IN THE UNITED STATES DISTRCT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Civil Action No. 18-00381 (RGA)
	)	
ENERGY FUTURE HOLDING CORP., et al.	)	
	)	
Debtors,	)	Bankr. Case No. 14-10979 (CSS)
	)	
SHIRLEY FENICLE, INDIVIDUALLY, AND AS SUCCESSOR-IN-INTEREST TO, THE ESTATE OF GEORGE FENICLE, DAVID WILLIAM FAHY, JOHN H. JONES, DAVID HEINZMANN, HAROLD BISSELL, KURT CARLSON, ROBERT ALBINI, INDIVIDUALLY, AND AS SUCCESSOR-IN-INTEREST TO THE ESTATE OF GINO ALBINI, AND DENIS BERGSCHNEIDER,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
ENERGY FUTURE HOLDINGS CORP., *et al.*, AND THE EFH PLAN ADMINISTRATOR BOARD	)	
	)	
Appellees.	)	

BRIEF OF AMICUS CURIAE PUBLIC JUSTICE, P.C.
IN SUPPORT OF APPELLANTS SHIRLEY FENICLE *ET AL.*

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CORPORATE DISCLOSURE STATEMENT

Public Justice, P.C., is a professional corporation. Public Justice has no parent corporation. There is no publicly held corporation that owns ten percent or more of its stock.

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I. INTEREST OF AMICUS CURIAE PUBLIC JUSTICE, P.C.

Public Justice is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and workers' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. This case is of particular interest to Public Justice because it involves the rights of toxin-exposed workers and their families to seek remedies under the civil justice system, and ensuring access to the civil justice system for the victims of corporate wrongdoing is a key element of Public Justice's mission.[1]

II. INTRODUCTION AND SUMMARY OF THE ARGUMENT

In confirming the Plan of Reorganization, the Bankruptcy Court reaffirmed its earlier holding that it could discharge "Unmanifested Claims" of persons who were exposed to asbestos at Debtors' power plants but have no present injury. This was because "publication notice *may* be sufficient to satisfy due process and, thus, would allow for the discharge of the Unmanifested Claims." *See* A00918 (2/27/18

[1] No counsel for any party authored this brief in whole or in part. No party or counsel for any party contributed money that was intended to fund preparing or submitting the brief. No person other than Public Justice, P.C., its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. Bankr. P. 8017(c)(4).

Order) (reaffirming and incorporating *In re Energy Future Holdings Corp.*, 522 B.R. 520, 537 (Bankr. D. Del. 2015) (emphasis in original)).

This ruling should be reversed. First, it is contrary to repeated recognitions by the Supreme Court, the Third Circuit, and other courts that constitutionally sufficient and effective notice could not be given to persons with unmanifested injuries and thus unripe claims. *See*, *e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) ("Impediments to the provision of adequate notice . . . rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement."); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir. 1996) ("Problems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable."); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 n.9 (2d Cir. 2001) ("We also note that plaintiffs likely received inadequate notice. . . . As described earlier, *Amchem* indicates that effective notice could likely not ever be given to exposure-only class members."), *aff'd in relevant part by evenly divided vote and rev'd in part sub nom. Dow Chem Co. v Stephenson*, 539 U.S. 111 (2003). Here, the Bankruptcy Court acknowledged what these courts found, that the Unmanifested Claimants "do not know that they have an asbestos related injury" and, indeed, "are *unknown* to themselves, let alone the debtors." 522 B.R. at 537 (emphasis in original). The Bankruptcy Court's conclusion that

they nonetheless can be given constitutionally sufficient notice thus was erroneous.

Second, if left in place, this ruling will harm the Unmanifested Claimants who later suffer life-threatening injury by causing them to lose any opportunity to obtain redress in court. Experience in the analogous setting of class action litigation settlements shows that when absent class members must take affirmative steps such as submitting a claim form to vindicate *presently-accrued* claims, very few of them will do so. *See*, *e.g.*, *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 401-02 (D. Mass. 2008) (consumer data breach class action settlement requiring class members to submit claim forms; only 3% of $200,000,000 settlement fund was claimed); *In re Compact Disc Min. Advertised Price Antitrust Litig.*, 370 F. Supp. 2d 320, 321 (D. Me. 2005) (antitrust class action settlement requiring claim-form submission; class members submitted only 2% of distributed vouchers to receive payments).

Indeed, even in a case involving toxic exposure claims where a class action settlement gave class members a *present* right to receive medical monitoring for latent illnesses, class members did not utilize nearly half the value of the available monitoring relief. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 472 (5th Cir. 2011) ($830,000 of $2,000,000 medical monitoring fund was unused). Here, where the Bankruptcy Court required the Unmanifested Claimants to file claim forms with no present right to obtain compensation, it is foreseeable that many of

them would not know to do so, and thus would have future personal injury claims discharged with no right to redress.

Third, by allowing Debtors here to discharge the Unmanifested Claimants' unaccrued personal injury claims without providing any compensation, the Bankruptcy Court's ruling, if affirmed, would assure that other debtors in future cases will utilize this procedure to obtain the same result. The Court should eliminate this incentive to extinguish future personal injury claims of persons who cannot presently identify themselves as injured by partially reversing the confirmation order to allow the Unmanifested Claimants to preserve their future personal injury claims.

Finally, 11 U.S.C. § 524(g) provides a process for resolving asbestos claims in bankruptcy that ensures that Unmanifested Claimants are provided for in the future—a process that avoids the notice, preservation, and incentive issues presented by the bar date and discharge approved by the bankruptcy court here. Debtors here could have chosen to follow the § 524(g) process for resolving asbestos claims, but they have not done so, and may not simply shed future liability in a way that harms claimants.

III. ARGUMENT

A. The Bankruptcy Court Erred in Holding That There Was Constitutionally Sufficient Notice for Unmanifested Claimants.

The Bankruptcy Court's holding that publication notice of the claim bar date would be sufficient to satisfy due process and thereby allow discharge of the Unmanifested Claims flies in the face of decades of Supreme Court and circuit court precedent.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Supreme Court addressed the constitutional sufficiency of notice to bind the beneficiaries of a trust fund to a state court's judgment and thereby extinguish their claims and rights to payments of money, and held that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id. at 314-15. *Mullane* held that notice by publication in a local newspaper pursuant to state law was deficient where the names and mailing addresses of those affected were available, but recognized that publication may be permissible if direct notice is not practicable. *Id.* at 317-18. The Court did not have occasion in *Mullane* to address the effect of a recipient's incapacity to apprehend a notice's

effect on him or her.

Just a few years later, however, the Supreme Court faced this very issue. In *Covey v. Summers*, 341 U.S. 141 (1956), the Court held that "[n]otice to a person known to be an incompetent who is without the protection of a guardian does not measure up to" the due process requirements set forth in *Mullane* because the recipient "was wholly unable to understand the nature of the proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer)." *Id.* at 146-47.

This type of analysis has underscored the resistance of federal appellate courts to finding that there could be constitutionally sufficient notice to persons with unmanifested injuries to apprise them of their rights in a proceeding. In *Georgine*, *supra*, the Third Circuit reversed a district court's approval of a nationwide class action settlement covering present and future asbestos-related personal injury claims. Although the decision turned on the class certification criteria of Fed. R. Civ. P. 23(a) and (b)(3), the Court also recognized that the "[p]roblems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable." 83 F.3d at 633. These problems were at least three-fold:

> *First*, exposure-only plaintiffs may not know that they have been exposed to asbestos within the terms of this class action. Many, especially the spouses of the occupationally exposed, may have no knowledge of the exposure. For example, class representatives

> LaVerne Winbun and Nafssica Kekrides did not learn that their husbands had been occupationally exposed to asbestos until the men contracted mesothelioma. *Second*, class members who know of their exposure but manifest no physical disease may pay little attention to class action announcements. Without physical injuries, people are unlikely to be on notice that they can give up causes of action that have not yet accrued. *Third*, even if class members find out about the class action and realize they fall within the class definition, they may lack adequate information to properly evaluate whether to opt out of the settlement.

Id. (emphasis added).

In affirming the result and virtually all of the Third Circuit's analysis in *Georgine*, the Supreme Court echoed its observations about constitutional notice requirements and the capacity of persons with unmanifested injuries to apprehend how a proceeding may impact upon claims and rights of which they are unaware. *See Amchem*, *supra*, 521 U.S. at 628 ("Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur."); *id.* ("In accord with the Third Circuit . . ., we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unself-conscious and amorphous.").

In *Stephenson*, *supra*, the Second Circuit echoed the Supreme Court and Third Circuit's analysis on this point. *Stephenson* involved claims by Vietnam veterans who, decades after their military service, developed cancers associated with their wartime exposure to Agent Orange. 273 F.3d at 255. When they filed

suit, the defendants argued and the district court held that their claims were barred by a global class action settlement of then-present and future personal injury claims that was finalized over ten years before their injuries manifested. *Id.* at 255-56. The Second Circuit reversed the dismissal of their claims, allowing them to collaterally attack the class action settlement on the grounds that they were not afforded due process because they were not adequately represented by class representatives with then-manifested injuries, which created conflicting interests between present and future allocations of settlement funds. *Id.* at 260-61.

Here again, the court questioned without deciding whether constitutionally sufficient notice to persons whose injuries had not manifested was even possible:

> We also note that plaintiffs likely received inadequate notice. . . . *Amchem* indicates that effective notice could likely not ever be given to exposure-only class members. *Amchem*, 521 U.S. at 628. Because we have already concluded that these plaintiffs were inadequately represented, and thus were not proper parties to the prior litigation, we need not definitively decide whether notice was adequate.

Id. at 261 n.9.

In each of these cases involving unmanifested claims from asbestos and Agent Orange exposure, the courts doubted the constitutional sufficiency of notice *not* because of its specific contents or form, but because of the recipients' capacity to identify themselves as parties in interest or to assess their rights in a proceeding concerning claims of which they have no past or present awareness.

The Third Circuit's more recent decision in *In re NFL Players Concussion*

Injury Litig., 821 F.3d 410 (3d Cir. 2016), is not to the contrary. There, the Court affirmed approval of a global class action settlement of professional football players' concussion-related personal injury claims where notice was given to all class members, *id.* at 435, by first-class mail sent to over 30,000 addresses, *see Turner v. NFL*, 307 F.R.D. 351, 385 (E.D. Pa. 2015), identified by the defendant and an administrator for approximately 21,000 class members. *See In re NFL*, 821 F.3d at 425. The *In re NFL* settlement agreement also was negotiated by separately represented subclasses of members who were currently and not as yet diagnosed with qualifying injuries, *see id.* at 425, and it provided an ***uncapped*** monetary award fund that will be kept open for 65 years. *See id.* at 424.

Based on the foregoing, the Bankruptcy Court's discharge of claims here on grounds that "publication notice *may* be sufficient to satisfy due process" totally misses the mark. Whether or not the form of notice provided could ever be constitutionally sufficient in some setting, it is not sufficient here when its would-be recipients lack capacity to identify themselves as parties in interest or to assess their rights with respect to unknown claims. The confirmation order thus should be reversed to the extent it covers Unmanifested Claimants.

B. The Confirmation Order Will Cause Many Potentially Valuable Claims to be Discharged.

The Bankruptcy Court's confirmation order will result in many valuable future personal injury claims being discharged before they ripen.

The likelihood of this result is demonstrated from experience with settlements of class action litigation. When a class action settlement requires class members to take affirmative action such as submitting a proof of claim form, it is common for there to be low redemption or claims rates where fewer than ten percent of class members obtain relief. *See*, *e.g.*, *Keil v. Lopez*, 862 F.3d 685, 701-02 (8th Cir. 2017) (three percent claims rate for breach of warranty claims); *White v. Experian Info. Solutions, Inc.*, 803 F. Supp. 2d 1086, 1100 (C.D. Cal. 2011) (five percent claims rate for Fair Credit Reporting Act claims); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 2011 U.S. Dist. LEXIS 40843, at *21-22 (D. Me. April 13, 2011) (four percent claims rate for antitrust claims); *In re TJX*, *supra*, 395 F. Supp. 2d at 401-02 (three percent claims rate for data breach claims); *In re Compact Disc*, 370 F. Supp. 2d at 321 (two percent claims rate for antitrust claims); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 526 (E.D. Mich. 2003) (seven or fourteen percent claims rate for antitrust claims); *Strong v. Bellsouth Telecomm's, Inc.*, 173 F.R.D. 167, 172 (W.D. La. 1997) (four percent claims rate for deceptive billing claims); *Voege v. Ackerman*, 70 F.R.D. 693, 694 (S.D.N.Y. 1976) (sub-one percent claims rate for securities fraud claims); *see also Walter v. Hughes Comm's, Inc.*, 2011 U.S. Dist. LEXIS 72290, at *35 (N.D. Cal. July 6, 2011) (class counsel should be aware that "average claims submission rates in similar class actions are typically ten percent or less").

The foreseeability of low claims and redemption rates has lead consumer advocates to conclude that "claim forms should be avoided" in class action settlements and should be used "only if deemed necessary," such as to identify class members, establish eligibility for relief, or determine the scope of damages and amount of recovery. *See* National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 299 F.R.D. 160, 218 (3d ed. 2014) (Guideline 12, Claim Forms).

Indeed, even outside of the smaller-value consumer context, a class action involving toxic exposure claims that resulted in a settlement providing class members a present right to medical monitoring for latent illness still resulted in nearly half of a $2 million monitoring fund going unused. *See Klier*, *supra*, 658 F.3d at 472 ("If its members met proximity-to-plant and exposure standards, they could either recover a small compensation sum or elect to participate in a medical-monitoring program, which was funded by $2 million of the proceeds allocated to the subclass."); *id.* ("At issue on this appeal is the district court's use of the *cy pres* doctrine to dispose of approximately $830,000 that went unused during the medical-monitoring program created for the benefit of Subclass B.").

Here, the foreseeable proof of claim filing rate could be far lower than the monitoring-utilization rate in *Klier* because claims filers here are entitled to no relief when they file a proof of claim. The Supreme Court long has recognized that

requiring affirmative steps by persons entitled to little or no recovery will result in little or no action being taken. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Court rejected the defendant's due process argument that a state-court class action involving out-of-state class members could only be conducted on an opt-in basis because the Court recognized this would deter participation by persons with small-value claims:

> Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution. If, on the other hand, the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to 'opt out.'

Id. at 812-13.

The Supreme Court's analysis in *Shutts* demonstrates why the confirmation order discharging claims based on failure to file a proof of claim by the bar date should not have been applied to the Unmanifested Claimants. At present, the Unmanifested Claimants cannot identify themselves as injured and likely cannot obtain contingency-fee representation for highly speculative claims at some uncertain future time. The Bankruptcy Court's requirement that these presently healthy and unrepresented persons understand that they need to take affirmative

action now to preserve claims for injuries that may or may not manifest in the future all but guarantees that many of these claims will be discharged without the claimants having a meaningful chance to preserve them.

In sum, because it is not possible to provide constitutionally sufficient notice to Unmanifested Claimants and because discharging Unmanifested Claims not filed by a bar date will invariably result in discharge of potentially valuable claims without any compensation, the confirmation order entered by the Bankruptcy Court should be reversed to the extent it discharges Unmanifested Claims.

C. Permitting the Debtors to Escape Liability for Future Asbestos Claims Here Would Incentivize Other Solvent Companies to Abuse the Bankruptcy System.

If the Debtors are permitted to discharge their liability for a large percentage of future asbestos claims by engaging in bankruptcy proceedings, then other entities with similar future-claims liability would be incentivized to abuse bankruptcy in the same way. The purpose of Chapter 11 bankruptcy reorganization is to preserve an insolvent business while "maximizing property available to satisfy creditors." *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119 (3d Cir. 2004) (quoting *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (internal quotations omitted)). The idea is to "resuscitat[e] a *financially troubled* corporation"—while still satisfying creditors to the extent possible. *Id.* at 121 (quoting *In re Coastal Cable T.V., Inc.*, 709 F.2d

762, 765 (1st Cir. 1991) (Breyer, J.) (emphasis added by *Integrated Telecom*)). The purpose of bankruptcy is *not* to simply shed liabilities.

But using the bankruptcy process to shed future tort liability—as opposed to salvaging a troubled business—is exactly what the bankruptcy court's decision, if allowed to stand, would permit. The Asbestos Debtors are not insolvent: They have nearly $1 billion in assets, and they estimate that they had, absent any discharge, approximately $54 million in total asbestos liability, including both present and future claims. *See* Appellants' Principal Brief (ECF No. 30) at 13-14. Asbestos Debtors have no other significant liabilities. *Id.* Thus, even if, as Appellants contend, the $54 million estimate substantially underestimates Debtors' asbestos liability, Debtors are well able to pay and will be well able to continue to pay asbestos claims going forward. *Id.* at 40 (explaining that Debtors would be able to pay asbestos claims as long as necessary).

Since the Asbestos Debtors are capable of paying the current or future claims against them, the reorganization plan's discharge of Unmanifested Claims does little more than reduce the debtors' predicted future liability at the expense of those who will fall gravely ill. As explained above, it is unsurprising that there are large numbers of those who were exposed to asbestos at the hands of Debtors but who did not file a claim by the bar date. Some of those individuals will fall ill in the future—indeed, some of them already have fallen ill since the bar date. What

the discharge does for the Asbestos Debtors is eliminate future liability for those claims, which they would have been able to satisfy absent discharge in bankruptcy. In other words, the discharge creates a windfall for Debtors.

Because of the potential windfall, it is not hard to see why being able to eliminate future tort liability would be an attractive model for both solvent and insolvent corporations to emulate. If this Court affirms the bankruptcy court's discharge of the Unmanifested Claims against the debtor, more debtors will no doubt try the same trick. In addition to impacting asbestos claims, this Court's decision will apply with equal force in any situation where there is a long latency period between exposure and when the health harm manifests, meaning there is a long period between the act that causes the injury and when the resulting tort claim becomes ripe. *See, e.g.*, *Stephenson*, 273 F.3d at 255 (claims for long-latency injuries after exposure to Agent Orange); *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1383, 1385 (10th Cir. 1985) (claims for long-latency cancer after exposure to radiation from uranium processing facility).

In sum, the discharge of Unmanifested Claims based on failure to satisfy a bar date for filing proofs of claim after issuance of constitutionally deficient notice is an abuse of the bankruptcy process—which is not meant to be a way to shed inconvenient liability—that punishes vulnerable, sick individuals and their families. If this Court condones such actions, more of the same is sure to follow.

D. Having Failed to Follow the Process for Resolving Asbestos Liability Provided by § 524(g), the Debtors May Not Shed Liability for Unmanifested Asbestos Claims.

For the reasons stated above, requiring that Unmanifested Claimants file claims before knowing whether they will fall ill creates a notice conundrum, will result in victims being unable to recover for their claims, and incentivizes companies to enter bankruptcy proceedings solely to shed asbestos liability. An asbestos bankruptcy reorganization that resolved current and future asbestos liability could have been structured to avoid all of those issues. But the Debtors chose not to do so.

Though the long latency period of asbestos illnesses creates "unique problems and complexities" in the context of bankruptcy reorganization, Congress has provided a procedure for effectively addressing them in 11 U.S.C. § 524(g). *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004). In essence, § 524(g) codifies the procedure pioneered by *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bankr. S.D.N.Y 1986), which, as part of the bankruptcy reorganization, established a trust for the benefit of future asbestos claimants, who, in turn, were enjoined from bringing lawsuits against the entities involved in the bankruptcy. They had to draw upon the trust instead. This would leave the debtor free from the specter of outstanding asbestos tort liability. *Id.* Though *Johns-Manville* effectively dealt with the problems presented by claimants with unmanifested asbestos

illnesses, it was unclear whether the procedure comported with the then-existing provisions of the Bankruptcy Code. In response, Congress passed § 524(g), which expressly approved of existing trusts set up for current and future claimants, and standardized the requirements for doing so. *See* H.R. Rep. No. 103-835, at 40.

Like the reorganization plan in *Johns-Manville*, and unlike the plan approved by the bankruptcy court here, § 524(g) does not require that Unmanifested Claimants file a claim by a particular date or forever lose the right to seek redress. Rather, § 524(g) provides for the creation of a personal injury trust, upon which claimants can draw as they fall ill in the future. This procedure

> relieves the debtor of the uncertainty of future asbestos liabilities. This helps achieve the purpose of Chapter 11 by facilitating the reorganization and rehabilitation of the debtor as an economically viable entity. At the same time, the rehabilitation process served by the channeling injunction supports the equitable resolution of asbestos-related claims. In theory, a debtor emerging from a Chapter 11 reorganization as a going-concern cleansed of asbestos liability will provide the asbestos personal injury trust with an "evergreen" source of funding to pay future claims. This unique funding mechanism makes it possible for future asbestos claimants to obtain substantially similar recoveries as current claimants in a manner consistent with due process.

Combustion Eng'g, 391 F.3d at 234. For a reorganization plan to be approved under § 524(g), a number of specific requirements must be met, requirements "specifically tailored to protect the due process rights of future claimants." *Id.* at 234 n.45. Section 524(g) requires a finding that the channeling injunction is "fair and equitable" to Unmanifested Claimants, 11 U.S.C. § 524(g)(4)(B)(ii); requires

that a representative be appointed to separately represent the interests of Unmanifested Claimants, *id.* § 524(g)(4)(B)(i); requires that Unmanifested Claimants be treated "in substantially the same manner" as present claims, *id.* § 524(g)(2)(B)(ii)(V); and requires a 75% super-majority of current claimants to vote in favor of the plan, *id.* § 524(g)(2)(B)(ii)(IV)(bb).

Adoption of a reorganization plan that tracked the trust model laid out in § 524(g) could have resolved each of the problems raised here, while still resolving Debtors' asbestos liability. First, because there would have been no bar date by which Unmanifested Claimants could seek compensation, the substantial concerns about whether the notice could ever be constitutionally adequate would have fallen away. Second, although Unmanifested Claimants would not have been able to obtain tort recoveries against the Debtors going forward, they could have sought remedies for their injuries from a trust. Thus, the risk that Unmanifested Claimants' valuable claims would go entirely uncompensated because of an arbitrary bar date would have been eliminated. Third, following the § 524(g) procedure would have ensured that bankruptcy was used for its intended purpose—to resuscitate an insolvent business by permitting it to have a fresh start—and not to give a windfall in the form of eliminating liability of a solvent debtor.

The Debtors here, however, chose to eschew the bankruptcy system's intended purpose in favor of trying to obtain the windfall. They should not be

permitted to relieve themselves of liability without having followed the procedures designed to protect the interests of asbestos claimants.

IV. CONCLUSION

For all of the reasons set forth, the Bankruptcy Court's confirmation order should be reversed to the extent it discharges Unmanifested Asbestos Claimants.

Dated: May 29, 2018

Respectfully submitted,

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