Manville: Good Faith Reorganization or "Insulated" Bankruptcy

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On August 26, 1982, the Manville Corporation ("Manville"), a "Fortune 500" company boasting annual sales of approximately two billion dollars filed for reorganization under chapter 11 of the 1978 Bankruptcy Code (the "New Code"). In the past several years, the company has been hit by an onslaught of personal injury claims based on allegations of exposure to asbestos. Manville’s economic

1. Williams, The Fortune Directory of the Largest U.S. Industrial Corporations, FOR-TUNE, May 3, 1982, at 258. Manville was listed as 181 in the nation's top 500 companies for the year 1981, id. at 266, the most recent compilation prior to its bankruptcy petition.


A reorganization is an alternative to liquidation. It allows a business in financial distress to restructure its debts so that it may remain a viable company. Creditors will look to future earnings rather than current assets for satisfaction of their claims. Elfin, Business Reorganization Under the New Bankruptcy Code, 12 PAC. L.J. 163, 164 (1980). Any payment plan, however, must give to each creditor at least as much as he would have received in a liquidation. 11 U.S.C. § 1129(a)(7)(A)(ii) (1982). A creditor may request the court to dismiss the debtor's reorganization petition or convert it into a liquidation. Id. § 1112(b).

Upon filing for reorganization, the debtor receives the protection afforded by the Bankruptcy Code's automatic stay provision. Id. § 362. In pertinent part, § 362 bars prospective claimants from bringing suits which otherwise could have been brought against the debtor and halts proceedings which are pending at the time of the filing, id. § 362(a)(1), until resolution of the bankruptcy action. Id. § 362(c)(2).


5. Manville is the largest producer of asbestos in the noncommunist world. Kelly, Manville's Bold Maneuver, TIME, Sept. 6, 1982, at 17. The company has, however, received court approval to sell two of its subsidiary corporations. Manville will no longer mine asbestos after this transaction. N.Y. Times, Sept. 16, 1983, at D3, col. 6.

Exposure to asbestos dust can result in any of three deadly diseases: "asbestosis, a chronic disease of the lungs causing shortness of breath similar to emphysema; mesothelioma, a fatal cancer of the chest or abdomen lining; and lung cancer." Kelly, supra at 17.

Manville was not the first corporation to seek protection from asbestos-related litigation through the bankruptcy process. UNR Industries filed for corporate reorganization on July 29,
woes, however, stem only in part from these liabilities already incurred. The company also expects to pay out large damage awards to satisfy pending claims. In addition, tens of thousands of suits are anticipated in future years by those individuals, previously exposed to asbestos, but who have not yet manifested any resultant illnesses.6

The ordinary chapter 11 filing involves a debtor who is seeking protection from current and pending financial obligations.7 Manville's filing, however, reaches beyond these traditional parameters. It asks the bankruptcy court for relief, not only from claims already filed, but also from those claims which the company believes will be filed in years to come.8 Manville's expectation of large numbers of future claims goes beyond mere speculation. Medical studies indicate that the injurious effects of exposure to asbestos often do not appear until twenty to forty years after initial contact.9 While restrictive statutes of limitations will bar some claimants, the more liberal statutes allow suit whenever the disease is manifested.10 Manville asserts that if it must defend these suits in succeeding years, it will be forced to "sell, liquidate or otherwise dispose of assets and dismember its businesses."11 If Manville's contention is valid, it is inevitable that, at some future time, it will no longer have any funds available to compensate those remaining asbestos victims. Thus, the Manville reorganization raises the novel question of whether the bankruptcy laws should shield a presently sound corporation from possible future economic distress.

Part I of this note outlines the genesis of Manville's asbestos-

6. See Debtor's Affidavit, supra note 2, at 7. Epidemiology Resources, Inc. [hereinafter cited as E.R.I.], the firm hired by Manville to project asbestos-related litigation, concluded that 32,000 additional claims would be filed against the company. See Summary of Asbestos-Related Litigation Projection, STOCKHOLDERS & CREDITORS NEWS SERVICE CONCERNING JOHNS-MANVILLE CORP., ET AL. 82 (Sept. 15, 1982).
7. See B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 8.01 (1980).
8. Debtor's Affidavit, supra note 2, at 7-8.
10. See infra text accompanying notes 118-27.
11. Debtor's Affidavit, supra note 2, at 8.
related problems and reviews the statistics concerning the company's present and potential liabilities. Part II examines the appropriateness of Manville's use of the bankruptcy system in order to satisfy its legal obligations to asbestosis victims and ultimately evolve as a viable and profitable corporation. This section specifically addresses the question of whether good faith is required in the filing of a reorganization petition and, answering this question in the affirmative, considers whether Manville has satisfied this requirement. Analysis also focuses on issues of fairness to all parties concerned and the logistical problems which would arise in determining the rights of a presently unidentifiable class—the future claimants. This note concludes that since Manville is not abusing the jurisdiction of the bankruptcy court or frustrating the legislative aims of the bankruptcy system, its reorganization petition was appropriately filed.

I. Historical Background

Manville's first use of asbestos, ironically called the "miracle mineral," began prior to the turn of the century. The company's founder, H.W. Johns, capitalized on the unique fire-resistant properties of the mineral by using it to strengthen building roofs. The company was prospering under his direction when he died in 1898 of "dust phthisis pneumonitis." There was, however, no medically recognized connection between his and other such deaths and asbestos dust. Charles Manville, a Milwaukee entrepreneur, bought out the Johns' family interest in the company in 1901 and the Johns-Manville Company was born.

The company's range of products greatly expanded under Charles Manville's direction. By 1925, the company mined its own asbestos and manufactured over 2000 products ranging from insulation materials to artificial beards for department store Santas. The only medical information available at that time consisted of one documented case of asbestosis in England in 1907 and an American...
Medical Association report on asbestosis published in 1928. 20 Manville, therefore, saw no need to alter its practices, or to provide its employees with any relief from their continuous exposure to asbestosis and its yet unknown debilitating effects. As a result, after each work shift, the employees—covered from head to toe with asbestos dust—returned home and exposed their families to the harmful particles. 21

Conclusive evidence linking asbestos to asbestosis was documented in the 1930’s. 22 Relationships between asbestos and lung cancer as well as mesothelioma were not established until decades later. 23 Manville instituted some protective measures in the 1930’s, 24 but its actions were not sufficient to forestall the, as yet unknown, epidemic. Although Manville states that it followed the United States Public Health Service standard set in 1938, 25 that standard reflected early studies that regarded presently unacceptable levels of asbestos exposure to be “safe.” 26 It was not until 1964 that the full extent of danger from exposure to asbestos was clarified, at which time not only asbestosis, but lung cancer and mesothelioma, were acknowledged as substantial risks. 27 Manville focuses on that date: “Not until 1964 was it known that excessive exposure to asbestos fiber released from asbestos-containing insulation products can sometimes cause certain lung diseases.” 28 Beginning that year, Manville took further steps to deal with the problem. It instituted the use of warning labels on some asbestos products 29 and improved its dust collecting apparatus. 30 The company also continued its over twenty year practice of x-raying its employees. 31

Unfortunately, Manville’s enhanced safety program was too late to have any beneficial effect on those individuals who had already suffered long term exposure to asbestos—particularly, Manville fac-

20. Id. at 16, col. 1.
21. Id. at 18, col. 2.
23. Id.
25. Id.
26. See Epstein, supra note 22, at 18.
27. See id. at 18-19.
30. Id. at 20, col. 4, at 21, col. 1.
31. See id. at 16, col. 1.
tory workers and their families. Today's victims, who have also contracted asbestos-related diseases, include government shipyard workers exposed to the dust during World War II, employees of other companies that utilized Manville's products, consumers who used Manville's goods, and children who played in the company's dump.

Victims suing Manville allege damage to their health due to asbestos fiber exposure, either during manufacturing operations utilizing asbestos or in the handling of products containing the mineral. Plaintiffs also allege that Manville neither provided adequate information concerning the health hazards of asbestos nor protected adequately against its dangers. The onrush of litigation, which began in 1968, persisted until Manville filed for reorganization.

In its reorganization affidavit, Manville's treasurer, James Beasley, quoted statistical data for 1980, 1981, and the first half of 1982. The statistics indicated that the number of lawsuits, initiated in various jurisdictions throughout the United States, had continually increased. These statistics also reflect the enormous costs incurred by Manville to defend these suits. In addition, Beasley stated that as of the filing of its reorganization petition, Manville had already been found liable for punitive damages in ten asbestos-related actions.

32. Not only have factory workers died from asbestos exposure, but so have nonfactory employees such as a stock boy and management personnel. Id. at 19, col. 2.
33. Kelly, supra note 5, at 18.
34. Epstein, supra note 22, at 15.
35. For example, a 13 year old boy died of an asbestos-related disease after helping his father fix automobile brakes. Coplon, supra note 14, at 19, col. 2.
36. Id.
37. Debtor's Affidavit, supra note 2, at 5.
39. Kelly, supra note 5, at 17.
40. By the end of 1980, there were 5087 cases brought by 9300 plaintiffs; by the end of 1981, there were 9300 cases brought by 12,800 plaintiffs; and by the end of the first half of 1982, there were approximately 11,000 cases brought by approximately 15,550 plaintiffs. Debtor's Affidavit, supra note 2, at 5-6.
41. By the end of 1980, there was an average of 365 new plaintiffs instituting an average of 230 new cases each month; in 1981, there was an average of 560 new plaintiffs instituting an average of 400 new cases each month; and during the first half of 1982, there was an average of 495 new plaintiffs instituting an average of 425 new cases each month. Id. at 5.
42. Average costs per claim, excluding legal expenses and court costs, in 1980, were $22,710; in 1981, were $15,025; and in the first half of 1982, were $18,690. Noting several pending cases as well, the average cost equalled $20,690 per claim. The inclusion of defense expenses has increased the current cost of litigation to approximately $40,000 per case. Id. at 5-6.
43. Id. E.g., Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982).
These past and pending claims, as well as 32,000 anticipated future claims, compounded by insurance coverage battles, precipitated Manville's controversial decision to file for corporate reorganization under chapter 11 of the New Code.

The average punitive damage award is approximately $616,000 per case. Debtor's Affidavit, supra note 2, at 6.

43. See supra note 6. But see Martin Shubik's Affidavit in Support of Creditor's Motion to Dismiss at 2, 5, 10, In re Johns-Manville Corp., Nos. 82 B 11656 to 82 B 11676 (Bankr. S.D.N.Y. filed Oct. 31, 1982). Professor Shubik, the Seymour H. Knox Professor of Mathematical Institutional Economics at Yale University, claims that:

[T]he application of statistical projections to demographic studies, health studies, economic and social and political investigations is burdened with considerable difficulties. . . .

. . . . Given [these] uncertainties . . . their use in business calculations must reflect these uncertainties. . . .

. . . . [T]he number of assumptions made by E.R.I. are so broad, and its sample so small, as to deprive its estimates of 'credibility'. . . .

. . . .

It is my opinion that the management of Manville is utilizing the bankruptcy process as a strategic weapon to protect itself against unmanifested and, to a large extent, hypothetical worst case contingencies, rather than as a societal means of relief for proven misfortune. In doing so, the management is discriminating against its various classes of creditors. Finally, Dr. Irving J. Selikoff, chief of environmental health at Mount Sinai Hospital in New York and an expert in the field of asbestos-related disease, believes Manville might be underestimating the number of future claims. N.Y. Times, Aug. 31, 1982, at A13, col. 4.

For the purposes of this note, it is assumed that the E.R.I. statistics are sound. If Professor Shubik's conclusion was accepted at this time, Manville's projected financial crisis would be averted, probably resulting in an early dismissal of the reorganization petition because of a lack of good faith. Such a result would allow the courts to avoid addressing the critical issue of whether a presently healthy corporation, laden with future monetary obligations which would cause severe financial problems, could seek protection under the umbrella of the New Code.

44. Although Manville has insurance coverage which could indemnify the corporation in these proceedings, the insurance companies have refused to pay based on differing interpretations of the insurance policies. See Debtor's Affidavit, supra note 2, at 7. While Manville asserts that the insurers are liable for all policies in effect at the time of exposure, the insurance companies claim that their liabilities are limited to those policies now in effect, Kelly, supra note 5, at 17. Litigation has been pending in the Superior Court of the State of California for the City and County of San Francisco since March 1980. In re Asbestos Insurance Coverage Cases, Nos. 1072 and 765226 (filed March 31, 1980). Debtor's Affidavit, supra note 2, at 7.

Manville has since sued the United States Government to recover damages paid to shipyard workers who contracted asbestos-related diseases. See Johns-Manville Corp. & Johns-Manville Sales Corp. v. United States, No. 465-83 C (U.S. Cl. Ct. filed July 19, 1983). The company claims that the government failed to assume responsibility for the health and safety of those individuals. N.Y. Times, July 20, 1983, at D1, col. 1. Manville has also lobbied for federal legislation which would hold the government partially responsible. Id.

45. See Debtor's Affidavit, supra note 2, at 7-8.

Although Manville's annual volume of business is approximately $2 billion, id. at 3, Beas-
Believing reorganization to be the only viable solution to such a devastating set of circumstances, Beasley asserted in the reorganization affidavit that:

Confronted with such potentially massive liabilities, Manville would have no recourse except to sell, liquidate or otherwise dispose of assets and dismember its businesses in order to continue to pay the costs of disposing of these suits. Not only would a point soon be reached where future successful plaintiffs would be unable to collect the amounts of their judgments or proposed settlements, but all other creditors of Manville would likewise be confronted with the stark realization that they too could not be paid nearly in full.

Therefore, in order to treat all creditors of Manville evenhandedly, whether their claims at the present time be liquidated or unliquidated, contingent or non-contingent, mature or unmatured, Manville has reluctantly, but of necessity, deemed the filing of the . . . chapter 11 petitions to be an economic imperative.

It is only through the financial reorganization provisions of chapter 11 of the Bankruptcy Code that all claims against the Debtors can be liquidated or estimated, and be treated within the framework of a plan of reorganization that will realize more for creditors than would a liquidation but yet will be consistent with Manville's capacity to perform. It is thus Manville's intention to formulate effective procedures to accomplish precisely that in a manner which will not improperly favor any creditor over any other creditor similarly situated, be consistent with the fundamental bankruptcy tenet of equality of distribution and permit Manville to emerge as the viable and profitable business it has been and expects to be once again.46
Opponents, however, vehemently object to Manville's use of the bankruptcy system to satisfy its obligations. This note specifically addresses the most controversial issue in the Manville dilemma: whether or not Manville has filed its reorganization petition in good faith.

II. THE APPROPRIATENESS OF MANVILLE'S REORGANIZATION PETITION

A. Is There a Good Faith Requirement?

Before undertaking an analysis of whether or not Manville filed...
its reorganization petition in good faith, one must first determine whether a debtor seeking reorganization under the New Code must, in fact, file in good faith at all. The New Code is silent on a good faith filing requirement. Chapter 11 of the New Code is, however, a consolidation of selected portions of the now repealed Bankruptcy Act of 1898 (the "Old Act").48 Those portions, corporate reorganization and arrangements chapters X, XI, and XII, were added to the Old Act in 1938.60 Therefore, it is appropriate to examine the good faith issue under the Old Act to ascertain its relevance in the New Code. Only chapter X explicitly required that the debtor's reorganization petition be filed in good faith.61 Courts deciding current cases under chapters XI and XII have, nevertheless, construed an implied good faith filing requirement in those chapters.62

Congress sought and obtained a second stay until December 24, 1982, United States v. Marathon Pipe Line Co., 103 S. Ct. 200 (1982), but failed to pass corrective legislation prior to the adjournment of the 97th Congress. Wall St. J., Dec. 22, 1982, at 6, col. 2. Anticipating Congress' failure to act within the allotted time, the Judicial Conference of the United States proposed an interim rule which would, if adopted, minimize the chaos and confusion that would result in the absence of any orderly bankruptcy system. See White Motor Corp. v. Citibank, 704 F.2d 254, 256 (6th Cir. 1983). Under the rule, the bankruptcy courts may still adjudicate bankruptcy matters, but with significant involvement by the district courts. Id. Each circuit has since adopted some variation of the rule. Id. The District Court for the Southern District of New York, the district where the Manville proceeding has been filed, adopted its Emergency Bankruptcy Rule on December 21, 1982. S.D.N.Y. EMER. BANKR. R. I. The interim rules are still in effect since the Supreme Court has denied Congress a third extension to pass corrective legislation. United States v. Marathon Pipe Line Co., 103 S. Ct. 662 (1982); Wall St. J., Dec. 24, 1982, at 1, col. 6. Although the interim rules have provided some temporary relief, there is still uncertainty surrounding the nation's bankruptcy system. The determination of a case such as Manville, which depends in large part upon the resolution of state tort claims, is hopelessly caught up in this intragovernmental branch confusion.

Opponents of Manville's reorganization petition object to the use of the bankruptcy courts for resolution and ultimate determination of asbestos-related claims against Manville. They challenge Manville's filing, asserting that it is an abuse of the bankruptcy process. See N.Y. Times, Aug. 27, 1982, at D4, col. 1. Therefore, even if Congress should ultimately decide to afford bankruptcy judges article III powers, the issues raised by Manville's opponents must still be addressed. This note focuses on those complaints and not on the constitutionality of the current bankruptcy law.


The New Code is in effect for all cases brought on or after October 1, 1979; thus, all prior

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The next step in the analysis is to determine whether the New Code's consolidation of the Old Act's chapters has preserved that good faith prerequisite. Courts have overwhelmingly held that petitions filed under chapter 11 of the New Code must be filed in good faith.\(^6\) In their holdings, courts have focused on section 1112 of the New Code\(^5\) and have concluded that that section, which lists nine reasons for a court to dismiss a debtor's reorganization petition, is not all-inclusive.\(^6\) Also central in their concerns have been comments in House and Senate Reports\(^6\) that the nine provisions enumerated in section 1112 are not exhaustive,\(^5\) as the Reports state that the courts are empowered to "consider other factors as they arise, and to use [their] equitable powers to reach an appropriate result in individual cases."\(^6\) Since bankruptcy courts are indeed courts of equity, they may properly dismiss a petition to ensure that

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Prior to listing the nine examples for dismissal or conversion, § 1112(b) states: "[T]he court may convert . . . or . . . dismiss a case . . . for cause, including . . . ." 11 U.S.C. § 1112(b) (1982) (emphasis added). The word "including" is defined in § 102(3) as "not limiting." Id. § 102(3).


58. House Report, supra note 45, at 6362; Senate Report, supra note 56, at 5903.
the purposes of the New Code are fulfilled. Section 305 of the New Code also enables a court to dismiss or suspend a case if “the interests of creditors and the debtor would be better served by such dismissal or suspension.” Moreover, a court may abstain from hearing a particular proceeding of a case properly within its jurisdiction. Thus, once the requirement of good faith is read into the New Code, the next step is to define that term and to ascertain whether or not Manville’s filing comports with that definition.

B. Good Faith Defined

1. Abuse of the Jurisdiction of the Bankruptcy Court.—Several courts have held that to abuse the jurisdiction of the bankruptcy court is equivalent to a lack of good faith. One oft-quoted decision has held that:

[D]ismissal for lack of “good faith” as distinguished in the jurisdictional integrity sense... is not precluded by the new Code. Good faith, in the sense perceived by this court to have continued relevance, is merged into the power of the court to protect its jurisdictional integrity from schemes of improper petitioners seeking to circumvent jurisdictional restrictions and from petitioners with demonstrable frivolous purposes absent any economic reality.

Examples of jurisdictional abuses are numerous and varied and include: attempting to escape state court proceedings; forming a debtor solely to obtain an automatic stay of foreclosure; transferring property from an ineligible entity to one able to utilize the bankruptcy system in order to circumvent a foreclosure sale; shielding the assets of an investor’s more affluent companies from the jurisdiction of the bankruptcy court; forestalling tax liability by requesting such liability be determined in bankruptcy court without any need for reorganization; filing for reorganization with an ab-

62. See infra notes 63-72 and accompanying text.
64. E.g., In re Cook, 104 F.2d 981 (7th Cir. 1939).
sence of real debt and real creditors; and using the system solely to recoup investment or obtain profit in lieu of foreclosure proceedings, solely to recapture property transferred pursuant to an agreement with creditors, or solely to frustrate enforcement of power of sale provisions under a deed of trust. Of the foregoing examples, two require further analysis because of their relevance to the Manville petition: attempting to escape state court proceedings and filing for reorganization with an absence of real debt and real creditors.

a. Attempts to Escape State Court Proceedings.—Two pre-Code decisions either mandate or prefer adjudication in state courts to adjudication in the bankruptcy court system. Neither, however, appears to buttress Manville's opponents’ claims that the reorganization petition should be dismissed.

In the first such decision, In re Cook, a committee representing bondholders of a foreclosed hotel was accused of misconduct. The state court in charge of the proceedings removed the committee members from the management of the property and ordered an accounting. Ten days prior to the date of the accounting, the committee members filed a voluntary reorganization petition. The federal court held that although the debtor filed its petition shortly before the date of the accounting, that by itself, might not be conclusive of a bad faith filing. This circumstance, however, coupled with the fact that the debtor was neither insolvent nor unable to pay its debts as

72. E.g., In re Fast Food Properties, Ltd., 5 Bankr. 539 (Bankr. C.D. Cal. 1980).
73. In re Cook, 104 F.2d 981 (7th Cir. 1939).
74. Tucker v. Texas Am. Syndicate, 170 F.2d 939 (5th Cir. 1948), reformed and aff’d sub nom. Tucker v. Baker, 185 F.2d 863 (5th Cir. 1950), modified on other grounds, 214 F.2d 627 (5th Cir. 1954).
75. E.g., N.Y. Times, Aug. 27, 1982, at D4, col. 1: “[A]sbestos claimants’ lawyers... think the bankruptcy courts are the wrong place to resolve [the asbestos] problem. They say it is an abuse of the system to use the bankruptcy laws as a shield against litigation.” But see Creditors Committee for Asbestos-Related Property Damage School Claimants’ Memorandum of Law in Opposition to Dismissal and/or Abstention at 10, In re Johns-Manville Corp., Nos. 82 B 11656 to 82 B 11676 (Bankr. S.D.N.Y. filed Dec. 9, 1982) [hereinafter cited as School Creditors]: “[The debtors] have not filed their petition in a sham attempt to avoid their responsibilities in litigation elsewhere.”
76. 104 F.2d 981 (7th Cir. 1939).
77. Id. at 983.
78. Id. at 983-84.
79. A debtor need not be insolvent under the New Code, see In re Century City, Inc., 8 Bankr. 25, 31 (Bankr. D.N.J. 1980); see also The Chrysler Corporation Financial Situation:
they matured, mandated dismissal of the petition. The court held that:

[T]he instant proceeding was instituted not for the purpose of obtaining benefits afforded by the Act to a corporation in financial distress, but to enable [the debtors] to escape the jurisdiction of another court where the day of reckoning for their alleged acts of misconduct was at hand. . . . Their conduct and the demonstrated purpose of coming into the Federal Court was a fraud, not only upon that court, but the State Court as well.

In *Tucker v. Texas American Syndicate*, as in *Cook*, the court believed that the debtor was not in need of bankruptcy protection. In *Tucker*, a diversified landowner and developer filed a voluntary reorganization petition asserting an inability to pay its debts as they mature. Prior to approving the petition, the lower federal court stayed five suits that were pending in state court. On appeal, the court of appeals dismissed the petition holding that the debtor was not insolvent and had paid off debts not due in order to qualify as a debtor unable to pay its current debts. The debtor also had sufficient assets which could be utilized to raise the monies needed to pay off any and all of its financial obligations. While dismissing the petition for lack of good faith, the court also noted the impropriety of granting the stays for the state court lawsuits. The court stated that if it was “not a distinct disservice, at least it would be a work of

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*Hearings on H.R. 5805 Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs, 96th Cong., 1st Sess. 6 (1979) (Professor Frank Kennedy, in his report, “The Impact of a Chapter 11 Bankruptcy Proceeding on Chrysler Corporation,” stated that: “It is no longer necessary for a petitioner for reorganization relief to allege or show insolvency or inability to pay debts as they mature.”). But see N.Y. Times, Sept. 1, 1982, at D1, col. 1, quoting Yale Law School Professor Joseph Bishop, Jr.:

‘If I were the judge, I’d kick [Manville] out of bankruptcy court. . . . [T]he odds are slightly in favor of some court, somewhere up the line, saying that the bankruptcy petition is in error, because Manville is not insolvent.’

The Manville case will be the first test of whether insolvency is an implied prerequisite of bankruptcy under the 1978 act. . . .

The New Code mentions insolvency or inability to meet one’s debts as they mature only in connection with a chapter 9 (Adjustment of Debts of a Municipality) proceeding. See 11 U.S.C. § 109(c)(3) (1982) (“Who may be a debtor”).

80. *See Cook*, 104 F.2d at 985.

81. *Id.* (citation omitted).

82. 170 F.2d 939 (5th Cir. 1948), reformed and aff’d *sub nom.* *Tucker v. Baker*, 185 F.2d 863 (5th Cir. 1950), *modified on other grounds*, 214 F.2d 627 (5th Cir. 1954).

83. *See id.* at 940.

84. *Id.*

85. *Id.*

86. *Id.* at 941.
supererogation for the bankruptcy court to take all these [real estate] suits away from the state courts and try them in the federal court.\textsuperscript{87}

In both \textit{Cook} and \textit{Tucker}, the courts were not only convinced that the debtor was not in need of financial rehabilitation, but that each voluntary filing was an abuse of the jurisdiction of the bankruptcy courts. In \textit{Cook}, the debtors' sole motive was to escape possible state court prosecution,\textsuperscript{88} while in \textit{Tucker}, the debtor merely sought relief from debts it could otherwise have paid.\textsuperscript{89} Although it is true that asbestos-related tort suits are traditionally state claims,\textsuperscript{90} neither \textit{Cook} nor \textit{Tucker} mandate that a corporation truly in need of financial rehabilitation may not utilize the federal bankruptcy system despite the fact that part of the debtor's financial troubles is due to traditionally state-created claims.

This point is further supported by comparisons between the Old Act's and the New Code's treatment of tort claims. In the Old Act, in order for a claim to be discharged,\textsuperscript{91} it had to be both provable\textsuperscript{92} and allowable.\textsuperscript{93} One recent case, decided under the Old Act,\textsuperscript{94} held that there were no provisions for tort claims under the Old Act and thus such claims were not provable.\textsuperscript{95} The New Code, however, has abandoned the provability requirement.\textsuperscript{96} Similarly, it has altered the standards for allowing claims.\textsuperscript{97} The New Code now requires that the bankruptcy court estimate any contingent or unliquidated claim,\textsuperscript{98} whether or not such estimation will delay the administration

\textsuperscript{87}. \textit{Id}.
\textsuperscript{88}. 104 F.2d at 985.
\textsuperscript{89}. 170 F.2d at 940.
\textsuperscript{90}. See infra note 102.
\textsuperscript{92}. \textit{Id}. § 63, 11 U.S.C. § 103.
\textsuperscript{93}. \textit{Id}. § 57, 11 U.S.C. § 93.
\textsuperscript{94}. \textit{In re Magnavox Co.}, 627 F.2d 803 (7th Cir. 1980).
\textsuperscript{95}. \textit{Id}. at 805. But see Old Act § 63(a)(7), 11 U.S.C. § 103(a)(7) (damages for negligence could be proved and allowed if suit was instituted prior to and pending at the time of the filing of the petition).

In any event, a contingent or unliquidated claim that was proved could be allowed only if such claim was then liquidated or estimated and such liquidation or estimation would not "unduly delay the administration of the estate or any proceeding under this Act." \textit{Id}. § 57(d), 11 U.S.C. § 93(d). If a contingent or unliquidated claim has not been allowed as provided by § 57(d), then the claim shall not be deemed provable. \textit{Id}. § 63(d), 11 U.S.C. § 103(d).
\textsuperscript{96}. B. \textsc{Weintraub} \\& A. \textsc{Resnick}, \textit{supra} note 7, at ¶ 5.01.
\textsuperscript{97}. See Old Act §§ 57(d), 63(d), 11 U.S.C. §§ 93(d), 103(d); see also supra note 95.
\textsuperscript{98}. 11 U.S.C. § 502(e)(1) (1982); B. \textsc{Weintraub} \\& A. \textsc{Resnick}, \textit{supra} note 7, at ¶ 5.05[4]. One notewriter suggests that the bankruptcy court only estimate Manville's total asbestos-related liability and permit other courts to estimate each individual asbestos-related

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of the estate, resulting in the discharge of those claims. If Manville is successful in proving that it is, in fact, in need of financial reorganization—even though such need is due to asbestos-related tort claims—its refuge in the bankruptcy system is not an abuse of the jurisdiction of the bankruptcy courts per se. There seems to be little distinction in this regard between a debtor in financial distress due to conventional business misfortunes seeking discharge of a single tort claim, and a debtor in financial distress due entirely to tort claims seeking discharge of those claims. Therefore, since tort claims are now dischargeable under the New Code, once a debtor has successfully shown financial despair, opponents cannot argue simply that a company such as Manville is, prima facie, abusing the jurisdiction of the bankruptcy courts merely because its debts are tortious in nature.

This conclusion finds further support in the recent In re Alton Telegraph Printing Co. decision. In that case, the debtor newspaper filed a chapter 11 petition for reorganization. The bankruptcy court noted that the debtor would not have been involved in the bankruptcy proceeding "if it were not for the libel judgment obtained by [the opposing creditor], as well as other very substantial libel claims currently pending against it." Although bankruptcy relief was sought solely because of those tort claims, the court held that the debtor was eligible for relief under the New Code and that the petition was filed in good faith.


100. 11 U.S.C. § 524 ("Effect of discharge") (1982); id. § 1141(d) (the discharge effect of plan confirmation); see In re Magnavox Co., 627 F.2d 803, 805 n.5 (7th Cir. 1980).

101. In re Magnavox Co., 627 F.2d 803, 805 n.5 (7th Cir. 1980).

102. Robert J. Rosenberg, an attorney representing asbestosis plaintiffs, believes that "the company should have faced the alleged victims in the state courts." Wall St. J., Dec. 24, 1982, at 1, col. 6. But see School Creditors, supra note 75, at 10: "[The debtors] have not filed their petition in a sham attempt to avoid their responsibilities . . . ."; see also Newsday, Nov. 11, 1982, at 47, col. 1 (reporting the comments of Senator Robert Dole, Chairman of the Judiciary Subcommittee on Courts): "At first glance, the filing by the Manville Corp. seemed 'dubious and unusual' . . . . But he said closer analysis led him to the conclusion that bankruptcy action, 'at least in Manville's case, could [give] certain significant advantages, not only to Manville, but also to asbestos victims.' ")


104. Id. at 241.

105. Id.
b. Absence of Debt and Creditors.—The other pertinent example of jurisdictional abuse is filing for reorganization with an absence of real debt and real creditors. Opponents of the Manville filing stated their respective challenges to the petition claiming: (1) absence of real debtors; (2) absence of real debt; and (3) absence of real creditors.\textsuperscript{106} Since these three objections are so tightly interwoven, significant individual analysis is impractical, although some specific observations can be made. It has already been established that insolvent, or the inability of a debtor to pay its debts as they become due, is not a requirement for an entity filing a reorganization petition under chapter 11.\textsuperscript{107} One must ascertain, therefore, whether Manville's current financial position warrants bankruptcy protection. If so, Manville could be an appropriate debtor. The biggest obstacle facing Manville, however, is whether those estimated 32,000 individuals previously exposed to asbestos,\textsuperscript{108} but not yet ill—or more specifically, not yet aware of their illness—can be presently considered creditors with claims against the Manville Corporation. If not, one could argue that Manville is financially able to handle all of its current asbestos-related liabilities without the need of reorganization. Conversely, if these potential plaintiffs can be classified as present claimants, then Manville would be entitled to the protection afforded by the bankruptcy system for an entity in financial distress.

Analysis must therefore begin with the determination of the status of those individuals not yet ill. The New Code defines creditor, in part, 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,”\textsuperscript{109} and defines claim, in part, as a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”\textsuperscript{110} There is little question that future asbestosis victims will ultimately have claims against Manville. The problem, however, is whether these individuals have claims against

\textsuperscript{106} See, e.g., M.J. Whitman & Co.’s Motion to Dismiss at 1, \textit{In re} Johns-Manville Corp., Nos. 82 B 11656 to 82 B 11676 (Bankr. S.D.N.Y. filed Nov. 1, 1982).

\textsuperscript{107} See supra note 79.

\textsuperscript{108} See supra note 6.


\textsuperscript{110} 11 U.S.C. § 101(4) (1982). Those asbestosis victims who have already received judgments, were in the process of litigating their lawsuits, or were ready to proceed against Manville are all statutory creditors because their claims have certainly arisen “before the order for relief concerning the debtor.”
the debtor which arose at the time Manville filed its bankruptcy petition.\textsuperscript{111}

Although not addressing this point directly, the legislative history, on its face, cannot be construed to deny creditor status to those exposed to asbestos but not yet ill. The legislative reports note that the term "claim" in the New Code is broader in scope than it was in the Old Act.\textsuperscript{112} In fact, it was intended to be given the broadest definition possible: "The bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court."\textsuperscript{113} Therefore, awarding potential asbestosis victims creditor status with present claims is not precluded by the New Code.\textsuperscript{114}

In determining whether potential victims are claimants, the Manville court may focus on the treatment accorded asbestos-related

\begin{itemize}
\item \textsuperscript{111} Both UNR Industries and Amatex Corporation are faced with similar problems. \textit{See supra} note 5. In two decisions addressing requests by those debtors for the appointment of either a legal representative, \textit{In re} UNR Indus., 29 Bankr. 741 (N.D. Ill. 1983), or a guardian ad litem, \textit{In re} Amatex Corp., 30 Bankr. 309 (Bankr. E.D. Pa. 1983) (recommendation to the district court), to represent potential asbestosis victims, both courts denied the debtors' requests, \textit{UNR}, 29 Bankr. at 748; \textit{Amatex}, 30 Bankr. at 315-16, reasoning that those individuals had no claims cognizable under the New Code. \textit{UNR}, 29 Bankr. at 745, 746; \textit{Amatex}, 30 Bankr. at 315-16. Both decisions are being appealed. \textit{UNR, appeal docketed}, No. 83-1746 (7th Cir. Apr. 26, 1983); \textit{Amatex, appeal docketed}, No. 83-1843 (3d Cir. Nov. 18, 1983).

It is relevant to note, however, that in \textit{Amatex}, the debtor had stipulated to one witness' opinion that no jurisdiction would recognize a cause of action for asbestos-related disease until the symptoms of the disease had manifested themselves. 30 Bankr. at 311. Since the court relied on this stipulated testimony to reach its conclusion, \textit{id.} at 315, and since various jurisdictions \textit{will} recognize tort claims prior to manifestation, see \textit{infra} text accompanying notes 118-27, the court's opinion is of minimal persuasion regarding the issue of whether or not future victims are creditors with cognizable claims.

It is also important to note the procedural history of these opinions: Both stem from applications of appointment, not from the basic question of whether or not future victims could be labeled creditors.

For further discussion of the surrogate representation issue, see \textit{infra} notes 153-57 and accompanying text.

Federal District Judge Edelstein, currently involved in the Manville case, is insisting that future unknown asbestosis victims be included in the reorganization plan. N.Y. Times, Oct. 26, 1983, at D1, col. 1. For further discussion of Judge Edelstein's role and his proposals in the Manville case, see \textit{infra} note 220.

\item \textsuperscript{112} \textit{House Report, supra} note 45, at 6266; \textit{Senate Report, supra} note 56, at 5807-08.

\item \textsuperscript{113} \textit{House Report, supra} note 45, at 6266; \textit{Senate Report, supra} note 56, at 5808.

\item \textsuperscript{114} It is not suggested that the legislators anticipated a situation where an otherwise viable corporation, such as Manville, wrought with potentially devastating tort claims, would seek the protection of the bankruptcy courts. This notewriter, however, suggests that the broad language and intent of the New Code would permit such a distressed entity to avail itself of the protection of the bankruptcy courts.

\end{itemize}
tort claims under applicable state law. Although bankruptcy courts were established pursuant to article I of the United States Constitution as federal courts to assume original and exclusive jurisdiction over bankruptcy cases and, therefore, are not bound by state law, bankruptcy courts have, in the past, looked to state law for guidance. For example, bankruptcy courts have focused on state law in determining the origin and existence of a claim. Thus, the bankruptcy court handling the Manville petition will be faced with several state legal theories regarding the accrual of an asbestos-related tort claim. These state law theories are integrally related to the “door-closing” statute of limitations defense available to defendants in asbestos-related tort claims. The time at which a state's statute of limitations begins to toll should indicate when a state-created claim accrues. States have chosen a variety of formulas for determining this crucial time period, for example: time of the initial harmful contact, time of last exposure, time when the medical condition

116. In re Taddeo, 685 F.2d 24 (2d Cir. 1982) (although state law required payment of a mortgage in its entirety when accelerated, the court held a debtor could cure default under the New Code); In re Spanish Trails Lanes, Inc., 16 Bankr. 304 (Bankr. D. Ariz. 1981) (although an unlicensed contractor could not sue in state court, he had an actionable claim in bankruptcy court); In re Bowers, 16 Bankr. 298 (Bankr. D. Conn. 1981) (although the corporation's claim against the debtor would be unenforceable in state court because of failure to obtain a certificate of authority, the corporation had a valid claim in bankruptcy court); In re Lewis, 17 Bankr. 341, 342 (Bankr. S.D. Ohio 1982) (state court finding of “willful and malicious” behavior is not binding on bankruptcy court). It is interesting to note that although the New Code excepts from discharge any debt for “willful and malicious” injury by an individual debtor, 11 U.S.C. § 523(a)(6) (1982), a corporation is not an individual, compare id. § 101(24) (“individual with regular income”) with id. § 101(30) (“person”). Thus, even if Manville's actions were found to be “willful and malicious,” no exception to discharge would result.
117. E.g., In re Spanish Trails Lanes, Inc., 16 Bankr. 304, 306 (Bankr. D. Ariz. 1981) (“The bankruptcy court in determining which claims are allowable should look to state law in determining the origin and existence of a claim; however, after this initial determination is made, state law is no longer controlling and the court is free to use its equitable powers in allowing or disallowing a claim.”); In re Bowers, 16 Bankr. 298, 302 (Bankr. D. Conn. 1981) (“State law is utilized only to determine if the creditor holds a claim, not how and what claims shall be allowed.”); In re Grosso, 9 Bankr. 815, 821 n.3 (Bankr. N.D.N.Y. 1981) (“The question . . . when a state-created cause of action accrues . . . [is] governed by state law.”).
118. See, e.g., Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 115-16 (D.C. Cir. 1982) (noting the different formulas utilized by various jurisdictions). Due to the inherent vagueness of these formulations, it is uncertain whether some of these verbally distinct standards are, in fact, different.

http://scholarlycommons.law.hofstra.edu/hlr/vol12/iss1/4
begins;\textsuperscript{121} time when the disease was medically diagnosable;\textsuperscript{122} time when the plaintiff knows, or by reasonable diligence should know, that he has the disease;\textsuperscript{123} time when the plaintiff knows, or by reasonable diligence should know, of the injury and that the injury was caused by the wrongful act of another;\textsuperscript{124} time when the plaintiff knows, or by reasonable diligence should know, of the injury and that the defendant has caused it;\textsuperscript{125} or time when the disease manifests itself.\textsuperscript{126} In addition, shipyard workers have been successful in having courts apply federal maritime law, which requires the defendant to show, as an affirmative defense, the plaintiff’s unjustifiable delay in bringing the suit.\textsuperscript{127}

These various formulas present some interesting scenarios when applied to the Manville case. Manville, as both a tort defendant and debtor, would obviously prefer those jurisdictions that recognize a claim at the earliest possible time; as a tort defendant, because a plaintiff’s suit may be time-barred by the statute of limitations and, as a debtor, so that the origin of the claim would have occurred prior to the time of Manville’s petition. Potential asbestosis victims, on the

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\textsuperscript{121} Braswell v. Flintkote Mines, Ltd., No. 82-2699 (7th Cir. Dec. 6, 1983) (available Jan. 8, 1984, on LEXIS, Genfed library, Cir file). The court, construing Indiana law, held that “the causes of action herein accrued when plaintiffs were last exposed to the asbestos.” \textit{Id.}; Pauley v. Combustion Eng’g, Inc., 528 F. Supp. 759, 761 (S.D. W. Va. 1981) (summarizing various formulas used by several states, including West Virginia). The federal district court in \textit{Pauley}, a diversity action, refused to follow its interpretation of West Virginia law, see Scott v. Rinehart & Dennis Co., 116 W. Va. 319, 180 S.E. 276 (1935), that an action accrues at the time of last exposure. Although Scott has never been overruled, the \textit{Pauley} court believed that the highest state court would not rely on that decision.


\textsuperscript{127} See id. (citing Urie v. Thompson, 337 U.S. 163 (1949) and Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975)) (summarizing various formulas).

One court has explicitly held that the “time to commence litigation does not begin to run on a separate and distinct disease until that disease becomes manifest.” Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 112 (D.C. Cir. 1982) (emphasis added).

other hand, would prefer to apply those state laws under which the cause of action does not accrue until the latest possible date. The latter approach would accomplish two goals: First, these potential victims might not be considered creditors for the purpose of the debtor's petition, resulting either in the petition's dismissal or the "nondischargeability"\(^{128}\) of their potential future claims;\(^{129}\) and second, their traditional tort claims are less likely to be barred by a state's statute of limitations. One problem arises, however, for those individuals who were exposed to asbestos years earlier, but are currently unaware of their condition, and who might be time-barred because of their states' restrictive statute of limitations.\(^{130}\) These individuals might conceivably opt for creditor status as the only means of compensation.\(^{131}\)

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128. The word "nondischargeability" may be inappropriate because if they have no claims, they will not need to defend the nondischargeable status of their claims.

129. This would, of course, be a gamble. Those victims who will eventually have claims against Manville, although some time in the future, are assuming that Manville will be in existence at that time and will be able to compensate them for their injuries via traditional state court remedies. The risk, however, is that Manville will have been liquidated and there will be no source from which these victims could recover.

130. Although some bankruptcy cases have not followed state law, see cases cited supra note 116, other cases support the use of that route, see cases cited supra note 117. One case, however, mandates that the state's statute of limitations be followed: "The question (1) when a state-created cause of action accrues or (2) how long the applicable limitations period ought to be, are governed by state law." \(\text{In re Grosso, 9 Bankr. 815, 821 n.3 (Bankr. N.D.N.Y. 1981).}\)

131. It is possible, however, that such a creditor would be precluded from exercising that option due to the statute of limitations bar. The New Code states that if a party in interest objects to a claim, that claim will be "unenforceable against the debtor . . . under any . . . applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1) (1982).

Since § 502(b)(1) of the New Code requires a party to object, however, it is conceivable that Manville would choose not to do so; especially, if its objection would decrease the number of creditors it deemed necessary to be considered an entity in financial despair. Manville could, if necessary, explain its refusal to raise the statute of limitations affirmative defense—it would not only be extremely costly to investigate the status of each individual potential claim, thereby reducing the amount available for satisfaction of its debts, but it would be quite time-consuming, frustrating a basic tenet of bankruptcy policy: namely, the "efficient, final resolution of claims." \(\text{See infra note 170 and accompanying text. This does not appear to preclude, however, the use of the defense by the asbestos victims who would be eligible for state court relief and, therefore, have a vested interest in the dismissal of the Manville case. Such plaintiffs could litigate their pending cases, file "ripe" cases, or recover the full amount of any prior judgment without having to share recovery with otherwise time-barred plaintiffs. Cf. \text{In re Toledo, 17 Bankr. 914, 917 (D.P.R. 1982) (trustee as party in interest may use any defenses available to the debtor). Of course, state legislatures might choose to amend their statutes of limitations policies as they pertain to asbestos-related injury because of the extensive latency period of asbestos-related illness. See supra text accompanying note 9.}}\)

This notewriter recognizes the problem of affording those individuals relief through the bankruptcy process who would otherwise be denied the possibility of relief, as compared with
The greatest friction between Manville and potential asbestosis victims arises in relation to the state laws which are most lenient to asbestosis victims. Manville would like the bankruptcy court to consider those individuals creditors, with claims against the debtor which arose at the time of the bankruptcy petition, while those victims appear most eager to resolve their claims against Manville in the traditional state court fashion. The bankruptcy court is left sifting through these state laws, considering each state’s definition of the origin of a claim. If it should reject state definitions, the court may establish a definition of its own. The definition selected will ultimately affect the breadth of the Manville reorganization or possibly preclude bankruptcy relief entirely.

The bankruptcy court will probably examine previous decisions to help it decide whether to afford creditor status to some or all of the potentially ill individuals. One of Manville’s business creditors, in its motion to dismiss the reorganization petition, relied on In re Gladding Corp., a pre-Code decision, to buttress its position.

132. See cases cited supra note 116. But see cases cited supra note 117.

133. If the bankruptcy court deems that a claim arises upon exposure, then Manville’s position that it will not be able to satisfy such claims has merit. If, on the other hand, the court opts for a showing of manifestation, the pool of creditors will, of course, be lessened. Such a reduced pool of creditors, when compounded with general business debts as well as asbestos-related obligations to other creditors (including school districts, tort claimants with judgments, and those whose cases are pending) may, nevertheless, enable Manville to demonstrate financial distress. Requiring manifestation, however, would cause future financial uncertainty and would seriously impair Manville’s chances for a successful reorganization.


136. M.J. Whitman & Co.’s Memorandum of Law In Support of Its Motion to Dismiss the Petition at 10-11, In re Johns-Manville Corp., Nos. 82 B 11656 to 82 B 11676 (Bankr. S.D.N.Y. filed Nov. 1, 1982) [hereinafter cited as Whitman & Co.].

The Committee of Asbestos-Related Litigants and/or Creditors filed its memorandum of law and supporting affidavits seeking dismissal on November 14, 1983. The Committee alleges, inter alia, that Manville was aware of, and concealed, the health hazards of asbestos, engaged in fraudulent accounting practices, and possessed the ability to pay its asbestos-related tort obligations, as they mature, in the ordinary course of business. Furthermore, the Committee argues that the recently submitted plan violates the constitutional rights of future asbestosis victims and eliminates their right to trial by jury. Therefore, they conclude that the Manville reorganization should be dismissed. Memorandum of Law of the Committee of Asbestos-Related Litigants and/or Creditors in Support of Motion to Dismiss the Manville Chapter 11 Petitions, Henderson and Levy Affidavits in Further Support of Asbestos Committee’s Motion to Dismiss Manville’s Bankruptcy Petitions, In re Johns-Manville Corp., Nos. 82 B 11656 to
The *Gladding* debtor, a recreational vehicle manufacturer, sold a vehicle to CEF Enterprises ("CEF") in 1975, which was subsequently sold to Mr. and Mrs. Coomes. In 1977, the debtor filed a chapter XI petition and its plan of arrangement was confirmed in 1978. In 1979, the Coomes' sued CEF alleging a defect in the vehicle and, in 1980, CEF impleaded the debtor. The debtor argued that CEF's claim was provable and allowable, and was, therefore, already discharged in the prior plan confirmation. The court, however, held that the claim "was so remote at the time of confirmation as to render it incapable of proof." Defining a contingent claim as "one which, either as to its existence or as to its amount, depends upon some future event uncertain either as to its occurrence altogether, or as to the time of its occurrence," the court suggested that Congress probably did not "intend to declare a debt provable on the sole ground that it is contingent. The proper construction of § 63a(8) [contingent debts and contingent contractual liabilities] . . . necessitates its limitation to the contingent claims that are in their nature provable." Although the court labels the debtor's obligation to CEF at the time of the confirmation as a "mere possibility of a claim of unknown origin, in an unknown amount, and which only might arise, if at all, at some unknown time," the claim was not discharged because "at the time required for proof, [it] would have been so incapable of proof as to prohibit its allowance."

*Gladding* was decided under the Old Act, with its statutory provability requirement. Although the New Code, governing *Manville*, has abandoned such a requirement, that is only one distinguishing feature between the two cases. Of greater significance is the legislature's explicit intent, upon enacting the New Code, to broaden the scope of relief available to the debtor. Thus, while *Gladding*'s precise facts, if placed in the context of a current chapter 11 reorganization might not mandate discharge, neither should *Manville's*


137. *Gladding*, 20 Bankr. at 567.

138. *Id.*

139. The New Code has dispensed with the provability requirement. *See supra* text accompanying note 96.

140. *Gladding*, 20 Bankr. at 567.

141. *Id.* (quoting 3A COLLIER, COLLIER ON BANKRUPTCY ¶ 63.30 (14th ed. 1978)).

142. *Id.* at 567-68 (quoting COLLIER, supra note 141, at ¶ 63.30).

143. *Id.* at 568 (emphasis added).

144. *Id.* (citation omitted).

145. *See supra* text accompanying note 113.
unique facts preclude discharge.

Furthermore, the applicability of *Gladding* to the *Manville* reorganization is also narrowed by the different and unique factual setting of the *Manville* case. For example, in *Gladding*, the opinion does not state the reason why the debtor sought relief, although it is known that it was not due to CEF's claim, since that claim was presumably not listed and a plan had previously been confirmed. In the *Manville* case, the debtor has filed because of its future liabilities and without their inclusion there will be arguably no reorganization at all. In addition, *Gladding* was not at the filing stage, but as previously mentioned, past confirmation. It would appear that if CEF's claim was adjudicated discharged, CEF might not have been entitled to share in the already agreed upon plan, because it had not filed a proof of claim before confirmation.146 Assuming arguendo that the potential asbestosis victims could surmount the inherent difficulties they face in the submission of their claims,147 the controversy surrounding the inclusion or exclusion of potential asbestosis victims as creditors has occurred at the filing stage and, as a result, these individuals would not be statutorily precluded from sharing in any agreed upon plan.

Finally, the *Gladding* court concluded its decision by stating that:

> If the court were to adopt the debtor's argument, every retailer and consumer who purchases an item from a manufacturer prior to the bankruptcy of the manufacturer, would then be compelled to file in the bankruptcy proceeding a proof of claim for some as yet unknown and undetermined possibility of damage. Such a procedure would be absurd.148

This argument may have validity for *Gladding's* facts, but is, nevertheless, inapplicable to the *Manville* situation. Those individuals exposed to asbestos have a strong possibility—or probability, if statistics are accurate—of damage, the origin of which is, in fact, known (exposure), and the effects of which can be determined (i.e., asbestosis, mesothelioma, or lung cancer). It is, therefore, reasonable for Manville to include these victims in its reorganization scheme.

Somewhat analogous to the potential asbestosis victims are

147. See infra notes 159, 182-84, 186 and accompanying text.
those warranty-holders whose warranties have not yet expired and whose products have remained undamaged. Although such warranty-holders would appear to be creditors of the manufacturer/retailer because of contractual obligations, treatment of their claims in a reorganization poses similar problems to those of the potential asbestosis victims. For example, the contingent warranty-holder may not realize the importance of protecting his interest, while the potential asbestosis victim may not even realize he has any interest to protect. The latter situation could occur for several reasons: The individual could be or feel quite healthy, have been only slightly exposed, be a family member of one who was exposed, or not even know he is at risk. In any event, both contingent warranty-holders and potential asbestosis victims would be required to file proofs of claim in order to partake in any reorganization plan. It is apparent that this set of circumstances creates problems for both groups. One suggestion, offered in the warranty context, is the use of public interest groups to intervene on behalf of the contingent warranty-holders.

150. Id.
152. See B. Weintraub & A. Resnick, supra note 7, at ¶ 5.04.
153. Note, supra note 149, at 365.

UNR Industries (“UNR”) and Amatex Corporation (“Amatex”), who are also both attempting reorganization because of asbestos-related claims, see supra notes 5 and 111, had requested the appointment of a legal representative or a guardian ad litem to help deal with the complex issue of unknown, future asbestosis victims. UNR claimed that a court-appointed representative would aid in its reorganization as well as assure adequate representation for those as-yet-unknown claimants. See In re UNR Indus., 29 Bankr. 741, 744-44 (N.D. Ill. 1983), appeal docketed, No. 83-1746 (7th Cir. Apr. 26, 1983). Both UNR and Amatex believed that such legal representation would aid the court in identifying this class of creditors and in assuring that adequate notice is given. See id.; In re Amatex Corp., 30 Bankr. 309, 310-11 (Bankr. E.D. Pa. 1983), appeal docketed, No. 83-1843 (3d Cir. Nov. 18, 1983); Olick, Chapter 11—Panacea or Peril In Toxic Tort Cases, N.Y.L.J., Feb. 23, 1983, at 1, col. 4, at 6, col. 4. For further discussion of the issue of notice, see infra text accompanying notes 163-87. The United States Trustee in the UNR case requested that an amicus curiae be appointed to advise the court on, among other issues, the number and identity of these future claimants before considering the appointment of a legal representative. The amicus curiae could aid the court in resolving questions of standing and representation. See UNR, 29 Bankr. at 744. The Trustee also suggested a guardian ad litem be appointed. Id. at 744 n.3; see Olick, supra, at 6, col. 4-5. Both courts, however, denied all such requests. Amatex, 30 Bankr. at 315-16 (recommendation to district court); UNR, 29 Bankr. at 744 & n.3, 747.

Manville has proposed several alternatives. On February 4, 1983, it asked the court to estimate the monetary amount of all pending and unfiled asbestos-related claims. The estimate could be ascertained by considering actuarial and statistical data, economic issues, and relevant historical-claim and litigation records. Wall St. J., Feb. 7, 1983, at 16, col. 4. For further
discussion of the procedural history of this issue, see infra note 220.

On May 12, 1983, Manville suggested that the asbestosis victims accept either a “no-fault” compensation system, receiving awards based on each claimant’s specific physical injuries or, if such a proposal is rejected, have the bankruptcy court impose a settlement. Under either plan, Manville requested that no punitive damages be awarded. See infra note 223 and accompanying text. Manville also suggested that a “spin-off” company be formed and that such company be free from all asbestos liability. Wall St. J., May 13, 1983, at 2, col. 2.

The next proposal, one week later, reiterated the corporate “spin-off” idea, with the new company contributing some of its earnings to a fund designed to compensate the asbestos claimants. Neither the “no-fault” nor the settlement procedure was included in this plan. It was reported, however, that unless there is to be a “global plan” whereby the entire asbestos industry contributes to the fund, litigation would continue for years. N.Y. Times, May 18, 1983, at D1, col. 1.

Manville’s next proposal, which it had planned to submit on October 17, 1983, met with considerable opposition. That plan provided for the creation of two distinct entities—M-One and M-Two. M-One would be responsible for all asbestos-related liability while M-Two, insulated from such liability, would continue the corporation’s business operations and utilize its profits to satisfy Manville’s debts. N.Y. Times, Oct. 18, 1983, at D7, col. 1. Negotiations were focusing upon, among other things, how the money in the plan would pass to asbestosis victims. In this proposal, a “no-fault” system whereby victims would submit their claims and receive a set amount for that degree of injury was again suggested. Some opponents, however, believe that this procedure is unworkable because it fails to deal adequately with individual cases and interferes with contingency fee arrangements between victims and their attorneys. Id. Furthermore, no procedure had been evolved to deal with future asbestosis victims. Id. Federal District Judge Edelstein, who is currently involved in the Manville case, has suggested the implementation of a 20-year sinking fund to pay those future claimants. For a further discussion of Judge Edelstein’s role and his proposals in the Manville case, see infra note 220.

On October 27, 1983, Manville submitted another plan, which was in many ways similar to the October 17th proposal, but Bankruptcy Judge Lifland refused to accept it. That plan specifically requested that the asbestos lawyers’ fees be sharply reduced. Wall St. J., Oct. 28, 1983, at 60, col. 2. Manville had, months earlier, offered $400 million to settle the asbestos claims, but the attorneys rejected that offer. They instead requested more than $700 million. That figure would approximate the contingency fees due the attorneys, leaving a balance of $400 million to the victims. N.Y. Times, Oct. 28, 1983, at D3, col. 6.

Also, on October 27, James Vermeulen, a former Manville employee with asbestosis and executive director of the Asbestos Victims of America, criticized the attorneys in the case. He complained to Judge Lifland that “‘[i]n all these months, I have not been apprised of what’s going on . . . .’” Id. Judge Lifland suggested that Mr. Vermeulen sit on the creditors’ committee. Id. The judge recommended that the victims themselves take a more active role in the negotiations. Wall St. J., Oct. 28, 1983, at 60, col. 2. He also told Mr. Vermeulen that he was more sympathetic to the plight of the asbestos victims than any other party in the Manville case. Id.

Manville filed its reorganization plan on November 21, 1983. Although the plan must be approved by creditors and the court, Manville has requested an April 30, 1984 deadline in order to gain support for its plan. N.Y. Times, Nov. 22, 1983, at D15, col. 1. The plan, in essence, sets forth specific monetary amounts for specific illnesses and allows for additional compensation in certain individual cases. Claimants, who are dissatisfied with the determination of the severity of their illness, could appeal their award to a court-appointed medical panel. Id. Manville has again requested that contingency-fee arrangements between claimants and their attorneys be voided and replaced by a system based upon hours worked and services rendered. The plan reiterates the M-One and M-Two proposal. Id.

The asbestosis victims’ attorneys question the constitutionality of the plan and have re-
the court's permission, a public interest group could sit on a creditor's committee and represent the interests of a particular class of creditors. Although a public interest group is not, in fact, a creditor, bankruptcy courts have become more flexible regarding the composition of creditors' committees and may allow for public interest representation.

If the bankruptcy court should award potential asbestosis victims creditor status, they also could receive committee representation, either directly or indirectly through public interest intervention. Representation would be crucial, particularly due to the special circumstances surrounding their claims.

i. Constitutional Issues.—The issue as to whether or not to award potential asbestosis victims creditor status is further complicated by constitutional arguments. The three critical points emphasized by Manville's opponents are: (1) that potential victims cannot receive adequate notice informing them of any aspect of the reorganization; (2) that these potential victims will be unable to comply with section 1111(a) of the New Code requiring that all contingent claims be filed; and (3) that these potential victims cannot adequately participate in the acceptance or rejection of any reorganization plan. Opponents, therefore, conclude that potential asbesto-
sis victims would be denied due process.\textsuperscript{162}

If the bankruptcy judge finds that potential asbestosis victims have received adequate notice, it would appear that the other two complaints could be satisfied. The issue of notice has been resolved in two pre-Code cases. In \textit{In re DCA Development Corp.},\textsuperscript{163} an unsecured creditor challenged a court approved transfer of the debtor's assets in a chapter XI arrangement proceeding. He asserted that his right as a creditor to a fair hearing was denied due to insufficient notice.\textsuperscript{164} The creditor had received notice of the first transfer hearing one day in advance and notice of the second hearing hours before it was to be held. Although he was personally represented on both occasions, he objected to the brief period between notice and each hearing, claiming he had insufficient time to prepare his opposition to the transfer.\textsuperscript{165} The court disagreed, and held notice was sufficient.\textsuperscript{166}

Although the \textit{DCA} case is factually dissimilar from \textit{Manville}, the court's analysis of notice and due process sheds some light on the interrelationship between notice and bankruptcy proceedings. The \textit{DCA} court focused on two Old Act sections\textsuperscript{167} authorizing the court to establish notice requirements, and held that those provisions only mandated "such notice and opportunity for a hearing as is reasonable and appropriate in each particular case. . . . This is nothing more than traditional Due Process Clause analysis."\textsuperscript{168} Referring to the United States Supreme Court's decision in \textit{Mullane v. Central Hanover Bank & Trust Co.},\textsuperscript{169} the \textit{DCA} court held that "[t]he court in each case must balance the individual's interest in adequate procedure against the overall interest of efficient, final resolution of claims."\textsuperscript{170} The \textit{DCA} court added that efficient, final resolution of claims is of special importance in bankruptcy proceedings because delay could lead to a "diminution of corporate assets with no corresponding benefit to creditors."\textsuperscript{171} Finally, the \textit{DCA} court noted that

\begin{itemize}
  \item \textsuperscript{162} E.g., \textit{id.} at 12.
  \item \textsuperscript{163} 489 F.2d 43 (1st Cir. 1973).
  \item \textsuperscript{164} \textit{id.} at 44.
  \item \textsuperscript{165} \textit{id.} at 45-46.
  \item \textsuperscript{166} \textit{id.} at 47.
  \item \textsuperscript{168} 489 F.2d at 46 (citation omitted).
  \item \textsuperscript{169} 339 U.S. 306 (1950).
  \item \textsuperscript{170} 489 F.2d at 46 (citing \textit{Mullane}, 339 U.S. at 313-14).
  \item \textsuperscript{171} \textit{id.}
\end{itemize}
“even where formal notice to affected parties is omitted or is insufficient, informal or constructive notice which provides them with the same opportunity for a fair hearing can satisfy the procedural requirements of the [Old] Act.”

Another pre-Code case, more factually similar to the Manville situation, is *In re GAC Corp.* The relevant portion of the case concerned the adequacy of notice given to former holders of the debtor’s debentures who had already sold their certificates prior to the chapter X proceeding. These individuals had claims against the debtor because of alleged securities violations. The objection to notice was filed by a debenture holder already participating in the proceeding on behalf of all those other prior holders who had not allegedly received adequate notice. The court, in analyzing the steps taken by the lower court, held that all debenture holders had received adequate notice. The notice, claimed to be insufficient, included a “Claims Bar Order” mailed to approximately 280,000 potential claimants, and publication of the order, twice, in fifty-three leading newspapers. The order set the time, place, and form by which all potential claimants were to file proofs of their claim or be barred from participating in the chapter X proceeding. Although not all potential claimants were included in the direct mailing, the court concluded that the above procedure satisfied due process requirements. The *GAC* court also quoted *Mullane*: “‘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 [claims].’” The court noted that notice by mail could be required whenever the trustee has “actual knowledge of the existence of a claim and the name and address of the claimant is easily ascertainable,” but held that this was not such a case. Notice by publication satisfied the requirements of due process because claims by those no longer holding the debentures were speculative and the cost

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172. *Id.* at 47.
173. 681 F.2d 1295 (11th Cir. 1982).
174. *Id.* at 1297.
175. *Id.* at 1300.
176. *Id.* at 1297-98.
177. *Id.* at 1300.
178. *Id.* (quoting *Mullane*, 339 U.S. at 314).
179. *Id.* (emphasis in original).
180. *Id.*
and burden upon the trustees to ascertain the names and addresses of all prior debenture holders mandated notice by publication.\textsuperscript{181}

Both of these cases emphasize the important role a bankruptcy court has in weighing the need for individual notice against the need for resolution of the case at hand. Under the New Code, the court's role has not changed. A creditor with a contingent claim must still file a proof of claim,\textsuperscript{182} but the court has discretion in setting the time wherein proofs of claim must be submitted\textsuperscript{183} and the form of notice by which creditors are informed of the proceeding.\textsuperscript{184}

The court, in analyzing whether the 32,000 potential asbestosis victims\textsuperscript{185} can receive "notice reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their [claims],"\textsuperscript{186} will com-

\begin{itemize}
\item \textsuperscript{181} Id.
\item \textsuperscript{182} 11 U.S.C. § 1111(a) (1982). Although the appellant in GAC wanted to file a class proof of claim, the court, without holding that class proofs might never be permissible, indicated that no court or statutory provision specifically authorizes such a filing. GAC, 681 F.2d at 1298-99. Certainly the Manville court could authorize such a step, but that possibility seems unlikely despite rule 3001(b) of the Federal Bankruptcy Rules: "A proof of claim shall be executed by the creditor or the creditor's authorized agent. . . ." R. PRACTICE & P. BANKR. 3001(b) (emphasis added). The Manville court could conceivably accomplish the same result by extending the time for individual filing. See infra note 183 and accompanying text.
\item \textsuperscript{183} "The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." R. PRACTICE & P. BANKR. 3003(c)(3); see also House Report, supra note 45, at 6307 ("The Rules of Bankruptcy Procedure will set the time limits . . . for filing, which will determine whether claims are timely or tardily filed.").
\item \textsuperscript{184} "There shall be given such notice as is appropriate of an order for relief in a case under this title." 11 U.S.C. § 342 (1982). "The court may order notice by publication if it finds that notice by mail as provided in this rule is impracticable or that it is desirable to supplement the notice." R. PRACTICE & P. BANKR. 2002(k). "The court may from time to time enter orders designating the matters in respect to which, the person to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules." R. PRACTICE & P. BANKR. 2002(l); see also House Report, supra note 45, at 6287-88 ("The Rules [of Bankruptcy Procedure] will prescribe to whom the notice should be sent, and in what manner notice will be given.").
\item \textsuperscript{185} See supra note 6 and accompanying text.
\item \textsuperscript{186} Mullane, 339 U.S. at 314.
\item It is interesting to note that although a debtor company is supposed to replace its business forms with those that read "Debtor in Possession," the bankruptcy judge permitted Manville to retain its current forms. As Manville's bankruptcy attorney, Michael J. Crames, explained "'[The replacement is] so everyone will know they're dealing with a company in bankruptcy. We suggested to the judge that the publicity might be such that people would know about Manville,'" and thus no replacement was required. N.Y. Times, Aug. 30, 1982, at D1, col. 4.
\end{itemize}
pare whatever notice is ultimately given with the harsh reality that if these 32,000 individuals are denied creditor status—thus resulting in a dismissal of the Manville petition—the Manville Corporation will eventually lack sufficient funds to compensate the remaining asbestosis victims to any degree whatsoever. One observer appears to strike the balance in favor of creditor status:

The human tragedy is that there are so many victims of asbestos-related diseases. Unfortunately, there are not enough assets available in Manville to compensate all victims fully. . . . Bankruptcy may increase the pool of assets available to victims [by shifting part of the inevitable losses to other classes of creditors who might otherwise have been paid off in full and by applying the money saved by not defending each tort suit individually to the pool available for distribution]. The clear effect of bankruptcy will be to allocate this pool more evenly among asbestos victims. While currently identified victims may lose in the process, the as-yet-unidentified victims, and perhaps the class as a whole, will gain.187

2. Furtherance of Legislative Aims.—Even if the bankruptcy court ultimately agrees with Manville's position that it is properly within the jurisdiction of the bankruptcy court, that will not end the good faith analysis. Another indication of good faith is whether the debtor is furthering the legislative aims of the bankruptcy system.

Although this factor is in no way determinative of the adequacy of notice and does involve the awareness of the business community, the bankruptcy judge may find that the publicity given to the Manville filing is related to the adequacy of notice ultimately given to the potential asbestosis victims.

If the bankruptcy judge should rule that the notice ultimately given satisfies the potential asbestosis victims' due process, thus allowing the case to go forward, that decision will not be a definitive bar to those individuals who later choose to challenge that ruling. "[There is] the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action." Fed. R. CIV. P. 23 advisory committee note (explaining 1966 amendment).

Depending upon the type of reorganization plan ultimately confirmed, arrangements could be made to permit these subsequent creditor-victims to participate in the apportionment. Admitting that this could complicate matters, it should not preclude a current resolution of this already complex matter. If the bankruptcy court should hold that notice is appropriate, it does have statistical guidelines explaining how many potential asbestosis victims exist and can correlate that number with the total number that actually file proofs of claim. If far less than that proposed number do file, the court could require further publication be given and/or extend the deadline for filing claims. Furthermore, if an asbestosis money fund or corporate securities are to be allocated as part of the plan, additional funds or securities could possibly be added at a later date. This notewriter does not believe that such an added financial burden upon Manville is great enough to detract from its desire for finality through the reorganization process.

“It has been long recognized that one who invokes the protective provisions of the bankruptcy laws must do so in order to accomplish and further the expressed legislative aim of the particular Chapter and not for any other purpose.” Specifically, “those who invoke the reorganization or rehabilitation provisions of the bankruptcy law must do so in a manner consistent with the aims and objectives of bankruptcy philosophy and policy—must, in short, do so in ‘good faith.’”

To discern whether Manville’s petition furthers the legislative aims of the New Code, and more specifically, the chapter 11 reorganization provision, those aims must first be ascertained. Although the new statute replaces the Old Act, the basic philosophy of business reorganization remains the same: “avoidance of the consequences of economic dismemberment and liquidation, and the preservation of ongoing values in a manner which does equity and is fair to rights and interests of the parties affected.” As the legislative history indicates, the Old Act was archaic, unable to handle effectively either the increased number of consumer bankruptcy cases or the more complicated business reorganization cases. The bankruptcy law needed to be revised and modernized, and one result, the new chapter 11, offered greater speed, efficiency, and protection for debtors, creditors, and the public at large.

Two very important objectives surrounding business reorganizations, whether under the old or new law, are: (1) the preservation, where possible, of an ongoing, but troubled business, and (2) the

preservation of currently held jobs by the employees of the threatened entity.\textsuperscript{198} The first objective is premised on the fact that it is more economically efficient to reorganize than liquidate because "assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap."\textsuperscript{199} Reorganization also furthers the public interest by preserving business opportunities.\textsuperscript{200} Moreover, concerning the second objective, reorganization is economically more efficient than liquidation since it preserves jobs\textsuperscript{201} by minimizing unemployment,\textsuperscript{202} another public interest concern.\textsuperscript{203}

If Manville is, in fact, financially troubled,\textsuperscript{204} its filing for reorganization furthers both objectives of the reorganization provision. If Manville is precluded from attempts at reorganization today and the current situation continues in the future, Manville will again seek reorganization, or worse, be forced into liquidation. Liquidation of a "Fortune 500" company would, indeed, be economically inefficient and, therefore, Manville's current plight makes its chapter 11 filing both appropriate and necessary. "[W]here . . . a once viable business supporting employees and unsecured creditors has more recently been burdened with judgments that threaten to put it out of existence, unless and until, rehabilitation has been shown to be unfeasib-
ble, the bankruptcy courts are a most appropriate harbor within which to weather the storm.\textsuperscript{205}

Opponents, of course, argue that Manville \textit{can} accommodate all those asbestosis victims holding judgments against it and that "‘t[he] bankruptcy laws weren’t set up to allow bailouts for future problems.’"\textsuperscript{206} Proponents, however, disagree, as one stated: "‘If there’s not enough money to satisfy everyone who may ultimately have a claim, the bankruptcy court is an appropriate place to apportion the damages, just as it is whenever creditors’ claims exceed assets. . . .'"\textsuperscript{207}

Since asbestosis claims will clearly continue to arise,\textsuperscript{208} planning should occur now, before it is too late. This notewriter believes that any cut-off point short of forced liquidation would be purely arbitrary. To base the allowance of Manville’s reorganization petition solely upon the actual number of tort claim filings and judgments would be shortsighted and too mechanical. This is particularly true in view of the fact that large numbers of claims will probably be forthcoming. Such a cut-off point could also set the stage for possible liquidation, resulting in both the demise of an ongoing business and loss of jobs. This resultant liquidation would make it impossible to compensate those individuals who will inevitably suffer from asbestosis-related disease. Closing one’s eyes to this tragic reality will not make it disappear and delaying Manville’s reorganization attempts until another day will only adversely affect those future claimants whose added misfortune it will be that they did not become ill sooner. As Manville stated in its chapter 11 petition, “a point [would] be reached where future successful [asbestosis] plaintiffs would be unable to collect the amounts of their judgments or proposed settlements [and] all other creditors . . . would likewise be confronted with the stark realization that they too could not be paid nearly in full.”\textsuperscript{209} The petition was filed, “‘[t]herefore, in order to treat all creditors of Manville even-handedly.’”\textsuperscript{210} Manville’s petition for reorganization does, in fact, further the legislative aims of the New Code.

3. Other Considerations.—If the bankruptcy court should

\textsuperscript{205} \textit{In re} Bonded Mailings, Inc., 20 Bankr. 781, 785 (Bankr. E.D.N.Y. 1982).
\textsuperscript{206} N.Y. Times, Aug. 27, 1982, at D4, col. 1.
\textsuperscript{207} \textit{Id.; see also supra} note 187 and accompanying text.
\textsuperscript{208} \textit{See supra} notes 43, 187 and accompanying text.
\textsuperscript{209} Debtor’s Affidavit, \textit{supra} note 2, at 8.
\textsuperscript{210} \textit{Id.}
agree with the foregoing contention, then it should necessarily reject the assertion of Manville's opponents that the reorganization filing was an abuse of the New Code's privileges.\textsuperscript{211} Although it is true that "[t]he Code is not to be abused by the extention of its rights and privileges to those not within its contemplation,"\textsuperscript{212} Manville's petition does further the legislative aims of the New Code. Its filing may be unique,\textsuperscript{213} but it is not an abuse of the system.\textsuperscript{214}

Opponents of the Manville petition also assert that the filing was made with the intent to cause hardship and delay to the asbestosis victims.\textsuperscript{215} If this is indeed true, then the petition should be deemed filed in bad faith and dismissal should result, since "[i]f it is obvious that a debtor is attempting unreasonably to deter or harass creditors . . . , [then] good faith does not exist."\textsuperscript{216} Conversely, if the bankruptcy court finds that Manville's petition is not in bad faith, then Manville will be entitled to benefit from all of the New Code's privileges\textsuperscript{217} despite the delays inherent in a statutory reorganization. For example, the automatic stay provision,\textsuperscript{218} which has halted all asbestosis litigation against Manville, cannot be considered

\begin{footnotes}
\item[211] See Kelly, supra note 5, at 17; N.Y. Times, Aug. 27, 1982, at D4, col. 1.
\item[214] See id.
\item[216] In re Northland Constr. Co., 560 F.2d 756, 759 (7th Cir. 1977) (quoting In re Loeb Apartments, Inc., 89 F.2d 461, 463 (7th Cir. 1937)); cf. In re Horizon Hosp., Inc., 7 BANKR. CT. DEC. (CRR) 682, 683 (Bankr. M.D. Fla. 1981) ("a fraudulent or improper invocation of [the bankruptcy court's] jurisdiction would certainly be a 'cause' for dismissal.").
\item[217] It is again interesting to note Judge Lifland's comments in an earlier case: "In determining a lack of good faith, the court should emphasize the intent to abuse the judicial process rather than to delay creditors." In re Eden Assocs., 13 Bankr. 578, 584 (Bankr. S.D.N.Y. 1981); see supra note 53.
\item[218] "Unreasonable delay" is also one of the nine enumerated clauses permitting the court to dismiss a case. 11 U.S.C. § 1112(b)(3) (1982).
\item[217] In In re Bonded Mailings, Inc., 20 Bankr. 781 (Bankr. E.D.N.Y. 1982), although the bankruptcy court found that the debtor had previously engaged in fraudulent conduct designed to frustrate its creditor's attempts to enforce a prior court judgment, the court refused to dismiss the chapter 11 petition. The court held that the debtor, a formerly viable business threatened with immense judgments, was in need of statutory relief. Id. at 784-85. Manville's school creditors cite Bonded Mailings for the proposition that "[e]ven if the Committee of Asbestos-Related Litigants and/or Creditors' charge that the Debtors' filing is part of a scheme to prevent them from obtaining fair compensation is credited on the sparse record before this Court, that claim does not establish bad faith or warrant dismissal." School Creditors, supra note 75, at 9 n.*.
\item[218] 11 U.S.C. § 362 (1982); see supra note 45.
\end{footnotes}
delay for purposes of finding bad faith. Furthermore, it is both anticipated and accepted that large companies seeking reorganization will probably require more time to complete the reorganization process. This is evidenced by the House Report's comments regarding the statutory time permitted the debtor to file a reorganization plan:

The bill gives the debtor an exclusive right to propose a plan for 120 days. In most cases, 120 days will give the debtor adequate time to negotiate a settlement, without unduly delaying creditors. The court is given the power, though, to increase or reduce the 120-day period depending on the circumstances of the case. For example, if an unusually large company were to seek reorganization under chapter 11, the court would probably need to extend the time in order to allow the debtor to reach an agreement.


220. House Report, supra note 45, at 6191 (emphasis added) (footnotes omitted); see also 11 U.S.C. § 1121(d) (1982); "On request of a party in interest . . . the court may . . . increase the 120-day period . . ."."

One notewriter has compiled a sampling of the time it took for large corporations to reorganize: "Dolly Madison Industries (seven years, five months), King Resources (seven years), Equity Funding (four years, eight months), United States Financial (four years, four months), and Interstate Sales (three years, 11 months)." Note, supra note 149, at 355 n.40. The reorganization plan of Bobbie Brooks, Inc., a clothing manufacturer, was recently confirmed and the company is now out of chapter 11 proceedings. The process took a little over one year. Wall St. J., Feb. 17, 1983, at 16, col. 3.

Similar time delays have plagued the Manville case as Manville had been granted 10 extensions since its initial filing. N.Y. Times, Nov. 8, 1983, at D4, col. 6. Manville submitted its reorganization plan on November 21, 1983, N.Y. Times, Nov. 22, 1983, at D15, col. 1., the date of its final deadline. See N.Y. Times, Nov. 8, 1983, at D4, col. 6. The tenth extension was requested by both Manville and the asbestosis claimants, id., while the ninth extension had been requested by Manville's commercial creditors' attorney. Wall St. J., Oct. 28, 1983, at 60, col. 2. Bankruptcy Judge Lifland granted the ninth extension after refusing to accept one of Manville's plan proposals. He then instructed the parties to continue negotiations in order to develop a plan which would be acceptable to Manville and its creditors. Id. The most significant problems at that time involved Manville and the asbestosis victims' attorneys, with the commercial creditors apparently acting as the mediator. Id. These, as well as other problems, continued to plague the reorganization when Manville submitted its plan. N.Y. Times, Nov. 22, 1983, at D15, col. 1. For a further discussion of Manville's past proposals and current plan, see supra note 153.

The Committee of Asbestos-Related Litigants and/or Creditors originally filed a motion to dismiss the Manville Chapter 11 petitions in the bankruptcy court. After the seventh extension was granted, N.Y. Times, Sept. 22, 1983, at D3, col. 1, however, the Committee moved to withdraw the motion to dismiss—then pending in bankruptcy court—and have the district court, instead, rule on the motion. See In re Johns-Manville Corp., Nos. 82 B 11656 to 82 B 11676 (S.D.N.Y. Nov. 9, 1983) (unpublished memorandum decision). GAF Corporation, one
Finally, opponents of Manville's reorganization petition further assert that Manville is attempting to avoid large damages awards, especially since Manville had, prior to its petition, been found liable for punitive damages. Although this note has dealt exclusively with the appropriateness of Manville's filing a petition for reorganization relief and not an analysis of any conceivable plan, it is possible, albeit uncertain, that a bankruptcy court might award punitive damages to a creditor in appropriate circumstances.

of Manville's codefendants in several asbestos tort suits, joined the motion requesting removal. District Judge Stewart, however, denied their motion. Id. Judge Stewart reasoned: "The Bankruptcy Courts are well acquainted with claims of bad faith filings. While the allegations of conspiracy and constitutional violations perhaps raise more complicated questions [than] the usual bad faith filing case, we are not convinced that these elements warrant withdrawal of the motions from the Bankruptcy Court." Id.; see N.Y. Times, Nov. 11, 1983, at D4, col. 4. The motion to dismiss was argued before Bankruptcy Judge Lifland on January 5, 1984 and the decision is pending. See N.Y. Times, Jan. 6, 1984, at D3, col. 6.

The district court's involvement in the Manville case also extended to the issue of the estimation of future claims. On October 14, 1983, District Judge Edelstein, although not deciding this specific issue, stated that he would personally take under advisement the general question of whether unknown future asbestos victims should be bound by any current reorganization plan. Wall St. J., Oct. 17, 1983, at 3, col. 2. On October 25, Judge Edelstein proposed that Manville create a 20-year sinking fund to pay the claims of those individuals exposed to asbestos, but not yet ill or aware of their illness. Wall St. J., Oct. 26, 1983, at 10, col. 1. The plan which Manville submitted, however, does not include such a proposal. See supra note 153.

Judge Edelstein's proposal appears to require that all creditors accept less payment now in order to guarantee the rights of future victims. He stated: "I am not going to be satisfied with any plan that shows we are expunging the rights of future claimants." Wall St. J., Oct. 26, 1983, at 10, col. 1. Although officially involved in only part of the Manville reorganization, Judge Edelstein may be prepared to hear the entire case. N.Y. Times, Oct. 26, 1983, at D1, col. 1.

222. See supra note 42 and accompanying text.
223. See In re Anchorage Boat Sales, Inc., 4 Bankr. 635, 645 (Bankr. E.D.N.Y. 1980) (court did not assess punitive damages against the debtor in a chapter 11 reorganization since it found the debtor's conduct stemmed from "honest confusion and a lack of money"). But see In re GAC Corp., 681 F.2d 1295, 1301 (11th Cir. 1982) (court refused to assess punitive damages against the debtor in a chapter X proceeding because "the effect of allowing a punitive damages claim would be to force innocent creditors to pay for the bankrupt's wrongdoing."). One notewriter suggested that Manville's plan be based on a "modified workers' compensation type-system" which would preclude punitive damage recovery. Note, The Impact of a Solvent Corporation's Reorganization on Products Liability Claimants, 4 CARDOZO L. REV. 519, 543 (1983).

Prior to Manville's request that the court estimate its total asbestos-related liability, see supra note 153, Manville outlined a reorganization proposal. That proposal would have sought determination of each claim through arbitration, a system which does not usually assess punitive damages. N.Y. Times, Jan. 28, 1983, D4, col. 4. Manville's currently proposed plan, submitted November 21, 1983, as expected, precludes punitive damage awards. See supra note 153.

Options available to the bankruptcy court could minimize the benefits Manville is seeking
Confronting tens of thousands of asbestos-related claims, the Manville Corporation realized that its only means of survival was to file for corporate reorganization under chapter 11 of the New Code. Although it is presently solvent and seeking to minimize its liability due to both current and future asbestosis claims, these factors should not, per se, preclude Manville from utilizing this opportunity to salvage its corporate existence.

Despite opponents' claims that Manville is merely attempting to escape state court proceedings, closer analysis reveals that the corporation is truly in financial difficulty. Similarly, critics' complaints that Manville lacks sufficient debt to warrant bankruptcy protection are also unfounded. Present claims added to the multitude of claims that will surely arise in the future make Manville an appropriate debtor. In fact, Manville has fulfilled the jurisdictional prerequisites for reorganization, and has, indeed, filed its petition in good faith. Moreover, although the New Code was not adopted with Manville's specific facts in mind, permitting Manville to utilize the bankruptcy process is consistent with the legislative aims underlying the Code.

Finally, it is only through the reorganization process and the classification of future claimants as present creditors, that the as-yet-unknown asbestosis victims can be assured some hope of adequate compensation from the source of their injuries. Without the opportunity to reorganize, Manville may be forced to liquidate its assets, leaving these future claimants potentially remediless—with no one to sue but a penniless "deep pocket."  

Sandrea Friedman

224. As this note went to press, Bankruptcy Judge Lifland rendered two decisions in the Manville case, In re Johns-Manville Corp., Nos. 82 B 11656 to 82 B 11676 (Bankr. S.D.N.Y. Jan. 23, 1984) (Decision and Order on Motions to Dismiss Manville's Chapter 11 Petition ("Decision No. 1"), and Decision and Order on Keene's Motion to Appoint a Legal Representative for Future Claimants ("Decision No. 2"), and the Court of Appeals for the Seventh Circuit dismissed the appeal filed by UNR Industries, In re UNR Indus., No. 83-1704 (7th Cir. Jan. 17, 1984).

In Decision No. 1, Judge Lifland denied four motions to dismiss the Manville petition. Of these four motions, three were premised on the theory that future asbestosis victims are neither
cognizable nor dischargeable, in bankruptcy. The court denied these motions because, whether or not the victims' interests are indeed dischargeable, they are "parties in interest" pursuant to § 1109(b) of the New Code. As a result of this conclusion, Judge Lifland found insufficient cause to dismiss the petition. The fourth motion to dismiss, filed by the Committee of Asbestos-Related Litigants and/or Creditors, alleging bad faith in the filing of the petition, was also denied since the Committee had not substantiated its allegations of fraud. Judge Lifland commented on Congress' intent of liquidation avoidance and its obvious relationship to the case at bar. He found no jurisdictional abuse of the bankruptcy court in Manville's filing, but rather, a company in dire need of reorganization. Judge Lifland emphasized, however, that pursuant to § 1129 of the New Code, good faith, in this case, will be most appropriately examined in connection with plan confirmation.

In Decision No. 2, Judge Lifland granted a motion for the appointment of a legal representative for the future asbestosis victims' interests. He also commented on the diverse state statutes of limitations and reasoned that, in order to treat all victims fairly, a uniform standard applying a manifestation formula should be utilized for purposes of allowability of claims in bankruptcy. Although the issue of dischargeability was not before the court, Judge Lifland, in dicta, noted the broad definition of "claim" in § 101(4) of the New Code and the congressional intent that all of a debtor's obligations be handled in a reorganization. Aware of the due process requirement of adequate notice, Judge Lifland stated that although the problem would be difficult to resolve, it would not be insurmountable. Both decisions have been appealed.

The Seventh Circuit, in UNR, held that the district court's refusal to appoint a legal representative for future asbestosis victims was not a final order and, hence, not ripe for appellate review. The court did, however, in dicta, comment on the issue of potential asbestosis victims and the extent of their relationship to the reorganization case at bar. The Seventh Circuit noted that individuals exposed to asbestos in states where a cause of action accrues upon inhalation would appear to have claims provable in bankruptcy. Moreover, the court further commented that even in states where manifestation is the trigger for accrual (and further assuming the term "claim" defined in § 101(4) could not encompass these individuals), a bankruptcy court might be able to use its equitable powers to provide for future asbestosis victims upon final approval of a reorganization plan. Although it was merely dicta, the court's sensitivity to the complex issue of what rights and interests future asbestosis victims might possess in the UNR reorganization is clearly apparent.

[An unpublished copy of this note was cited in both of these cases—Eds.]