestos exposure in construction work).

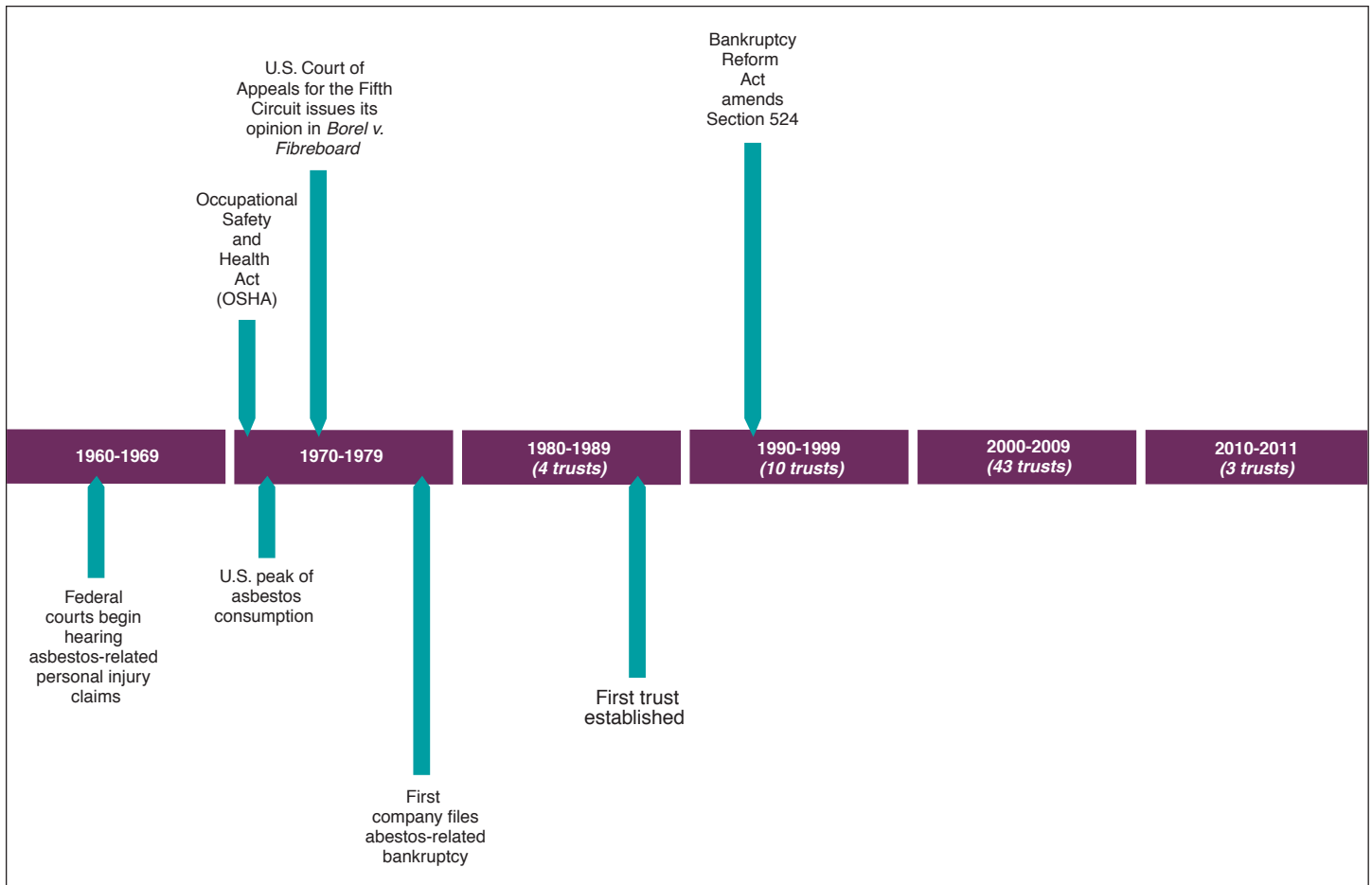
¹²*Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973).

¹³See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4113-17. More specifically, the 1994 amendment adding subsection (g) to § 524, in effect, codified the approach utilized in the Johns-Manville Corporation's bankruptcy. In that case, Johns-Manville filed for bankruptcy under Chapter 11 and, in accordance with its confirmed plan of reorganization, the company's asbestos-related liabilities were channeled to the Manville Personal Injury Settlement Trust by way of a court-imposed injunction, thus becoming the first asbestos trust responsible for processing and paying present and future asbestos personal injury claims. Lingering concerns as to whether the injunction issued as part of this plan could withstand all challenges underscored the 1994 amendment modeled after this approach.

other actions against the debtor company for the duration of the bankruptcy process and establishing an asbestos personal injury trust as part of the company's reorganization and in accordance with § 524(g) bankruptcy affords the debtor company an opportunity to transfer all future asbestos-related liabilities to the trust, thereby limiting the debtor company's asbestos-related liabilities.¹⁴ The goal of the trusts is to compensate present and future claimants, equitably and outside the court system, by managing the debtor company's assets assumed by the trust as part of the bankruptcy reorganization. Figure 2 provides a timeline of events surrounding the establishment of asbestos trusts.

¹⁴See 11 U.S.C. § 362 (providing for a stay of actions commenced against a debtor); 11 U.S.C. §§ 1101-46 (Chapter 11, Reorganization); and 11 U.S.C. § 524(g) (allowing for the issuance of an injunction against future claims of liability for asbestos-related injuries against the debtor company if the confirmed plan for reorganization establishes a trust that assumes the liabilities of the debtor).

Figure 2: Timeline of Events Surrounding the Establishment of Asbestos Trusts



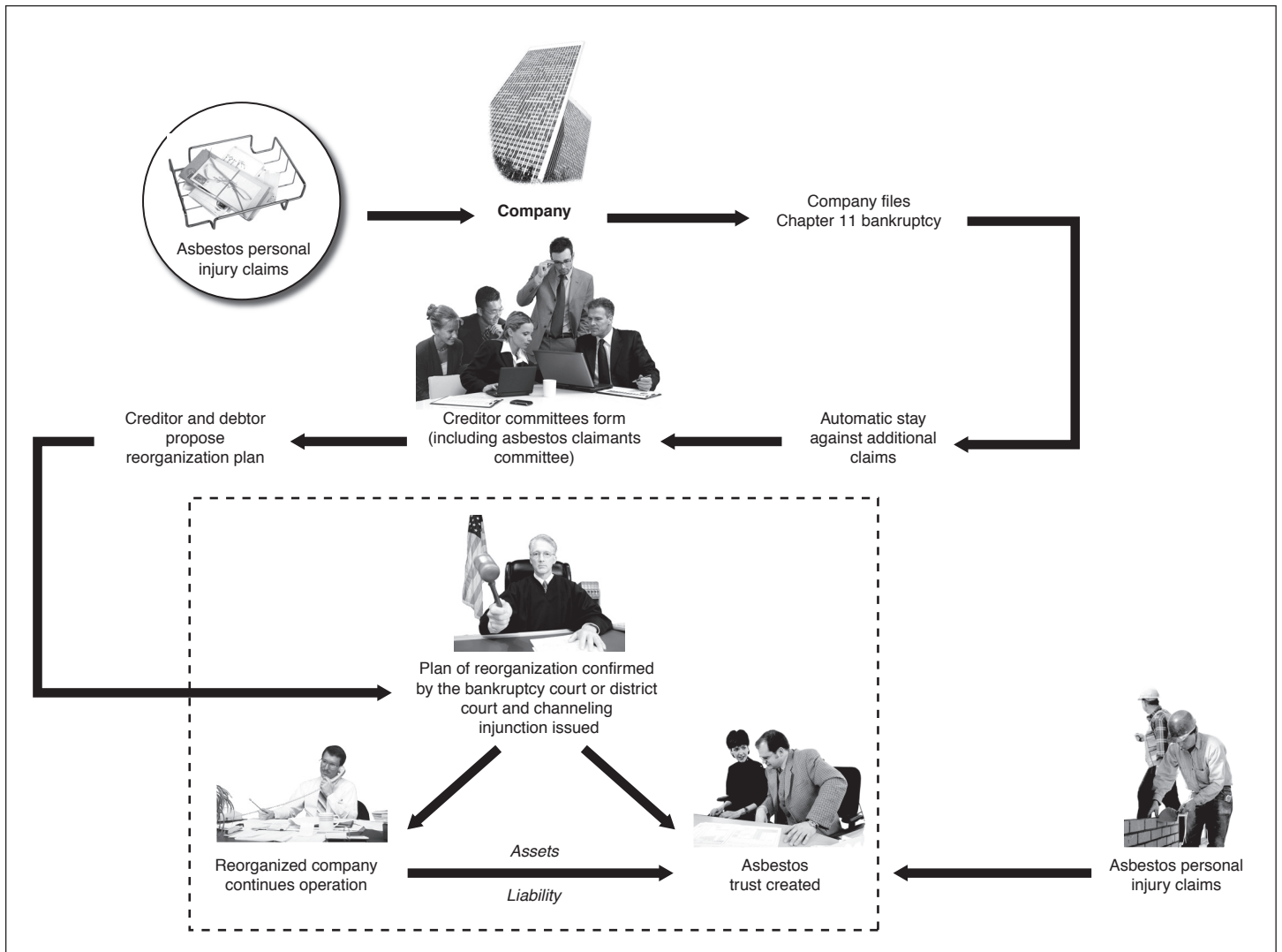
Source: GAO analysis.

To resolve their asbestos liabilities while at the same time continuing with general business operations, companies may seek to reorganize their debts by filing for bankruptcy under Chapter 11 and in accordance with § 524(g) of the federal bankruptcy code. In accordance with these provisions, a debtor company, creditors (that is, parties with claims against the debtor, including asbestos claimants), and as appropriate, other interested parties, such as insurance companies that may have issued liability insurance policies to the debtor company, will develop and propose a plan of reorganization. The plan will provide for the establishment of an asbestos personal injury trust to assume the asbestos-related liabilities of the debtor company and compensate present and future claimants for harm caused by exposure to asbestos.

The plan of reorganization must then be confirmed by the U.S. Bankruptcy Court and affirmed by the U.S. District Court of jurisdiction.¹⁵ Once the reorganization plan is confirmed and the trust established, all asbestos personal injury claims originally intended for the debtor company must go through the trust. See figure 3 for the Chapter 11 bankruptcy process through which asbestos bankruptcy trusts are created.

¹⁵ In some instances the U.S. District Court, and not the Bankruptcy Court, may confirm a plan of reorganization.

Figure 3: Chapter 11 Bankruptcy Process through Which Asbestos Bankruptcy Trusts Are Created



Sources: GAO analysis of U.S. Bankruptcy Code; and Art Explosion (photos).

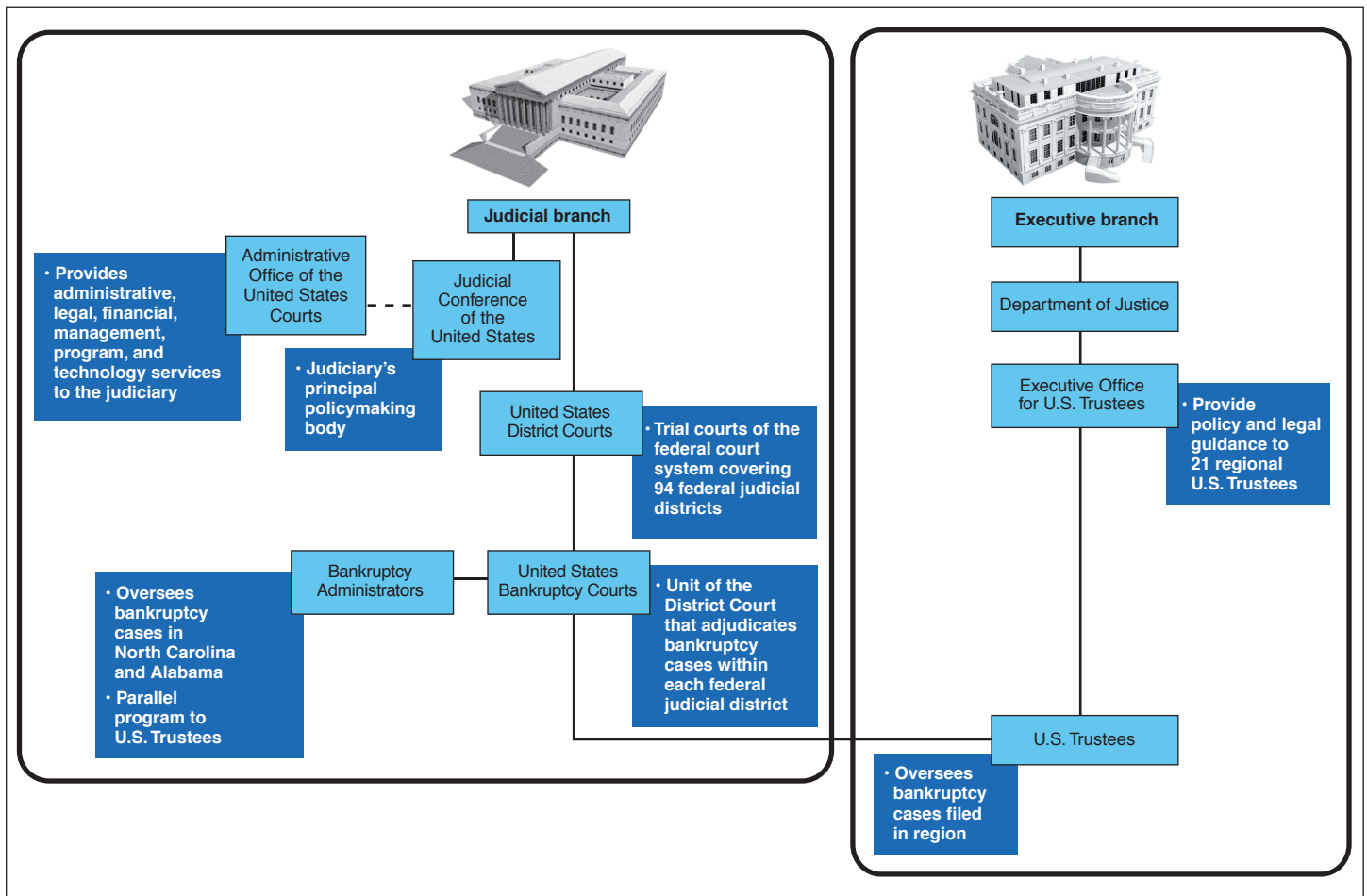
When a company files a petition for bankruptcy under Chapter 11 with the U.S. bankruptcy court of appropriate jurisdiction, that court will preside over the debtor company's reorganization. Concurrently, United States Trustees or, where applicable, Bankruptcy Administrators, have

responsibility for supervising or overseeing the administration of bankruptcy cases.¹⁶ Although the role of the U.S. Trustees will vary depending on the circumstances of a petition, in general, they will monitor the debtor company's business operations, including a review of monthly operating reports or other financial information and the debtor company's progress in filing and confirming its reorganization plan. When a plan of reorganization involves a debtor company facing asbestos-related liability and provides for the establishment of a trust in accordance with § 524(g), the U.S. Trustees will generally ensure compliance with applicable provisions of the federal bankruptcy code but will not focus on issues specific to the operations of the trust, such as provisions negotiated by the debtor company, asbestos claimants, other creditors, and interested parties.

After the reorganization plan is filed with the bankruptcy court, the bankruptcy judge verifies that it complies with Chapter 11 of the bankruptcy code. If the plan involves the establishment of an asbestos personal injury trust, the bankruptcy court and U.S. District Court will also ensure compliance with § 524(g) before confirming, or affirming confirmation of the debtor company's plan of reorganization and issuing the channeling injunction. Upon confirmation of the reorganization plan, the role of the bankruptcy courts and U.S. Trustees is significantly reduced, in particular, with respect to an asbestos personal injury trust established pursuant to the plan. Postconfirmation, neither the courts nor the U.S. Trustees have any specific statutory or other requirements to oversee a trust's administration. The bankruptcy court, however, ordinarily maintains limited postconfirmation jurisdiction over the trust, including receipt of annual financial reports filed by a trust, which are usually filed with the court in accordance with a trust's reorganization plan or trust agreement. See figure 4 for an overview of the U.S. bankruptcy system.

¹⁶The U.S. Trustee Program, a component of the Department of Justice, administers bankruptcy cases in 88 of the 94 judicial districts in 48 states. Bankruptcy Administrators, part of the Administrative Office for U.S. Courts, operate in the remaining 6 districts, located in Alabama and North Carolina. For purposes of this report, references to the U.S. Trustees include both the U.S. Trustees and the Bankruptcy Administrators.

Figure 4: Overview of the U.S. Bankruptcy System



Source: GAO analysis; clipart photo Flickr.

Organization and Administration of Trusts

For a debtor company to obtain the benefit of § 524(g) of the bankruptcy code the trust established as part of the company's plan for reorganization must operate through mechanisms that provide a reasonable assurance that the trust will increase in value, and be in a financial position to pay present and future demands that involve similar claims in substantially the same manner.¹⁷ As part of the bankruptcy

¹⁷See 11 U.S.C. § 524(g)(2)(B)(ii)(V).

reorganization process, the creditors and the debtor establish the trust's administrative functions, amounts of compensation claimants may receive, and processes that determine whether a claimant is entitled to compensation. These are established and described in a trust's TA and TDP. The TA is the instrument that creates a trust and that describes the trust's purpose, acknowledges the transfer and acceptance of assets from the debtor company in exchange for assuming the debtor's liability, and describes key actors in the trust's administration. The TDP contains the processes that govern the review, valuing, and payment of asbestos-related personal injury claims.¹⁸ Among other things, the TDP coordinates claim processing, assigns payment values for various asbestos-related diseases, sets medical criteria for the different diseases, prescribes procedures for reviewing the claims, and establishes a dispute resolution process. These provisions function to ensure that all claimants, both current and future, receive equitable compensation for their asbestos-related injuries.

The asbestos trusts are privately managed and are generally comprised of at least one or more trustees, a trust advisory committee (TAC), and a future claimants' representative (FCR). Trustees manage the daily operations of the trusts, including managing the trusts' investments, hiring and supervising support staff and advisers, filing taxes, and submitting annual reports to the bankruptcy court, as required by the trusts' TA. The trustees are to manage the trust for the sole benefit of the present and future claimant beneficiaries, who are represented by the TAC and the FCR, respectively. The TAC, a group established by the TA, and the FCR, a position statutorily required by § 524(g), both advise the trustees on and must generally consent to significant changes in trust administration and the implementation of the TDP.¹⁹

Although 60 companies subject to asbestos-related liabilities have filed for bankruptcy under Chapter 11 and established asbestos bankruptcy trusts in accordance with § 524(g), asbestos claimants can also seek compensation from potentially liable solvent companies (that is, a company that has not declared bankruptcy) through the tort system. In

¹⁸Some trusts refer to these as the Claims Resolution Procedures.

¹⁹11 U.S.C. § 524(g)(4)(B)(i) (requiring the court to appoint a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands against the debtor company for asbestos-related injuries).

such instances, trust compensation as well as a claimant's occupational exposure and medical evidence submitted to trusts may be taken into consideration. RAND's Institute for Civil Justice released a report in August 2011 addressing the potential effects of asbestos bankruptcy trusts on compensation in the tort system²⁰ At issue in the report is how the tort system takes into consideration compensation paid by trusts and the time at which a plaintiff must disclose trust submissions, focusing on selected states' practices and liability regimes. The report also examines how the establishment of the trusts potentially affects total plaintiff compensation and payments by the solvent defendants.

Asbestos Trusts Have Paid at Least \$17 Billion in Claims and Are Administered in Accordance with Trust Distribution Procedures

Asbestos Bankruptcy Trust Payments

Since the establishment of the first trust in 1988 through 2010, available data indicate that asbestos trusts have paid about 3.3 million claims valued at about \$17.5 billion. Trusts typically report the number of claims paid and the value of these claims in annual reports submitted to the bankruptcy court, which are generally available to the public. In 2010, the RAND Corporation reported that from 1988 through 2008, trusts paid about 2.4 million claims totaling \$10.9 billion with about 575,000 claims totaling \$3.3 billion in 2008.²¹ We reviewed available 2009 and 2010 annual financial reports and found that these trusts paid approximately 443,000 additional claims totaling \$3.6 billion in 2009 and approximately

²⁰RAND Corporation, *Asbestos Bankruptcy Trusts and Tort Compensation*, RAND Institute for Civil Justice, MG-1104 (2011).

²¹RAND Corporation, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND Institute for Civil Justice, TR-872-ICJ (2010).

461,000 more claims totaling \$3 billion in 2010. The number and value of claims paid presented above provides a conservative estimate of total trust payments since 1988. RAND Corporation reported that its data provide the lower bounds because data on the number and value of claims paid are incomplete for some trusts' payments prior to 2006. Although we were able to collect 47 (84 percent) of the 56 trusts' annual reports for 2009 and 47 (81 percent) of the 58 trusts' annual reports for 2010, some trusts' annual reports may not be publicly or readily available. Four of the trusts did not have 2009 annual reports because the trusts were newly established or were established in 2010 or 2011. Two of these trusts also did not have 2010 annual reports available because the trusts were newly established or were established in 2011. In addition, annual reports may have been filed under seal with the Bankruptcy Court for reasons deemed appropriate by the court, according to U.S. Bankruptcy Court judges we interviewed.

Asbestos Trusts Assess and Pay Claims in Accordance with Trust Distribution Procedures

Each asbestos trust has a TDP that governs the administration of the trust and establishes the process for assessing and paying claims. Claims that meet the criteria documented in the TDP are paid as a percentage of the scheduled value specified in the TDP as discussed below. TDPs may also include a claim payment ratio provision that specifies the amount of payments that the trust may allocate for the most serious claims (malignancies, serious asbestosis) versus the less serious claims each year. Such provisions serve to prioritize the more serious claims to ensure that less serious claims do not absorb the bulk of available assets each year simply because there are more of them.²² The ratio is different in each trust, but trusts may allocate 80 percent or more of their available assets to the more serious claims.

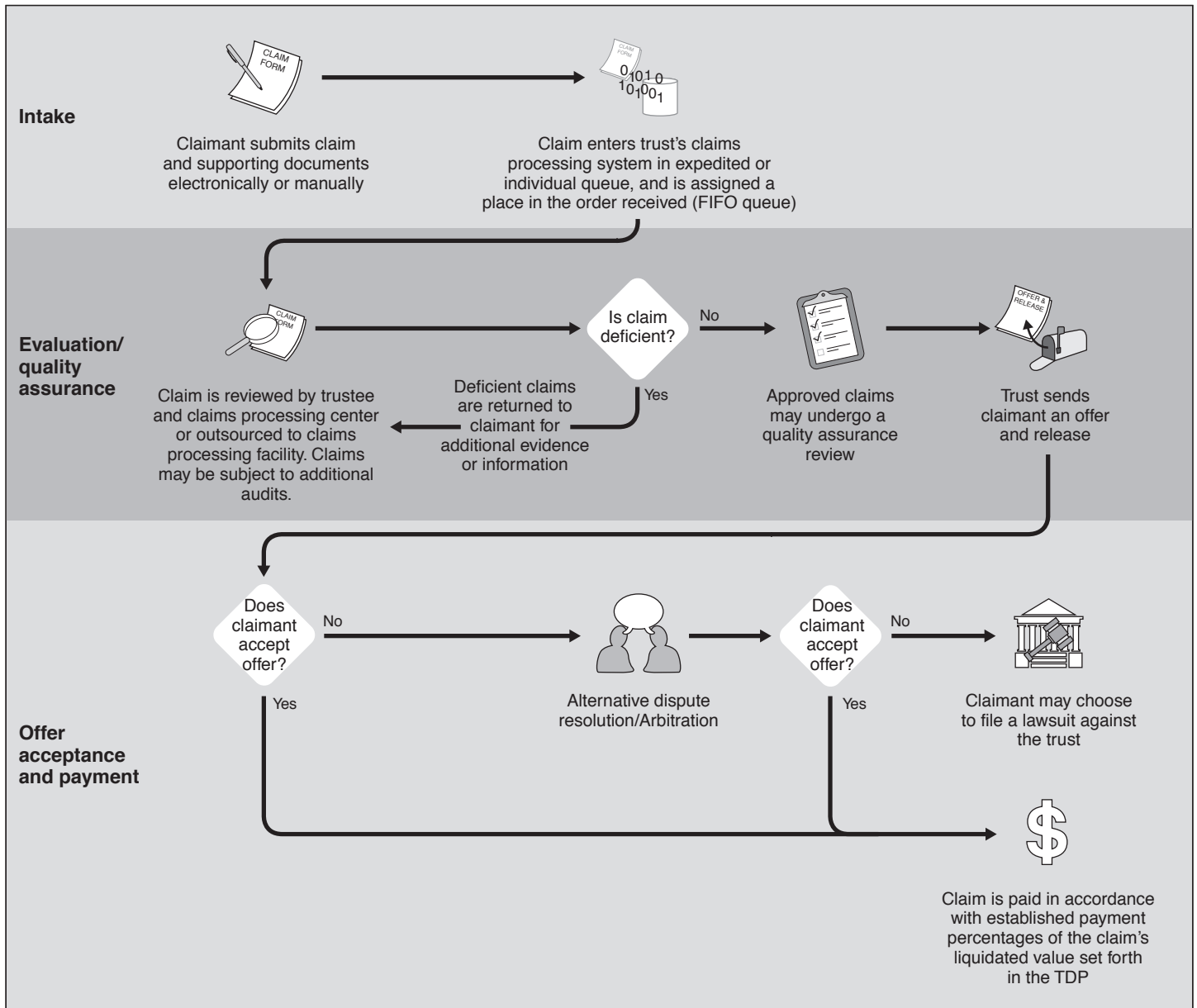
Trusts typically offer claimants two options for claim review, either expedited review or individual review. Under expedited review, claims that meet the medical and exposure criteria for the alleged disease (referred to as the disease level) are to be assigned a scheduled value for the disease. The trusts seek to achieve relative equity among claimants by establishing these scheduled values. A claim that meets the criteria

²²TDP's will also generally provide for a limit on the amount of payments a trust will make each year, referred to as the "maximum annual payment." In the event payment of a claim would cause a trust to exceed the maximum annual payment threshold, that claim shall generally be carried over into the next year.

documented in the TDP typically includes a completed claim form with documented evidence of exposure to asbestos products. Such evidence of exposure may consist of the claimant's work history, Social Security records, invoices, employer records, or deposition testimony of the claimant or coworkers taken in asbestos litigation. The claimant, or attorney acting on the claimant's behalf, also submits medical reports or records sufficient to support a diagnosis for the specific disease being claimed or, if applicable, a copy of a death certificate.²³ As an alternative to expedited review, individual review provides a claimant the opportunity to receive individual consideration of his or her medical condition and of the claim's value. Some categories of disease may be compensated only through individual review (i.e., lung cancer without underlying asbestosis). In the individual review process, the trust may be able to take into account factors relevant to the individual claimant (dependants, pain and suffering, for example) and factors relevant to the litigation posture of the claim were it to have been pursued in the tort system (such as the jurisdiction and the track record of the law firm representing the claimant). Payment for an individual review claim can be higher or lower than a claim in the expedited process. In general, under either expedited or individual review process, claims are paid according to a first-in, first-out (FIFO) rule, processing each claim based on the date the claim was filed. Based on our review of 52 of 60 TDPs and our interviews with officials from 11 trusts, the process for assessing and paying claims typically follows the process shown in figure 5.

²³Claims may be filed on behalf of deceased claimants.

Figure 5: Asbestos Trust Claim Process



Source: GAO analysis of asbestos trust claim process.

Intake of claims. Based on our review of 52 of 60 TDPs and interviews with 11 trusts, claims and supporting documents are filed electronically or manually. Upon review of a claim and supporting documents, the trust's claim processing facility begins the review process in accordance with the method selected by the claimant. A claimant chooses the expedited or individual review process, both of which are separately processed through the FIFO queue. Two to 3 percent of claims are processed through the individual review process, while most claims flow through the expedited claims queue. Claims processed through the expedited review claims queue are paid the scheduled values for disease level as set forth in the TDP.

A claimant may elect to have a claim undergo the individual review process for purposes of determining whether the liquidated value exceeds the TDP's scheduled value, or if the claim does not meet the presumptive medical criteria for any of the disease levels in the TDP. A claimant can demonstrate exposure to an asbestos-related product in a variety of ways. For example, an asbestos claimant diagnosed with mesothelioma or asbestos lung cancer and who is receiving chemotherapy could be a male age 60 or older who has worked for construction companies at numerous work sites and shipyards where he was exposed to various asbestos-containing products for an extended period of time. This claimant files claims with several trusts where the now reorganized companies' products or operations are identified at those specific work sites. For occupational exposure evidence, the claimant may provide a trust with Social Security records in support of the claim to document where the claimant was employed at the time of exposure. The record may indicate that the claimant was employed by a specific company that was known to have used asbestos products; however, there may not be a direct link between the claimant's exposure to the product at the company. Under these circumstances, trusts may solicit work histories from the claimant's company in support of the claim. However, it is possible that accurate work records may not exist due to, for example, the passing of a substantial amount of time between exposure and the date a claim is filed, and the trust, therefore, may have to rely on depositions from other parties or even professional judgment that considers all available information.

Evaluation of claims. The process for evaluating claims varies across trusts. Seven of the eight large trusts we interviewed told us they rely on claims processing companies to assess claims against the criteria outlined in the trusts' TDPs. Officials we interviewed at 9 of the 11 trusts said they have internal claims reviewers to determine whether the claimant's medical and exposure evidence satisfies the requirements

outlined in the TDP. If a trust has any concerns about a claim, the trust may request the claimant provide additional documentation, such as other independent medical records. Officials we interviewed at 5 of the 11 trusts told us they also track public information and court filings to determine if questions are raised in the tort system about the authenticity of information and claims filed by a particular lawyer or claimant. In cases where questions are raised about the validity of claims from particular individuals, trusts officials stated that they will further inspect such claims.

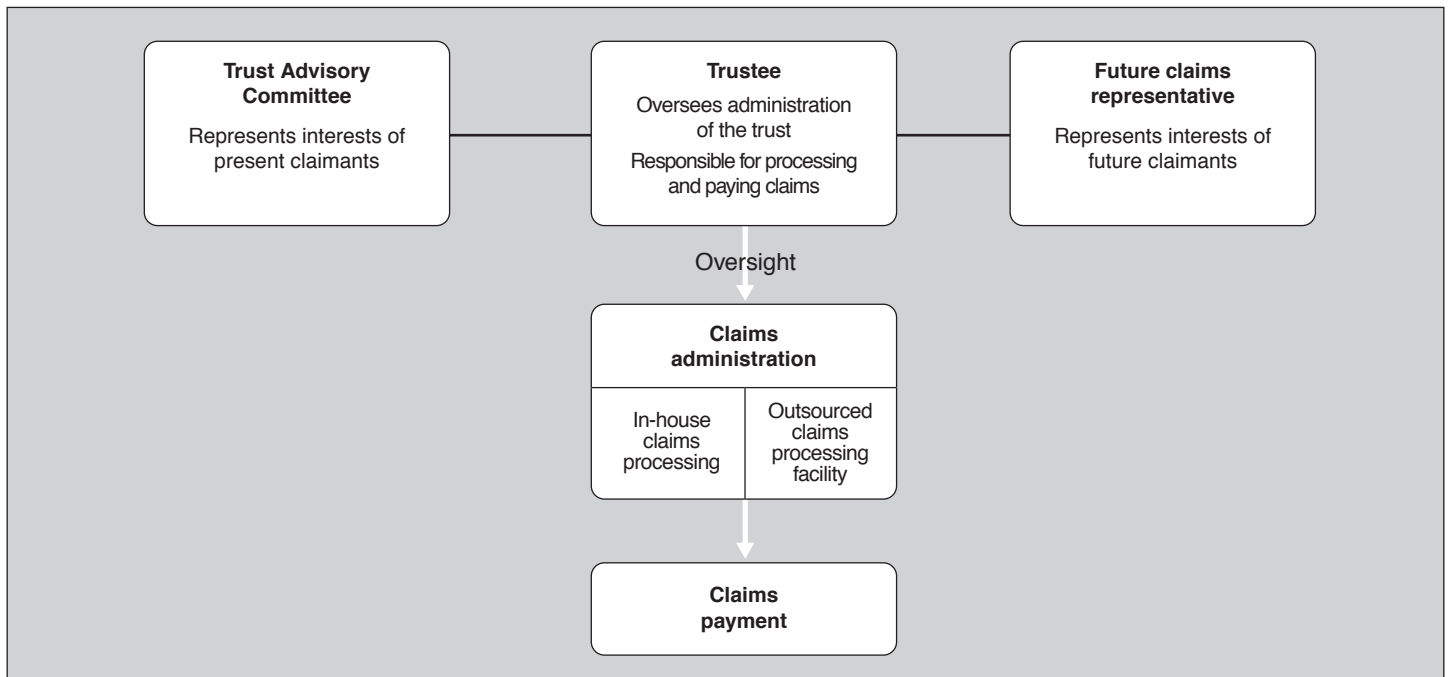
Payment process. If a trust determines that a claim meets the criteria documented in the TDP, the trust is to make the claimant an offer based on a percentage of the scheduled disease value specified in the TDP.²⁴ Most trusts cannot pay the full value of a claim and still maintain sufficient assets to compensate all present and future claimants. As a result, trusts determine a payment percentage, a fraction of the full value that can be paid to present claimants and still maintain sufficient assets for future claims. Payment percentages vary across trusts and TDPs we reviewed specify a range of payment percentages from 1.1 percent to 100 percent for certain diseases, such as mesothelioma or asbestosis. The median payment percentage across trusts is 25 percent, according to the 2010 RAND Corporation study.²⁵ Periodically, trustees will calculate what the trust can afford to pay based on the assets it has on hand, and what those assets are expected to earn in the future. For example, a trust with a scheduled disease value of \$100,000 for a specific disease type, such as mesothelioma or asbestosis, that applies a payment percentage of 44 percent would pay a claimant \$44,000. In arriving at a payment percentage, the trustees, the TAC, and FCR review the trust's claim statistics and compare those to the original forecasts made of the volume and value of claims at the time the trust was created. The trustees review the payment schedule periodically and may adjust it, up or down, based on what assets are available to meet a trust's present and future

²⁴The payment percentage is a percentage applied to the value that a trust assigns to a disease to determine the amount that will be actually paid to the claimant. Payment percentages are initially set during trust formation but may be changed by the trustee or trustees with the consent of the trust advisory committee and the future claimants' representative. Payment percentages are used as a means to preserve trust assets to pay future unknown claims.

²⁵RAND Corporation, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND Institute for Civil Justice, TR-872-ICJ (2010).

liabilities.²⁶ The TAC and FCR must generally consent to any changes that are made to the payment percentage. If the claimant accepts the trusts' offer, the claim is paid. If the claimant rejects the offer, the claimant may enter into alternate dispute resolution, as set forth in the TDP. If the issue is not resolved through alternate dispute resolution, the claimant may file a lawsuit in the tort system against the trust in an appropriate court of jurisdiction regarding the amount of compensation offered by the trust.

Figure 6: Key Actors Involved In the Asbestos Bankruptcy Trust Payment Process



Source: GAO analysis of asbestos trust claim process.

Quality Assurance and Audit programs. Fifty (98 percent) of the 52 TDPs we reviewed contained a provision requiring that the trusts conduct a claims audit program. These TDPs provide that the trustees, with the consent of the TAC and FCR may develop methods for auditing the

²⁶If the payment percentage is increased, the trust will generally make supplemental payments to all claimants who previously liquidated their claims against the trust and received payments based on a lower payment percentage, as set forth in each trust's TDP.

reliability of medical evidence. While trust processes vary, officials we interviewed at all 11 of the trusts stated that they incorporate quality assurance measures into their intake, evaluation, and payment processes. For example, officials we interviewed at 2 of the 11 trusts said they reviewed random and targeted samples of processed claims to ensure claims were valid and supported. These trusts told us that these audits include reviews of supporting medical and work history documentation to determine if they are valid and accurate. For example, one trust stated that if they identified claims by multiple individuals with the same birth date and same disease filed by the same law firm, this would likely trigger follow-up procedures to ensure that these individuals actually exist. Another trust we contacted reported conducting an external audit with claims selected randomly to identify claims that required further review for potential fraudulent activities. The objective of the audit was to ensure that appropriate amounts of money were paid to the proper claimants and medical documentation was valid. As part of the audit, a sample of x-rays was sent to an independent doctor who evaluated the x-rays to determine whether the disease existed based on the evidence submitted to the trust. According to the trust, any irregularities identified by the audit were addressed and all of the randomly selected claims were supported by sufficient medical and exposure evidence and found to be processed and paid in accordance with trust procedures.

According to the officials we interviewed at all 11 trusts we selected, each trust is committed to ensuring that no fraudulent claims are paid by the trust, which aligns with their goals of preserving assets for future claimants. Although the possibility exists that a claimant could file the same medical evidence and altered work histories with different trusts, each trust's focus is to ensure that each claim meets the criteria defined in its TDP, meaning the claimant has met the requisite medical and exposure histories to the satisfaction of the trustees. Of the trust officials that we interviewed that conducted audits, none indicated that these audits had identified cases of fraud.

**Most Asbestos Trusts
Publish Annual
Financial Reports
Whose Details Vary;
Parties May Obtain
Other Information
through Requests or
Subpoenas**

**Trusts' Annual Financial
Reports**

All of the 44 TAs that we reviewed require that trusts submit annual financial reports to the U.S. Bankruptcy Court of jurisdiction. For example, one trust requires that the "Trustees shall cause to be prepared and filed with the Bankruptcy Court a report containing a summary regarding the number and type of claims disposed of during the period covered by the financial statements." The TDP, which contains the processes that govern claim filing and payment, typically requires that the trust make information available to claimants and other interested parties on the number and value of claims that have been resolved. For example, one trust's TDP requires that the trust "make available to claimants and other interested parties, the number of claims by disease levels that have been resolved indicating the amounts of the awards and the averages of the awards by jurisdiction."

Each of the 47 trust annual financial reports for 2009 and 2010 that we obtained and reviewed included the total amount of payments made by the trusts and most included the total number of claims received and paid. Table 1 provides a summary of information presented in these 2009 and 2010 annual reports.

Table 1: Information Found in Trusts' 2009 and 2010 Annual Reports Obtained and Reviewed by GAO

	2009 Annual reports	2010 Annual reports
Number of reports obtained and reviewed	47 (of 56 trusts)	47 (of 58 trusts)
Reports including claims received	37	35
Minimum claims received by a trust ^a	0	0
Maximum claims received by a trust	Over 800,000	Over 160,000
Total claims received by trusts	1.6 million	1.3 million
Reports including claims paid	42	42
Minimum claims paid by a trust	0	0
Maximum claims paid by a trust	Over 79,000	Over 83,000
Total claims paid	443,000	461,000
Reports including value of claims paid	47	47
Minimum value of claims paid by a trust	0	0
Maximum value of claims paid by a trust	Over \$800 million	Over \$650 million
Total value of claims paid by trusts	\$ 3.6 billion	\$ 2.9 billion

Source: GAO analysis of available trusts' annual reports.

^aAccording to the annual reports for those trusts that reported 0 claims received and 0 claims paid, the trusts did not accept claims because the trusts are in the process of organizing (if newly established), have pending litigation, have no funds available to pay claims, or have pending assets in the form of unliquidated insurance assets.

Of the annual reports we reviewed, one trust reported information on the amount paid to each individual and listed these individuals' names. According to officials from this trust, they included individual's names to reduce the number of external requests for claimant payment information and, therefore, reduce the trust's operating expenses associated with addressing such requests.

Trusts that submitted annual reports for 2009 and 2010 may summarize claims paid according to whether the claim is for a malignant or nonmalignant disease, by the state (or country) from which the claim was filed, or by whether the claim was a prebankruptcy filing or filed after the trust's establishment. The annual reports may also include information about the trusts' other activities, including names of trust administrators, records of administrator meetings, changes in the payment percentage, and updates on resolved and ongoing litigation involving the trust or the debtor companies' insurers.

Trust Information May Also Be Obtained through Requests or Subpoenas in Some Cases

Outside of the TAs, TDPs, and publicly available annual financial reports, additional information related to trusts or claimants may be obtained through direct requests to the trust or by way of court-ordered subpoenas. When asbestos-related litigation makes its way into the tort system, such as when a party brings suit against a solvent company, the court may require that a claimant or trust share information about an individual's exposure to asbestos, work history, or other evidence submitted to the trusts either at its own initiative or at the request of one of the parties through discovery. Discovery is the pretrial phase of a lawsuit during which the parties seek production of information related to the litigation or that may be "reasonably calculated to lead to admissible evidence."²⁷ In asbestos cases, exposure and work history may be sought as evidence in determining a particular defendant's liability for the exposure or a plaintiff's exposure history, among other things. While discovery is governed in each jurisdiction by judicially adopted or statutorily mandated rules (for example, discovery in federal civil matters is generally governed by Rule 26 of the Federal Rules of Civil Procedure), discovery is generally limited to nonprivileged materials and matters relevant to the subject involved in the case. Typically, materials and information disclosed in the course of settlement negotiations is recognized as not discoverable. Sixty-five percent of the trust distribution procedures that we reviewed specifically state that claimant information submitted to the trust for purposes of obtaining compensation is confidential and should be treated as a settlement negotiation. Depositions, requests for document production and review, and subpoenas are the commonly used techniques to compel production of discoverable material. Judges may require that a claimant or trust disclose trust claim forms during the discovery phase, which may include statements of work history, asbestos exposure, and medical diagnosis, for claims previously submitted to trusts.

Whether claim forms and payments should be discoverable has been a subject of dispute during the discovery phase of asbestos-related litigation. The disagreement centers around whether claim forms and the subsequent claim evaluation fall under the privileged material exemptions to general discovery rules. Similar to the Federal Rules of Civil Procedure, state civil procedure rules generally protect the confidentiality of settlement negotiations, and settlement agreements are generally not admissible into evidence at trial. The trusts and claimant representatives

²⁷See, e.g., Fed R. Civil P. 26(b)(1).

have argued that trusts should be treated as any other settling party while defendant solvent companies and insurers have argued that the trusts' claims processing is nonadversarial and, therefore, should not be treated as a settlement negotiation or agreement.

Within the tort system, if a claim proceeds to trial and results in a verdict for the claimant, the liability of each defendant is established in accordance with applicable state law.²⁸ The court, however, may adjust any amounts awarded by way of a verdict to account for compensation that the claimant has already received from trusts or through settlements with other parties. Efforts to offset amounts awarded by verdict with an amount received from trusts constitute a method for managing contributions from multiple defendants and accounting for other sources of compensation related to the harm deemed to have been inflicted. State courts generally require that the liable defendant (or defendants) be given credit for compensation the plaintiff has already received (for example, as a claimant to a trust), which may have the effect of reducing the amount a plaintiff will receive from a particular defendant. In such instances, a court will generally require, if it had not done so earlier in the proceedings, that the plaintiff disclose any compensation actually received for the harm, including payments from trusts. However, if a plaintiff had not filed any claims with trusts prior to or during the trial, then there would be no claims information available to potentially offset an amount awarded by verdict. Following a verdict, a prevailing plaintiff would generally not be precluded from subsequently filing claims for compensation to those trusts to which the harm is attributable. In addition, a solvent company found liable for damages in the court system could file an indirect claim with a trust seeking compensation for that trust's (or, the debtor company's) contribution to the underlying harm suffered by the plaintiff.²⁹

²⁸For example, in a state that applies a "joint and several liability" standard for awarding damages, each party found liable to a plaintiff is individually responsible for the entire amount awarded, but may have a right of contribution and indemnity from nonpaying parties. In a state that applies a "several liability" standard, a party found liable is only responsible for its share of the damages, as determined in trial. The 2011 RAND study on asbestos bankruptcy trust and tort compensation discusses the liability regimes of California, Illinois, New York, Pennsylvania, Texas, and West Virginia.

²⁹In general, an indirect claimant is one who seeks reimbursement or compensation from a trust because it has compensated a potential claimant of the trust in another forum. Examples of indirect claimants include insurance providers, solvent companies, and other trusts.

Asbestos trusts typically protect the confidentiality of claimants' submissions to the trust in accordance with the trust's TDP, unless specifically given permission by the claimant or subpoenaed by a court of jurisdiction. Thirty-three (65 percent) of the 52 TDPs we reviewed included sections related to protecting the confidentiality of claimants' information and these sections often state that the trusts will only disclose information to outside parties with permission of the claimant or in response to a valid subpoena. For example, one trust's TDP states that the trust "will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only, with the permission of the holder... to such other persons as authorized by the holder... or in response to a valid subpoena." However, of the 52 TDPs that we reviewed, 18 did not include a confidentiality statement.

According to trust officials with whom we spoke, if served with a subpoena requesting disclosure of an individual claimant's information, the trust may consider whether the subpoena is valid before identifying whether or not the subpoenaed claim or information exists. For example, the trust may consider whether the court issuing the subpoena has jurisdiction. If the claim or information exists, the trust notifies the claimant (or his or her representative) of the subpoena and the claimant (or his or her representative) may file an objection or motion to quash (or void) the subpoena. If no objection or motion to quash the subpoena is filed, the trust will generally produce the subpoenaed information or claim file but may exclude any confidential settlement, payment, or nonpertinent medical information. According to trust officials we interviewed, subpoenas typically request disclosure of an individual claimant's information for use during either the pre-trial discovery or post-trial setoff processes. However, in other circumstances, solvent companies, debtor companies that are attempting to reorganize under Chapter 11, or insurance carriers may attempt to have a trust's entire claimant database subpoenaed. In such instances, the breadth of such a demand for disclosure may prompt a trust to challenge the subpoena.

Views Differ on Whether Additional Claimant Information Should Be Made Available; Recent Efforts to Change the Trust System

Stakeholder Views

Stakeholders, including plaintiff and defense attorneys, trustees, and other interested parties expressed differing views on the extent to which additional individual claimant information should be made available to outside parties. Those who oppose additional disclosure of individual claimant information note that parties in the tort system are not required to disclose settlement negotiation or agreement information outside of the subpoena process. For example, during the expert panel discussions at a conference on asbestos bankruptcy proceedings and trust operations, three plaintiff attorneys stated that all potentially relevant information about an individual's exposure to asbestos, work history, or other evidence submitted to the trusts may be available through the pretrial discovery process, during which time a subpoena may have been used to obtain the information. The three plaintiff attorneys who gave presentations at the conference and who we interviewed emphasized that the trusts are analogous to any other settling party and related negotiations and payments are privileged. Also, as part of its 2011 study, RAND Corporation interviewed 11 asbestos plaintiff attorneys, 20 defense attorneys, and 6 trust officials and asked them their views of the disclosure of individuals' personal information submitted to trusts.³⁰ The plaintiff attorneys interviewed in the RAND study stated that all of the potentially relevant information in the trusts' possession is available to the defense through pretrial discovery and emphasized that the trusts are analogous to any other settling party and related negotiations and payments are privileged.

³⁰ RAND Corporation, *Asbestos Bankruptcy Trusts and Tort Compensation*, RAND Institute for Civil Justice, MG-1104 (2011).

Moreover, officials we interviewed from all 11 trusts and the trust attorneys that RAND Corporation interviewed emphasized that trusts are bound to keep the claim forms and settlement amounts with individual claimants confidential for two primary reasons.³¹ First, the TDPs generally require the confidentiality of claimant information and, second, trust attorneys and trust officials maintain that requests for information impose substantial costs. Such costs may include the legal fees associated with their duty to preserve the confidentiality of claim forms as well as the costs of finding, producing, and reviewing the information sought in a valid discovery request. According to officials for 2 of the 11 trusts whom we interviewed, paying these costs would deplete trust assets, which exist solely for the purpose of compensating asbestos claimants. For example, officials for one of the trusts we interviewed said the trust incurred \$1 million in attorneys' fees over a request to disclose every document on every claimant, as the trust attorneys had to review each document to delete confidential information not germane to the subpoena.

In contrast to the plaintiffs' attorneys and trust officials, an association representing the business community's views that we interviewed, along with three defense attorneys who were presenters at the conference on asbestos bankruptcy proceedings and trust operations, and the defense attorneys that RAND Corporation interviewed, stated that more claimant information should be available. For example, defense attorneys have argued that trust submission forms, which could include claimant medical history and asbestos exposure and payment information, should be made available because the increase of information on claimant filings and compensation may decrease the asbestos-related litigation burden on the remaining solvent defendants by demonstrating that the trusts have increased claimants' overall compensation beyond the amount justified in relation to the harm caused. These defense attorneys also argue that a lack of transparency could enable plaintiffs to file contradictory claims to different trusts while also pursuing recovery through the tort system.³²

³¹One of the 11 trusts discloses a list of individual claimant information along with disease category, amounts, and corresponding date of payments in its annual report.

³²See, e.g., *Kananian v. Lorillard Tobacco Company*, No. CV 442750 (Ohio Cuyahoga County Com. Pl. Jan. 18, 2007) (concluding that attorneys representing a mesothelioma victim's estate simultaneously filed claims with numerous asbestos trusts that contradicted similar claims made in the tort system thereby precluding them from practicing before the court but not dismissing the lawsuit as the court found neither the plaintiff's estate nor its current counsel culpable).

One of the two researchers and one of the two law professors with whom we spoke also expressed a need to increase transparency out of similar concerns for claimants' misrepresenting their exposure histories to trusts or in the tort system.

Recent Proposals and Actions Related to Asbestos Trusts and the Disclosure of Claimant Information

In recent years, there have been various proposals to address the disclosure of claimant information in the possession of trusts and the means for compensating persons with conditions attributed to asbestos exposure. One proposal, made by an expert in administrative alternatives to mass tort litigation and asbestos litigation in 2006, for example, would have created a federal depository to review asbestos bankruptcy trust claims for any inconsistencies to ensure that claims filed across trusts were valid. A 2010 proposal by the Institute for Legal Reform (ILR), an affiliate of the U.S. Chamber of Commerce that represents the business community, is aimed at imposing reporting requirements on asbestos bankruptcy trusts to report claimant-related information to increase transparency.³³ Specifically, the proposal would require asbestos trusts to file publicly available quarterly reports. Reports submitted under this proposal would need to describe each demand for payment the trust received during the reporting period, including an individual's asbestos exposure history, as well as each amount paid for demands during the report period, but would not include confidential medical records or claimant Social Security numbers. The ILR believes that a lack of transparency presently undermines the intent of § 524(g) to the extent that contradictory claims are depleting trust assets to the detriment of valid future claimants. According to the ILR, to restore oversight, either the U.S. Trustee program needs statutory authority to directly oversee the administration of the trusts or all of the stakeholders, such as solvent defendants and other trusts, should have access to claimant work history and exposure information to monitor for inconsistent or fraudulent claims. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Advisory Committee on Bankruptcy

³³According to its website, the U.S. Chamber Institute for Legal Reform (ILR) is a "national campaign representing the nation's business community, with the critical mission of making America's legal system simpler, fairer, and faster to everyone."

Rules (Advisory Committee), anticipates considering the proposal at its fall 2011 meeting.³⁴

The Advisory Committee's Subcommittee on Business Issues preliminarily identified several issues it would consider before recommending action on the ILR proposal. The issues raised primarily focus on whether the courts have authority to prescribe such a rule, whether implementation of the proposed rule falls within the scope of bankruptcy jurisdiction, and whether the ILR proposal demonstrated a sufficient need for the reporting and disclosure provisions it advocates. With respect to the courts' authority to prescribe such a rule, the subcommittee opined that imposing discovery and other disclosure requirements for purposes of matters "outside the contours of a bankruptcy case," such as tort and other nonbankruptcy suits, might exceed the courts' authority to prescribe rules involving practice and procedure in bankruptcy cases.³⁵ With respect to the bankruptcy court's jurisdiction, the subcommittee acknowledged that while its jurisdiction does not cease upon the confirmation of a plan of reorganization, it does decrease at that point. It further acknowledged that while in instances where a confirmed plan establishes a trust pursuant to § 524(g), and the bankruptcy court continues to exercise jurisdiction to receive annual reports and other information from the trustees, the extent of this postconfirmation exercise of jurisdiction remains unsettled. The rule proposed by ILR would operate postconfirmation and, as such, the reporting and disclosure obligations the rule would impose may not appropriately fall within the bankruptcy court's jurisdiction. With respect to the reporting and disclosure obligations the proposed rule would impose, the subcommittee primarily addressed two points. First, it suggested that quarterly reporting requirements would not necessarily achieve the purpose of ensuring the integrity of the trust payment system by rooting out improper claim payments, and acknowledged that one person seeking and receiving payments from several trusts does not itself reveal

³⁴The Judicial Conference serves as the principal policy making body concerned with the administration of the U.S. Courts. The Judicial Conference also supervises the Director of the Administrative Office of the U.S. Courts in the performance of his or her duties as the administrative officer of the courts of the United States.

³⁵See 28 U.S.C. § 2075 (empowering the Supreme Court of the United States "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under [the Federal bankruptcy code]," but that "such rules shall not abridge, enlarge, or modify any substantive right").

impropriety. Second, the subcommittee opined that the bankruptcy court may not need the information at the level of detail proposed by the rule, in particular as it relates to enabling defendants in tort actions to offset against a judgment any amounts the plaintiff has already been paid for the same injury. The subcommittee also opined, however, that if discovery tools in tort litigation have proven to be ineffective and that trusts should be providing more information than they currently are, a legislative solution, such as an amendment to § 524(g) that imposes additional requirements on trusts created under that provision may be appropriate. The Judicial Conference plans to give the ILR suggestion further consideration after hearing responses from interested parties in the fall of 2011.

Various legislative proposals have sought to address the means for compensating persons with diseases or conditions attributed to asbestos exposure. Such proposals have sought to establish more fair and efficient processes for resolving asbestos injury claims, ensuring the availability of compensation for all present and future claimants, providing compensation commensurate with the degree of injury suffered, relieving federal and state courts of the burden of asbestos-related litigation, and better ensuring the availability of scarce resources for legitimate claimants. Most proposals involved consolidating responsibility for the receipt, evaluation, and payment of claims into a single office, while also proposing the establishment of a single fund, sustained by contributions of asbestos defendants, insurers, and other responsible parties, from which valid claims would be paid. The proposals would further have established the processes and procedures of such offices as the exclusive remedy for asbestos claims and generally would have barred the pursuit of asbestos-related claims in federal or state courts. More recent proposals, such as the Fairness in Asbestos Injury Resolution Act of 2005, referred to as the FAIR Act, would have potentially affected the viability of asbestos personal injury trusts by requiring, among other things, that trusts deposit a portion of their assets into the fund established under that proposed act. The current regime for addressing the liability of asbestos defendants—primarily, asbestos personal injury trusts and the tort system—remains. For a summary of proposed federal legislation addressing compensation for asbestos-related harms and death, see appendix I.

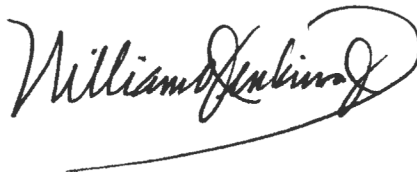
Agency Comments and Our Evaluation

We provided a draft of this report to the Department of Justice (DOJ), Administrative Office of the U.S. Courts, and the Federal Judicial Center for official review and comment. None of these agencies provided comments on this report. DOJ and the Administrative Office of the U.S. Courts provided technical clarifications, which we incorporated where appropriate.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the Administrative Office of the U.S. Courts, Federal Judicial Center, Department of Justice, and interested congressional committees. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any questions concerning this report or wish to discuss the matter further, please contact me at (202) 512-8757, or jenkinswo@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report are listed in appendix II.

Sincerely yours,



William O. Jenkins, Director
Homeland Security and Justice Issues

Appendix I: Select Federal Legislative Proposals Addressing Compensation for Asbestos-Related Harms or Death

Proposed legislation	Citation	Brief synopsis of select provisions
Asbestosis and Mesothelioma Benefits Act	H.R. 6906, 93rd Cong. (1st Sess. 1973).	With respect to claims for benefits filed before December 31, 1974, would authorize the Secretary of Health, Education, and Welfare to promulgate regulations to provide compensation, in conjunction with state worker's compensation laws, where an asbestos worker is disabled or deceased due to asbestosis or mesothelioma. Such regulations would ensure consideration of all relevant evidence, including workers' exposure to asbestos and relevant medical tests. With respect to claims for benefits filed after December 31, 1974, the proposed act would authorize the Secretary of Labor to promulgate regulations to provide compensation where an asbestos worker is disabled or deceased due to asbestosis or mesothelioma, but only if applicable state workers' compensation laws do not provide adequate coverage. The Secretary would list in the <i>Federal Register</i> those state workers' compensation laws that do not provide adequate coverage as a basis for awarding compensation.
Asbestos Health Hazards Compensation Act of 1981	S. 1643, 97th Cong. (1st Sess. 1981).	Recognizing that all parties directly or indirectly responsible for the occurrence of occupational asbestos diseases, including the federal government and the asbestos industry, should participate in the compensation for workers injured as a result of exposure to asbestos, would establish minimum standards under which state and federal workers' compensation laws will provide prompt, adequate, exclusive, and equitable compensation for occupational diseases or death resulting from exposure to asbestos. Among other provisions, the Secretary of Labor would prescribe, by regulation, minimum standards for determining if a worker's disability or death is due to asbestos-related disease would entitle a worker to compensation from his or her employer should a state or federal workers' compensation law be insufficient, and, if sufficient, benefits under a state or federal workers' compensation law would be the exclusive remedy against the employer, or any subsidiaries, predecessors, affiliates, or successors, among others.
Asbestos Health Hazards Compensation Act	H.R. 5224, 97th Cong. (1st Sess. 1981).	Would authorize the Secretary of Labor, in accordance with regulations promulgated pursuant to this authority, to direct responsible parties (including entities engaged in the manufacture, import, and distribution of asbestos) to make payment of benefits with respect to persons suffering a disability or who have died as a result of asbestos-related diseases before January 1, 1983. It would further establish an Asbestos Health Hazards Compensation Fund, sustained and developed with contributions from responsible parties, from which all valid claims for benefits would be paid. The fund would be directed by a board composed of representatives of responsible parties and affected persons, among others, that would be responsible for determining the validity of claims prior to authorizing disbursement and making investments on behalf of the fund, among other things.

**Appendix I: Select Federal Legislative
Proposals Addressing Compensation for
Asbestos-Related Harms or Death**

Proposed legislation	Citation	Brief synopsis of select provisions
Occupational Health Hazards Compensation Act of 1982	H.R. 5735, 97th Cong. (2d Sess. 1982).	Would authorize compensation for death or disability if a claimant established that exposure to asbestos (or uranium ore) during the course of employment caused the resulting condition and if compensation had not been otherwise awarded under other workers' compensation laws. It would provide that an order awarding or denying compensation be filed with the Department of Labor's Office of Workers' Compensation Programs, the applicable state workers' compensation agency and insurance commissioner, and that notice be provided to the claimant, responsible employer, and that employer's insurance carrier. It would require that all employers be responsible for payment of compensation to their employees by maintaining sufficient insurance or by furnishing proof to the Secretary of Labor of their financial ability to pay such compensation. In the event a responsible employer cannot be identified, it would provide for the payment of benefits out of an Asbestos Compensation Excess Liability Fund sustained with contributions of manufacturers and importers of asbestos and asbestos-containing products. Compensation to which a claimant is entitled under this proposed act is a claimant's exclusive remedy; entities contributing to the fund must continue to satisfy its obligations to maintain the liability protections under the proposed act.
Occupational Disease Compensation Act of 1983	H.R. 3175, 98th Cong. (1st Sess. 1983).	With the purpose of establishing a rational, effective workers' compensation law that provides prompt, adequate, and equitable compensation for workers disabled or deceased due to workplace exposure to toxic substances, including asbestos, and providing a mechanism for reducing related litigation, would establish a Toxic Substance Employee Compensation Insurance Pool from which all compensation for claims filed under this proposed law would be paid. All employers or toxic substance market participants, as determined by the Secretary of Labor, that participate as covered contributors of the pool would get the benefit of the proposed act's limited liability provisions (that is, compensation under the proposed act would be a claimant's exclusive remedy) provided they establish that they have sufficient insurance to meet their obligations to the pool.
Asbestos Workers' Recovery Act	H.R. 1626, 99th Cong. (2d Sess. 1986).	Recognizing the number of asbestos-related lawsuits, their potential impacts on the courts, economy, and victims, and that then-existing programs do not adequately address circumstances, would propose a federal mechanism by which all involved parties would, to the extent commensurate with their contribution to a persons disability or death caused by occupational exposure to asbestos, share the costs of compensation. Before filing a claim for supplemental benefits under this proposed act, an application for workers' compensation must have been filed. The Secretary of Health and Human Services, in evaluating a claim for supplemental benefits, would rely exclusively (except where not possible) on the determination of the applicable workers' compensation program concerning the nature and extent of the claimants condition, the extent to which an asbestos-related disease caused the condition, and whether exposure to asbestos in the course of employment caused the condition. It would create a National Medical Panel on Asbestos-Related Diseases within the Department of Health and Human Services to, among other things, promulgate a list of diseases caused by occupational exposure to asbestos. It would also impose an annual assessment on asbestos defendants and insurers of asbestos defendants' policies, and would have accounted for companies filing for bankruptcy, including reorganization under Chapter 11 of the federal bankruptcy code. Amounts assessed, as well as federal appropriations and other sources would sustain an Asbestos-Related Disease Trust Fund, with the Secretary of the Treasury (or a designee) serving as managing trustee, and an Asbestos-Related Disease Trust Fund Conservation Committee would, among other responsibilities, review claims. Contributors to the fund would be protected from further liability due to occupational exposure to asbestos, except for liability under workers' compensation laws.

**Appendix I: Select Federal Legislative
Proposals Addressing Compensation for
Asbestos-Related Harms or Death**

Proposed legislation	Citation	Brief synopsis of select provisions
Fairness in Asbestos Compensation Act of 1999	S. 758 106th Cong. (1st Sess. 1999).	Acknowledging, among other things, that asbestos litigation had already lead to the bankruptcy of more than 15 companies, representing a “great majority” of the former asbestos industry, it would establish an Asbestos Resolution Corporation, provide for the appointment of a Medical Advisory Board, establish criteria for how a claimant may demonstrate medical eligibility, and establish an alternative dispute resolution process to ensure prompt, efficient, fair, and inexpensive resolution of claims. Under the process proposed, a claimant would provide the corporation with contacts for all entities allegedly responsible for the asbestos-related injury, as well as the basis for the allegations (e.g., dates, locations, nature and frequency of exposure). The corporation notifies all named parties and allows for a period of reasonable discovery. If the parties do not settle, a mediator is appointed and both parties are expected to make good faith offers of settlement. If settlements are not reached, the claimant may pursue arbitration or file a civil action (though a civil action may only be filed if the procedures proposed by this act are followed and a release from mediation is obtained). Costs for these processes would be allocated among all named parties (i.e., the parties alleged to have caused the harm) and would be deposited into an Asbestos Resolution Corporation Trust Fund managed by the Secretary of the Treasury. This proposed act would not apply to existing trusts, though a trust would be able to voluntarily, albeit irrevocably, subject itself to the act.
Asbestos Compensation Act of 2000	H.R. 1283, 106th Cong. (2d Sess. 2000).	Would establish within the Department of Justice an Office of Asbestos Compensation to exercise exclusive jurisdiction (except for claims brought under any workers’ compensation laws or veterans’ benefits program) to determine if a claimant is entitled to compensation and the amount of compensation. It would further require the appointment of a medical director to manage the medical review process and to determine if a claimant meets medical or testing eligibility requirements, establish within the office an Asbestos Compensation Fund managed by a trustee and initially funded through appropriations but sustained through offsetting collections of cost and penalties paid to it, among other sources, establish an Office of Administrative Law Judges to expedite administrative adjudication of asbestos claims, and establish an Advisory Committee to periodically evaluate the medical eligibility criteria. Medically eligible claimants would name defendants who, after receiving notice, must provide claimant with a good faith settlement offer, after which the trustee would make an offer of compensation to the claimant. If the claimant were to accept any of defendants’ offers of settlement, the trustee’s offer would be reduced accordingly; if the claimant accepts the trustee’s offer, the trustee would then either accept the defendant(s) offer or decide to prosecute the claims; if claimant rejects all offers it may elect for administrative adjudication or may opt out of settlement proceedings and file suit against the defendant(s) in any state or federal court of competent jurisdiction. The office would further collect data on products, settlements, judgments, and awards in connection with asbestos claims, make such data publicly available, and exercise subpoena authority.
To amend the Internal Revenue Code of 1986 to provide relief for payment of asbestos-related claims.	H.R. 1412, 107th Cong. (1st Sess. 2001).	Would amend the Internal Revenue Code to, among other things, provide that any settlement fund established for the principal purpose of resolving and satisfying present and future claims relating to asbestos would not be taxed.

**Appendix I: Select Federal Legislative
Proposals Addressing Compensation for
Asbestos-Related Harms or Death**

Proposed legislation	Citation	Brief synopsis of select provisions
Asbestos Claims Criteria and Compensation Act of 2003	S. 413, 108th Cong. (1st Sess. 2003).	Recognizing, among other things, that asbestos exposure has created a flood of litigation “targeting approximately 8,400 defendant companies” and articulating its purpose to give priority to asbestos claimants who demonstrate actual physical harm or illness caused by asbestos, fully preserve the rights of claimants exposed to asbestos but who will pursue compensation in the future, enhance the ability of the federal and state judicial systems to supervise and control asbestos litigation and asbestos-related bankruptcy proceedings, and preserve scarce resources, the proposed act would prohibit a person from bringing or maintaining a civil action absent a prima facie showing of physical impairment due to a medical condition for which asbestos exposure was a substantial contributing factor, and would set forth minimum requirements for making such a prima facie showing.
Fairness in Asbestos Injury Resolution (FAIR) Act of 2003	S. 1125, 108th Cong. (1st Sess. 2003).	Would create a privately funded, publicly administered Asbestos Injury Claims Resolution Fund to provide the necessary resources for a fair and efficient system to resolve asbestos injury claims by providing compensation to legitimate present and future claimants, to provide compensation based on the severity of the injury, and to relieve federal and state courts of the burden of asbestos litigation. Would establish within the Court of Federal Claims an Office of Special Asbestos Masters to provide fair compensation in a nonadversarial manner to persons whose health has been adversely affected by asbestos exposure, and a process by which persons suffering from an eligible disease or condition may file a claim with the Court. The proposed act would establish the requisite medical and exposure evidence, as well as asbestos-disease levels. Claimants who meet established requirements would be entitled to an award as determined by the prescribed benefits table, which sets forth a scheduled value for asbestos-related conditions and diseases. The fund would be administered by an administrator (appointed by the President) through an Office of Asbestos Injury Claims Resolution and would be sustained via assessments from defendant participants (as determined by the fund administrator) as well as amounts paid to the fund by insurer participants, as determined by an Asbestos Insurers Commission. The proposed act would impose criminal sanctions on parties who knowingly and willfully submit false information or otherwise make attempts to defraud the process and it would prohibit asbestos claims from being pursued in any federal or state court. The proposed act would further impact a debtor company’s attempt to reorganize under Chapter 11 of the federal bankruptcy code and establish a trust under § 524(g) of the code and it would require that any trusts established under § 524(g) assign a portion of its corpus to the fund.
Fairness in Asbestos Injury Resolution (FAIR) Act of 2004	S. 2290, 108th Cong. (2d Sess. 2004).	Would establish an Office of Asbestos Disease Compensation within the Department of Labor to provide timely, fair compensation, in amounts and under terms specified in the proposed act, on a no-fault basis and non-adversarial manner, to individuals whose health has been adversely affected by exposure to asbestos. The office would be headed by an administrator responsible for, among other things, promulgating regulations and procedures for processing claims, and operating an Asbestos Injury Claims Resolution Fund, sustained with contributions from defendant and insurer participants as described in the proposed act. The administrator would establish an Advisory Committee on Asbestos Disease Compensation to advise the administrator on claim filings and processing procedures, and authorizes a Medical Advisory Committee to provide expert advice on medical issues. The proposed act sets out medial criteria, means for weighing occupational exposure, and requisite medical and exposure evidence. Claimants who meet all applicable criteria would be entitled to an award, the amount determined pursuant to the prescribed benefits table (basically, a schedule of disease values) along with a structured payment schedule. Criminal sanctions could be imposed for knowing and willful attempts to defraud. The proposed act would further impact a debtor company’s attempt to reorganize under Chapter 11 of the federal bankruptcy code and establish a trust under § 524(g) of the code, and it would require that any trusts established under § 524(g) assign a portion of its corpus to the fund.

**Appendix I: Select Federal Legislative
Proposals Addressing Compensation for
Asbestos-Related Harms or Death**

Proposed legislation	Citation	Brief synopsis of select provisions
Asbestos Compensation Fairness Act of 2005	H.R. 1957, 109th Cong. (1st Sess. 2005).	With a purpose to give priority to claimants who demonstrate actual physical harm or illness caused by exposure to asbestos or silica, fully preserve the rights of future claimants, enhance the ability of state and federal judicial systems to supervise and control asbestos and silica litigation and asbestos-related bankruptcy proceedings, and to conserve scarce recourses, the proposed act would require that a person bringing or maintaining a civil action make a prima facie showing of physical impairment resulting from a medical condition of which exposure to asbestos was a substantial contributing factor, with minimum requirements for making such a prima facie showing set forth in the proposed act. It would establish the federal district courts as having jurisdiction over asbestos and silica claims and would authorize courts to consolidate for trial any number and type of asbestos and silica claims with consent of all parties, but absent consent would authorize the consolidation of claims relating to the same exposed person and members of his or her family. It would further establish plaintiffs' burden of proof, hold a defendant liable only for that portion of a judgment that corresponds to that defendant's percentage of liability (regardless of whether all or other parties were involved in the case), and established separate liability provisions for sellers, renters, lessors, and premises owners (i.e., distinguishing them from manufacturers).
Fairness in Asbestos Injury Resolution Act of 2005	S. 852, 109th Cong. (2d Sess. 2006).	Would establish an Office of Asbestos Disease Compensation within the Department of Labor to provide timely, fair compensation, in amounts and under terms specified in the proposed act, on a no-fault basis and nonadversarial manner, to individuals whose health has been adversely affected by exposure to asbestos. The office would be headed by an administrator responsible for, among other things, promulgating regulations and procedures for processing claims, and operating an Asbestos Injury Claims Resolution Fund, sustained with contributions from defendant and insurer participants as described in the proposed act. The administrator would establish an Advisory Committee on Asbestos Disease Compensation to advise the administrator on claim filings and processing procedures, and authorizes a Medical Advisory Committee to provide expert advice on medical issues. The proposed act sets out medial criteria, means for weighing occupational exposure, and requisite medical and exposure evidence. Claimants who meet all applicable criteria would be entitled to an award, the amount determined pursuant to the prescribed Benefits Table (basically, a schedule of disease values) along with a structured payment schedule. Criminal sanctions could be imposed for knowing and willful attempts to defraud. The proposed act would further impact a debtor company's attempt to reorganize under Chapter 11 of the federal bankruptcy code and establish a trust under § 524(g) of the code, and it would require that any trusts established under § 524(g) assign a portion of its corpus to the Fund. The remedies provided under this proposed act would be the exclusive remedy available for asbestos claims and, generally, would bar the pursuit of all asbestos claims in federal or state courts.

Source: GAO analysis of proposed legislation.

Appendix II: Contact and Staff Acknowledgments

GAO Contact

William O. Jenkins, Jr., (202) 512-8777 or jenkinswo@gao.gov

Staff Acknowledgments

In addition to the contact named above, Chris Currie, Assistant Director, and Gary M. Malavenda Analyst-in-Charge, led the development of this report. Elizabeth Dunn, Octavia Parks, and Corinne Robertson made significant contributions. David Alexander assisted with the design and methodology. Tom Lombardi provided legal counsel. Jason Kelly, Lara Miklozek, and Robert Robinson provided technical support.

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