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## Feature

BY EDWARD NEIGER AND DAVID STERN

### The Evolution of Future Claims Representatives



**Edward Neiger**  
ASK LLP; New York



**David Stern**  
ASK LLP; St. Paul, Minn.

Edward Neiger is co-managing partner of ASK LLP in New York and oversees the firm's Bankruptcy, Mass Tort and Personal Injury Divisions. He is also a 2019 ABI "40 Under 40" honoree. David Stern is an associate in the firm's St. Paul, Minn., office and represents clients in mass tort bankruptcy litigation.

A future claims representative (FCR) is a person in a mass tort bankruptcy who is "appointed to represent and protect the interests of persons with future unknown claims."<sup>1</sup> Appointed by the bankruptcy court,<sup>2</sup> an FCR is paid by the debtor's estate, upon court approval.<sup>3</sup> The FCR's statutory role is "protecting the rights of persons that might subsequently assert demands,"<sup>4</sup> and typical tasks may include familiarizing themselves with the debtor's insurance, business affairs, assets and liabilities, relationships and "other due diligence items," as well as handling negotiations regarding a potential reorganization plan.<sup>5</sup>

An FCR is considered a party-in-interest under 11 U.S.C. § 1109(b) and has all of the powers and duties of a committee as set forth in 11 U.S.C. § 1103.<sup>6</sup> This person can hire professionals with prior court approval,<sup>7</sup> and can compel the production of information.<sup>8</sup> An FCR can appeal court orders<sup>9</sup> and object to plan confirmation.<sup>10</sup>

This article explores the evolution of the FCR, from its judicial creation to its codification and its further judicial expansion. This article also analyzes how courts have dealt with poten-

tial future claims in three pending cases, and provides a cautionary note on expanding the FCR role too broadly.

#### First FCR in Bankruptcy: Creature of Judicial Construction

The first use of an FCR in a bankruptcy was the first mass tort bankruptcy, *In re Johns-Manville Corp.*<sup>11</sup> In this case, the debtor wanted to discharge its past and future asbestos liability,<sup>12</sup> but asbestos has a long latency period, with injuries sometimes taking decades to manifest.<sup>13</sup> Thus, the court appointed a representative to advocate for the interests of people who had been exposed to the debtor's asbestos but had not yet manifested symptoms.<sup>14</sup> At the time, the Bankruptcy Code did not overtly permit FCRs, so the *Johns-Manville* court justified appointing an FCR by citing state court cases demonstrating the "inherent" power "in every court" to appoint "some kind of representative for parties-in-interest whose identities are yet unknown."<sup>15</sup>

#### Enactment of FCRs in Asbestos Mass Tort Bankruptcies

Congress amended the Bankruptcy Code in 1994 by enacting § 524(g) to explicitly permit the format of the *Johns-Manville* bankruptcy for future asbestos cases, including the use of FCRs.<sup>16</sup> Although the phrase "future claims representative" does not appear in § 524(g) or elsewhere in the Code, it is

1 See *Wright v. Owens Corning*, 679 F.3d 101, 108 n.7 (3d Cir. 2012).

2 11 U.S.C. § 524(g)(4)(B)(i).

3 See Order Appointing Roger Frankel, as Legal Representative for Future Opioid Personal Injury Claimants, Effective as of the Petition Date, *In re Mallinckrodt PLC*, Case No. 20-12522-JTD (Bankr. D. Del. June 11, 2021) (hereinafter the "Frankel Appointment Order").

4 11 U.S.C. § 524(g)(4)(B)(i).

5 See Debtors' Motion for Entry of an Order Appointing James L. Patton, Jr., as Legal Representative for Future Claimants, *Nunc Pro Tunc* to the Petition Date at Ex. C, *Boy Scouts of Am.*, Case No. 20-10343-LSS (Bankr. D. Del. March 18, 2020).

6 See Order Appointing James L. Patton, Jr., as Legal Representative for Future Claimants, *Nunc Pro Tunc* to the Petition Date, *In re Boy Scouts of Am.*, Case No. 20-10343-LSS (Bankr. D. Del. April 24, 2020) (hereinafter the "Patton Appointment Order").

7 See *In re Imerys Talc Am. Inc.*, Case No. 19-10289, 2020 WL 6927654, at \*1, \*4 (Bankr. D. Del. Nov. 20, 2020) (citing 11 U.S.C. §§ 105(a), 330, 331, 524(g)).

8 See Fed. R. Bankr. P. 2004.

9 *In re Bestwall LLC*, Case No. 3:20-cv-105-RJC, 2022 WL 68763, at \*1, \*4 (W.D.N.C. Jan. 6, 2022).

10 See *In re Flintkote Co.*, 486 B.R. 99, 111 (Bankr. D. Del. 2012) ("Parties-in-interest also have standing to object to confirmation of a plan.").

11 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd sub nom.*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

12 See *In re Johns-Manville Corp.*, 36 B.R. 743, 745-46, 749 (Bankr. S.D.N.Y. 1984).

13 *Id.* at 745.

14 *Id.* at 749, 759.

15 *Id.* at 758-59.

16 See 11 U.S.C. § 524(g)(4)(B)(i); *In re Combustion Eng'g Inc.*, 391 F.3d 190, 235 n.47 (3d Cir. 2004).

well established that § 524(g)(4)(B) requires their use in asbestos bankruptcies utilizing channeling injunctions.<sup>17</sup> The Code only explicitly permits FCRs in chapter 11 asbestos bankruptcies,<sup>18</sup> and Congress was intentionally neutral regarding whether courts could use § 524(g)'s tools in non-asbestos cases.<sup>19</sup>

## Bankruptcy Courts Expanded FCRs Beyond Asbestos Mass Tort Bankruptcies

Just as a court created the first FCR before the Bankruptcy Code explicitly permitted it, bankruptcy courts expanded the use of FCRs beyond the asbestos context to which § 524(g) explicitly applies. In 1988, years before § 524(g)'s enactment, a bankruptcy court appointed an FCR in a case involving personal injuries from intrauterine devices.<sup>20</sup> Courts have been appointing FCRs in cases involving non-asbestos injuries with long latency periods ever since.<sup>21</sup> When courts appoint FCRs in bankruptcies that are unrelated to asbestos, they generally cite 11 U.S.C. §§ 105(a) and 1109(b) as the statutory authorities.<sup>22</sup>

## FCRs Protect the Due-Process Rights of Future Claimants

The Fifth Amendment's safeguard that "[n]o person shall ... be deprived of life, liberty, or property without due process of law"<sup>23</sup> extends to bankruptcy. One court reasoned that "[t]he bankruptcy power is subject to the Fifth Amendment."<sup>24</sup> Meanwhile, the Bankruptcy Code is "founded in fundamental notions of procedural due process."<sup>25</sup> Another court noted that "[d]ue process requires notice that is 'reasonably calculated to reach all interested parties, reasonably conveys all the required information, and permits a reasonable time for a response.'"<sup>26</sup>

At its foundation, the purpose of an FCR is to protect future claimants' due-process rights.<sup>27</sup> The concern is that without pushback from an FCR, current creditors would consume all of the debtor's available resources, leaving nothing for future creditors.<sup>28</sup> Some courts have held that a

restructuring with no FCR violated future claimants' due-process rights such that the debtor never discharged its liability to them.<sup>29</sup>

**Courts should continue appointing FCRs in cases primarily discharging liability for injuries with long latency periods or in cases where they are otherwise absolutely necessary.**

## A Potent Tool on the Edge of Due Process

Three currently pending bankruptcies illustrate how the interests of future creditors were protected. *In re Boy Scouts of America*<sup>30</sup> is an example of the appropriate use of an FCR in a non-asbestos case. Courts recognize that survivors of childhood sexual abuse sometimes repress their memories of the abuse.<sup>31</sup> In the *Boy Scouts* case, cognizant of how childhood sexual abuse can impact memory, the court appointed an FCR with a narrow scope of representation: to only represent survivors who were sexually abused after the debtor filed for bankruptcy and did not file a proof-of-claim form by the bar date, and either were not 18 years old by the bar date or were not aware of the sexual abuse because they repressed their memory of it, if the concept of repressed memory is recognized by the highest court of the jurisdiction where the abuse occurred.<sup>32</sup> The *Boy Scouts* court joined a line of sexual abuse cases appointing FCRs in a creative and properly limited fashion.<sup>33</sup>

*In re Mallinckrodt*<sup>34</sup> is an example of a case where an FCR might not have been absolutely necessary because of the short latency period of opioid addiction, but the court appointed one anyway, upon the agreement of all major parties. Mallinckrodt manufactures opioids<sup>35</sup> and wanted to discharge its past and future liability for harm its opioids caused.<sup>36</sup> The company was successful in getting the court to appoint an FCR.<sup>37</sup> Mallinckrodt likely moved to appoint an FCR to reduce the ability of future claimants to litigate against it for opioid liability.<sup>38</sup> The whole point of an FCR is to protect the due-process rights of future claimants whose injuries have not yet manifested due to a long latency peri-

17 See *In re Energy Future Holdings Corp.*, 949 F.3d 806, 812 (3d Cir. 2020).

18 See *Combustion Eng'g*, 391 F.3d at 234 nn.45, 46 (quoting 11 U.S.C. §§ 524(g)(1)(A), 524(g)(2)(B)(i)(I), (ii)(I-III), 524(g)(4)(B)(i)).

19 See 140 Cong. Rec. H10752, 10766 (daily ed. Oct. 4, 1994) ("The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas.").

20 See *In re A.H. Robins Co. Inc.*, 88 B.R. 742, 742-44 (E.D. Va. 1988).

21 See *In re Eagle-Picher Indus. Inc.*, 203 B.R. 256, 261, 267 (S.D. Ohio 1996) (appointing FCR for future claims caused by asbestos and lead); *In re Hoffinger Indus. Inc.*, 307 B.R. 112, 115 (E.D. Ark. 2004) (appointing FCR for future claims caused by swimming pools and pool accessories).

22 See, e.g., Patton Appointment Order 2-3 (citing 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); 11 U.S.C. § 1109(b) ("A party-in-interest ... may raise and may appear and be heard on any issue in a case under this chapter.")).

23 U.S. Const. amend. V.

24 *U.S. v. Security Indus. Bank*, 459 U.S. 70, 74 (1982).

25 *In re HNRK Dissolution Co.*, 3 F.4th 912, 927 (6th Cir. 2021) (quoting *In re Savage Indus. Inc.*, 43 F.3d 714, 721 (1st Cir. 1994)).

26 See *Jones v. Chemetron Corp.*, 72 F.3d 341, 346 (3d Cir. 1995) (quoting *Greyhound Lines Inc. v. Rogers (In re Eagle Bus Mfg. Inc.)*, 62 F.3d 730, 735 (5th Cir. 1995)).

27 See *Jones v. Chemetron Corp.*, 212 F.3d 199, 209 (3d Cir. 2000) ("[D]ue-process considerations are often addressed by the appointment of a representative to receive notice for and represent the interest of a group of unknown creditors.").

28 See *In re Amatek Corp.*, 755 F.2d 1034, 1042-43 (3d Cir. 1985) (noting that creditors' committee "comprised of asbestos claimants whose injuries had already manifested" opposed creation of FCR because "if future claimants are excluded from the reorganization plan, the current claimants will receive a larger portion of an obviously limited fund").

29 See *In re Grumman Olson Indus. Inc.*, 467 B.R. 694, 710 (Bankr. S.D.N.Y. 2012) ("[T]here was not a future claims representative in this case, or any provisions made for unrepresented future claimants. Thus, [future claimants] ... were not afforded either the notice and opportunity to participate in the proceedings or representation in the proceedings that due process would require in order for them to be bound by the Bankruptcy Court's orders."); *Chemetron*, 212 F.3d at 209 ("[I]f a potential claimant lacks sufficient notice of a bankruptcy proceeding, due process considerations dictate that his or her claim cannot be discharged by a confirmation order."); *In re Chance Indus. Inc.*, 367 B.R. 689, 708-10 (Bankr. D. Kan. 2006).

30 No. 20-10343-LSS (Bankr. D. Del.).

31 See *Clark v. Edison*, 881 F. Supp. 2d 192, 201-17 (D. Mass. 2012); *Isley v. Capuchin Province*, 877 F. Supp. 1055, 1055-67 (E.D. Mich. 1995).

32 See Patton Appointment Order ¶ 4.

33 See, e.g., *In re Roman Catholic Archbishop of Portland in Oregon*, Case No. 04-37154-ELPLL, 2005 WL 148775, at \*1 (Bankr. D. Ore. Jan. 10, 2005); Order Authorizing Appointment of Future Claimants' Representative and Appointing Fred C. Caruso as Future Claimants' Representative ¶ 2, *In re USA Gymnastics*, Case No. 18-09108-RLM-11 (Bankr. S.D. Ind. May 17, 2019) (hereinafter the "Caruso Appointment Order").

34 Case No. 20-12522 (JTD) (Bankr. D. Del. 2020).

35 See Declaration of Stephen A. Welch, Chief Transformation Officer in Support of Chapter 11 Petitions and First Day Motions ¶¶ 12, 71-72, *Mallinckrodt*, Case No. 20-12522 (JTD) (Bankr. D. Del. Oct. 12, 2020).

36 *Id.* at ¶¶ 68, 83, 91, 93.

37 See Frankel Appointment Order.

38 See *Grumman Olson*, 467 B.R. at 710; *Chemetron*, 212 F.3d at 209; *Chance*, 367 B.R. at 708-10.

od.<sup>39</sup> However, common opioid injuries have a short latency period, and it takes only a “couple of weeks” to get addicted to opioids.<sup>40</sup> In addition, an overdose can occur “minutes to hours after the drug was used.”<sup>41</sup>

The use of an FCR when not absolutely necessary may handicap the interests of the debtor’s current creditors and ultimately may harm the institution of the FRC itself, even in cases where it is absolutely necessary. This is particularly true in non-asbestos cases where there is no statutory precedent for FCRs. For example, the continued expansion of “nonconsensual third-party releases” in cases where they were not absolutely necessary has harmed the concept itself, even in cases where they were broadly supported and absolutely necessary, such as in the *Purdue Pharma* bankruptcy, where the district court reversed a broadly supported plan on the basis that it contained nonconsensual third-party releases.<sup>42</sup> Since nonconsensual third-party releases and FCRs have the same legislative and judicial history, a pertinent lesson should be learned: The overuse of the FCR may ultimately be its downfall.

Interestingly, the *Purdue Pharma* cases provided a unique and novel way of dealing with the problem of future claims with short latency periods. In *In re Purdue Pharma LP*,<sup>43</sup> the court never appointed an FCR, as no party requested it. Instead, the court imposed a claims bar date,<sup>44</sup> and to deal with future claims, the debtor set aside \$5 million. After a given period of time, any unused portion of such amount will revert to the trust for current victims.<sup>45</sup>

## Conclusion

Courts should continue appointing FCRs in cases primarily discharging liability for injuries with long latency periods or in cases where they are otherwise absolutely necessary. However, expanding the scope of the FCR by appointing them in every case with tort creditors may ultimately backfire and hurt future claimants, even in cases where an FCR is eminently appropriate. **abi**

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39 See *Chemetron*, 212 F.3d at 209; *Amatex*, 755 F.2d at 1042-43.

40 “The Science of Addiction: Can Opioids Be Taken Responsibly,” John Hopkins Medicine, available at [hopkinsmedicine.org/opioids/science-of-addiction.html](http://hopkinsmedicine.org/opioids/science-of-addiction.html) (unless otherwise specified, all links in this article were last visited on Sept. 19, 2022).

41 “Overdose Education,” Boston University School of Medicine, Clinical Addiction Research & Education Unit, available at [www.bumc.bu.edu/care/research-studies/project-recover/overdose-education](http://www.bumc.bu.edu/care/research-studies/project-recover/overdose-education).

42 See Decision and Order on Appeal at 7, 141-42, *In re Purdue Pharma LP*, Case No. 21-cv-7532 (CM) (S.D.N.Y. Dec. 16, 2021) (vacating bankruptcy court’s confirmation order because plan contained nonconsensual third-party releases), *appeal pending*, Case No. 22-110 (2d Cir. Feb. 18, 2022).

43 Case No. 19-23649 (SHL) (Bankr. S.D.N.Y. 2019).

44 See Order Establishing (I) Deadlines for Filing Proofs of Claim and Procedures Relating Thereto, (II) Approving the Proof of Claim Forms, and (III) Approving the Form and Manner of Notice Thereof 1-16, *Purdue*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Feb. 3, 2020).

45 See Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma LP and Its Affiliated Debtors § 5.7(f), *Purdue*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Sept. 2, 2021); Findings of Fact, Conclusions of Law, and Order Confirming the Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma LP and Its Affiliated Debtors § R.R.(c)-(d), *Purdue*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Sept. 17, 2021).