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A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration

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May 11, 2005

Harold Kim, Staff Attorney
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Technical Comments on the FAIR Act

Dear Harold:

I hope you find the following technical comments of assistance. They are the product of analysis by the NBC's Mass Torts Committee, Chaired by Judge Barbara Houser. In addition to the comments in this letter, I attach "Analysis of Bankruptcy Related Provisions of S. 852" and "Talking Points Regarding S 852" which contain some further observations.

1. The Definition of "Asbestos Claim".

The Bankruptcy Code at 11 U.S.C. § 101(5) and § 524(g) speaks of asbestos liabilities much more broadly than the definition of "asbestos claim" in Section 3(3) of the FAIR Act. The Bankruptcy Code Section 524(g) makes provision for both asbestos "claims" as defined at Section 101(5), as well as "demands" which are not yet choate enough to be "claims," but which may become "claims" in the future as injury manifests. The FAIR Act, in the bankruptcy context, limits an "asbestos claim" to a "claim" presented in a bankruptcy proceeding; it omits "demands." Arguably, the FAIR Act definition of "asbestos claim" also omits claims that have not been "presented in a civil action or bankruptcy proceeding." FAIR Act Section 3(3).

Recommendation:

Consider amending Section 3(3)(a) to read "The term 'asbestos claim' means any claim or demand, premised on any theory, allegation, or cause of action for damages or other relief presented in a civil action or bankruptcy proceeding, or provided for in a bankruptcy proceeding, directly . . ."

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2. Obligations of Debtors to Continue Funding Bankruptcy Code Section 524(g) Trusts.

Although a plan of reorganization is substantially consummated within the meaning of 11 U.S.C. § 1101(2), the reorganized debtor may have continuing obligations to fund a trust or to backstop existing trust assets as provided for in the confirmed plan of reorganization. While we are not entirely clear on the superseding effect of FAIR Act Section 202(f), it appears that the effect may be to absolve debtors or third parties from their obligations to continue funding trusts established in confirmed and substantially consummated plans of reorganization.

Recommendation:

Consider the implications of the superseding provisions on continuing funding obligations imposed upon a debtor or third parties as a result of a confirmed and substantially consummated plan of reorganization to assure that those obligations are not superseded.

3. Bankrupt Business Entities and Small Debtors.

Under the FAIR Act, qualifying "small debtors" and "bankrupt business entities" may proceed to confirm plans of reorganization which establish trusts and channeling injunctions to deal with asbestos claims. But, in all events, the asbestos claims are subject to Section 403(d) of the FAIR Act and must be paid in accordance with the FAIR Act. It follows that the bankruptcy trusts so established would turn over appropriate assets to the FAIR Act Fund in order to discharge the asbestos claims.

Thus, qualifying small debtors and bankrupt business entities will seek confirmation of plans of reorganization in which asbestos claims are treated under the FAIR Act. It follows that asbestos claimants may be indifferent to the plan of reorganization – they get what they get. A problem will be presented in these bankruptcy cases when the asbestos claimants vote against the plan although the plan provides the mandated FAIR Act statutory treatment of asbestos claims.

Recommendation:

Provide that asbestos claimants are deemed to accept a plan of reorganization which vouchsafes their statutory treatment under the FAIR Act.

4. Administrative Expense Priority of Debtor Funding Obligations Under the FAIR Act.

Non-qualifying bankruptcy business entities must fund in accordance with the FAIR Act and these funding obligations are given administrative expense priority in the bankruptcy case. In addition, debtors that file Chapter 11 after January 1, 2003, but before FAIR Act enactment, with more than \$1 million of prior asbestos expenditures, are Tier I debtors, subject to the FAIR Act. Their funding obligations are also given administrative expense priority in the bankruptcy case. Under 11 U.S.C. § 1129(a)(9), those holding claims with an administrative expense priority are entitled to be paid in cash in full on the effective date of the plan – unless the holder of the claim “has agreed to a different treatment on such claim.”

Recommendation:

The Administrator be given discretion, as contemplated by 11 U.S.C. § 1129(a)(9), to defer immediate cash payment of the entire administrative expense priority claim. Otherwise, debtors which cannot pay the full administrative expense claim in cash in full on the effective date of the plan will face liquidation to the detriment of the parties in interest, including the Administrator and the asbestos claimants.

Penalties assessed by the Fund should not be given administrative expense priority status. To do so punishes innocent creditors for the misconduct of the debtor.

5. Venue.

There are a number of venue or forum-selection provisions that permit asbestos claimants to file suit under certain circumstances, but require that the suit be filed in a particular state or federal court, such as one located in the claimant or defendant’s place of residence or where the asbestos injury arose. Examples of these provisions include FAIR Act Section 106(f)(2)(A)(i)&(ii), Section 106(f)(3)(A)(i)&(ii), and Section 405(g)(3).

Recommendation:

In each case, reference should be added to the bankruptcy or district court in the district in which the defendant is the debtor in a Chapter 11 case. Cf. 28 U.S.C. § 127(b)(5).

6. Constitutionality; Severability.

The FAIR Act alters rights established under confirmed Chapter 11 plans of reorganization.

Harold Kim
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Recommendation:

The FAIR Act includes a severability clause protecting its comprehensive scheme even if the Administrator and the Fund cannot obtain the assets of asbestos trusts established under previously confirmed and consummated Chapter 11 plans of reorganization for constitutional reasons.

Representatives of the NBC are available to discuss these and any other bankruptcy-related implications of the FAIR Act.

Cordially,



Ralph R. Mabey
Co-chair, Legislation Committee

Attachments

**ANALYSIS OF BANKRUPTCY RELATED PROVISIONS OF S. 852
"FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2005"**

Definitions are contained in sections 3 and 201:

"Affiliated Group" ("AG") means a defendant participant [**"defendant participant" is not defined**] that is an ultimate parent and any person whose entire beneficial interest is, directly or indirectly, owned by that ultimate parent on the date of FAIR's enactment, but does not include a debtor or any direct or indirect majority-owned subsidiary of a debtor. § 201(1).

"Asbestos Claim" is defined in § 3(3) and includes claims presented in a bankruptcy case.

"Debtor" is a person that is subject to a case pending under a chapter of title 11 on the date of enactment or at any time during the one year period preceding enactment, whether or not the case was dismissed, § 201(3)(A), **BUT EXCLUDES** an entity [**why not "person"**] in whose chapter 7 case a final decree "closing the estate" was entered before the date of enactment or an entity whose chapter 11 plan is final (no longer subject to appeal or judicial review) and that has been substantially consummated [**doesn't say "before the date of enactment"**]. § 201(3)(B)(i), (ii).

"Participant" includes any person subject to the funding requirements of title II, including "defendant participants" ("DPs") that are subject to liability to the Fund (the "FUND") under Title II, subtitle A, and insurer participants subject to payment under subtitle B, and any successor in interest of a participant. § 3(11)(A)(i). But a DP does not include a person protected from any asbestos claim by an injunction in a final confirmed plan that has been substantially consummated. § 3(11)(B)(i), (ii). Successor in interest (to a participant) is defined in § 3(15).

"Prior asbestos expenditures" is defined in § 201(7). p. 96.

"Trust" means any trust described in § 524(g)(2)(B)(i), § 524(h), or established under § 105 in a plan that in whole or in part provides compensation for asbestos claims. § 201(8). p. 97.

Five categories of cases or entities that are relevant to NBC analysis:

1. Closed Chapter 7 Cases
 - a. excluded from the definition of "Debtor;" and
 - b. FAIR does not apply.
2. Confirmed and Consummated Chapter 11 Cases
 - a. Excluded from the definition of "Debtor;" but certain provisions of FAIR apply to these reorganized debtors.

- b. Turnover of assets to the FUND under § 402(f).
 - i. A trust established under a confirmed and consummated plan must turnover its assets to the FUND.
 - (1) Trust is defined in § 201(8) to include § 524(g) and (h) trusts. In turn, § 402(f) amends section 524 of the Bky Code to require the assignment of a portion of the corpus of a trust to the FUND – i.e., the portion allocated to the payment of asbestos claims. p. 206.
 - ii. But, it appears that the debtor keeps its discharge and that any injunction issued under the plan remains in full force and effect. p. 210.
- c. Asbestos claimants get the treatment provided by FAIR and not the plan.
 - i. “All asbestos claims against a trust are superseded and preempted” as of the date of FAIR’s enactment, and a trust “shall not make any payment relating to asbestos claims after that date,” with a few exceptions specified. p. 209.
 - ii. Constitutional problems with this are obvious.

3. Small Chapter 11 “Debtors”

- a. Debtor is a person that is subject to a case pending on the date of enactment or at any time during the 1 year period preceding enactment [why?], whether or not the case was dismissed. § 201(3)(A).
- b. A “Small Debtor”
 - i. is any debtor (together with all direct or indirect majority-owned subsidiaries) in chapter 11 that has “prior asbestos expenditures” of less than \$1 million. § 202(a)(3).
 - ii. can proceed to file, solicit, and confirm a plan that does not comply with the requirements of FAIR, including proposing a plan that contains a trust and channeling injunction provisions. § 202(a)(3).
 - iii. But, any asbestos claims made in conjunction with the plan are subject to § 403(d) of FAIR, which provides that FAIR’s remedies are the exclusive remedy for any asbestos claim.
 - iv. And, the trust established under the plan would be required to transfer its

assets (or those allocated to the payment of asbestos claims) to the FUND.

- v. So, asbestos claimants would get the treatment provided by FAIR, but the debtor could be discharged and protected by an injunction.

4. Defendant participants – are liable for payments to the FUND, § 202(a)(1), and are classified into tiers and subtiers.

a. Tier I – p. 99.

- i. includes all “Debtors” who, together with their direct or indirect majority-owned subsidiaries, have “prior asbestos expenditures” greater than \$1 million. § 202(b).

ii. Treatment of Tier I business entities in bankruptcy

(1) “Bankrupt Business Entity” is a person that is not a natural person that

(a) files before 1/1/03

(b) has not confirmed a plan before FAIR’s enactment, and

(c) Bky Ct determines, timely, that asbestos was not the sole or precipitating cause of the “entity’s” **[should be person’s]** chapter 11 filing. § 202(c)(1)(A).

(i) A motion requesting this determination must be filed within 30 days of enactment of FAIR.

(ii) The bankruptcy court must make this determination within 60 days after the filing of the motion.

(iii) Any appeal of the bankruptcy court’s decision is subject to expedited review under § 303, which provides for exclusive jurisdiction in the DC Circuit Court.

(2) A Bankrupt Business Entity can proceed to file, solicit, and confirm a plan that does not comply with the requirements of FAIR, including proposing a plan that contains a trust and channeling injunction provisions, if

- (a) the Bky Ct determines that
 - (i) confirmation is necessary to permit the entity to reorganize and assure that all creditors are treated fairly and equitably, and
 - (ii) confirmation is clearly favored by the balance of the equities, and
 - (b) an order of confirmation is entered within 9 months of FAIR's enactment (or such extended period as the court may grant for cause).
- (3) But, any trust established under the plan would be required to transfer its assets (or those allocated to the payment of asbestos claims) to the FUND.
 - (4) And, any asbestos claims made in conjunction with the plan are subject to § 403(d) of FAIR, which provides that FAIR's remedies are the exclusive remedy for any asbestos claim.
 - (5) So, claimants would get the treatment provided by FAIR, but the debtor could discharge its asbestos liability and could be protected by an injunction.
 - (6) **Query: Does the debtor who timely obtains the required bky court determinations have to fund in accordance with Tier I, or can the Debtor propose its own funding in the plan – i.e., based on the estimated amount of claims, and then simply transfer those assets to the FUND?**
 - (a) It appears that the debtor would fund [**the trust established under the plan? Or the FUND?**] at the Tier I levels.
- iii. If the preceding requirements (timely Bankruptcy Court determinations) are not satisfied, FAIR applies to the "Bankrupt Business Entity." § 202(c)(2), (3).
 - (1) Then, these debtors must fund in accordance with FAIR, but cannot be discharged from asbestos claims in its bankruptcy case.
 - (2) In fact, the funding obligations to FAIR become costs of administration of the case and the obligations cannot be affected by

confirmation of a plan, etc. *See infra*, pp. 9-10 (for description of § 402 entitled “Effect on Bankruptcy Laws”).

- iv. In addition, debtors that filed Chapter 11 after 1/1/03 (but before FAIR’s enactment) with more than \$1 million of prior asbestos expenditures are simply Tier I debtors subject to FAIR.
 - (1) Recall definition of Bankrupt Business Entity is an entity that filed Chapter 11 before 1/1/03.
 - (2) So, any debtor that files after 1/1/03 but before FAIR’s enactment with more than \$1 million of prior asbestos expenditures is ineligible to attempt to get the Bankruptcy Court determinations that might make it eligible to propose a plan that includes a trust and channeling injunctions.

- v. Superceding Provisions for Tier I Debtors. § 202(f). p. 105. FAIR supercedes
 - (1) the treatment of any asbestos claim in any plan,
 - (2) an asbestos claim against any Tier I debtor,
 - (3) any agreement, understanding, or undertaking by any such debtor or any third party with respect to the treatment of any asbestos claim filed in a debtor’s bky case or with respect to a debtor before the date of FAIR’s enactment.
 - (4) “whenever” the debtor’s case is either still pending under a chapter other than chapter 11 or is subject to confirmation or substantial consummation of a chapter 11 plan.
 - (a) **Query: does the “whenever” clause modify (A), (B), and (C) or only (C)?**
 - (5) Section 202(f)(2), redundant though it may be, says that prior agreements, including plans, understandings, and undertakings, are of no force or effect.
 - (a) **Query: Does (f)(2) have any independent meaning?**

- vi. Section 202(c)(4) contains provisions regarding “offsets” – that is, dealing with payments by insurers and by a “bankrupt business entity” to a section

524(g) trust.

vii. The procedures for Tier I debtors making payments to the FUND are described in § 204(i). p. 131.

viii. Tier I subtiers

(1) Subtier 1 – p. 109.

(a) debtors with prior asbestos expenditure of \$1 million or more

(b) shall pay on an annual basis 1.67024% of the debtor's 2002 revenues, § 203(b)(2)(B), not to exceed \$ 80 million annually, § 203(b)(2)(D)(iv). The revenues of a debtor include those of its direct or indirect majority-owned subsidiaries. § 203(a)(2)(C). p. 107.

(c) Payments continue for 30 years, § 204(a)(1), or until the FUND is fully funded in accordance with § 202(a)(2), unless funding levels are "stepped down" by the Administrator in accordance with § 205(a)(1) or a funding holiday is declared by the Administrator in accordance with § 205(b)(1).

(2) Subtier 2 – p. 110.

(a) debtors with no material ongoing business operations but that hold cash or other assets allocated or earmarked for payment of asbestos claims.

(b) these assets must be assigned to the FUND within 90 days of enactment. § 203(b)(3).

(3) Subtier 3 – p. 110.

(a) debtors that have no material continuing business operations and no cash or assets so allocated or earmarked.

(b) these debtors contribute 50% of their unencumbered assets to the FUND within 90 days of enactment. § 203(b)(4).

b. Tier II (defendant participants) – created by § 202(d), as are Tiers III - VI. p. 103.

i. includes persons or AGs with prior asbestos expenditures of \$75 million or

more. Subtiers are created according to the revenues of persons (including defendant participants and AGs). § 203(a).

- (1) Subtier 1 – shall pay \$27,500,000 annually § 203(c)(2)(A). p. 112.
- (2) Subtier 2 – shall pay \$24,750,000 annually § 203(c)(2)(B).
- (3) Subtier 3 – shall pay \$22,000,000 annually § 203(c)(2)(C).
- (4) Subtier 4 – shall pay \$19,250,000 annually § 203(c)(2)(D).
- (5) Subtier 5 – shall pay \$16,500,000 annually § 203(c)(2)(E).

c. Tier III

i. Includes persons or AG's with prior asbestos expenditures of \$50 million or more but less than \$75 million

- (1) Subtier 1 – shall pay \$16,500,000 annually § 203(d)(2)(A).
- (2) Subtier 2 – shall pay \$13,750,000 annually § 203(d)(2)(B).
- (3) Subtier 3 – shall pay \$11,000,000 annually § 203(d)(2)(C).
- (4) Subtier 4 – shall pay \$8,250,000 annually § 203(d)(2)(D).
- (5) Subtier 5 – shall pay \$5,500,000 annually § 203(d)(2)(E).

d. Tier IV

i. Includes persons or AG's with prior asbestos expenditures of \$10 million or more but less than \$50 million

- (1) Subtier 1 – shall pay \$3,850,000 annually § 203(e)(2)(A).
- (2) Subtier 2 – shall pay \$2,475,000 annually § 203(e)(2)(B).
- (3) Subtier 3 – shall pay \$1,650,000 annually § 203(e)(2)(C).
- (4) Subtier 4 – shall pay \$550,000 annually § 203(e)(2)(D).

e. Tier V

- i. Includes persons or AG's with prior asbestos expenditures of \$5 million or more but less than \$10 million
 - (1) Subtier 1– shall pay \$1,000,000 annually § 203(f)(2)(A).
 - (2) Subtier 2 – shall pay \$ 500,000 annually § 203(f)(2)(B).
 - (3) Subtier 3 – shall pay \$ 200,000 annually § 203(f)(2)(C).

- f. Tier VI
 - i. Includes persons or AG's with prior asbestos expenditures of \$1 million or more but less than \$5 million
 - (1) Subtier 1 – shall pay \$ 500,000 annually § 203(g)(2)(A).
 - (2) Subtier 2 – shall pay \$ 250,000 annually § 203(g)(2)(B).
 - (3) Subtier 3 – shall pay \$ 100,000 annually § 203(g)(2)(C).

- g. Tier VII
 - i. Even if a person or AG is included in Tiers II - VI, it will be included in Tier VII if it
 - (1) is or has been subject to asbestos claims brought under the Employers' Liability Act, 45 U.S.C. § 51 et seq., as a result of operations as a common carrier by railroad and
 - (2) has paid not less than \$5 million in settlement, judgment, defense, or indemnity costs relating to such claims.
 - ii. And will be liable to pay additional sums to the FUND annually in amounts ranging from \$ 550k to \$11 million.

- h. Once a defendant participant or AG is assigned to a tier and subtier under § 204(i)(6), the defendant participant or AG stays there for the life of the FUND regardless of a subsequent bankruptcy, a discharge, confirmation of a plan, or sale of assets to any other person or AG, unless the Administrator finds that the information submitted by the defendant participant or AG to support its inclusion in that tier was inaccurate. § 202(e)(1).

- i. If an AG makes an election, all the members of the AG shall be treated as a single participant. § 204(f). p. 126.
 - j. Funding by participants or AG's will continue for 30 years, § 204(a)(1), or until the FUND is fully funded in accordance with § 202(a)(2), unless funding levels are "stepped down" by the Administrator in accordance with § 205(a)(1) or a funding holiday is declared by the Administrator in accordance with § 205(b)(1).
 - k. However, if the Administrator ever determines that the FUND will not have sufficient resources to pay 100% of all resolved claims while also meeting all other obligations of the FUND under FAIR, FAIR "sunsets." § 405(f). And, asbestos claimants whose claims have not been resolved return to the tort system.
5. Persons Subject to a Bankruptcy Case After FAIR's Enactment – § 202(e)(2). pp 104-105.
- a. These entities remain in whatever Tier and Subtier they were placed in when FAIR was enacted.
 - b. As to these entities, payments to the FUND are expenses of administration payable in accordance with FAIR; these payments are not stayed and shall not be impaired or discharged in any pending or future bankruptcy case.

Section 402—Effect on Bankruptcy Laws.

1. Adds a new paragraph (19) to section 362(b) – enforcement of payment obligations under § 204 of FAIR are not subject to the stay if the debtor is a participant. § 402(a); p.203. (Note: would not apply to a confirmed and consummated plan.)
2. Adds a new subsection (p) to section 365 – if a debtor is a participant, the trustee shall be deemed to have assumed all executory contracts entered into by the participant under § 204 of FAIR. These contracts cannot be rejected. (Note: would not apply to a confirmed and consummated plan.)
3. New section 503(c) added. Payments due under FAIR are allowed as administrative expenses, and a debtor is not entitled to notice or a hearing with respect to such claims. § 402(c). (Note: would not apply to a confirmed and consummated plan.)
4. New sections 523(f) and 524(i) added – no discharge of FAIR obligations. Reinforces other changes made as described above. § 402(d) & (e). (Note: would not apply to a confirmed and consummated plan.)
5. New section 546(h) protects transfers made under FAIR by a participant from all avoidance powers. § 402(g).

6. New section 1129(a)(14) adds as a confirmation standard the continuation of all FAIR payments. § 402(h). (Note: would not apply to plans already confirmed and consummated.)

7. Treatment of Asbestos Trusts – New Section 524(j) (added by section 402(f)). pp. 206-212.

As noted previously, a trust is to assign its assets to the FUND within 6 months of enactment of FAIR or 30 days following funding of a trust established under a plan subject to FAIR § 202(c). But, there is an exception for assets devoted to payment of claims that are not asbestos claims. DC District Court has jurisdiction to resolve all disputes about allocation of assets between asbestos and non-asbestos claims. § 402(f)(2)(C).

All asbestos claims against a trust are superseded by FAIR, and the trust shall not make payments relating to asbestos claims after that date. § 402(f)(2)(E). p. 209.

All injunctions under the plan remain in full force and effect. No court may enjoin the transfer of assets to the FUND even if the transfer or the validity of FAIR, including this section, is challenged. § 402(f)(3). p. 210.

Standing in Bankruptcy Cases.

The Administrator has standing in any bankruptcy case involving a debtor participant. The bankruptcy court cannot require the Administrator to return property seized to satisfy FUND obligations. § 402(j).

Small Business Exemption – p. 119.

A person or AG that is a small business concern under section 3 of the Small Business Act, 15 U.S.C. § 632, on 12/31/02 is exempt from any payment requirement and shall not be included in the subtier allocations under § 203. § 204(b).

Adjustments of Payment Obligations.

A DP may seek adjustment of its payment obligation based upon severe financial hardship or demonstrated inequity. The Administrator will decide if adjustments are warranted. § 204(d).

TALKING POINTS REGARDING S 852

While the Mass Tort Committee has concerns about the appropriateness of certain aspects of FAIR,¹ the focus of our work has been on ways to assist Congress in implementing FAIR such that the apparent goals of FAIR can be maximized while enabling debtors to reorganize their affairs for the benefit of all creditors, including asbestos claimants with rights under FAIR. This memorandum will address five categories of entities that were or are debtors when FAIR is enacted or may become debtors after FAIR's enactment, and raises issues that should be considered by Congress to achieve the goals just stated.

Closed Chapter 7 cases.

It appears that FAIR has no implications for debtors whose Chapter 7 cases were closed when FAIR was enacted. These debtors are excluded from the definition of "Debtor" under FAIR and, because their bankruptcy cases were closed when FAIR was enacted, have no assets remaining for transfer to the fund established by FAIR (the "FUND"), since those assets would have been distributed by the Chapter 7 trustee in accordance with his final report.

Confirmed and Consummated Chapter 11 cases.

¹First, there are serious Constitutional challenges that can be made to FAIR. FAIR preempts the treatment of asbestos claims under confirmed and consummated Chapter 11 plans. A trust established under such a plan must turnover the assets which it holds in trust for present and future asbestos claimants to the fund established by FAIR, the trust must stop paying its beneficiaries – *i.e.*, the holders of asbestos claims, and the distributions on account of asbestos claims provided by the confirmed plan and the trust established thereunder is superseded by FAIR's treatment of asbestos claims. The Constitutional problems with these provisions are obvious. Second, as a practical matter, why are asbestos claims treated more favorably than other unsecured creditors' claims against a debtor? A debtor's obligations to fund under FAIR are expenses of administration in a bankruptcy case that cannot be modified or discharged. By elevating a debtor's obligations under FAIR to administrative claim status, asbestos claimants will be treated better than the debtor's other unsecured creditors, including other potential personal injury claimants or trade suppliers. Of course, this superior status for one category of unsecured creditor violates a fundamental premise of our bankruptcy laws for at least a hundred years – similarly situated creditors of a debtor should be treated equally.

While debtors with confirmed and consummated plans are excluded from the definition of “Debtor,” FAIR does have certain implications for these debtors. While these debtors are entitled to keep the benefits of their plans – *i.e.*, a discharge of asbestos claims and the protection of channeling injunctions, the trusts established under confirmed and consummated Chapter 11 plans must turn over the assets that would otherwise be distributed to the asbestos trust beneficiaries (the asbestos claimants) to the FUND, and they must stop making payments to asbestos claimants under the trust distribution procedures provided by the plan. Instead of being paid what the confirmed plan provides, asbestos claimants will be treated in accordance with FAIR, which preempts the plan’s terms.

However, FAIR – inadvertently, we believe – preempts any provision of a confirmed plan which requires that the debtor continue making payments or distributions of property to the asbestos trust established under the plan, thus having the net effect of relieving the debtor both of any direct obligation to make future payments to the FUND like defendant participants and the debtor’s prior obligation under the confirmed plan to continue funding the trust established under its plan. As we read the superceding provisions of FAIR, the FUND (and asbestos claimants) would be deprived of the additional payments that the debtor is obligated to make under the confirmed and consummated plan to the trust. Accordingly, FAIR should be amended to recognize a debtor’s obligation under a plan to continue to fund the trust, and the trust’s continuing obligation to assign subsequently received distributions from the debtor to the FUND.

While it appears that debtors with confirmed and consummated plans are entitled to a discharge of asbestos claims (if their plan so provides), what happens if the FUND runs out of money before all of the debtor’s asbestos claims are paid under FAIR? The statute should specifically address this.

Given the questions likely to be raised about the constitutionality of FAIR, particularly as applied to trusts (and the beneficiaries of such trusts) established under confirmed and consummated plans, FAIR should have a severability clause so that its terms as to other categories of entities is not at risk. This recommendation assumes, of course, that Congress would prefer to keep the balance of the comprehensive scheme established by FAIR in place, even if the FUND could not obtain the assets of asbestos trusts established under previously confirmed and consummated Chapter 11 plans for constitutional reasons, rather than having to start over from scratch with new legislation if this provision of FAIR is ultimately found unconstitutional.

Also, FAIR should address what happens if confirmation of a plan is revoked for fraud in accordance with § 1144 of the Bankruptcy Code. Presumably, if a debtor’s discharge is revoked for fraud, that debtor would become a Tier I debtor, but the statute should specifically address this potential situation.

Small debtors

A “Small Debtor” is any debtor (together with all direct or indirect majority-owned

subsidiaries) in Chapter 11 that has “prior asbestos expenditures” of less than \$1 million. It can proceed to file, solicit, and confirm a plan that does not comply with the requirements of FAIR, including proposing a plan that contains a trust and channeling injunction provisions. But, any asbestos claims made in conjunction with the plan are subject to § 403(d) of FAIR, which provides that FAIR’s remedies are the exclusive remedy for any asbestos claim. And, the trust established under the plan would be required to transfer its assets (or those allocated to the payment of asbestos claims) to the FUND. So, asbestos claimants would get the treatment provided by FAIR, but the debtor could discharge its asbestos liability and could be protected by a channeling injunction.

Since the asbestos claimants must receive the treatment provided by FAIR, those claimants have no incentive to participate in the plan process. But, since the debtor can propose a plan that includes a trust and the protections of a channeling injunction, the debtor needs to be able to confirm the plan irrespective of the vote of its asbestos claimants. Otherwise, a “small debtor” could be unable to obtain confirmation of a plan of reorganization. So, some mechanism needs to be provided whereby the debtor can proceed to confirm a plan over the potential objection of its asbestos claimants if the plan satisfies some specified criteria. For example, if the plan provided for asbestos claimants to be treated in accordance with FAIR and the bankruptcy court estimated the funding amounts required to pay those claims at that level – then the plan could be confirmed over the objection of the asbestos claimants. Of course, the trust established under the debtor’s plan would be obligated to turn over its assets (*i.e.*, the funding amounts so found) to the FUND as those payments were received from the reorganized debtor. Other alternatives could be considered as well.

It is unclear under FAIR how a “small debtor’s” obligation to fund asbestos claims under a plan is to be determined. Is it through a traditional estimation process in the bankruptcy court? Is the bankruptcy court to estimate the cost of paying asbestos claims in accordance with FAIR? Then, does the debtor fund its trust in that amount and, under FAIR, the trust becomes obligated to turn over its assets to the FUND for payment to claimants?

Tier I debtors

Bankrupt Business Entities

A “Bankrupt Business Entity” is a person that: (i) is not a natural person that files Chapter 11 before January 1, 2003, (ii) has not confirmed a plan before FAIR’s enactment, and (iii) the bankruptcy court presiding over the case determines, timely, that asbestos was not the sole or precipitating cause of the “entity’s” **[should be person’s]** chapter 11 filing. If this initial determination is made timely, a Bankrupt Business Entity can proceed to file, solicit, and confirm a plan that does not comply with the requirements of FAIR, including proposing a plan that contains a trust and channeling injunction provisions, if the bankruptcy court enters an order of confirmation within 9 months of FAIR’s enactment (or such extended period as the bankruptcy court may grant for cause), and further determines that: (i) confirmation is necessary to permit the entity to reorganize and assure that all creditors are treated fairly and equitably, and (ii) confirmation is clearly favored by the balance of the equities (collectively, the “Additional Confirmation Standard”). But, any trust

established under the plan would be required to transfer its assets (or those allocated to the payment of asbestos claims) to the FUND. And, any asbestos claims made in conjunction with the plan are subject to § 403(d) of FAIR, which provides that FAIR's remedies are the exclusive remedy for any asbestos claim. So, claimants would get the treatment provided by FAIR, but the debtor could discharge its asbestos liability and could be protected by a channeling injunction.

The Additional Confirmation Standard is a very high standard. As a result, it may be difficult for these debtors to discharge their asbestos liabilities, even though the bankruptcy court has determined that asbestos was not the sole or precipitating cause of the Chapter 11 filing. Is this what was intended or should the standard be relaxed?

Funding questions also arise with respect to "bankrupt business entities" who obtain the required bankruptcy court determinations. Do these debtors fund at the Tier I level – *i.e.*, 1.67024% of the debtor's 2002 revenues annually? Or, can these debtors propose their own funding in the plan – *i.e.*, based on the estimated amount of claims, and then simply transfer those assets to the FUND?

In addition, for the reasons explained with respect to "small debtors," "bankrupt business entities" that obtain the required bankruptcy court determinations must be able to confirm a plan over the objection of asbestos claimants under certain circumstances. Conforming amendments would be appropriate.

Other Tier I debtors

If the preceding requirements (timely Bankruptcy Court determinations) are not satisfied, FAIR applies to the "bankrupt business entity." Then, these debtors must fund in accordance with FAIR, but cannot be discharged from asbestos claims in their bankruptcy cases. In fact, the funding obligations under FAIR become costs of administration in the bankruptcy case and the obligations cannot be affected by confirmation of a plan, etc. In addition, debtors that filed Chapter 11 after January 1, 2003 (but before FAIR's enactment) with more than \$1 million of prior asbestos expenditures are simply Tier I debtors subject to FAIR.

As noted, these debtors' obligations under FAIR are administrative expenses in their Chapter 11 cases. FAIR does not appear to give the Administrator or a court the ability to delay payments for a reasonable period of time. Normally, administrative claimants have the ability to agree to defer their payments, or accept payments over time, to facilitate the debtor's reorganization. Accordingly, we suggest that either the Administrator be given the discretion to deal with a debtor like other administrative claimants or that the bankruptcy court presiding over the Chapter 11 case have some flexibility to delay payments to the FUND for a reasonable period of time, while maintaining the priority of those payments as administrative claims. It is not in the best interests of the asbestos claimants or the FUND that debtors who can and should reorganize be forced to liquidate their assets because they cannot make a payment required under FAIR when it is due. In all likelihood, such a liquidation would result in payments to secured creditors, but not others. Even if the currently due payment under FAIR was made in a liquidation, the debtor's future obligations under FAIR would not be paid. In short, there needs to be some "give" in the system.

Another area that may need further thought is the successor liability provisions of FAIR. If a debtor wishes to sell assets, FAIR, as currently written, will effectively chill any ability to sell such assets. As a result, debtors who are FAIR participants may not be able to maximize the value of their estate because purchasers will reduce the price to be paid for assets unless they can be satisfied that they are not exposed as "successors in interest" under FAIR. Again, is this what was intended? If not, perhaps debtors should be permitted to sell assets under certain circumstances free of FAIR obligations provided that certain criteria are satisfied.

Finally, the ability of debtors to obtain financing may be adversely affected by FAIR. Specifically, one can anticipate that lenders considering whether to make a DIP loan available to a debtor subject to FAIR will take into consideration the amount that must be paid to the FUND during the pendency of the Chapter 11 case, and the extent to which the liquidity of the debtor is adversely impacted by these continuing payments (since, in the existing situation, the automatic stay precludes payments to all unsecured creditors including asbestos claimants), resulting in the need for a larger financing facility. Depending on the availability of assets of the debtor, the lender may conclude that the lending risks of the larger loan are no longer attractive and either the loan will not be made or the costs of the financing will be increased. In connection with an exit loan facility, while the annual payment to the FUND will also be taken into account in structuring both the size and terms of the loan, this would also be the case absent FAIR where there is a continuing obligation by the reorganized debtor to fund a section 524(g) trust. The difference is that FAIR, unlike the existing situation under section 524(g), provides for a return to the tort system (and therefore potential continuing liability for the debtor) if the FUND runs out of money. This distinction could significantly and adversely affect the availability of exit financing for the debtor if, at the time of confirmation of the debtor's plan, it appears that the FUND is, or could soon be, depleted.

Bankruptcy Cases filed after FAIR's enactment.

Entities who file for protection under the Bankruptcy Code after FAIR's enactment will remain in whatever Tier and Subtier they were assigned to upon FAIR's enactment. We understand that the debtor's obligations under FAIR remain fully intact – *i.e.*, they cannot be stayed, rejected, discharged, etc.

The issues raised in connection with the "other Tier 1 debtors" – *i.e.*, concerns over the FUND's administrative claim, successor liability in connection with asset sales, and DIP and exit financing facilities – apply to these debtors. Conforming amendments would be appropriate.

Other miscellaneous issues to be addressed

Although the definition of "asbestos claim" seems broad, that definition, in the context of asbestos bankruptcy cases, is arguably a narrow one that could be read to exclude not only *future claims* (which are referred to not as "claims," but rather as "demands," in Bankruptcy Code section 524(g)), but also *present claims* that have not yet been asserted in either the bankruptcy court or a state court action.

First, the definition of "asbestos claim" appears to require that the "claim" have been "presented in a civil action or bankruptcy proceeding." This suggests, at least arguably, that claims which have not yet been "presented" do not qualify as "asbestos claims" under FAIR. Recall that bar dates often are not set for asbestos personal injury claims in Chapter 11 cases. Thus, many claims (even present claims) are never "presented" (at least on an individual basis) in the bankruptcy case at all, but rather are asserted against the section 524(g) trust after confirmation. Moreover, in many asbestos Chapter 11 cases, a large percentage of the tort liability asserted by the plaintiffs' interests do not involve "claims" that could be asserted even if there was a bar date, since such claims have not yet accrued under state law. Thus, looking at the definition of "asbestos claim" from a bankruptcy prospective, one might argue that FAIR's definition excludes a significant portion of potential asbestos liability. This argument is bolstered by the fact that Congress may be presumed to know the difference between "claims" and "demands," since it distinguished between those terms in section 524(g) and was presumably aware of section 524(g) when it considered FAIR. The definition should be fixed by broadening it.

There are a number of venue or forum-selection provisions that permit asbestos claimants to file suit under certain circumstances, but require that the suit be filed in a particular state or federal court, such as one located in the claimant's or defendant's place of residence or where the asbestos injury arose. These provisions all ignore the bankruptcy context, where the claim should be filed (and presumably be permitted to be resolved) in the bankruptcy court (or the district court for that district). Examples of such venue-or-forum-limiting provisions appear in § 106(f)(2)(A)(i) & (ii), § 106(f)(3)(A)(i) & (ii), and § 405(g)(3). In each case, reference should be added to the bankruptcy or district court in the district in which the defendant is the debtor in a Chapter 11 case.

With respect to the treatment of obligations to fund under FAIR as administrative claims in the bankruptcy case, it is unclear whether penalties assessed by the Fund are also given administrative priority status. Even if the obligation to contribute the specified percentage of revenues to the FUND should be treated as an administrative expense, it is not appropriate for penalties to be so treated, since that would, in effect, punish creditors for misconduct by the debtor. The FUND is amply protected by granting administrative priority to the monetary contributions to the FUND, without extending that protection to penalties.

FAIR uses the term "debtor participant," but does not define it. FAIR also uses the term "defendant participant," but defines it only in the sense of excluding companies that have confirmed and consummated chapter 11 plans. Clear definitions of both terms would be helpful.

As always, we look forward to discussing these issues with you. And, we renew the NBC's continuing offer of assistance with respect to the evaluation of FAIR and its interface with our nation's bankruptcy laws.