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DO LAWYERS PLAY WHILE VICTIMS PAY WHEN CORPORATIONS DISCHARGE TOXIC TORT LIABILITY IN BANKRUPTCY?*

My days at Manville were in the finishing department... cutting asbestos, bagging asbestos, crushing asbestos, speaking to my friends with asbestos, and everything we did in that plant was asbestos. As the sun would shine through the skylight, all you could see was [sic] millions of particles that would glitter. We would pick out asbestos from our coffee, the larger pieces... fell in our sandwiches... or... we drank [them]. [Now] our lives have been destroyed.

The industry knew of the ills caused by asbestos. They used us like a bunch of diseased prostitutes... To them it meant nothing... We took their ills home to our families. My wife is fifty-four years old [and] never worked a day in the plant. [She] looked to... the near future after raising her children that she too could enjoy life. [But she] is also a victim... My son, thirty-one, is also a victim... We paid our own medical bills because of someone else's greed that placed profit over human life. What was their excuse?

INTRODUCTION

The recent bankruptcies of the largest United States asbestos manufacturers emanate from the staggering volume of asbestos litigation in this country. Major newspapers and legal periodicals have reported the substantial expenses related to asbestos litigation. A trial initiated by the Manville Corporation

* One asbestos victim protested outside a courtroom in which billions of dollars worth of disputed insurance claims were at stake. The picket sign observed that "Lawyers Play While Victims Pay." *TIME*, Mar. 18, 1985, at 67.


2. Mitchell, *Manville's Bid to Evade Avalanche of Lawsuits Proves Disappointing: Chapter II Filing Will Result in High Costs for Years; Victims Still Get Nothing*, Wall St. J., July 15, 1986, at 1, col. 6. Mitchell reports, "While Manville has paid attorneys and others during the reorganization some $40 million, victims and their widows haven't received a dime from Manville because the bankruptcy filing froze the litigation." *Id.* at 21, cols. 3-5 [hereinafter cited as *Victims Get Nothing*]. Chen, *Asbestos Litigation Is A Growth Industry*, ATL. MAG., July 1984, at 24 (citing Rand Corp. study reporting that asbestos victims received $236 million in compensation where lawyers on both sides received $764 million, including $395 million to fight claims for victims who received nothing); Gibson, *When Lawyers Prosper*, FORBES, Mar. 30, 1981, at 44 (statement of Manville's counsel: "I'd characterize [asbestos health suits] as lawyers' cases, not true disability cases"); contingency fees consume nearly 55% of settlements, for every dollar paid to plaintiffs, two to three times that amount goes for legal defense fees); *Manville Should End the Nightmare*, BUS. WK., Dec. 10, 1984, at 166 (over two-thirds of money spent on claims paid to lawyers). Other sources indicate that only ten to twenty cents per dollar paid by defendants goes to asbestos victims. The balance goes to the lawyers and insurance companies.

(Manville) and four additional asbestos manufacturers against fifty insurance companies began in San Francisco on March 5, 1985. The parties disputed billions of dollars of insurance claims. One year was required to locate a trial site because no existing courtroom could hold all the lawyers. Finally, an old high school auditorium was remodeled into a courtroom, at a cost to the parties of $200,000. Computers, which cost an additional $200,000, were installed to accommodate over one hundred million pages of documents. The lawyers flipped switches at twenty-six separate tables to illuminate lights at the judge’s console when they wished to speak. The auditorium accommodated one thousand spectators. The judge sat on the stage with rococo wall decorations and an ornate pipe organ at his side while the lawyers joked about hearing musical interludes during court recesses.

Outside the rococo “courtroom,” a man breathed from an oxygen tank while leading a demonstration of asbestos victims. Their purpose was to remind the public that key asbestos industry officials probably knew as early as the 1930’s that asbestos caused cancer. Public records suggest that these same industry officials conspired to manipulate medical evidence and “cover up” asbestos hazards. Ultimately, Manville found itself besieged by nearly seventeen thousand asbestos-related health suits, and consequently filed a Chapter Eleven bankruptcy petition in 1982.

Today, over two million American industrial workers, their family members and neighbors are expected to die prematurely of asbestos-related diseases. Approximately 675,000 asbestos victims will die by the end of this

4. These claims are disputed because carriers generally challenged the “occurrence” of “bodily injury” when latent disease is at issue. The carriers argue that “bodily injury” does not “occur” until asbestos related diseases manifest themselves with conclusive symptoms between ten and twenty years after exposure. See Roscow and Liederman, An Overview to the Interpretive Problems of “Occurrence” in Comprehensive General Liability Insurance, 16 FORUM 1148, 1153-54 (1981) (listing seventeen suits).
5. Galante, Megatrials, NAT’L L.J., Mar. 25, 1985, at 1 (over 150 lawyers expected to participate in the proceedings).
6. Victims Get Nothing, supra note 2 (“an estimated 2,000 of the 16,500 personal-injury plaintiffs died while Manville was haggling over its reorganization”); Comment, Asbestos Litigation: The Dust Has Yet to Settle, 7 FORDHAM URB. L.J. 55 (1978) (citing statement by Joseph A. Califano, former Secretary of Health, Education, and Welfare, reported in Hartford Courant, Sept. 12, 1978, at 1, cols. 7-8).
7. The neighbors and families of asbestos workers are also victims of “environmental exposure.” Neighbors and family members are exposed to asbestos by routine chores, such as doing an asbestos worker’s laundry. Selikoff, Hammond & Seidman, Mortality Experience of Insulation Workers in the United States and Canada 1943-1977, 62-63 (1978).
8. Related occupational lung diseases are generally classified as inorganic pneumoconiosis (dust exposure), organic pneumoconiosis (plant and moldy hay exposure), occupational asthmases (toxic chemical exposure), occupational respiratory infections (bacteria, fungus, and virus exposure), and occupational lung cancer (airborne carcinogens, such as arsenic, cobalt, nickel, haematite, uranium, isopropyl oil, gas retort fumes, chromates, asbestos, and other silicates). Postol, An Attorney’s Guide to Occupational Lung Disease, 20 TRIAL, Feb. 1984, at 82.
centuries—the equivalent of two hundred and sixty Bhopal disasters.\textsuperscript{10}

The Bankruptcy Reform Act of 1978 (the "Code")\textsuperscript{11} lacks an express good faith filing requirement. Currently, a tortfeasor who knew or should have known that it was injuring employees and putting a dangerous or defective product into the stream of commerce may, without putting good faith at issue, file a Chapter Eleven petition to discharge tort liability. This gap in the Code directly counteracts the public policy considerations that underlie common law product liability actions.\textsuperscript{12} A tortfeasor in bankruptcy may

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12. The \textit{Restatement (Second) of Torts} § 402A states that:

\begin{enumerate}
  \item One who sells any product in a defective condition unreasonably dangerous to the user or consumers or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  \begin{enumerate}
    \item the seller is engaged in the business of selling such a product, and
    \item it is expected to and does reach the user or consumer without substantial change in the condition which it is sold.
  \end{enumerate}
  \item The rule stated in Subsection (1) applies although
  \begin{enumerate}
    \item The seller has exercised all possible care in the preparation and sale of this product, and
    \item The user or consumer has not bought the product from or entered into any contractual relation with the seller.
  \end{enumerate}
\end{enumerate}

Thus, common law strict liability focuses on the condition of the product, not the seller's conduct. However, most courts hold sellers strictly liable only for manufacturing and design defects. In failure to warn cases, courts first look to the defendant's negligent conduct, i.e. the manufacturer's or seller's good faith. A plethora of cases impose liability in failure to warn cases when the seller knew or should have known of the need to provide warnings for product defects. See, e.g., Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969); Oakes v. E.I. DuPont de Nemours and Co., Inc., 272 Cal. App. 2d 643, 77 Cal. Rptr. 709 (1969). \textit{See also} Karjala v. Johns-Manville Products Co., 523 F.2d 155, 158-59 (8th Cir. 1975) (under Minnesota law, failure to provide product warnings renders the product unreasonably dangerous and subjects the manufacturer to strict liability for damages). Comment j to section 402A reads, in pertinent part:

\textit{Directions or Warning.} In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which
ignore the key issues of knowledge, conduct, and product defects—the same questions that are key in product liability litigation.

Since 1982, three solvent asbestos firms have used Chapter Eleven of the Code to discharge their respective tort liability for asbestos-related disease.

A substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warnings as to use may be required.

Section 402A and comment j constitute the basis for a manufacturer's liability to the ultimate worker or user. It remains unclear whether a manufacturer who, despite testing, could not have reasonably foreseen the range of hazards of a product should be strictly liable.

Soon after section 402A was adopted in 1965, the Illinois Supreme Court construed 402A liberally in Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186-87 (1965). The court held that strict liability for physical harm to consumers is imposed on sellers of defective products besides food. In contrast, negligence tolerates and assigns no liability for unknown hazards. See Basko v. Sterling Drug Co., Inc., 416 F.2d 417, 426 (2d Cir. 1969) (imposing liability for unknown hazards undesirable because manufacturers must have leeway to experiment). See also Christofferson v. Kaiser Foundation Hosp., 15 Cal. App. 3d 75, 80, 92 Cal. Rptr. 825, 827 (1972) (liability for unknown hazards would "bar the very experience which alone could give early hint of side effects of a new product"). This reasoning supports the macabre proposition that without asbestosis and mesothelioma victims, the asbestos industry would not have known asbestos was hazardous.


14. "Discharge" does not necessarily connote absolution. Dischargeability in bankruptcy refers to whether or not the claims of a creditor or interested party are cognizable and adjudicable in a bankruptcy proceeding. Under the Code, tort claims are dischargeable. See 11 U.S.C. 502(c)(1982) (requiring bankruptcy court to estimate all unliquidated claims regardless of delay to administration of estate resulting from discharge of such claims). See also 11 U.S.C. § 502(c)(1) (claims estimation), § 524 (effect of discharge) and § 1141 (discharge effect of plan confirmation); In re UNR Industries, Inc., 725 F.2d 1111, 1116 (7th Cir. 1984) ("[A] major change brought about by the Bankruptcy Reform Act of 1978 was to authorize the bankruptcy court to adjudicate claimants' rights under the tort law, thus merging the tort determination with the claim determination"). See generally 11 U.S.C. § 101 (1982). A "claim" under the Code is "right to payment, whether or not such right is reduced, liquidated, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." Id. § 101(4)(A). See S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5807-08; H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6266. In Schweitzer v. Consolidated Rail Corporation and Reading Company, 758 F.2d 936 (3rd Cir. 1985), the Third Circuit held that a plaintiff in a non-asbestos-related personal injury action who had no manifest injury prior to the consummation date of his employer's reorganization in bankruptcy did not have a dischargeable "claim" within the meaning of the Code. The court assumed, without deciding, that a cause of action can withstand a motion to dismiss even if the action has not accrued within the relevant limitations period.
through corporate reorganization. It has taken Manville over three years to propose a reorganization plan that purports to provide adequate victim

_Cf._ Mooney Aircraft Corp. v. Foster, 730 F.2d 367, 375 (5th Cir. 1984). The Fifth Circuit, interpreting Chapter VII of the Bankruptcy Act of 1898, held that persons killed in an airplane crash, five years after the assets of the airplane manufacturer had been purchased in the bankruptcy court, did not have dischargeable claims against the debtor in prior proceedings. _Mooney_ may dispel the confusing proposition that a person who could not know that many years into the future he would die at the hands of a debtor's product would need to file a claim to the assets of the debtor's estate. In mass tort litigation, however, there may be nothing more than an empty corporate shell available to sue by the time victims manifest conclusive symptoms of their injuries.

15. The United States Supreme Court held in Ohio v. Kovacs, 105 S. Ct. 709 (1985), that a hazardous waste site owner could avoid compliance with a state court injunction requiring him to clean the waste site by filing a personal bankruptcy petition. However, the facts in _Kovacs_ are severely limited and the holding is narrow. In fact, the liabilities at issue were not tort liabilities, but rather obligations to pay money. In _Kovacs_, the state of Ohio obtained an injunction against Kovacs ordering him to clean up the waste site. The state subsequently obtained the appointment of a receiver when Kovacs failed to comply with the injunction. The receiver took possession of Kovacs' property and assets to implement the injunction. When Kovacs filed a personal bankruptcy petition, the state moved to require Kovacs' post-bankruptcy income to be applied to aid the receiver in cleaning up the site. The Court held that the appointment of a receiver had converted the injunction into an obligation by Kovacs to pay money, an obligation that is definitely dischargeable in bankruptcy. Thus, when the case reached the Supreme Court, tort liability was not at issue. Accordingly, the Court warned that "we do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed." *Id.* at 711 (emphasis added). Thus, the Court expressly left open the question of tort liability, concluding that "we do not question that anyone in possession of the site . . . must comply with the environmental laws of the State of Ohio." *Id.* at 711-12.

In _Kovacs_, however, the respondent was not in possession of the property which gave rise to the tort liability. Therefore, _Kovacs_ has little bearing on the subject matter of this Comment. In fact, the entire case is merely a necessary adjudication of financial obligation which was unrelated to tort liability and required by the Bankruptcy Code. _Accord_ Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 106 S. Ct. 755 (1986).

16. See 11 U.S.C. § 502(c) (1982). Liabilities must be adjudicated in bankruptcy proceedings regardless of their unliquidated or contingent nature. H.R. REP. No. 95-595, 95th Cong., 1st Sess. 354 (1977); S. REP. No. 95-989, 95th Cong., 2d Sess. 65 (1978). This represents a significant change from the old Bankruptcy Act of 1898. The change ensured that bankruptcy proceedings give the debtor full relief which will not be defeated by an outstanding debt that would otherwise remain unaffected by discharge. See 11 U.S.C. § 1141(d)(1)(ii) (1982). In theory, the Code does not distinguish personal injury claimants, banks, insurance companies, or trade creditors. The Code's avowed, but theoretical, concern is when each claim arises, not the nature of the claim. Claims arising from pre-petition corporate activity are treated equally, whether they are personal injury claims or not. See, e.g., 11 U.S.C. § 1122(a) (1982), which provides that a reorganization plan may place claims or classes of interests in a particular class, if such a claim or interest is "substantially similar" to the other claims or interests of the class. It is important to note that upon filing a bankruptcy petition, corporate assets become a trust for the benefit of pre-existing claimants, which enables the trustee or debtor-in-possession to operate the business for the benefit of those pre-existing claimants. Claims that arise subsequent to the filing of the bankruptcy petition have priority in payment. Likewise, if a firm injures someone due to post-petition activity, the injured party has priority in payment over the pre-petition creditors. Thus, the Code distinguishes claimants by virtue of when their claims arise.

Asbestos firms in Chapter 11 argue that unknown claimants, exposed victims with precursor or no symptoms, represent pre-petition claims by virtue of pre-petition inhalation of asbestos
compensation, and another year may pass before Manville's creditors, victims, and shareholders approve a version of this plan.17

Asbestos-related diseases are commonly occupational in nature,18 many of which develop after latency periods of fifteen to forty years.19 A victim exposed to lethal toxic agents today may not exhibit symptoms for decades, and therefore may not recognize asbestos-related injuries until long after the employer has gone out of business or reorganized in bankruptcy.20

particles. Therefore, these firms argue that these victims should be dealt with under their respective organization plans.

17. See In re Johns-Manville Corp., 52 Bankr. 879 (Bankr. S.D.N.Y. 1985) (decision and order on motions for retention of special counsel, reimbursements of expenses and summary judgment on an issue of corporate governance). Manville objected to the shareholders' attempt to compel a shareholders meeting in response to the proposed establishment of a trust fund for the benefit of the tort claimants. The company argued that the shareholders had effectively abandoned the Chapter Eleven process and used the Delaware proceeding to jeopardize Manville's attempt to emerge from bankruptcy. The court enjoined the Delaware action: "If it were not for the ongoing unwillingness of opposing factions to seek a consensual or near consensual plan rather than risk an attempt at an imposed plan, a section 1129 confirmation hearing might already have been held." Id.


19. All diseases are ultimately detectable as symptoms develop. Rarely, however, are asbestosis cases ever conclusively diagnosed within a decade after initial exposure. See Selikoff, Churg & Hammond, Asbestos Exposure and Neoplasia, 188 J. A.M.A. 22 (1964); 1 Asbestos Properties, Application and Hazards (L. Michaels & S. Chissick eds. 1979).

20. Other toxic products may also cause mass injuries, though not all mass tortfeasors have immediately sought asylum in bankruptcy to minimize tort liability. See Schwadel, Robins Sets $615 Million Pool to Cover Dalkon Shield Claims, Halts Dividends, Wall St. J., Apr. 3, 1985, at 2, col. 3. (A.H. Robins Co. established $615 million reserve to cover Dalkon Shield claims for payment to injured women over next seventeen years; creation of fund eradicated Robins' net worth). See also A.H. Robins Loses $461.6 Million, L.A. Times, Apr. 3, 1985, IV+:1, at 1, col. 2. (senior vice president and Robins' chief financial officer, G.E.R. Stiles, asserted that "[w]e are not (bankrupt) [sic] and we are not in danger of that . . . . We are operating todayjust as we did yesterday and as we will be . . . . It's business as usual"). Despite the evacuation of Robins' net worth, the company did not seek protection in bankruptcy until it first attempted to create a fund to compensate victims of the Dalkon Shield. Robins waited to file its bankruptcy petition until the company was convinced that the $615 million fund it created in April, 1985, would be insufficient to cover legal fees and damages. See, e.g., Diamond, Drug Company Asks Protection From Creditors, N.Y. Times, Aug. 22, 1985 at 1. But see Daniels, Attempt Seen to Block Robins Chapter 11 Move, N.Y. Times, Aug. 22, 1985 at 31 (victim's attorney
Massive tort liability remains the *raison d'être* for the asbestos bankruptcies because tort claims are dischargeable under the Code. The Code's lack of an express good faith filing requirement exemplifies conflicting social policy; the goal of tort law is victim compensation, while the goal of corporate reorganization is debtor rehabilitation. Furthermore, victims have no control over when a tortfeasor files a bankruptcy petition.

arguing that Robins attempted to exploit the bankruptcy code, in view of company's record earnings pace in 1985). Retired district Judge Miles W. Lord accused Robins in open court of "corporate irresponsibility as its meanest" when he accused three top Robins officials of waiting to settle cases until the eve of trial so that Robins would earn interest on the settlement fund. Schwadel, *Robins and Plaintiffs Face Uncertain Future*, N.Y. Times, Aug. 23, 1985, at 36. For a review of the Robins litigation, see *Lord's Justice* (Book Review), 35 De Paul L. Rev. (in print 1985) [forthcoming]. Manville, however, argued that since its net worth would be dissipated, it was functionally insolvent and, therefore, in need of reorganization. *But see Manville Should End the Nightmare*, Bus. Week, Dec. 10, 1984, at 166 (Manville has been reluctant to compromise its interest to settle claims without litigation).

21. Judge Lifland used the phrase "*raison d'être*" in *In re Johns-Manville Corp.*, 36 Bankr. 727 (Bankr. S.D.N.Y. 1984) to describe the main and only reason Manville filed a bankruptcy petition. *Id.* at 730. See also Code § 362 (which automatically stays all pending litigation against the tortfeasor and precludes new tort plaintiffs from commencing new litigation). See *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1284 (6th Cir. 1983), cert. denied, 104 S. Ct. 3537 (1984). In a mass tort-based bankruptcy, the automatic stay provisions are naturally a significant benefit to tortfeasors and a significant bar to victim compensation. Thus, the automatic stay provisions of Code § 362 afford a Manville-like tortfeasor the "breathing room" to delay victim compensation and create an incentive to litigate liability with insurance carriers.


23. See *Roe, Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 846 n.1 (1984). Professor Roe explains that asbestos and diethylstilbestrol (DES) catastrophes merely foreshadow a forthcoming national problem. Citing Dr. Leon Cander, Chief of Internal Medicine, Albert Einstein Medical Center, Professor Roe emphasizes that 80% of the cancer diagnosed in America is occupationally induced by carcinogens in the workplace. Thus, it may be common for a corporate tortfeasor's aggregate liability to exceed its net worth. This disparity raises tantalizing bankruptcy issues, because tort claimants are currently considered general unsecured creditors, subject to priority of preferred shareholders and secured commercial creditors. If tort liability alone exceeds the value of a tortfeasor's assets, nothing will remain for the tort victims. Most tort victims of asbestos exposure have yet to manifest conclusive symptoms, relegating them to the arguable status of mere "contingent" claimholders. Contingent claims are "all debts that, either as to their existence or as to their amount, depend upon some future event uncertain either as to its occurrence altogether or as to the time of its occurrence." *Edwards Co. Inc. v. Long Island Trust Co.*, 347 N.Y.S.2d. 893, 902 (Sup. Ct. 1973) (quoting 3A *COLLIER ON BANKRUPTCY*, § 63.30, at 1912.1 (14th ed. 1977)). Cf. 11 U.S.C. § 303(b) (1982); *In re UNR Industries, Inc.*, 12 Bankr. Ct. Dec. (CRR) 1002 (Bankr. N.D. Ill. 1985); *In re Amateck Corp.*, 755 F.2d 1034 (3d Cir. 1985) ("An involuntary case is commenced by the filing with the bankruptcy court in petition . . . by . . . holder(s) of claim(s) against such person . . . not contingent as to liability"). One court has reasoned that tort claims are not truly contingent as to liability, even if they are disputed. *In re Dill*, 30 Bankr. 546 (Bankr. 9th Cir. 1983), *aff'd*, 731 F.2d 629 (9th Cir. 1984). However, bankruptcy courts disagree about whether tort claims are contingent in any respect. One line of cases holds that tort claims are not contingent as to liability, when tortious events that give rise to the claim have already occurred. See, e.g., *In re Dill*, 30 Bankr. 546 (Bankr. 9th Cir. 1983), *aff'd*, 731 F.2d 629 (9th Cir. 1984); *In re Longhorn 1979-11 Drilling Program*, 32 Bankr. 923 (Bankr. W.D. Okla. 1983). One court ruled to the contrary that tort claims depend upon a judicial finding of liability, and are therefore contingent. *In re Turner*, 32 Bankr. 244 (Bankr. D. Mass. 1983) (expressly rejecting *Dill*).
This Comment focuses on asbestos litigation to analyze the legal relationships between latent disease, traditional victim compensation, and corporate rehabilitation. Parts I and II analyze the asbestos bankruptcies, and particularly In re Johns-Manville Corp., to illustrate the present inadequacies of the Code in the compensation of tort victims. Part III proposes an express good faith filing requirement for tort-based reorganizations. Such a requirement would help courts determine whether a tortfeasor knew or should have known, prior to filing its Chapter Eleven petition, that it was injuring employees or putting an unreasonably dangerous or defective product into the stream of commerce. An amendment of this sort would hold tortfeasors in bankruptcy to the same liability standards that are crucial in non-bankruptcy product liability litigation.

I. THE Manville CASE

A. Manville in Bankruptcy

The Manville Corporation filed for Chapter Eleven bankruptcy reorganization on August 26, 1982. The following day, Manville reported that its domestic assets were virtually unencumbered, with $1.4 billion in net book value of unmortgaged property, plants, and equipment, and $600 million in net book value of other consolidated assets. Manville held $15 million in cash on the day that it filed for protection from tort claimants. Manville's chief executive claimed that Manville had better cash flow than any other big company ever to file a bankruptcy petition. Nevertheless, due to an estimated thirty-five thousand potential lawsuits at a speculated total cost of two billion dollars, Manville filed for bankruptcy. Manville's commercial creditors and numerous tort claimants subsequently filed over twenty motions to dismiss the bankruptcy petition for lack of good faith. The challengers of the Manville petition asserted bad faith on two grounds. First, Manville's commercial creditors argued that the company's financial condition appeared healthy. Second, the asbestos victims argued that asbestos caused cancer, and that Manville had "covered up" the truth.

In In re Johns-Manville Corp., the bankruptcy court denied the motions to dismiss the petition for lack of good faith. The court concluded that "because the allegations of the Asbestos [Victims] Committee are not supported by concrete facts . . . and it is contended by Manville that it was not until recently that the full extent of the dangers due to asbestos exposure..."
was clarified . . . the Asbestos Committee has not sustained its burden of demonstrating fraud to vitiate the filing ab initio."28

B. Asbestos History

The bankruptcy court's conclusion in the Manville case does not comport with either the evidence compiled by the asbestos victims or with the findings of other courts that have heard similar evidence. The following history highlights the evolution of scientific, legal, and lay knowledge concerning asbestos. Specific facts regarding the actions of various corporations and their executives are not intended as an indictment. Rather, they are merely a recounting of a public record that illustrates the types of problems that a good faith filing requirement in tort-based bankruptcy could solve.

Western civilization has long been aware of asbestosis. Even the first century Romans knew that slaves who mined asbestos suffered from lung disease and used "make shift respirator[s]" for protection.29 A French Department of Labor inspector linked fifty deaths to asbestos exposure in a weaving mill in 1906.30 By 1933, Manville itself had paid $35,000 to settle eleven asbestosis claims.31 Until recently, however, the industry has not acknowledged its own contribution to asbestos-related death and injury. The widely publicized discovery of correspondence between major industry executives, doctors, and lawyers from the 1930's through the 1960's suggests repeated efforts by the asbestos industry to distort evidence and hide asbestos-related hazards. As late as 1977, Manville apparently attempted to mislead its own shareholders on the matter in its Annual Report.32 As an appellate court in Florida recently noted, "there is voluminous evidence that the asbestos industries have known for decades of the dangers involved in the use of asbestos products."33

Asbestos hazards were common knowledge as early as the 1930's. Specifically, Dr. Roscoe Gray, the surgical director for Aetna Life Insurance Company wrote in his 1934 "Attorneys' Textbook of Medicine" that:

28. 36 Bankr. at 735.
31. Meeting of the Board of Directors of Johns-Manville Corporation, June 26, 1933, reprinted in CHRONOLOGY, supra note 30, at 82-83.
32. 10-K ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF SECURITIES EXCHANGE ACT OF 1934, JOHNS-MANVILLE CORPORATION, FISCAL YEAR ENDED DECEMBER 31, 1977, ITEM 5. LEGAL PROCEEDINGS [hereinafter cited as ANNUAL REPORT].
33. Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242, 249 n.5 (Fla. App. 1984), review den., 467 So. 2d 999 (Fla. 1985)
Asbestos particles inhaled into the lung produce an exceedingly severe and perhaps fatal inflammation... Since asbestosis is incurable, and usually results in total disability followed by death, care and caution should be assumed before a claim is filed. This is a very serious disease...

While the surgical director for Aetna Life, then a major insurer of asbestos firms, disseminated this material, the manufacturers denied awareness of the disease.

On December 10, 1934, Vandiver Brown, general counsel for Manville, wrote to Dr. A.S. Lanza, medical director of the Metropolitan Life Insurance Company, about an article that Lanza was writing. Brown complained that Lanza had deleted observations from a draft of the article that minimized the gravity of asbestos-related disease. Brown wrote that "the observations... in your original report presented an aspect of your survey that was favorable to the industry and we should like to see them retained." On December 21, 1934, Brown returned Dr. Lanza's galley proofs, requesting "that all the favorable aspects of the survey be included... I feel confident we can depend upon you... to give us this 'break'..."!

One year later, in September 1935, A.S. Rossiter, editor of Asbestos magazine, wrote to Sumner Simpson, president of Raysbestos-Manhattan. Rossiter requested permission to report current research about asbestos-related diseases, and acknowledged that "{always you have requested that for certain obvious reasons we publish nothing and naturally, your wishes have been respected.}\"! The following October, Simpson contacted Brown regarding Rossiter's request. Simpson stated: "I think the less said about asbestos, the better off we are..."

Brown replied, and told Simpson that "I quite agree with you that our interests are best served by having asbestos receive minimum publicity." Brown also advised Simpson to:

warn the editors to use North American data on the subject rather than English. [T]he clinical picture presented in North American localities... is considerably milder than that reported in England and South Africa..."!

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34. CHRONOLOGY, supra note 30, at 28 (emphasis added).
35. CHRONOLOGY, supra note 30, at 29.
37. CHRONOLOGY, supra note 30, at 29.
39. Id. See also The Effect of Bankruptcy Cases of Several Asbestos Companies on the Compensation of Asbestos Victims, Subcommittee on Labor Standards of the Committee on Education and Labor, 98th Cong., 1st Sess. 48 (1983) [hereinafter cited as Bankruptcy Hearings].
40. CHRONOLOGY, supra note 30, at 29.
41. Id.
42. Id.
Apparently, industry officials knew of foreign studies as well as American data. Thus, the industry's asserted denials about its awareness of asbestosis during the 1930's now seem questionable. Additionally, the industry financed and controlled its own research project at the Saranac Laboratories in Saranac Lake, New York.\(^4\)

In November, 1936, Simpson wrote to F. H. Schulter, president of Thermoid Rubber Co., and proposed that several asbestos manufacturers control the Saranac Study.\(^4\) Each manufacturer would pay an equal share to finance the research, and each manufacturer would ultimately help decide whether to publish the completed results. Simpson thought that:

> it would be a good thing to distribute the information among the medical fraternity provided it is the right type and would not injure our companies ... [W]e do know that Asbestos Fibres [sic] can, and do, get into the lungs and may set up a Fibrosis [sic] condition ... called asbestosis.\(^4\)

In apparent accord with Simpson's scheme, Manville's counsel, Vandiver Brown, informed the Saranac laboratory that, "[t]he results ... will be considered the property of those ... advancing the funds, who will determine whether ... they shall be made public ... [T]he manuscript of your study will be submitted to us for approval prior to publication."\(^4\) The Saranac research continued for three years. In March 1939, Simpson wrote to Rossiter at Asbestos magazine about dust abatement; his evident intent was to suppress the information until the Saranac research was actually completed. Simpson wrote, "I can tell you confidentially, but I am not willing to make it public, that the air can be kept below five million microns with proper controls, but I am not willing to start a controversy with my competitors."

Rossiter seems to have followed Simpson. On March 23, 1939, Rossiter apparently agreed to suppress the preliminary Saranac research, finding "[t]he information ... most interesting. Of course we understand that all this information on asbestos is to be kept confidential and that nothing should be published by Asbestos at present."\(^4\) Indeed, Manville attorney Brown apparently adopted the same silence when he confessed that, "I have in mind ... the ostrich-like attitude which has been evinced from time to time by some members of the industry."

Similar attitudes prevailed within Manville itself. In 1949, Dr. Kenneth Smith conducted Manville's own survey of 708 employees. X-ray results

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\(^4\) CHRONOLOGY, supra note 30, at 30.

\(^4\) Id.

\(^4\) CHRONOLOGY, supra note 30, at 31; Brodeur, supra note 30, at 75-76.

\(^4\) CHRONOLOGY, supra note 30, at 31 (emphasis added).

\(^4\) Id.

\(^4\) Id.
showed that seventy-five percent of the employees sampled displayed lung fibrosis.\textsuperscript{50} The survey indicated that the increase in fibrosis of the lung was directly proportional to the length of exposure. The survey also found another 475 employees with early signs of non-specific fibrosis, "all of whom will show progressive fibrosis if allowed to continue working in dusty areas."\textsuperscript{51} Dr. Smith insisted in the report that the employees should not be told of their illness. Rather, Smith reasoned that:

\begin{quote}
\hspace{1cm} as long as the man feels well, is happy at home and at work, and his physical condition remains good, \textit{nothing should be said} . . . . [A]s long as the man is not disabled . . . the Company can benefit by his many years of experience.\textsuperscript{52}
\end{quote}

Finally, when Dr. Irving Selikoff's independent 1964 study\textsuperscript{53} of 1,500 asbestos workers showed a high incidence of cancer, asbestos firms began to provide warnings on their products. Regardless, the leading asbestos products liability decision at that time held that these warnings were useless. In \textit{Borel v. Fibreboard Paper Products Corp.},\textsuperscript{54} the Fifth Circuit Court of Appeals insisted that:

\begin{quote}
\hspace{1cm} none of the so called "cautions" intimated the gravity of the risk: the danger of a fatal illness caused by asbestosis and mesothelioma or other cancers. The mild suggestion that inhalation of asbestos in excessive quantities over a long period of time "may be harmful" conveys no idea of the extent of the danger. The admonition that a worker should "avoid breathing the dust" is black humor. There was no way for insulation workers to avoid breathing asbestos dust.\textsuperscript{55}
\end{quote}

Despite Manville's decision to hide the adverse results of its own medical survey from company employees, Manville published the following characterization of what the company and the industry knew about asbestos hazards. Manville's fiscal year Annual Report for 1977, filed with the Securities and Exchange Commission, reassured the shareholders that,

\begin{quote}
\hspace{1cm} [t]here was no basis for any warning until publication of scientific studies in 1964 . . . . The company believes that . . . during the periods of injurious exposure, the Company, government officials and medical and scientific studies believed the dust levels to which asbestos insulation workers were exposed presented no appreciable hazard to the health of such workers . . . .\textsuperscript{56}
\end{quote}

Although the history of the asbestos industry raises obvious problems of good faith, these issues are irrelevant to the filing of the petition in a tort-based bankruptcy.

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 117.
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.} (emphasis added).
\item \textsuperscript{53} \textit{Id.} at 50. See Selikoff, Churg, and Hammond, \textit{The Occurrence of Asbestosis Among Insulation Workers}, 132 ANN. NEW YORK ACAD. 139 (1965).
\item \textsuperscript{54} \textit{Borel v. Fibreboard Paper Products Corp.}, 493 F.2d 1076 (5th Cir. 1973), \textit{cert. denied}, 419 U.S. 869 (1974).
\item \textsuperscript{55} 493 F.2d at 1104.
\item \textsuperscript{56} \textit{ANNUAL REPORT, supra} note 32, at Item 5. Legal Proceedings (emphasis added).
\end{itemize}
II. Bankruptcy Analysis and Impact

Current toxic tort litigation\(^\text{57}\) illustrates that large corporations may face financial ruin if they are liable for placing defective products into the stream of commerce. Unfortunately, the prospective insolvency of major corporations currently presents conflicts\(^\text{58}\) between corporate rehabilitation and victim compensation. This is especially true when plaintiffs uncover overwhelming evidence of dubious corporate conduct prior to the corporation's filing of a bankruptcy petition.\(^\text{59}\)

The asbestos bankruptcies raise the issue of whether corporations may reasonably file for reorganization\(^\text{60}\) without good faith, simply to avoid tort liability. This is problematic because the Code gives tort claimants less protection than contract creditors.\(^\text{61}\)


\(^{58}\) Compensation of tort victims may leave the tortfeasor without assets. In \textit{In re UNR Industries, Inc.}, 29 Bankr. 741 (Bankr. N.D. Ill. 1983), Judge Hart cryptically observed, "The Court is not unaware that in refusing to approve of a procedure by which the right of putative claimants would be adjudicated and cut off, the putative claimants may wind up with judgments against corporations with only one asset: a corporate charter." \textit{Id.} at 748. Bankruptcy also accelerates unmatured contract claims but not unmatured tort claims. 11 U.S.C. §§ 502(b), 726, 1129(a)(7)(A) (1982); H.R. Rep. No. 595, 95th Cong., 1st Sess. 353 (1977), \textit{reprinted in 1978 U.S. CODE CONG. & AD. NEWS} 5963, 6309.


\(^{60}\) Though culpability is generally not germane to bankruptcy analysis, this Comment suggests that culpability should be a key issue in tort-based reorganizations.

\(^{61}\) Code § 101(9)(A) defines "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. §
Commercial creditors may minimize financial exposure to the risk of a debtor's bankruptcy by taking a priority security interest, or by bargaining for favorable terms in a security agreement that provides for default or non-payment of debt.\textsuperscript{62} Contract creditors extend credit voluntarily. This bargaining process allows commercial contract creditors to make intelligent decisions about extending credit. However, tort victims are involuntary claimants who cannot minimize toxic exposure; they do not rely upon contracts or agreements. Rather, tort victims recover damages based solely upon common law principles designed to prevent personal harm. Tort victims do not bargain for the risks they unwittingly take before they are injured. While employees as tort victims do bear the implied risk that employers may become insolvent, they do not assume an implied risk that employers may subject them to industrial fallout from dangerous and defective products.\textsuperscript{63} Those risks are protected by the tort system. Because social policy rather than contract law imposes the duty violated by tortfeasors, the Code should subject tortfeasors to traditional tort policies at a preliminary stage in a bankruptcy.

101(9)(A) (1982). The Code appears to treat all claimants equally. See, e.g., S. REP. No. 989, 95th Cong., 2d Sess., \textit{reprinted in} 1978 U.S. CODE CONG. & AD. NEWS 5787, 5792 ("The Committee feels that the policy of the bankruptcy law is to provide a fresh start . . . . Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally"). See also 11 U.S.C. § 362 (1982) (equitable treatment of creditors underlies the automatic stay provisions); 11 U.S.C. § 547 (1982) (preference procedures); 11 U.S.C. § 507 (1982) (priority procedures). However, even if a culpable tortfeasor is granted relief from tort liability in reorganization, the tort victim is not guaranteed compensation when the new firm emerges. See 11 U.S.C. § 1141(c) (1982) ("After confirmation . . . the property . . . is free and clear of all claims . . . of creditors"). The Code likewise provides that "confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1) (1982). The Code's bias toward commercial creditors is evidenced by the fact that most tort claims were not provable in bankruptcy before the Bankruptcy Reform Act of 1978 was enacted. Old Code § 103 governed the "provability" of claims in bankruptcy, but has since been deleted. 11 U.S.C. § 103 (1976) (repealed 1978). A discharge in bankruptcy under old Code § 35(a) released a debtor from all provable debts with some exceptions. \textit{Id.} at § 35(a). Tort claims were provable only if reduced to a judgment owed at the time of filing. \textit{Id.} at § 103(a)(i).


63. For a modern court to imply that tort victims assume this risk would be a medieval return to the doctrine of assumption of risk. In Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973), \textit{cert. denied}, 419 U.S. 869 (1974), the court stated that:

none of the so called "cautions" intimated the gravity of the risk: the danger of a fatal illness caused by asbestosis and mesothelioma or other cancers. The mild suggestion that inhalation of asbestos in excessive quantities over a long period of time "may be harmful" conveyed no idea of the extent of the danger. The admonition that a worker should "avoid breathing the dust" is black humor: There was no way for insulation workers to avoid breathing asbestos dust.

\textit{Id.} at 1104 (on petition for rehearing and petition for rehearing en banc) (emphasis in original).
A. Good Faith Filing Requirements or No Faith at All?

The Code lacks an express good faith filing requirement. Many courts, however, generally imply such a requirement. Code Section 1112 lists various grounds for "cause" to dismiss a bankruptcy petition. The list is not exhaustive and bankruptcy courts have individual discretion to determine dismissal for cause depending on the circumstances of each case. "Good faith" may be challenged under the aegis of abuse of bankruptcy jurisdiction. Abuse commonly arises from the protean schemes of cunning petitioners to circumvent Code restrictions when the true economic need to reorganize is lacking.

Analogizing the case law to the Manville petition, the asbestos victims
in In re Johns-Manville Corp.\textsuperscript{73} argued that, prior to filing, Manville lacked sufficient debts to warrant reorganization. Indeed, the Manville filing, not its solvent pre-petition financial condition, triggered acceleration of $700 million in real debt. First, simply filing the Manville bankruptcy petition accelerated $275 million in unsecured and institutional debt.\textsuperscript{74} Second, Manville's commercial creditors were forced to file claims for an additional $425 million of liquidated debt.\textsuperscript{75}

In effect, Manville accelerated enough immediate debt to create the real need to reorganize. When the Asbestos Committee and nineteen other respondents challenged the Manville petition, Manville successfully argued that if the court dismissed the petition, then the company would remain liable for all its real (but self-accelerated) debts.\textsuperscript{76} Manville asserted that its cash and liquid assets were insufficient to pay those obligations. Manville convinced the bankruptcy court, and the district court on appeal, that the company had "real debt, real creditors, and a compelling need to reorganize to meet those obligations."\textsuperscript{77}

The courts accepted Manville's circular argument. First, if Manville had not filed a bankruptcy petition, $275 million in unsecured and institutional debt would have remained unaccelerated. Second, Manville would have presumably discharged its $425 million in commercial debt under its pre-petition credit arrangements. Instead, Manville used the bankruptcy petition itself as a device to create the need to reorganize. Only after the petition accelerated $700 million in real debt did Manville truly need the aid of the bankruptcy court. The bankruptcy petition itself rearranged Manville's debt structure, thereby leaving the company unable to pay its consequently matured debt.\textsuperscript{78}

Nevertheless, the bankruptcy court distinguished a primary case upon which the challengers of the Manville petition relied. In Tucker v. Texas

\textsuperscript{73} 36 Bankr. 727, 743 (Bankr. S.D.N.Y. 1984).
\textsuperscript{74} It is important to remember that Manville filed a voluntary Chapter 11 petition, pursuant to 11 U.S.C. §§ 109, 301 (1982), under which no solvency requirement exists. Contingent indebtedness is not a bar to filing for relief in Chapter 11. Contingent and unliquidated claims can be administered in bankruptcy. 11 U.S.C. § 502(c) (1982). Debts are administered in Chapter 11 regardless of this unliquidated or contingent nature. This represents a change from the Bankruptcy Act of 1898. The purpose of this change is to ensure that a bankruptcy proceeding fully relieves debtors despite debts which would otherwise be unaffected by reorganization. Further, and most important, the mere filing of a bankruptcy petition accelerates unmatured debts.
\textsuperscript{75} Manville's commercial creditors would lose their right to recover liquidated debts if they did not file claims in the bankruptcy proceeding. See also 11 U.S.C. 501(c) (1982) (debtor may file proofs of claim on behalf of creditors who do not timely file). Presumably, whether or not the liquidated claimholders voluntarily filed proofs of claim, Manville could have filed on their behalf, and accelerated debts that otherwise were not due.
\textsuperscript{76} 36 Bankr. at 740.
\textsuperscript{77} Id.
\textsuperscript{78} 36 Bankr. at 740. The court rescued Manville's solvency argument by claiming that "upon dismissal of this petition, Manville may be liable in the amount of all of the above-described real debts, plus interest." Id.
American Syndicate, the bankruptcy court held that a solvent debtor did not require bankruptcy protection. In Tucker, a landowner and developer filed a voluntary reorganization petition, asserting an inability to pay their debts as the debts matured. Like the debtor in Tucker, Manville argued that if the asbestos victims' potential tort claims ever matured, the company would be unable to carry or discharge its total real debt that matured by filing a bankruptcy petition. On appeal in Tucker, the Fifth Circuit Court of Appeals held that the debtor, like Manville, was solvent; the court found that the debtor had discharged debts not yet due to qualify as a debtor who is unable to pay its current debts.

Thus, in Tucker, the Fifth Circuit held that a debtor's discharge of debts not due, in order to qualify as a debtor with real creditors, was an abuse of bankruptcy jurisdiction. The bankruptcy court in Manville distinguished Tucker, even though Manville used the bankruptcy petition to accelerate debts not due to qualify as a debtor with real creditors. The bankruptcy court's response to Tucker was that "it has not been established . . . that Manville has the ability to manage in full all its present liquidated and unliquidated obligations." The court's analysis mischaracterizes "present" obligations by including the urgent debts that Manville created for itself by filing the petition.

In the first paragraph of the opinion, the bankruptcy court readily acknowledged that:

the sole factor necessitating [Manville's] filing is the mammoth problem of uncontrolled proliferation of asbestos health suits brought against it because of its substantial use for many years of products containing asbestos which injured those who came into contact with the dust of this lethal substance.'

Nonetheless, the bankruptcy court concluded that the Manville petition did not lack good faith, particularly because Manville intended to establish some sort of "claims-handling facility" as part of its reorganization plan. There is, however, a disturbing undercurrent beneath the court's reasoning. If Manville intended to establish a claims-handling facility for asbestos victims, it is curious that the company first attempted to discharge the tort liability in bankruptcy. With a pre-petition net worth of $2.15 billion, Manville

79. 170 F.2d 939 (5th Cir. 1948).
80. Id. at 940.
81. 36 Bankr. at 740.
82. 170 F.2d at 940.
83. Id.
84. 36 Bankr. at 740.
85. Id. at 729.
86. Id. at 742. However, Manville engaged in fervent discovery litigation which, whether intended or not, frustrated the establishment of a claims-handling facility. See infra note 96.
87. A primary reason that a firm seeks the protection of the bankruptcy law is to freeze collection efforts by creditors by virtue of the automatic stay. However, some firms have established compensation funds without bankruptcy. See supra note 20.
could have established some sort of "claims-handling facility" before it filed for bankruptcy, rather than accelerating $700 million of liquidated debt. Manville could doubtless have appropriated a financially reasonable portion of its assets and future earnings to purchase annuities or establish a trust to finance a "claims-handling facility." Yet, instead of finding bad faith, the court upheld the Manville petition, concluding that the company had not abused bankruptcy jurisdiction.

Additionally, the bankruptcy court narrowly held that the good faith inquiry is germane only to the confirmation of the reorganization plan. In support of this holding, the court identified "open access" as a primary goal of the federal bankruptcy system. Citing legislative authority, the court rigidly stated that the Congressional purpose was to "encourage resort to the bankruptcy process."

It is nevertheless difficult to reconcile Congress's intended use of the bankruptcy laws with recent judicial observations about Manville or similar tortfeasors. In Johns-Manville Sales Corp. v. Janssens, the appellate court of Florida upheld a punitive damage award against Manville for the following reason:

Johns-Manville learned of the high probability of danger to thousands of persons manufacturing and using asbestos products over a period of years and, despite such knowledge, made conscious decisions at the executive level not to disclose the presence of this danger nor to alert affected individuals to the potential harm that could result from such exposure over a long period of time. Johns-Manville's conduct ... is clearly of a character evincing a reckless disregard for human life or the safety of persons exposed to its dangerous effect, which supports a finding by a jury of a conscious indifference to consequences, wantonness, recklessness, and a grossly careless disregard for the safety and welfare of members of the public.  

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88. For a discussion of various financial devices available to establish some sort of claims handling facility, see Roe, supra note 23, at 866-75.
89. 36 Bankr. at 737. Judge Lifland stated that "there is no strict and absolute 'good faith' predicate to filing a Chapter 11 petition." Id. But see In re Victory Constr. Co., 9 Bankr. 549, 563-65 (Bankr. C.D. Cal. 1981) (good faith is an implied filing requirement).
90. Id. at 743. "[T]he type of plan which emerges, i.e., whether or not [the plan] treats ... future claimants fairly, if at all, is irrelevant to the threshold determination ... as to the 'good faith' of Manville's filing." 36 Bankr. at 743. The court's reasoning is backwards. The issue at this juncture of the bankruptcy proceeding was whether Manville filed the petition in good faith, not whether the subsequent plan treats victims fairly. Thus, the propriety of the plan is irrelevant to the propriety of the filing because good faith in plan should presuppose good faith in filing the petition initially.
91. Id. at 736.
93. 36 Bankr. at 736.
94. 463 So. 2d at 249.
95. Id. Similarly, in Jackson v. Johns-Manville Sales Corp., No. 82-4285, slip opin. (5th
In a bankruptcy court, however, a tortfeasor's previous conduct is not germane to the court's jurisdiction. When thousands of victimized employees finally sued the company, Manville accelerated sufficient debt to warrant a present need to reorganize, convincing a bankruptcy court and district court that the company's bankruptcy petition did not lack "good faith," but instead deserved open access to the bankruptcy system.

The ruling in In re Johns-Manville Corp. reduces the bankruptcy courts to halls of corporate justice. The court's rigid application of the Code and severely narrow reliance on legislative authority illustrate that judicial discretion in tort-based bankruptcies is susceptible to abuse. Tort claims are unlike contract claims. Commercial creditors may lose money, but tort claimants lose their careers, their health, and their lives.

Cir. January 22, 1986), while upholding a punitive damage award for the reasonable probability of contracting cancer in the future and related mental distress, the Fifth Circuit commented that "the jury might also have concluded that the asbestos companies' practices of directing their doctors not to participate in programs devoted to learning the association between asbestos and lung-related disease reflected malicious behavior or reckless indifference to the rights of those workers-who would be around asbestos."

96. See, e.g., In re Johns-Manville Corp., 36 Bankr. 743, 745 (Bankr. S.D.N.Y. 1984). The court conceded, "but for this continually evolving albeit amorphous constituency [and mammoth problem of uncontrolled proliferation of asbestos health suits], it is clear that an otherwise economically robust Manville would not have commenced these reorganization proceedings." Additionally, Manville engaged in fervent discovery wars, apparently to frustrate, rather than to establish, a "claims-handling facility." See In re Johns-Manville Corp., 42 Bankr. 362, 364 (Bankr. S.D.N.Y. 1984) (Manville opposing order to produce market share data from 1930's to present, needed by Manville's insurance carrier to determine the appropriate contribution to the claims handling facility); see also In re Johns-Manville Corp., 39 Bankr. 659, 661 (Bankr. S.D.N.Y. 1984). Manville successfully fought to bar ex-employees' discovery requests for medical and employment histories under 11 U.S.C. § 362(d) (1982), arguing that even if an ex-employee contracted asbestos-related diseases from exposure at Manville's plants, "Manville's financial resources would go to discovery litigation at the expense of claimants and that the energies of the Bankruptcy Judge and bankruptcy counsel would be diverted from the central issue of the reorganization."

97. 36 Bankr. 743. Perhaps Manville filed for bankruptcy to put pressure on Congress. See Release to Shareholders, Employees, Customers, Suppliers, and Creditors, Corporate Relations Department, Manville Corporation, Wall Street J., Aug. 26, 1982, at 25 (advertisement):

Q: Your businesses are in good shape, but you filed under Chapter 11? Why?
A: We're overwhelmed by 16,500 lawsuits related to the health effects of asbestos, with many more projected. The federal government has refused to admit its responsibility to shipyard workers. Congress has failed to act to provide compensation for claimants. . . .

Q: Isn't there some other national program for people injured on the job?
A: There are programs in other industries, but not for asbestos workers. There should be a statutory compensation program for asbestos injuries. We've tried to get a program passed but Congress has been preoccupied. This is another reason we've been forced into Chapter 11. No other country uses the court litigation system to provide compensation for occupational disease.

Id. (emphasis in original). See generally In re Johns-Manville Corp., No. 82 Civ. 8189 (S.D.N.Y. Apr. 22, 1983) (Manville petition delayed payment to tort claimants while company litigated disputes with insurance carriers). Nearly four years later Manville still believes Congress should
III. SOLUTIONS

Solving the toxic tort debacle will be a long process. Asbestos litigation is currently as cancerous as the diseases themselves, consuming significant public resources while settling very little. Defendants like Manville and their insurance carriers do not hurriedly compensate thousands of claimants without protracted litigation. Today, toxic tort trials have become media spectacles and feasts for what some critics might call carrion attorneys. At the very least, Congress should amend the current Code specifically to address tort-based bankruptcies in which victims of latent diseases are the primary claimants of the debtor’s estate. An express good faith filing requirement for tort-based bankruptcies would help determine whether a tortfeasor knew or should have known, prior to filing its bankruptcy petition, that it was putting an unreasonably dangerous or defective product into the stream of commerce.

The Code currently permits a culpable tortfeasor like Manville to commence and maintain a voluntary bankruptcy case because the Code lacks an

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compensate claimants. See Prokesch, Talking Business with McKinney of Manville, N.Y. Times, July 8, 1986, at 30, cols. 1-3:

Q: You are still trying to force the Government, in lawsuits and in Congress, to help compensate asbestos-health victims. What are the chances of Congress passing such legislation?

A: It’s not difficult to convince Senators and Congressmen that it’s unfair for industry to pay for the consequences of the acts of government. But to phrase it simply, it’s not enough to be right in Washington.

98. See Tracy, How to Milk Money From a Bankrupt, FORTUNE, May 14, 1984, at 130. The Manville bankruptcy necessitated legal services from thirty-seven law firms, which together billed over $25 million. The two investment firms retained by bankruptcy Judge Lifland, Morgan Stanley and First Boston, billed Manville $125,000 per month to evaluate the reorganization plan and estimate Manville’s liquidation value. “Until all this is finally worked out, the claimants will go right on waiting while the law firms and investment bankers go right on collecting.” Id. at 130.

99. Judges and journalists frequently attack plaintiffs’ attorneys for pursuing their own interests, rather than the interests of their clients. See In re Johns-Manville Corp., 36 Bankr. 743, 749 n.3 (1984) (Asbestos Committee composed primarily of lawyers who “have their own financial interests in the proceedings emanating from their contingency fee arrangements” and who “restrict their collective focus upon their own parochial interests”).

Cf. Orangemail: Why It Got Paid, N.Y. Times, Mar., 1985 (editorial). The editorial praised Federal Judge Weinstein for protecting the Agent Orange settlement fund from plaintiffs’ attorneys, on the ground that their case was baseless: “[I]t is totally uncertain whether any serious adverse health effects could have been caused by the level of Agent Orange exposure veterans might have received in Vietnam.” See also Margolick, Anti-Smoking Climate Is Encouraging Suits Against the Tobacco Industry, N.Y. Times, Mar. 15, 1985, at 5, col. 1. John F. Banzhaf 3d, professor at George Washington University Law School, commented that “[y]ou can use whatever analogy you want—flies to honey, vampires to blood—but we’ve got a glut of lawyers out there just looking for someone to sue . . . . [S]uits against the tobacco companies will soon make other toxic tort cases, like Agent Orange, asbestos or DES, look like preliminary bouts before the heavyweight match.” Id.

100. Although in “normal” bankruptcies, good faith is an elastic concept to be construed
express good faith filing requirement. Courts are unclear as to whether the Code contains an implied good faith filing requirement.¹⁰¹

In *In re Johns-Manville Corp.*, the bankruptcy court held that good faith is germane to plan confirmation under Code Section 1129(a)(3), which states in pertinent part:

(a) The court shall confirm a plan only if all the following requirements are met:
   (1) The plan complies with the applicable provisions of this title
   (3) The plan has been proposed in good faith and not by means forbidden by law.

The legislative history to Section 1129 states that "applicable" provisions relate to the provisions of the entire title.¹⁰² Contrary to the *Manville* court’s interpretation of Section 1129, nothing in the legislative history suggests that good faith is the exclusive concern of section 1129(a).¹⁰³

One such "applicable" provision under 1129(a)(1) is Section 301, which states that good faith is an implicit prerequisite to the filing of a Chapter Eleven case. Therefore, when Section 1129(a)(1) is read in conjunction with the implied good faith requirement in Section 301, the holding in *In re Johns-Manville Corp.* is unsupported. In fact, the court did not cite one case that supported the proposition that good faith is not germane to the filing of a bankruptcy petition, nor any precedent to support the corollary—that good faith is germane only to plan confirmation.

Thus, the asbestos bankruptcies, and particularly *Manville*, highlight the need for Congress to eliminate ambiguities in the Code regarding good faith. Congress should regulate the filing of tort-based bankruptcies by amending Code Section 301 to include an express good faith filing requirement for tortfeasors. The amendment would be simple and narrow, adding to current Section 301 the following modification:

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¹⁰¹ Some courts have concluded that "good faith" is not implied by the Code. See, e.g., *In re Eden Associates*, 13 Bankr. 578, 584 (Bankr. S.D.N.Y. 1981) ("slavish" adherence to a good faith concept may redound to the detriment of those non-debtor claimants who are or may putatively be beneficiaries of the reorganization process); Banque de Financement v. First Nat'l Bank of Boston, 568 F.2d 911 (2d Cir. 1977) (courts should not dismiss a Chapter 11 case where the debtor has any significant prospect of successfully reorganizing its real debt); *In re Northwest Recreational Activities, Inc.*, 4 Bankr. 36, 39 (Bankr. N.D. Ga. 1980) (dismissal for lack of good faith is not expressly required by the new Code).


Current Section 301 - Voluntary Cases.

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court, a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

Proposed Amendment

Unless:
(A) A voluntary case under a chapter of this title is commenced in response to stipulated or alleged prospective tort liability arising from any:

1. accidents in which the petitioner is involved; or
2. products liability claims, present or future; or
3. any other incident or occurrence which inflicts or may inflict personal injury or property damage upon petitioner's employees, product users, or ultimate consumers of petitioner's products, services, or any form of property; and

(B) In any such case within subsection (A), the filing must be in good faith, whereas the petitioner must expressly state under oath that:

1. petitioner had no knowledge of any design defect, nor the necessity to warn of any other defect in its product or service; or
2. petitioner could not have known of any defect, nor that its product or service was unreasonably dangerous to employers, users, and ultimate consumers; and

(C) In any such case within subsection (A) and (B), in which the petitioner expressly states under oath that such petition is in good faith, a rebuttable presumption of validity and truth arises upon filing wherein any opponent of the petition may file objections to the petition, wherein such opponent may show in full adversary proceedings that on the day of the filing, petitioner knew or should have known the product or service giving rise to stipulated or alleged prospective tort liability was defective or unreasonably dangerous to employees, users, or ultimate consumers, or to the property of such parties; and

(D) The court shall dismiss or convert to a liquidation proceeding under Chapter 7, any petition for any such case under subsections (A), (B), and (C), upon sufficient rebuttal of the good faith presumption by any or all the opponents of a petition.

Conclusion

Today, complex trials commence between asbestos manufacturers and their insurance carriers, in which billions of dollars of disputed insurance claims
are at stake. Liability for product-related disease is so great that some manufacturers have sought protection of the bankruptcy laws. Millions of dollars are paid monthly to the lawyers. But asbestos victims wait idly by, paying their own legal fees and medical expenses while manufacturers and insurance companies litigate firm assets away. The Bankruptcy Code currently permits a solvent tortfeasor that knew or should have known it was injuring employees and putting a dangerous or defective product into the stream of commerce to file a bankruptcy petition. The Code should include an express good faith filing requirement for tortfeasors in an effort to balance bankruptcy subtleties with time-honored common law notions of good faith.

Michael K. Sweig