The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?

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ESSAY

THE DALKON SHIELD CLAIMANTS TRUST:
PARADIGM LOST (OR FOUND)?

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In this Essay, Dean Vairo discusses the policies and procedures governing the Dalkon Shield Claimants Trust. After raising questions about the Trust's experience in a theoretical and jurisprudential context, Dean Vairo describes the historical development of the Trust, and provides a preliminary assessment of the Trust's performance. Dean Vairo addresses various criticisms of the Trust and calls for a reasoned analysis of the Trust's policies in light of the theoretical questions raised in this Essay to determine whether the Trust should be considered as a model for resolving other mass tort cases.

INTRODUCTION

THE A.H. Robins Plan of Reorganization1 (the “Plan”) established a settlement fund with more than $2.3 billion2 to compensate the thousands of women and men who claimed injuries resulting from the use of the Dalkon Shield Intrauterine Device.3 The Plan, which was negotiated and agreed to by all the parties to the Robins reorganization, provided for the establishment of the Dalkon Shield Claimants Trust (“Trust”) and a Claims Resolution Facility (“CRF”) to be run by an

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independent Board of Trustees. In four years as a Trustee of the Dalkon Shield Claimants Trust, I have had little time to reflect fully on the larger implications of the Trust's claims resolution process.

The purpose of this Essay is threefold. First, the time has come to consider the Trust's policies and procedures in a larger theoretical and jurisprudential context. Specifically, the Dalkon Shield Claimants Trust experience raises questions in at least three broad areas of inquiry: professional ethics, law and economics, and feminist jurisprudence. Part I of this Essay raises, but does not begin to answer, some of the questions that ought to be kept in mind as one considers the Trust's policies, procedures and experience, which are discussed in Parts II and III of this Essay.

The second purpose is to provide a history of the Trust. To that end, Part II of this Essay describes the origins of the massive litigation problem and the formulation of a bankruptcy solution. Part III details how the Trustees acted to implement the Reorganization Plan.

The third purpose of this Essay is to provide a preliminary assessment of the Trust. Thus, Part IV discusses various criticisms of the Trust, suggests that the Trust will be successful in resolving a large number of claims fairly and efficiently, and argues that the Trust should be considered as a model for resolving other mass tort cases.

I. JURISPRUDENTIAL CONSIDERATIONS

In implementing the Plan and establishing the claims resolution process, the Trustees were motivated, quite consciously, by a number of factors. The Trustees' decision-making always was driven by efficiency considerations in an effort to maximize the resources available for claimant recoveries. The vast majority of these claimants are women, and less than thirty percent of the claimants were represented by counsel. Thus, it also was clear that this claimant population might make a difference in terms of decisions the Trustees would make or shape, and in terms of how others might react to those decisions.

The Trustees' study of pre-bankruptcy litigation demonstrated that, in general, a claimant's recovery had less to do with the merits than one would hope or expect. The Trustees also knew that many Dalkon Shield claimants felt victimized by the legal process and by lawyers both before and during the bankruptcy process. As a result, the Trustees tried to

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4. The Claimants Trust Agreement authorizes the Trustees to set up a claims resolution process to resolve the claims of those who timely notified the court of their intention to seek compensation. See Claimants Trust Agreement § 2.02, In re A.H. Robins Co. (No. 85-01307-R), in Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter CTR].

5. See infra notes 61-69 and accompanying text for a discussion of the selection of the original five Trustees, the removal of three of these Trustees, and the appointment of new Trustees.

develop a system that made claimants less dependent on external forces, and more in a position to handle their claims themselves if they so chose. This development, in turn, reduced the role and importance of lawyers.7

These basic considerations implicate at least three broad jurisprudential areas: professional ethics, feminist jurisprudence, and law and economics. No attempt will be made here to analyze fully the Trust’s experience in these areas. Rather, this part of the Essay raises important questions that I will explore in future articles.

A. Professional Ethics

The way in which some lawyers obtain and represent Dalkon Shield clients raises serious questions of professional ethics. For example, nine lawyers or law firms represent over 10,000 Option 3 claimants.8 Can one attorney or firm serve hundreds, let alone thousands, of clients?9 When counseling client A, is an attorney’s judgment clouded by his or her fee expectations in other cases? Is the usual advice given in a product liability case appropriate in an essentially administrative system for resolving claims? Are contingent fees ranging from twenty-four to fifty

7. This reduced role for lawyers is especially evident during the claims resolution part of the process. See infra Part II.A-B and accompanying text for a discussion of the claims resolution process.

8. Twenty-five thousand Option 3 claimants are represented by lawyers handling more than 10 Dalkon Shield claims. Over 11,000 Option 3 claimants are not represented by counsel. The Plan contemplates that Option 3 be elected by those claimants with the most serious Dalkon Shield injuries. See infra Part II.B.2.d.

percent for settling Dalkon Shield claims appropriate if a claim is settled without the need for negotiation or formal dispute resolution?10

When there is a fixed compensation pool, do attorneys have any duty to those who are unrepresented? Do they have any duty to their other clients? How far should attorneys go in "cooperating" with the Trust? How can attorneys who represent numerous claimants fairly advise clients who have obtained the first offers when the attorneys may owe a considerable amount to lenders who have carried them while waiting for settlements to be administered?11 Is there a need for courts to supervise lawyers' conduct and fee structures when lawyers are representing hundreds or thousands of claimants against one defendant?

Typically, the federal class action rule, and similar state provisions, protect the interests of class members when hundreds or thousands of persons have similar claims.12 In the Dalkon Shield claims resolution process, many lawyers have hundreds, and even thousands, of clients. Like the Dalkon Shield claims process, many large class actions feature

10. Most claims are settled on this basis, on the forms submitted and medical records, rather than by negotiation or formal dispute resolution. The contingent fee arrangement is supposed to shift risks from the client to the attorney—the high risk of litigating justifies a high fee. Commentators have criticized the use of high contingent fee arrangements in claims resolution, as opposed to litigation, contexts because the high risk does not exist. See Lester Brickman, The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?, 13 Cardozo L. Rev. 1819, 1837 (1992) [hereinafter Brickman, Asbestos Litigation Crisis]; Lester Brickman, Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark, 37 UCLA L. Rev. 29, 74 (1989) [hereinafter Brickman, Contingency Fees]; John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 889-94 (1987). Charging high contingent fees but not assuming any risk is arguably unethical. See Brickman, Asbestos Litigation Crisis, supra, at 1837 (calling it "illegal and unethical" as well as "grossly exorbitant" to collect contingent fees under such circumstances); Brickman, Contingency Fees, supra, at 53 (charging 33 to 40% contingency fee is violative of "the fiduciary obligation to deal fairly with the client" when risk of nonrecovery is low).

In the case of a properly screened Dalkon Shield claim, risk of nonrecovery is minimal. Lawyers know exactly how much they can expect from any single Option 1 or Option 2 claim simply by checking the Trust's damages schedules. Although it is possible to recover from $125 to over a $1,000,000 in Option 3, the medical evidence, and not the skill of the lawyer in "presenting" a claim, is determinative. See infra Part II.E.3. Arguably, the lawyer's skill and "risk" factors are relevant only if the claimant rejects the Option 3 offer and elects trial or arbitration. One commentator, in describing the asbestos claim resolution process, noted that it is "unfathomable . . . why lawyers continue to be paid on a contingency basis since the processing of asbestos claims has become relatively simple." Christopher P. Lu, Procedural Solutions to the Attorney's Fee Problem in Complex Litigation, 26 U. Rich. L. Rev. 41, 49 (1991). Although the medical issues are not always simple, the claims resolution process in the Dalkon Shield is very straightforward. See infra Part III.A.2.F.

11. See, e.g., Gladwell, supra note 9, at H1. A plaintiff's lawyer with a multitude of clients dismissed criticisms of his high contingent fees by stating he had his own financial concerns to worry about. In representing his Dalkon Shield claimants, the lawyer became $1 million in debt and paid $100,000 a year in interest.

contingency fees and a limited compensation fund. Should courts analogize such representation to class actions to protect the due process interests of the clients?  

The ethical issues are not confined to lawyers' behavior. How can Trustees, who are charged to act as fiduciaries, do so knowing that at least some subset of claimants will become adversaries? Do Trustees owe a higher duty to some claimants than others? For example, the Plan provides for Late Claimants 14 to receive payments if money is left over after all timely claimants are paid. 15 Do Trustees owe a higher duty to timely claimants?

B. Feminist Jurisprudence

The essence of the Trustees' policies is to maximize the benefits accorded to the group of claimants as a whole. The Trustees knew that their policies might not benefit particular individuals to the maximum degree that might have been expected in a single tort case. Although the Trustees' decisions were not consciously made from a feminist perspective, it seems obvious on reflection that their policies may very well fit into a feminist theoretical or jurisprudential context. 16 This dimension

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13. See, e.g., Brickman, Contingency Fees, supra note 10, at 65 (stating "[c]ontingent fee retainer agreements require . . . unparalleled judicial supervision"); Weinstein & Hershenov, supra note 9, at 289 ("[W]ith a limited compensation fund, court control over fees . . . is desirable."). Courts, however, have been reluctant to assume this function. See, e.g., Brickman, Asbestos Litigation Crisis, supra note 10, at 1838 n.72 (there is a "virtual complete failure of the courts to exercise superintendence"); Coffee, supra note 10, at 897 ("[T]he general attitude of courts . . . has been one of benign neglect."); Weinstein, supra note 9, at 1963 ("[A]s judges, we do not want to get involved in fees and supervision of lawyers.").

As noted above, the courts generally do not become involved in overseeing attorneys fee. The only exception is the class action, where judges do, in fact, act as guardians of the class members' interests with respect to attorneys fees. See Lu, supra note 10, at 61; Weinstein & Hershenov, supra note 9, at 326. In class actions, due process demands that judges protect the interests of absent class members. See Hansberry v. Lee, 311 U.S. 32, 45 (1940). Because of the inherent difficulties a lawyer has in assisting hundreds of clients with their claims, such clients are in a similar position as class members, particularly through the claims resolution process. Accordingly, the due process rationale for requiring court supervision may well apply to the Dalkon Shield claimants. As discussed earlier, many claimants are represented by lawyers with thousands of clients, making individual contact extremely difficult. Further, requiring a claimant to pay a large contingency fee to a lawyer who has provided little assistance with her claim undermines her satisfaction with her settlement offer.

14. Late Claimants are those who filed claims after the Bar Date. See infra Part II.B.1.a.

15. Late Claimants will be paid on a subordinated basis if there is money to pay after all timely claimants are paid in full. See Dalkon Shield Trust Claims Resolution Facility § G(14), In re A.H. Robins Co. (No. 85-01307-R), in Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter CRF].

16. See Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. Legal Educ. 3, 4-12 (1988) [hereinafter Bender, A Lawyer's Primer].

Professor Bartlett describes the feminist legal method as: (i) asking the "woman question" to see how women and other groups have been excluded and what difference this
too needs to be explored in detail. While there is clearly no single “femi-
nist jurisprudence,”17 many feminist scholars seem to agree that femin-
nism should lead to less of an emphasis on maximizing an individual’s
position in an effort to preserve or protect the good of the whole.18

Not all schools of feminist thought encourage the values of interdepen-
dence and cooperation within the community because these values argua-
bly make women subject to male oppression and domination.19 The
Trust’s model, however, does not implicate the problems of oppression
and domination. Rather, the Trust views the claimant pool as a commu-
nity, mutually dependent and interconnected. The Trust’s approach, as
seen in its policies, ensures that cooperation and interpersonal responsi-
bility are the norm.

Rather than the traditional “male” model or “competitive, win-lose
approach” to dispute resolution,20 the Trust’s approach avoids a system
in which claimants, through their attorneys, vie with each other for a
settlement jackpot, to the detriment of later claimants and unrepresented
claimants. Instead, the Trust sought to develop a system that would
treat all claims fairly and equally by equalizing the position of repre-
sented and unrepresented claimants and by encouraging settlements that

makes; (ii) using feminist practical reasoning to delineate the real human issues involved,
rather than abstract legal principles, from the vantage point of the excluded; and (iii)
utilizing consciousness-raising to gain knowledge of a collective experience of oppression
through the sharing of individual, personal experiences. See Katharine T. Bartlett, Fe-
mist Legal Methods, 103 Harv. L. Rev. 829, 833-36, 837, 849, 863 (1990). The Trust
incorporates many aspects of this methodology. As will be discussed, the Trustees con-
centrated on evaluating how policies and procedures would affect the injured women (and
men), especially those without legal representation, as a group. See infra Part III.C-D;
see also Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev.
659, 687 (1989) (“[Dalkon Shield] claimants seemed to relish the opportunity to tell their
own stories.”).

17. Feminist jurisprudence is far from a single, unitary theory. See Leslie Bender,
Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibili-
ties, 1990 Duke L.J. 848, 850 n.7 (1990) [hereinafter Bender, Feminist (Re)Torts]; Linda
J. Lacey, Introducing Feminist Jurisprudence: An Analysis of Oklahoma’s Seduction Stat-
ute, 25 Tulsa L.J. 775, 779 (1990); Robin West, Jurisprudence and Gender, 55 U. Chi. L.
Rev. 1, 13 (1988). In general, feminist jurisprudence can be divided into three “schools of
thought”: liberal feminism (supporting traditional notions equating feminism with equal-
ity), radical feminism (focusing on the power relationship between men and women and
male subordination of women), and cultural feminism (that there is a “distinctively femi-
nine way of approaching moral and legal dilemmas” that has been undervalued in tradi-
tional legal doctrine and scholarship). See Cass R. Sunstein, Feminism and Legal Theory,
101 Harv. L. Rev. 826, 827 (1988); see also Carol Gilligan, In a Different Voice 173-74
(1982) (women’s morality focuses on ethics of care and nonviolence).

18. Many feminist jurisprudentialists view the values of cooperation and connection
as central to any theory of feminism. See Lacey, supra note 17, at 783; Suzanna Sherry,
Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543,
584-85 (1986); West, supra note 17, at 14.

19. See West, supra note 17, at 28-29; see also Lacey, supra note 17, at 79! (“[W]hile
cultural feminists celebrate connection and relationships, . . . [r]adical feminists believe
that cultural feminism perpetuates the pattern of women’s subordination by affirming
traits that contribute to women’s willing collaboration with their oppressors.”).

20. See Bender, A Lawyer’s Primer, supra note 16, at 7.
would give the highest possible amount to each individual claimant, varying according to the strength of the medical evidence, without depleting the funds necessary to treat all remaining claims in the same manner.

The Trust's approach, in light of these feminist principles, also presents an opportunity to question the distinction between public and private law, as well as the claimant's role in this kind of dispute.21

Because of the implications of mass tort disasters for the general public, courts cannot continue to view private mass tort litigation as merely settling a private dispute.22 Neither should the parties involved maintain such a view. Both tortfeasor and injured plaintiff should begin to view themselves in terms of the community.23 Public law should force tortfeasors, notably large corporations, to realize the implications of imposing harm on the community. At the same time, injured plaintiffs should realize their position in protecting that very same community.24 In considering whether plaintiffs would sacrifice maximum recoveries in order to protect their community, one problem that might arise is the role of the lawyer. Lawyers, too, should re-examine their role in an interdependent, cooperative community and avoid letting fee considerations interfere with the fulfillment of that role.

Another aspect of the Dalkon Shield Claimants Trust experience needs to be examined. At the inception of the Dalkon Shield Claimants Trust, only about twenty-nine percent of the claimants were represented by counsel. By the time the Trust began paying the larger claims, over sixty percent were unrepresented. Were the injuries suffered by the women trivialized by lawyers? Do women have less access to legal services? Or did the procedures established by the Trust make legal representation unnecessary?

C. Law and Economics

The Trust's policies were designed to achieve as many settlements as possible in order to avoid more costly and time-consuming traditional

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22. See Bender, Feminist (Re)Torts, supra note 17, at 868 (tortfeasors "imposing risks on the public . . . and . . . coping with the harms resulting from those risks are public questions of the highest order"); David G. Owen, Deterrence and Desert in Tort: A Comment, 73 Cal. L. Rev. 665, 666-67 (1985) (stating that tort law is "often public in its spirit and effect"); Rosenberg, supra note 21, at 901 ("a claim's deterrence value is . . . a 'public good'").

23. See Bender, Feminist (Re)Torts, supra note 17, at 866; Rosenberg, supra note 21, at 907-08.

24. See Rosenberg, supra note 21, at 907 ("[P]ublic law litigation thus seeks to achieve the benefits of deterrence by sacrificing some of the benefits of individualized treatment of claims.").
dispute resolution techniques, such as negotiation, formal arbitration, or trial. Although it is too early to determine whether the Trust will achieve its goal, it will be interesting to see how our decisions and experience measure up from a law and economics perspective and from a game theory perspective. It will be interesting indeed to determine whether the Dalkon Shield Claimants Trust represents a successful marriage of law and economics principles and feminist jurisprudence, although scholars in both camps may find such a notion alarming.

II. Historical Overview

A. Pre-Bankruptcy

In the late 1960s, the public became alarmed about the side effects of the birth control pill. As a consequence, the medical community mounted an effort to develop non-chemical, presumably safer methods of birth control. One method that received renewed attention was the intrauterine device (“IUD”). A doctor and an engineer developed the Dalkon Shield and claimed that it had a very high rate of preventing unwanted pregnancies. In 1970, A.H. Robins acquired the rights to

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26. See Roger B. Myerson, Game Theory: Analysis of Conflict (1991); Eric Rasmusen, Games and Information: An Introduction to Game Theory (1989). Game theory analysis uses "games"—such as prisoner’s dilemma or the zero-sum game—to illustrate human behavior when faced with the choice to cooperate or not. For a general overview of this theory, see Carol M. Rose, Women and Property: Gaining and Losing Ground, 78 Va. L. Rev. 421, 424-28 (1992).

27. See, e.g., Michael Distelhorst, Judging Ourselves as Heirs to the Realist Insight: The Role of Ethics as a Bridge Between Law and Life, 60 U. Cin. L. Rev. 43, 59 (1991) ("these groups are not in any way philosophically interchangeable"); Minda, supra note 25, at 601 ("the ... movements appear to be fundamentally different"); Deborah L. Rhode, Feminist Critical Theories, 42 Stan. L. Rev. 617, 627 (1990) ("[T]he target ... in some critical feminist analyses, is ... the version [of liberal legalism] favored by law and economics commentators."). For a good example of the clashes between the two schools, compare Richard A. Posner, The Ethical Significance of Free Choice: A Reply to Professor West, 99 Harv. L. Rev. 1431 (1986), with Robin West, Submission, Choice, and Ethics: A Rejoinder to Judge Posner, 99 Harv. L. Rev. 1449 (1986) (debating a basic principle of law and economics: voluntary, consensual transactions). Even Professor West, however, noted the need “to cure our mutual ignorance” and to “talk across the descriptive and normative divide.” West, supra, at 1456. The Dalkon Shield Trust’s policies may be a good starting point to bridge the divide because the Trustees’ policies encompassed basic principles of law and economics as well as feminist thought. But see Distelhorst, supra, at 44 (arguing ethics as the bridge between competing philosophies of law).

28. For further background on the pre-bankruptcy period, see Disclosure Statement, supra note 3, at 16-29.


30. See id.
the Dalkon Shield.

Robins began national marketing of the Dalkon Shield in January 1971. By the time it withdrew the product from the United States market, Robins had distributed approximately 2.8 million Dalkon Shields in the United States, and also had distributed about 1.7 million Dalkon Shields to foreign countries. Approximately 3.6 million women throughout the world actually used the Dalkon Shield.

In the 1970s, doctors began reporting various problems with the Dalkon Shield. Women started filing lawsuits in state and federal courts charging a variety of injuries linked to the Dalkon Shield, such as unwanted pregnancies, ectopic pregnancies, septic abortions, miscarriages, and birth defects allegedly caused to fetuses when conception took place with the Dalkon Shield in the woman's uterus. There also were complaints about excessive bleeding and cramping, Pelvic Inflammatory Disease ("PID"), and complications arising from PID, including sterilizing surgery and infertility. Many young women, who had not yet had children, were injured. For obvious reasons, many of these cases had high emotional value. In some instances, infections were so serious that Dalkon Shield users died.

By the fall of 1975, Robins faced 286 complaints and could foresee the coming crush of cases. By the end of 1975, a federal Multidistrict Litigation Panel ("MDL") was convened to assist with Dalkon Shield cases. The MDL ultimately transferred the federal Dalkon Shield cases to the district court of Kansas for pretrial proceedings under 28 U.S.C. § 1407.

Next, various federal Dalkon Shield cases were transferred to the Northern District of California. By the end of 1979, thousands of cases were pending nation-wide. The District Court in California tried what at that time was a novel approach: After realizing that each Dalkon Shield case would take at least a week to try, and realizing the potentially huge exposure (estimated to be well over Robins' net worth because of the claims for punitive damages), the court certified a nationwide class under Rule 23(b)(1) of the Federal Rules of Civil Procedure on the issue of punitive damages, and a California class under Rule 23(b)(3) of the Federal Rules of Civil Procedure on the issues of liability and compensatory

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32. See id.
33. See One of Three Women Found Infertile, U.S. Affairs, June 14, 1985, Medicine & Health, at B3.
35. See id. at 542.
damages.\textsuperscript{36} The Ninth Circuit, however, reversed.\textsuperscript{37}

At the same time, a securities class action (ultimately settled for $6.9 million) was filed in the Southern District of New York for Robins' alleged misrepresentations and failure to disclose other information about the Dalkon Shield in Robins' financial statements.

Meanwhile, the number of lawsuits against Robins continued to increase. Although Robins won jury verdicts in many of the early cases, as certain sensitive documents\textsuperscript{38} were discovered, plaintiffs began to win, and win big. For instance, in May 1985, a jury in the \textit{Tetuan} case in Kansas awarded compensatory damages of $1.75 million, and punitive damages of $7.5 million.\textsuperscript{39} Although Robins and Aetna, its insurer, had disposed of 9,500 suits, and had paid out approximately $530 million, some 6,000 cases were still pending. Three months after \textit{Tetuan}, Robins filed for reorganization relief under Chapter 11 of the Bankruptcy Code.\textsuperscript{40}

\section*{B. The Bankruptcy Case}

Robins' bankruptcy was precipitated by the "avalanche of actions filed in various state and federal courts throughout the United States ... seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as a Dalkon Shield."\textsuperscript{41} The bankruptcy case has been the subject of at least two books which focus on the various relationships of the key players involved in the case.\textsuperscript{42} The main players were: 1) United States District Judge Robert R. Merhige, Jr., who retained jurisdiction over the case\textsuperscript{43} and jointly decided matters with bankruptcy Judge Blackwell N. Shelley; 2) the Claimants Committee, led by Murray Drabkin, at the time a partner at Cadwalader, Wickersham & Taft; 3) the Robins family, who controlled the company; 4) Aetna Insur-

\begin{itemize}
\item \textsuperscript{37} See In re Northern Dist. of California, Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 856 (9th Cir. 1982), cert. denied sub nom. A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983).
\item \textsuperscript{38} A member of the Robins' legal department claimed that Robins destroyed documents relating to Dalkon Shield claims. He contended that he secretly saved copies of some of these documents, which he ultimately produced. See Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1223 (Kan. 1987).
\item \textsuperscript{39} See id. at 1210.
\item \textsuperscript{41} A.H. Robins Co. v. Piccinin, 788 F.2d 994, 996 (4th Cir.), cert. denied, 479 U.S. 876 (1986).
\item \textsuperscript{42} See Morton Mintz, \textit{At Any Cost: Corporate Greed, Women, & the Dalkon Shield} (1985); Sobol, supra note 29.
\item \textsuperscript{43} Only federal judges appointed under Article III of the U.S. Constitution are permitted to adjudicate "traditionally judicial" matters. See Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982) (holding that bankruptcy judges could not constitutionally adjudicate "inherently judicial" matters). The A.H. Robins reorganization implicated thousands of tort claims which are "inherently judicial" in nature.
\end{itemize}
ance Company, Robins' insurance carrier, which was being sued for fraud and RICO violations along with Robins after plaintiffs' lawyers alleged that Robins and Aetna had conspired to withhold information about the problems with the Dalkon Shield; and 5) American Home Products, the company which eventually acquired Robins for more than $3 billion, the bulk of which funded the Trust.

The details regarding Robins' bankruptcy case are explained in the district court opinion confirming the Plan, and in a series of Fourth Circuit decisions. Robins' Plan was confirmed by order dated July 26, 1988 (the "Confirmation Order"). The Confirmation Order established the Dalkon Shield Claimants Trust and called for its initial funding in the amount of $100,000,000. After all appeals of the Confirmation Order were finally resolved, the Plan was consummated on December 15, 1989 (the "Consummation Date"), at which time the Trust received additional funds from American Home Products Corporation ("AHP"), Robins and Aetna for a total of $2.33 billion.

1. Estimation Hearing

The estimation hearing was an important part of the bankruptcy case. Its purpose was to estimate the amount of money that would be needed to satisfy all valid Dalkon Shield Claims.

a. The Bar Date

The court initially needed to determine the number of claimants. Early in the Chapter 11 case, the District Court fixed April 30, 1986, as the deadline for filing claims against Robins (the "Bar Date"). The district court's order setting the Bar Date also established a simplified two-step filing procedure for persons wishing to pursue Dalkon Shield personal injury claims against Robins.


47. See id. at 696.


50. First, claimants wishing to assert Dalkon Shield claims had to identify themselves by submitting their name and address in writing on or before the Bar Date. Upon receipt, the bankruptcy court entered that information into its computer records and sent the claimants a two-page questionnaire. The second step entailed returning the questionnaire to the court by June 30, 1986, for domestic claimants and by July 30, 1986, for foreign claimants. See In re A.H. Robins Co., 862 F.2d 1092, 1093 (4th Cir. 1988) [hereinafter Wiltz].
As a result of a worldwide notification campaign publicizing the Bar Date, the Bankruptcy Court began receiving thousands of claims every day beginning in January 1986. Although the notification campaign was criticized, about 350,000 claims were filed by the Bar Date. About 300,000 American women and men filed claims, and roughly 50,000 foreign women and men filed claims. The clerk of the Bankruptcy Court eventually ran triple shifts to process these claims.

Following the receipt of these claims, the court mailed a brief questionnaire to the claimants which asked for basic information about the claim. In the spring of 1987, the court mailed a second questionnaire to all claimants who failed to return the initial court questionnaire. The deadline for domestic claimants to mail the second questionnaire was July 15, 1987. The deadline for foreign claimants was August 15, 1987. Over 106,000 claimants failed to return the questionnaire, and those claims were disallowed by the court. The court, however, gave all disallowed claimants the opportunity to seek reinstatement of their claims. In sum, this left the court the task of approximating how much would be needed to pay the 197,000 active, timely claims.

b. Dalkon Shield Data Collection

In March 1986, Judge Merhige appointed Professor Francis McGovern, a specialist in mass torts, to assist in developing a data base from which the various parties in interest could approximate how much money would be needed to compensate all valid claims. Court appointed experts developed and sent a detailed questionnaire to a scientific sample of claimants. The various parties used the data obtained to present to the court their estimates of the funds necessary to pay all valid claims.

The estimates ranged from $7 hundred million (Robins' low end estimate) to $7 billion (the Claimants Committee's high end estimate). The Aetna expert estimated that the Trust would need $2.2 billion. Judge Merhige determined that $2.475 billion, payable over a reasonable period of time, would be needed to pay all valid Dalkon Shield claims and the Trust's administrative expenses in full.

51. See id. at 1093.

52. Due to the great volume of claims filed, the court quickly outgrew its office space and lacked the equipment necessary to maintain the enormous database of claim information. To meet its expanding needs, the court created an annex to the clerk's office known as the Dalkon Shield Records Center (the "DSRC"). The court staffed the DSRC with more than fifty temporary and full-time employees who created and maintained separate claim files for timely and late filed claims. Each claim file was pre-numbered and color coded by claim number. Timely filed claim files are buff-colored and late filed claim files are red. A claim file contains, inter alia, the claimant's original postcard or claim letter and questionnaire. Throughout the claims process, the clerk's office and the DSRC continually audited files to verify names, addresses, claim dates and questionnaire return dates.

53. See Wilts, 862 F.2d at 1095, for a detailed discussion of the reinstatement process, which involved a series of hearings and the participation of a Special Master.
2. The Plan

The parties, including all unsecured trade creditors and equity security holders, approved the Plan, which was made possible by American Home Products' offer to purchase Robins for more than $3 billion. The committee members' vote on the Plan was overwhelmingly positive. Indeed, about ninety-four percent of voting Dalkon Shield claimants voted in favor of the Plan. The district court formally confirmed the Plan in July 1988.

The Plan was adopted because of one basic element—the idea of full compensation to all creditors. Two other elements flowed from the element of full compensation: (1) the channelling of all Dalkon Shield claims to one compensation fund to achieve "Global Peace"; and (2) a Trust to be run by independent Trustees appointed by the court.

a. Full Compensation

The creditors approved the Plan because they believed that there would be sufficient money to pay all valid claims, including personal injury claims. The disclosure statement made clear, however, that if the money ran out, there would be no recourse against doctors, Aetna or others.

b. "Global Peace"

A controversial aspect of the Plan was the idea of "Global Peace." There were many parties to the bankruptcy litigation, and many defendants were named in the pre-bankruptcy Dalkon Shield cases. These defendants included: the A.H. Robins Company; members of the Robins family and other high officials of the Robins Company; Aetna (Robins' product liability carrier) which was accused of conspiring with Robins; and doctors and hospitals accused of medical malpractice associated with the use of the Dalkon Shield. The defendants all wanted the Chapter 11 case to result in the channelling of all pending and future Dalkon Shield claims into the Trust.

While the bankruptcy case was pending, lawsuits against Aetna continued to brew. Eventually, Judge Merhige certified a Rule 23(b)(1) settlement class in the Breland case against Aetna.54 The settlement provided two things: first, Aetna agreed to pay an additional $500 million to the compensation fund for Dalkon Shield claimants, including those whose claims were disallowed; and second, it resolved all Dalkon Shield related claims for Aetna.55

The Plan itself not only discharged the debtor, A.H. Robins, but it also released the Robins family, company officials, and doctors or health care providers who otherwise could have been sued for malpractice for claims

55. See id. at 709.
arising out of the insertion, removal or use of the Dalkon Shield by per-
manently enjoining such claims against them.

The Other Claimants Trust, which was to be funded with $50 million,
was available to pay doctors, hospitals or others who had claims for con-
tribution or indemnification against Robins. All personal injury claims
arising out of the use, insertion or removal of the Dalkon Shield were to
be filed against the $2.3 billion Dalkon Shield Claimants Trust.

Some plaintiffs' lawyers disagreed that there would be sufficient funds
to pay all personal injury claimants. Thus, they were concerned that
there would be no recourse against third parties such as doctors. Ac-
ccordingly, these plaintiffs' lawyers appealed both the *Breland*
class action
settlement and the injunction provisions against third parties. All ap-
peals, however, were unsuccessful. The Supreme Court denied certiorari
in the fall of 1989, and, in December 1989, the Plan was consummated
when American Home Products acquired A.H. Robins and remitted $2.3
billion to the Dalkon Shield Claimants Trust.

The Fourth Circuit specifically upheld the Plan's "Global Peace" as-
pect when it affirmed the Confirmation Order and approved the use of a
class action in the related Aetna *Breland* matter.

The Plan authorized the court to appoint five Trustees to implement
the CRF. The CRF provided the format for setting up the claims facil-
ity in Richmond, Virginia.

The CRF provides for several settlement options. This section de-
scribes the purposes of the different options provided for in the CRF.
Part III of this Essay discusses how the Trustees implemented the CRF,
including the range of payments offered.

Option 1—The "Short Form/Instant Offer"

The responses to the questionnaires submitted in connection with the
estimation hearing made clear that many of the claims filed would be
frivolous or of relatively low value, such as a temporary heavy bleeding
claim. The purpose of Option 1 was to permit a quick clearing of such
claims.

Option 2—The "Claim Form/Tailored Offer"

Dalkon Shield litigation, like other mass tort litigation, presented cau-
sation issues. In the Dalkon Shield case, the global causation issue was not too troublesome because medical experts agreed on the types of injuries the Dalkon Shield could cause. In fact, the CRF provided an exhibit which listed the various types of recognized Dalkon Shield injuries for which the Trustees could authorize payment.

The possibility of alternative causation, however, was a real concern. Medical evidence indicated that most of the injuries that were linked to the Dalkon Shield could have been caused by something else, such as another manufacturer's IUD, sexually transmissible diseases, and cancer. The purpose of Option 2 was to provide payment to claimants who had good medical proof of Dalkon Shield use and good medical proof of Dalkon Shield associated injury, but whose medical records revealed serious alternative causation problems.

**Option 3—The "Complete Form/Early Evaluation Offer"**

The purpose of Option 3 was to provide settlement offers based on the pre-petition historical settlement amounts for claimants with serious and provable Dalkon Shield injuries. The CRF provided that claimants who rejected Option 3 offers could attend a settlement conference. Finally, if settlements could not be reached within certain time-frames, claimants could elect binding arbitration or trial.

**Option 4—Deferral**

Option 4 permitted claimants to defer choosing among Options 1, 2, or 3 until after the claimant had assessed the full extent of her or his injuries.

**Late Claims**

The Plan also provided for the Trustees to process claims filed after the April 1986 Bar Date to determine whether they should be granted timely status. Late claimants who were not accorded timely status are entitled to compensation if there is money available after paying all timely claimants.

**Pro Rata Distribution**

Finally, the Plan provides that money left over after paying all claimants and the administrative expenses shall be paid to previously compensated claimants on a pro rata basis.

### III. The Trustees' Implementation of the CRF

Although the CRF provided this framework and some general guidelines, the Plan accorded the Trustees discretion to make the policy decisions needed to implement the Plan.

**A. Pre-Consummation Operations of the Trust**

The Plan provided for the appointment of five Trustees to administer
The selection of the Trustees was the subject of intense negotiation. In March 1988, several months prior to entry of the Confirmation Order, Judge Merhige informed the original five Trustees\textsuperscript{61} that they had been selected, and on April 11, 1988, the court entered an order appointing them.\textsuperscript{62}

Shortly thereafter, the court met with the Trustees "to impress upon them the tremendous responsibility of handling such a large number of claims and such an enormous trust fund," and to urge them "to hit the ground running."\textsuperscript{63} Specifically, the court wanted the Trustees to implement Option 1 and pay liquidated claims as soon as practicable because interest was continuing to accrue on these claims.\textsuperscript{64}

Although the pendency of the appeals of the Confirmation Order severely limited the powers of the Trust to resolve claims, the Trust was funded with a non-reversionary payment of $100 million (the "Start-up Payment") to lease office space, hire employees, purchase furniture and office equipment and begin paying Option 1 and Dalkon Shield Liquidated Claims.\textsuperscript{65}

1. Motion to Remove Trustees

Approximately two months after entry of the Confirmation Order, a group of five unaffiliated independent attorneys representing more than 1,800 Dalkon Shield claimants filed a motion to remove the Trustees for failing to discharge their fiduciary duties as set forth in the Claimants Trust Agreement. The motion was joined by attorneys representing over 1,400 other claimants. The motion alleged that the Trustees, among other things, had negligently failed to act prudently and expeditiously in setting up the Claims Resolution Facility, had opposed the court's efforts to supervise their activities, and had hired counsel who had an inherent conflict of interest.\textsuperscript{66} After a two day hearing, the court entered an order

\textsuperscript{60.} See id.

\textsuperscript{61.} The five original Trustees were: Barbara Blum, the President of the Foundation for Child Development and a former Commissioner of the New York State Department of Social Services; Kenneth Feinberg, a partner at Kaye, Sholer, Fierman, Hays & Handler and Special Master in the Agent Orange Product Liability case; Gene Locks, a partner at Greitzer and Locks, a Philadelphia law firm, who handled plaintiffs' asbestos claims and served as a member of various creditors committees in the asbestos litigations; Stephen Saltzburg, at the time a Law Professor at the University of Virginia; and Ann Samani, a Dalkon Shield claimant who served on the Dalkon Shield Claimants' Committee in the Robins Bankruptcy, and was Estate Administrator, United States Bankruptcy Court Clerk's Office in Kentucky. See Trustee Biographies, \textit{In re A.H. Robins Co.}, (No. 85-01307-R), in Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988).

\textsuperscript{62.} See \textit{In re A.H. Robins Co.}, 880 F.2d 779, 781 (4th Cir. 1989) [hereinafter \textit{Robins IV]}.

\textsuperscript{63.} Id.

\textsuperscript{64.} See id.

\textsuperscript{65.} See \textit{Robins III}, supra note 48, 880 F.2d 769, 771 (4th Cir. 1989).

\textsuperscript{66.} See \textit{Robins IV}, supra note 62, 880 F.2d 779, 781 (4th Cir. 1989).
removing three Trustees\textsuperscript{67} and retaining two, which order was upheld on appeal.\textsuperscript{68}

2. Option 1

In the fall of 1988, the Trustees adopted a simple procedure for electing Option 1. A claimant only needed to file a form affidavit acknowledging that she had used the Dalkon Shield and suffered an injury. The Trustees offered Dalkon Shield users $725 each, and offered non-users such as husbands $300. By the Consummation Date in December 1989, the Trust had paid nearly 85,000 Option 1 claims, totalling almost $60,000,000. Those who elect Option 1 sign a release in return for the payment.

\textsuperscript{67} See id. at 782. According to Richard Sobol, the selection of the Trustees was a source of great contention between Murray Drabkin, the lead attorney for the Claimants Committee, and the district court judge. See Sobol, supra note 29, at 210-13. Three of the original Trustees, Ann Samani, Gene Locks, and Barbara Blum (the three who were removed), were nominated by Mr. Drabkin. See id. at 213.

The district court appointed me to fill one of the vacant Trustee positions. Two of the three removed Trustees, Barbara Blum and Ann Samani, filed a notice of appeal. In December 1989, the Fourth Circuit entered an order staying their removal. See Robins III, supra note 48, 880 F.2d 769, 775 (4th Cir. 1989). Thus, pending the Fourth Circuit's decision on the removal, which was handed down in June 1989, the five Trustees were: the two remaining original Trustees, Kenneth Feinberg and Stephen Salzburg; the two appealing removed trustees, Ann Samani and Barbara Blum; and myself. Gene Locks, who was also removed, did not seek to stay the removal order.

At the time I was appointed to serve on the Dalkon Shield Claimants Trust, I was serving as a Trustee of the Dalkon Shield Other Claimants Trust. The Other Claimants Trust was funded with $50,000,000 to handle claims for contribution or indemnification by third parties, such as doctors and hospitals, against Robins. I was appointed to the Other Claimants Trust without objection from the Claimants Committee, after a member of Mr. Drabkin's law firm interviewed me. Despite the circumstances of my appointment, and despite my background and experience, Mr. Sobol questions my independent judgment and integrity. He speculates without any basis that the reason I was appointed to the Claimants Trust and "handsomely compensated" was because I was "prepared to carry out [Judge Merhige's] wishes." Sobol, supra note 29, at 339.

In any event, the Trustees' compensation is a matter of public record. See CTR, supra note 4, § 3.06. Moreover, when the Trustees decided to invoke the "holdback," they decided to "hold back" half of their salaries, and to "hold back" most meeting fees. Thus, the Trustees will not receive their total compensation authorized by the Plan until the Trust begins to pay on the "holdback."

\textsuperscript{68} The court noted that in the six months between the time they were appointed and removed, the Trustees had received $17,500 each in salary, a total of more than $111,000 in meeting fees, and over $36,000 in expenses, but had not yet implemented Option 1 or paid all the liquidated claims. See Robins IV, supra note 62, 880 F.2d 779, 784-85 (4th Cir. 1989).

In its affirmance, the Fourth Circuit agreed with the district court that the original Trustees had spent more time arguing about the extent of the district court's power to control the Trust than they spent setting up the administration of the Plan. See id. at 785-86. In a related opinion handed down the same day, the Fourth Circuit affirmed the district court's broad power to supervise the Trustees in matters such as appointment and fees of professionals. See Robins III, supra note 48, 880 F.2d 769, 776 (4th Cir. 1989).

The court noted that the district court did not have the power to interfere with the "day to day" operations of the CRF. See id. at 776.
In the spring of 1989, the Trustees' experts performed a study of those who accepted Option 1 to determine whether claimants were making a rational choice. The study indicated that only three percent of claimants choosing Option 1 should have considered choosing Options 2 or 3. Moreover, on closer analysis of many of these claims, it appeared that even in those cases there may have been a valid reason why the claimant did not hold out for more.

Use of the form affidavit may well have led to payments of $725 each to people who did not actually use the Dalkon Shield or suffer injury from it. The Trust, however, was not criticized for this, possibly because most observers would agree that this was a cost-effective way of clearing such claims. In addition, Option 1 provided a speedy mechanism for paying those with de minimis injuries.69

3. Preparation for Consummation

During the fall of 1988, the Trustees faced the difficult task of preparing for consummation without knowing whether the Plan ultimately would survive all appeals. Despite this uncertainty, in December 1988, the Trustees hired experts to assist in developing the claims resolution process under Options 2 and 3.

The Trustees retained Professor Charles Goetz, an economist and Law Professor at the University of Virginia, to help select the expert team and computer systems. In December 1988, the Trustees retained an expert team that they believed provided balance and credibility.

The Trustees chose Timothy Wyant, Ph.D., a bio-statistician from the Claimants Committee expert team, and Martha K. Wivell, a lawyer from Robins, Kaplan, Miller & Ciresi, one of the most successful firms handling pre-bankruptcy plaintiffs' Dalkon Shield claims. Mr. Wyant and Ms. Wivell's primary responsibilities were to prepare payment schedules and rules and to forecast whether the Trust's funds were sufficient to pay all claimants. By retaining members of the Claimants Committee estimation team, the Trustees sought to ensure that payment schedules and rules would be as favorable to claimants' interests as possible.

The Trustees also retained a former consultant to A. H. Robins, B. Thomas Florence, Ph.D., of Resource Planning Corporation, to develop procedures and claims forms. Rebecca Klemm of Klemm Analysis was

69. The only other claims the Trust was permitted to pay out of the Start-up Payment prior to the Consummation Date were Dalkon Shield Liquidated Claims. These claims are defined in the Plan as Dalkon Shield Claims that were either (a) "reduced to judgment before the commencement of the [Chapter 11] Case, whether or not such judgment [had] become final" or (b) "settled before the commencement of the Case pursuant to a valid and binding settlement agreement but remaining unpaid as of the commencement of the Case." See Plan, supra note 1, § 1.37.

By the Consummation Date, December 1989, the Trust had paid 38 Dalkon Shield Liquidated Claims totalling more than $1.7 million. Since that date, the Trust has identified and paid an additional six Dalkon Shield Liquidated Claims totalling more than $83,000.
hired to provide analytical, statistical and logistical support. This expert team worked with Michael M. Sheppard, the Executive Director, and the Trustees in developing the numerous policies and procedures required to implement the Plan.

The expert group began by compiling all the data relating to the valuation of Dalkon Shield claims. Beginning in March 1989, a subgroup of Trustees met weekly with the experts to discuss various policy issues concerning the choices the Trust's valuation system would make. For example, the question arose whether the Options 2 and 3 payment systems should discount in cases where legal defenses such as the statute of limitations were applicable. The Trustees rejected such a discount because of the uncertain application of such rules and because they wanted to provide an incentive to settle. The Trustees also rejected building into the compensation model differences based on jurisdiction, or what lawyer was representing the claimant, or whether the claimant was represented.

By June 1989, after the Fourth Circuit affirmed the Confirmation Order, the Trustees had adopted general approaches to structuring the compensation systems, staffing issues, and formulating other policies and procedures.

By August 1989, the Trustees identified 155 critical tasks that needed to be accomplished to begin the process of resolving claims under Options 2 and 3. During the fall of 1989, the Trustees adopted most of the important policies, such as the "best and final offer," "no negotiation" approach and the "holdback" policy.

Although the framework for this process was in place by the fall of 1989, the final steps could not be taken until the Supreme Court announced that it would not consider any further challenges to the Plan. Specifically, the Trustees believed it was imprudent to fully staff the CRF because of uncertainty as to whether the Plan would survive the challenge in the Supreme Court. Moreover, it was difficult to recruit qualified employees at a time when the Trust could not assure candidates that

70. Another candidate was Mark Peterson of Rand Corporation who worked with the court in connection with the estimation hearing and who subsequently was retained by one of the major plaintiffs' lawyers. Mr. Peterson later wrote one of the articles in the Duke Symposium which criticized the Trust. See Mark A. Peterson, Giving Away Money: Comparative Comments on Claims Resolution Facilities, 53 Law & Contemp. Probs. 113, 135 (1990). For further discussion of this article, see infra note 133.

71. The Trustees selected Ann Samani, one of the Trustees ultimately removed, and this author to serve on this subcommittee.

72. At the time, the Trustees were Steven A. Saltzburg (who resigned in September 1989) and Kenneth R. Feinberg (who resigned in the spring of 1990), the remaining two original Trustees; the author of this Essay; Marietta Robinson, a lawyer who represents plaintiffs in medical malpractice actions; and John Dowd, a prominent Washington, D.C. lawyer (who resigned in the spring of 1990), appointed in June 1989. The current Trustees are the author; Ms. Robinson; Robert Smith; a lawyer and former United States senatorial official; Henry Spalding, an investment advisor; and Ellen Bishop, a Dalkon Shield user who suffered Dalkon Shield injuries.

73. See infra Part III.E.3.

74. See infra Part III.E.4.
their jobs would not terminate in a matter of months. Immediately after
the Supreme Court denied certiorari in early November 1989, however,
the Trust finalized the claim election packets to be mailed to all claim-
ants and the claim evaluation rules, and hired and began to train the first
wave of claims reviewers.

The goal was to have the claim election packets ready for mailing by
the middle of March 1990, within three months of the projected date of
consummation. The Trustees, the expert team, Michael Sheppard and
his staff (including in-house counsel Linda Thomason and Ann Peters,
the Trust’s claims manager, who supervised the Dalkon Shield Records
Center Annex to the bankruptcy court) worked zealously during the fall
and winter of 1989-1990 to meet this goal.

Early in the process, the Trustees realized that their philosophy, which
de-emphasized the adversarial system, and the policies they adopted re-
quired a staff fully trained in the Dalkon Shield Claimants Trust ap-
proach. Accordingly, no claims adjusters who may have held pre-
conceived notions about how to settle cases were hired. Instead, the
Trustees employed well-educated people and taught them the Trust sys-
tem from scratch.

The expert team, led by Ms. Wivell, trained the first wave of claims
evaluators. The claims evaluators review the Option 2 and Option 3 ele-
cion forms and medical records submitted by the claimants. They apply
the claims evaluation rules the Trust developed to the records submitted
to determine the appropriate offer. To control costs, once Trust person-
nel were fully trained in the Trust’s claim evaluation system, they as-
sumed responsibility for training succeeding waves of claim evaluators.
The Trust is currently staffed by about 300 employees.

B. Post-Consummation Operations of the Trust

The Trust met its goal of mailing out claim election packets in mid-
March 1990. These packets included the forms necessary to elect either
Options 1, 2, 3, or 4, or to withdraw claims. The packets also included
detailed instructions and information about the different payment Op-
tions, and how to prepare the forms and collect the necessary medical

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75. See Robins I, supra note 46, 880 F.2d 694 (4th Cir.), cert. denied sub nom.
76. Richard Sobol criticized the Trust for not being prepared to send out the claim
election packets immediately upon the denial of certiorari. See Sobol, supra note 29, at
311-12. The Trustees could not predict the outcome of the petition, however, and time
was running out on American Home Products’ agreement to purchase Robins. If the
deal between American Home Products and A.H. Robins was not consummated by De-
ember 1989, American Home Products could have withdrawn its offer, and there would
have been no settlement fund. In any event, a three month delay is hardly noteworthy.
With respect to the Special Program, established to provide medical assistance to women
with fertility problems who wanted to become pregnant, the Trust, especially Stephen
Saltzburg, made every effort to obtain permission to use a portion of the start-up payment
for such purposes. Unfortunately, all efforts were unavailing. The Special Program was
launched immediately after consummation, and many pregnancies have resulted.
records. The packets also included the schedule of payments for Option 2, which ranged from $850 to $5,500 depending on the severity of the injury. Because of the complexity of the medical issues, especially in determining whether the Dalkon Shield caused the claimants injury, it was impossible to prepare an Option 3 schedule of payments. Each claimant's offer depends on her specific proof.

On March 15, 1990, the Trust mailed packets containing claim election forms for all four settlement options, as well as the withdrawal option, to 85,000 claimants who had identified themselves as Dalkon Shield users and who had not elected Option 1. The Trust sent the remaining 30,000 claimants a letter asking them to identify the nature of their claims. The Trust staff was ready to begin evaluating Option 2 and 3 claims immediately. By the summer of 1990, the Trust was able to process Option 2 claims as they came through the door. While the Option 3 claims process was slow at first, by the summer of 1991, the Trust achieved a rate of 200 claims per week or 10,000 offers per year on Option 3 claims. By the summer of 1992, the Trust was extending over 240 offers per week, or nearly 13,000 offers per year.

The Trustees believe that a faster rate of claims evaluation for Option 3 offers would compromise the Trust's quality control, which has resulted in consistency of offers and, thus, fairness to claimants. Because the Option 3 offer is the "best and final" offer, it is imperative that the Trust make every effort to insure the accuracy of its offers.

As of October 1992, there were fewer than 21,000 completed Option 3 files to be reviewed. Thus, offers should be made to those claimants before the summer of 1994. There are another 6,000 incomplete files. Some of these claimants are likely to select Options 1 or 2. The Trust estimates that all offers should be made by the end of 1994 or early 1995.

C. Primary Motivating Principles

Before discussing specific Trust policies and procedures, it is helpful to look at the Trustees' overall philosophy. Every policy decision the Trustees make has been driven by the following principles:

1. TREAT ALL CLAIMANTS FAIRLY AND EQUALLY, ALWAYS FO-
CUSBING ON THE BEST INTERESTS OF CLAIMANTS COLLECTIVELY INSTEAD OF ON THE INTERESTS OF A PARTICULAR CLAIMANT OR GROUP OF CLAIMANTS.

This principle sets the Dalkon Shield Claimants Trust apart from the traditional tort system.\(^8\) In essence, the Trust adopted a fiduciary stance vis-à-vis the claimants through the claims resolution process, and an adversarial stance if the claimant elected the traditional tort process. One of the questions that only time can answer completely is whether the Trust's claims resolution process avoided problems with the adversarial model, thus achieving a higher level of claimant satisfaction with the process at a lower transactional cost.

The Trustees recognize that an individual may not do as well under the Dalkon Shield Claimants Trust system as she might in the traditional tort system. For example, in a typical products liability case, the plaintiff with the best tort lawyer is likely to extract a better settlement offer from the defendant simply because of her lawyer's skill. The Trust, however, rejected that model, adopting rules which empowered the less powerful to insure that every claimant's case is evaluated solely on the basis of her evidence, regardless of who her lawyer is or what jurisdiction she is from, or what type of witness she might make.

Fairness requires the Trust to treat all claimants in the same manner. Of course, extraordinary circumstances occasionally arise which require an exception to this principle. For example, if a claimant is in a terminal medical condition, the Trust will expedite the disposition of her claim.

This principle of equal treatment has led to considerable criticism. Some critics, generally plaintiffs' lawyers as opposed to unrepresented claimants, suggest that the Trust's failure to consider individual requests is unfair. The Trust, however, does consider all requests for individualized treatment; it simply will not grant special treatment to a claimant unless there are demonstrably unique considerations that justify a departure from the equality principle.

The Trust assumes that in the real world, not all people (namely, claimants—or their lawyers, for that matter) are equally powerful. The adversary model results all too often in unequal justice, with more compensation for the powerful. Logically, this could lead to systemic unfairness in a case such as this one where there is a limited fund with which to compensate all claimants. Every extra dollar a powerful claimant extracts from the Trust is a dollar that otherwise could have gone to a less powerful claimant. Assuming that a represented claimant is, by definition, more powerful than an unrepresented one, failing to equalize the power relationships would injure or be unfair to the unrepresented claimants, who were approximately seventy-one percent\(^{81}\) of all claimants. By

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\(^8\) It may also be consistent with feminist jurisprudence models. See supra notes 16-24 and accompanying text.

\(^81\) At the time virtually all the Trustees' major policy decisions were made, approxi-
refusing to play the adversary game, the Trust is attempting to make it possible for the claimants to compete against each other solely on the strengths of their claims, rather than on the strength of their legal representation.

The Trustees made a number of decisions to facilitate this policy. For example, the Trust's claims forms and informational materials were designed to insure that all claimants would be able to handle their claims without lawyers. The claims forms were revised many times to ensure that unrepresented claimants could understand the forms and the information requested. In fact, the Trust tested its claims forms and instructions on unrepresented claimants from a broad range of socio-economic levels. As a result of this testing, the claims forms were revised many times.

In addition, the Trust has a program for helping claimants prepare their claims. Once a claimant submits her claims materials, a reviewer will examine her claims forms and documents to insure that they are complete. If there are document gaps, the reviewer affords the claimant an opportunity to submit the missing documents, or to explain why they are unavailable. If the claimant cannot obtain her medical records because the hospital or her doctor will not release them, another Trust unit will help her obtain them.

2. PRESERVE THE FUNDS AVAILABLE TO CLAIMANTS WITH VALID CLAIMS BY KEEPING ADMINISTRATIVE EXPENSES AT A MINIMUM.

The Trustees want to treat the last claimant to whom an offer is made in the same manner as they treated the first claimant. To achieve this end, the Trustees have made a number of controversial decisions, such as the "best and final offer" approach, the "no negotiation" policy, and the "holdback," each of which will be discussed below.

3. PREFER SETTLEMENT AND PROMPT PAYMENT OF CLAIMS OVER ARBITRATION AND LITIGATION.

The same controversial policies also are designed to provide incentives to claimants to settle within the claims resolution process rather than to litigate. The theory behind the "best and final offer" approach, for example, is to present the claimant with as high an offer as possible, given the Trust's limited fund and the claimant's proof. If she knows that the Trust will not negotiate, or settle on the courthouse steps because those increments have already been included in her offer, she is not as likely to test the offer, thereby subjecting herself to delay in payment, or, possibly, an adverse verdict. Similarly, by paying a claimant her full Option 3 offer if she accepts, the Trust is fulfilling the goals of preferring settlement and prompt payment.

mately 127,000 claimants of the approximately 179,000 claimants (71%) who qualified for review were unrepresented.
D. Communication

To ensure that all active claimants receive accurate and complete information, the Trust publishes a newsletter for claimants. As of November 1992, the Trust had distributed to claimants twelve editions of the newsletter, entitled the “Claims Resolution Report.” Because so many claimants were unrepresented by lawyers, the newsletter is written in “plain English” so that it can be easily understood, even by those claimants with poor reading skills. The Claims Resolution Report contains, among other things, information about the claims process, including discussions of the different payment options, how the process works, and timing considerations.

The Trust also has published several editions of a newsletter for lawyers, the “Attorney Update.” It contains some of the same information as the claimant newsletter but also addresses questions and concerns unique to lawyers.

By reducing important Trust policies to writing and publishing them in newsletters sent to all claimants or their attorneys of record, the Trust guarantees that the same, consistent information is disseminated to the claimants and the legal community. This promotes equal treatment and allays perceptions that certain lawyers receive preference. It also prevents lawyers or others from claiming that they have special inside knowledge.

Moreover, pursuant to the Plan, the Trust employs a number of individuals who serve as “Personal Contacts” for claimants. All active claimants are provided with the name and direct-dial telephone number of their Personal Contact, who is trained to answer questions regarding the claim forms and the claims resolution process. Personal Contacts have handled thousands of telephone calls and have responded to thousands of letters. They do not give advice on which payment Option to elect, but will refer claimants to Trust materials, such as the Claims Resolution Process Report, which provides the information claimants should need in making a decision.

In a further effort to communicate with and explain the claims evaluation process to claimants, the Trust held informational meetings for unrepresented claimants in Atlanta, Baltimore, Boston, Denver, Los Angeles, New York City, and Philadelphia. The Dalkon Shield Information Network (“DSIN”), a non-profit claimant support group, co-sponsored these meetings. The format included comments by a DSIN representative, a slide show of the Trust’s facilities, an explanation by the Trust’s Manager of Claimant Relations of the requirements for the various options for settling claims, and a question and answer session. Thousands of unrepresented claimants attended these meetings.

In addition, the Trustees met with a group of unrepresented claimants from all over the country and from Canada in a further effort to listen

82. See supra note 6 for a further discussion of the DSIN.
and learn, to answer questions, and to reassure the claimants that no special rules would be developed or used to favor lawyers or represented claimants. After this meeting, the Trustees made a number of policy decisions to respond to the concerns raised. For example, the Trustees decided to absorb the cost of translating foreign documents if the claimant was unable to do so herself.

The Trustees also had two lengthy sessions with members of the plaintiffs' bar who handled Dalkon Shield cases. One meeting was held in Boston in July 1989. At that point, the Trustees' general approach was tentatively presented, but few final decisions had been made. The primary purpose of the meeting was to listen to the plaintiffs' bar. The next meeting was in Orlando in January 1990. At that meeting, the Trustees set out in detail their major policy decisions, such as the "best and final" offer, "no negotiation" policy, and implementation of the "holdback."^83

E. The Claims Review Process

1. Valuation

To facilitate the fair and equal treatment of all claims, the Trust designed the claims review process to evaluate each and every Option 3 claim under the same highly structured, rules-based process. For instance, in making Option 3 offers, the Trust does not consider a claimant's geographic location or legal representation. Similarly, those claims involved in lawsuits pending before A.H. Robins filed for reorganization in August 1985 (the "Frozen Claims") are not offered more than non-Frozen claims.

The Plan provides that the Trust's settlement values in Option 3 should be consistent with historical, pre-petition settlement values. To assist the Trustees in determining the rules that would be applied to make Option 3 offers, the Trust's experts selected about 30 attorneys who were active in pre-petition Dalkon Shield cases or who represented large numbers of claimants. These attorneys were asked to review a number of redacted case files from resolved Dalkon Shield cases that were typical of Dalkon Shield claims or that presented difficult evaluation issues. The attorneys were asked to value the worth of each of the sample claims in 1985 and to value each sample claim, given a limited fund from which all had to be settled. The attorneys submitted their evaluations to the Trust. The Trust's experts then followed up by interviewing the lawyers who

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83. Critics charge that the Trust has been unresponsive and inflexible. See Sobol, supra note 29, at 315-18. This criticism is hard to fathom given the lengths to which the Trustees reviewed (and often implemented) suggestions submitted by individual lawyers and claimants, answered questions, and the extent to which the Trustees adjusted the claims process to implement such suggestions. See infra Part IV.

84. See CRF, supra note 15, § E.2. To date, amounts offered under Option 3 have ranged from $125 (to claimants whose claims fail due to a lack of probative evidence of Dalkon Shield use or injury) to over $1 million. See infra note 135 for a summary of the Trust's claims experience to date.
participated to clarify their responses and to explore the areas of agreement and the few areas where there was disagreement. The Attorney Evaluation Project helped the experts refine the claims evaluation rules and confirmed that the Trust's system would result in a proper evaluation of claims.

2. Priority in Processing: The Queue

The CRF requires the Trust to process claims in chronological order based on the date the Trust receives all documentation necessary to process the claim.\(^\text{85}\) Two groups of Option 3 claims, however, are entitled to priority treatment. The first group of claims (the "Priority Claims") includes those of claimants who were involved in the Frozen Claims. The second group includes those of claimants chosen to participate in the data collection part of the estimation process who returned a completed fifty page questionnaire in connection with the study conducted by court-appointed experts for the purpose of estimating Dalkon Shield claims.\(^\text{86}\)

The Trustees also have the authority to "consider and pay claims in any order for reasons of hardship or necessity or major efficiencies in claim handling."\(^\text{87}\) The Trustees, however, have granted fewer than 100 requests for expedited treatment under Option 3. All of these claimants had a terminal or life-threatening health problem.\(^\text{88}\)

Apart from the exceptions for hardship cases, the Trust does not deviate from reviewing claims in the order in which they are received. To administer this policy, the Trust uses a queue system. Each Option 3 claim is assigned a queue number on the date it is received by the Trust. Priority Claims are specially coded to identify them for priority processing. The Trust processed all completed Priority Claims it received before it began processing other Option 3 claims in the fall of 1991.

3. Best and Final Offer/No Negotiation

The Trustees have made a number of policy decisions to accomplish their goal of promoting settlement over litigation and arbitration. One such policy decision is to make Option 3 offers that are the highest amount the Trust believes it can pay a claimant based on the medical evidence submitted, historical settlement values and the existence of the limited fund. Accordingly, the offers will necessarily be "best and final" offers instead of initial, "low-ball" offers.

Because the Trust's offers will already be fair and as high as the evidence will support, the Trust will not negotiate at the settlement confer-

\(^{85}\) See CRF, supra note 15, § G.4.
\(^{86}\) See id. § G.1.
\(^{87}\) Id.
\(^{88}\) The unrepresented claimants who visited the Trustees in January 1990 were supportive of this policy. They seemed to agree that the Trust could not grant individuals hardship status based solely on financial considerations due to the difficulty of determining limiting principles.
ences established by the Plan. Rather, these conferences are used to answer questions and to explain the strengths and weaknesses of the claims. Unless newly discovered evidence is provided or an error has been made, the offer will not be increased or decreased.

If a claimant rejects the Trust's Option 3 offer and elects to proceed to trial or arbitration, the Trust will not offer more money to settle “on the courthouse steps.” The Trustees are determined to avoid creeping settlements which could cause serious financial deficiencies to the Trust and which would work to the detriment of claimants who have not yet been paid. Changing this policy also would be fundamentally unfair to those claimants who took the Trust at its word and accepted what they believed was the highest amount the Trust would pay.

4. Holdback

The Plan permits the Trustees to withhold some portion of the amounts awarded and to pay the balance when satisfied that sufficient funds are available to pay all valid claims. If a claimant obtains a judgment after binding arbitration or trial, the Trustees will assert the holdback provision.

To facilitate settlement, if a claimant accepts the Trust's offer at Option 2 or 3, she will receive the full amount offered. If, however, a claimant is offered $X at Option 3, rejects that offer, and then goes to trial and obtains a judgment for $10X, the claimant will only be paid $X or $10,000, whichever is greater. The Trustees will pay the remainder only when they are satisfied that they have fulfilled their obligation under the Plan to “ensure equality in distribution among claimants and the continued availability of funds to pay all valid non-subordinated claims.” Although the Trustees hope that all judgments eventually will be paid in full, holdback amounts will not be paid until the Trustees are confident that sufficient funds remain to pay all valid, non-subordinated claims.

The holdback provision is consistent with the Trustee's goal to promote settlement over litigation and arbitration. By announcing that any amounts awarded above the Trust's offer will be held back, the Trust creates a disincentive for claimants to “roll the dice” in litigation rather than accepting a settlement offer from the Trust. This approach also should minimize the Trust's defense costs, which ultimately are borne by other claimants.

5. In-Depth Review/Settlement Conferences

The in-depth review and settlement conference stage is the final step of the claims resolution process for Option 3 claimants who have rejected the Trust's settlement offers. No claimant can proceed either to bind-

89. See CRF, supra note 15, § G.3.
90. Id.
91. See id. § E.4.
ing arbitration or litigation until this final phase of the claims process is completed.\(^\text{92}\)

While the initial review of an Option 3 claim is construed liberally in favor of the claimant, the in-depth review is conducted exactly as its name implies—the Trust takes a more studied look at the claimant's evidence using the same evaluation rules utilized in the initial review. Following this in-depth review, settlement conferences are scheduled in order for the claimant to meet with Trust representatives to discuss the strengths and weaknesses of her claim and to determine whether any mistakes have been made in the evaluation process. Unless a mistake in the evaluation of the claim is discovered, or the claimant can present newly discovered evidence, the Trust will not increase its Option 3 offer.\(^\text{93}\)

If the new information presented at the settlement conference could have been discovered before the claim was originally reviewed by the Trust, it cannot be considered "newly discovered." Nevertheless, should the claimant desire the Trust to re-evaluate her claim in light of this new information, the Trust will assign the claim a new queue number and the claim will be reviewed again when its new number comes up in the queue.

Participation in the settlement conference is voluntary.\(^\text{94}\) Whether or not a claimant chooses to attend, however, the conference must be scheduled because the conference date is critical to the determination of when the claimant is eligible to commence or recommence litigation or arbitration.\(^\text{95}\)

The Trustees consider their "best and final offer" approach and the holdback provision strong incentives for claimants to settle. These poli-

\(^{92}\) See id. § E.5.

\(^{93}\) Adapting case law that interprets Rule 60(b)(2) of the Federal Rules of Civil Procedure to Trust procedures, "newly discovered evidence" is defined as evidence that was in existence at the time of the initial claim review, of which the claimant was excusably ignorant. The claimant must, therefore, demonstrate that she used due diligence in her attempts to obtain this evidence prior to the initial review of her claim. This new evidence must be relevant and not merely cumulative or repetitive of evidence previously submitted. Moreover, to be considered "newly discovered," such evidence must be likely to lead to a different result when the claim is reviewed again.

\(^{94}\) See CRF, supra note 15, § E.4.

\(^{95}\) Specifically, the Trust mails the claimant a packet of information within sixty days of the conference. The packet contains a final offer letter, the rules governing arbitration, a letter explaining procedures for pursuing a claim and a copy of Amended Administrative Order Number 1, which governs all arbitration and litigation proceedings. See infra Part III.G. Thereafter, the Trust's final offer will remain on the table for 90 days following the settlement conference. On the ninetieth day, if the claimant has not accepted the offer, it is formally and forever withdrawn. The claimant is then asked to elect either arbitration or trial, and the Trust applies to the district court for an order certifying that the claimant has completed the claims resolution process and may now proceed to arbitration or trial. Only claimants who elect the alternative dispute resolution process may bypass the settlement conference. See infra Part III.F.
cies, however, also ensure that once claimants reject the Trust’s offers, litigation or arbitration will inevitably follow.

a. Litigation

Because the Trustees are determined to keep litigation and defense costs to a minimum to preserve the assets in the fund for compensatory purposes, they did not hire a large law firm to serve as a “national coordinating counsel.” Rather, the Trustees believe that the cost of litigation can be controlled most cost-effectively by centralizing its coordination out of the Trust’s offices in Richmond. Consequently, the Trust employs several trial teams and counsel in all states, but their role will be to try cases, not to negotiate settlements.  

b. Arbitration

As previously stated, claimants who reject the Trust’s Option 3 offer can elect either litigation or binding arbitration. So far, most of these claimants have chosen litigation, which is not surprising because a majority of these claims were the Frozen Claims that were subject to the automatic stay under section 362(a) of the Bankruptcy Code. By October 1992, approximately twenty-six percent of those claimants who have elected to go beyond the claims resolution process have elected some form of arbitration.

To accommodate unrepresented claimants who reject the Option 3 offer, the Trustees have developed different arbitration options which may be attractive to these claimants, as well as to some represented claimants. The Trust has regular arbitration procedures and has adapted a discovery rule that the Trustees believe is more generous than that of most states. The Trust’s rules also provide that the law of Virginia applies. The Trustees adopted these uniform rules to maintain the equality of treatment principle and to ensure efficient administration.

Furthermore, the Trustees developed “Fast-Track” arbitration. Here, if a claimant agrees to cap her recovery at $10,000, the Trust will waive statute of limitations defenses, use an expedited procedure, and waive virtually all formal discovery and evidentiary requirements. Moreover, if the claimant is unrepresented, the Trust will be represented by a non-

96. The Trust started planning for litigation in the fall of 1990 by holding several meetings with distinguished counsel. The Trustees used a similar approach in developing their litigation policies and procedures as they did in putting together the Options 2 and 3 payment systems. Over 100 critical tasks were identified, ranging from choosing outside counsel to developing brief banks and witness lists. The Trustees also developed policies on many litigation strategy issues. For example, one important issue was whether the Trust could concede product defect in order to narrow the issue for trial to alternative causation. Another important issue was how to handle questions pertaining to a claimant’s sexual history or exposure to sexually transmissible diseases. The Trustees have prohibited their lawyers from inquiring into a claimant’s sexual history unless there is a pre-existing foundation for seeking to establish a relevant alternative causation defense.

lawyer employee of the Trust. This option may prove to be most attractive to unrepresented claimants, particularly those who have received low offers. These claimants may truly believe that their injuries were caused by the Dalkon Shield, but cannot prove it. This option gives them an opportunity to "tell their story," which the Trustees feel is an important ingredient of claimant satisfaction with the dispute resolution process.

The CRF provides for arbitration before a neutral third party. The Trustees selected Private Adjudication Center, Inc., an affiliate of the Duke University School of Law in Durham, North Carolina, as the Neutral Third Party ("NTP") required by the CRF. The NTP is responsible for selecting a panel of arbitrators, sending a list of proposed arbitrators to the parties, selecting an arbitrator after the parties have ranked the proposed arbitrators, scheduling pre-hearing conferences and selecting independent medical experts.

F. ADR Option

After about one year's experience in making Option 3 offers, the Trustees realized that the vast majority of claimants rejecting their Option 3 offers had received offers under $6,000. The Trustees believed that it would be appropriate to develop an alternative dispute resolution process ("ADR") for these claimants, rather than to require them to go through the in-depth review and settlement conference process before proceeding to arbitration or trial. While the latter process is lengthy and costly, both for the claimant and the Trust, the ADR process is quick, simple and exacts very low transaction costs.

The ADR option and rules are similar to the Fast-Track arbitration option outlined above. A claimant who agrees to cap her recovery at $10,000 need not wait for an in-depth review and a settlement conference, but rather can immediately elect the expedited ADR process before an impartial referee. When unrepresented claimants elect ADR, the Trust is represented by a non-lawyer.

G. Amended Administrative Order Number 1

The Trustees recognized that not every claimant will accept the Trust's Option 3 offer. To avoid inconsistent and unfair results in the inevitable trials and arbitration proceedings to come, the Trustees devised an administrative order to govern various aspects of arbitration and litigation and to establish rules, in keeping with the Plan and CRF, that

98. See id. § E.5.a.
99. The panel of arbitrators is composed primarily of retired trial judges and lawyers with at least 10 years of significant trial experience. No one who personally used the Dalkon Shield, or who has any immediate family member who used the Dalkon Shield, may be an arbitrator. Likewise, no person who has had any involvement in claims or litigation arising out of the Dalkon Shield or any other intrauterine device is eligible to serve as an arbitrator.
may be applied consistently and uniformly throughout every arbitration and litigation forum.

Under the Plan, and notwithstanding the Plan's confirmation and consummation, the District Court, sitting in bankruptcy, retains jurisdiction, *inter alia*, to enter orders in aid of the Plan and the CRF. Accordingly, on March 6, 1991, the Trust filed a motion asking the court to enter Administrative Order Number 1. All Dalkon Shield claimants with timely and late claims were given notice of the Trust's motion and an opportunity to object to the proposed order. The court held a hearing on the Trust's motion in Richmond, Virginia on May 21, 1991. The court entered Amended Administrative Order Number 1 (the "Administrative Order") on July 1, 1991. Currently, the order is on appeal in the Fourth Circuit.

The following is a summary of the most important provisions of the Administrative Order.

1. **Holdback**

In paragraph 13 of the Administrative Order, the district court approved the necessity of the "holdback" provision to "assure the continued availability of funds to pay all valid Dalkon Shield Personal Injury Claims" from the limited fund. Paragraph 13 reflects the holdback provision adopted by the Trustees which was described above. This aspect of the Administrative Order is under appeal.

2. **Discovery**

Paragraphs 4, 5, and 6 of the Administrative Order implement section E.5(c) of the CRF by setting the initial parameters of discovery for arbitration and litigation. These provisions streamline and centralize the control of all discovery in arbitration and litigation with the District Court. As a result, the Trust is protected from the costly process of responding to innumerable and often repetitious discovery requests before judges and arbitrators not fully familiar with the Plan or with the volume of previously produced documents.

Paragraph 4 of the Administrative Order requires the Trust to estab-

100. See Plan, *supra* note 1, § 8.05.
102. See Amended Administrative Order Number 1, Governing Dalkon Shield Arbitration and Litigation, *In re* A.H. Robins Co. (No. 85-01307-R) (July 1, 1991) [hereinafter Administrative Order].
103. *See id.* at para. 13.
lish and maintain a document depository in Richmond. The document depository contains as many of those documents produced without qualification by Robins in pre-petition lawsuits as the Trust, using its best efforts, has been able to identify. Thus, every claimant is afforded equal access to all discovery materials and the Trust is spared the burden and expense of responding repeatedly to identical document requests.

In addition to the central document depository, the Administrative Order requires the Trust to make available a catalog indexing materials and documents used in pre-petition matters. Using this catalog, all claimants can obtain listed documents by placing orders for them directly with the copying service that maintains these catalogued materials and documents.

Finally, paragraph 6 of the Administrative Order places certain limitations on the type and extent of allowable discovery in Dalkon Shield arbitration and litigation. Claimants are prohibited from conducting discovery against Robins, AHP, the Successor Corporation, Aetna, and any of their present or former officers, directors, employees, attorneys, agents, or representatives. Furthermore, all discovery against the Trust must be in the form of interrogatories and requests for admission, and may not reach issues of Trust administration. Discovery is permitted, however, against persons identified by the Trust as expert witnesses to be called in individual trials or arbitration hearings. In arbitration matters, discovery is to be conducted as provided by the arbitration rules.

3. Commencement/Recommencement of Litigation

One of the Trustees' obligations under the Plan and its supporting documents is to enforce the Plan's injunction prohibiting claimants from filing an action against, inter alia, the Trust. This section of the Plan contemplates that a claimant cannot bring an action against the Trust until he or she has completed all steps in the Option 3 claims resolution process and has properly elected to proceed. As part of their duty to enforce the Plan's injunction, the Trustees must have a uniform mechanism for determining or signaling that a proper election has been made and that the claim may go forward.

Paragraph 2 of the Administrative Order sets forth such a uniform mechanism. Pursuant to that paragraph, once a claimant has completed the claims resolution process, the Trust applies to the district court for an order certifying that the claimant is eligible to proceed to either litigation or arbitration. This process removes from the claimant the burden of petitioning the court for relief from the Plan's injunction

106. See id. at para. 4.
107. See id. at para. 5.
108. See id. at para. 6.
109. See Plan, supra note 1, § 8.04.
110. See Administrative Order, supra note 101, at para. 2.
and provides a court in which a Frozen Case is pending with an official order unequivocally stating that the case is ready to proceed.

Once a case has been certified as ready to proceed, the Administrative Order requires that the claimant conform any existing pleadings to its provisions. Thus, any demand for trebled, exemplary or punitive damages or attorney fees, none of which are available under the CRF, must be removed. Further, in Frozen Cases, the plaintiff must substitute the Trust for all other defendants, including Robins, Aetna, and doctors.

4. Court Powers

Under numerous provisions of the Administrative Order, the district court retains various powers regarding litigation and arbitration. As stated above, the Plan grants the court continuing supervisory powers in connection with disputes arising under the Plan. Discovery disputes in arbitration and litigation commenced pursuant to the Administrative Order may be resolved by the district court. Paragraph 11 of the Administrative Order empowers the court to stay any arbitration or litigation upon a showing by the Trust of undue prejudice from the multiplicity of ongoing, pending or scheduled trials or arbitration hearings. Paragraph 11 also authorizes the court to stay those arbitration hearings or trials which are shown by the Trust to be proceeding in violation of the Administrative Order, in contravention of the court's jurisdiction or in violation of the Plan.

H. Other Claims Issues

1. Late Claims

There are currently more than 60,000 Late Claims pending against the Trust. Under the Plan, Late Claimants are entitled to subordinated treatment. In other words, they may be paid by the Trust only after all timely filed claims have been paid in full.

On December 15, 1989, the Consummation Date, the Trustees determined that to fulfill their fiduciary obligations to claimants with timely filed, active claims, they could no longer accept Late Claims. In part, this decision was motivated by the Trustees' desire to conserve assets in

111. See id. at para. 10.
112. See id. at para. 9.
113. See id. at para. 10.
114. See Plan, supra note 1, § 8.05; see also Robins I, supra note 48, 880 F.2d 769, 776 (4th Cir. 1989) (upholding district court's supervisory power, except in the case of day-to-day operations of the Trust); Administrative Order, supra note 101, at para. 3 (granting the court jurisdiction over disputes as provided by the Plan).
115. See Administrative Order, supra note 101, at para. 6.
116. See id. at para. 11. To date, this power has not been invoked.
117. See id.
118. See CRF, supra note 15, § G.15.d.
order to pay timely filed claims rather than to administer Late Claims. The Claims Resolution Facility sets forth a detailed administrative procedure pursuant to which the Trust must review Late Claims to determine whether they are entitled to treatment equivalent to timely filed claims.119

2. Disallowed Claims

The Claims Resolution Facility contains no provision for reviewing reinstatement requests by claimants whose claims the court disallowed for failing to complete the two-step claim filing process by not returning the court questionnaire. Indeed, the CRF prohibits the Trust from considering disallowed claims unless they are reinstated by the court.120 Disallowed claimants who have filed a "Statement of Intent" to participate in the related Breland class action, however, can receive compensation from the fund created to establish the "Global Peace," as discussed above.121

3. Unreleased Claims—"Independent Medical Malpractice"

The Plan and its attachments contain the "Global Peace" provisions channeling into the Trust all personal injury claims against Robins, its affiliates, and other persons (including physicians, for example) arising out of the sale and use of the Dalkon Shield, and all non-personal injury claims to the Dalkon Shield Other Claimants Trust. The Plan is designed to ensure that Dalkon Shield claims are compensated fully, fairly, and efficiently, and to minimize the expense and burden of litigation relating to the Dalkon Shield.

Under the Plan, all Dalkon Shield claims against Robins, its affiliates, and any other persons (including Aetna, AHP, the Successor Corporation, physicians and health-care providers) (the "Released Parties"),

119. See id. By attempting to cut off Late Claims, the Trustees sought to save the Trust hundreds of thousands of dollars in administrative costs needed to process Late Claims and to coordinate the necessary hearings and inevitable appeals that would arise from this process. The Trustees believed that such expenditures would compromise their fiduciary obligations to timely claimants and Late Claimants who filed claims between May 1, 1986 and December 15, 1989.

On March 30, 1990, however, the court entered an order requiring the Trust to continue accepting Late Claims. See Order, In re A.H. Robins Co. (No. 85-01307-R) (Mar. 30, 1990). Pursuant to the court's order, the Trust sent a Late Claim Form to all persons who contacted the Trust between December 15, 1989 and March 30, 1990 regarding the filing of Late Claims. Upon receipt of a completed Late Claim Form, the Trust will send the late claimant written notification of her late claim number and will instruct her to submit medical evidence of Dalkon Shield use if she wishes the Trust to consider her claim. This additional requirement minimizes unnecessary expenses by ensuring that the Trust will only undertake the costly administrative review process of potential timely treatment for those claimants with valid Dalkon Shield claims.

120. See CTR, supra note 4, § 5.02(b).
121. See supra Part III.B.2.b.
have been released or discharged.\textsuperscript{122} The Plan permanently enjoins the commencement or continuation in any manner of any suit or proceeding against the Released Parties and prohibits any actions that do not comply with the Plan's claims resolution process.\textsuperscript{123}

The only exception to the Plan's broad permanent injunction and release is for claims based solely on "independent medical malpractice," but only if such claims cannot be asserted against one of the Trusts or any other person intended to be protected by the Plan. In light of the Plan's objectives, particularly its channeling provisions, the Trustees concluded that this exception is limited to actions claiming injury wholly independent of the Dalkon Shield. Accordingly, the Trust compensates claimants for any and all injuries relating to Dalkon Shield use, even if medical malpractice contributed to or even appears to be the primary cause of those injuries. In other words, the Trust will not "discount" Option 3 offers to claimants because of the existence medical of malpractice by a health-care provider when the claim resulted from the use, insertion, or removal of the Dalkon Shield.

On March 5, 1991, the district court held a hearing on five Motions to Interpret Section 1.85 of the Plan and the definition of "Unreleased Claim" contained in the Plan. By Order and Memorandum Opinion dated August 19, 1991, the district court defined "Unreleased Claim" based on medical malpractice.\textsuperscript{124} According to the court, such a claim is one in which the "Dalkon Shield may have been involved or otherwise present in the sequence of events, but played no part in any alleged resulting injury, and where there is no claim for injuries compensable as Dalkon Shield Claims."\textsuperscript{125}

Finding the district court's definition unnecessarily broad, the Fourth Circuit reversed and remanded on this issue.\textsuperscript{126} The court ordered the Trust to evaluate the claims, and to determine whether it was unreleased, based on the language in the Plan.\textsuperscript{127}

IV. \textbf{THE DALKON SHIELD CLAIMANTS TRUST: A PRELIMINARY APPRAISAL}

A set of recent articles in the \textit{Duke Journal of Law and Contemporary Problems} describe the various claims resolution facilities that recently have been established to deal with mass tort claims.\textsuperscript{128} Nearly all of the articles focus to some extent on the Dalkon Shield Claimants Trust, and

\textsuperscript{122} See Plan, \textit{supra} note 1, § 8.03.
\textsuperscript{123} See id. § 8.04.
\textsuperscript{125} Id. at 2 (emphasis added).
\textsuperscript{126} See \textit{In re A.H. Robins Co.}, 972 F.2d 77, 81 (4th Cir. 1992).
\textsuperscript{127} See id. at 81-82.
many are critical or inaccurate.\textsuperscript{129}

Typical criticisms are reported by Professor Francis McGovern. He wrote of the "high level of dissatisfaction over claims processing."\textsuperscript{130} Curiously, the source of this statement was a \textit{Wall Street Journal} article\textsuperscript{131} which described two claimants' dissatisfaction with how their claims were evaluated. McGovern wrote:

\[\text{This title reflects the sentiments of at least some of the participants in the claims resolution process and suggests a high level of dissatisfaction over claims processing. Commonly discussed general complaints include a lack of willingness to compromise, a failure to reveal information concerning the trust's evaluation of claims, an insensitivity to the behavioral needs of claimants, and an overemphasis on administrative convenience.}\textsuperscript{132}

There are several problems with this statement. First, "commonly discussed general complaints" by whom? Nowhere is it disclosed that many of the chief critics of the Trust are plaintiffs' lawyers who have not been able to influence the Trust to the degree that they had hoped. Because the Trust is an independent body, it has not accepted wholesale the suggestions of the plaintiff's bar.\textsuperscript{133}

\begin{footnotesize}

\textsuperscript{129} The article about the Trust, written by a former Trustee (who was so identified), contains several inaccuracies. \textit{See} Kenneth R. Feinberg, \textit{The Dalkon Shield Claimants Trust}, 53 Law & Contemp. Probs. 79 (1990). For example, it contends that the success or failure of the Trust depended on whether Option 2 was successful. \textit{See id.} at 109. However, because of technical requirements of the Plan, most of the Trustees were aware that Option 2 had limitations and would be a minor part of the settlement process. \textit{See infra} note 135 for a summary of the Trust's claims experience to date.


\textsuperscript{131} \textit{See} Milo Geyelin, \textit{Dalkon Shield Trust, Hailed as Innovative, Stirs a Lot of Discord}, Wall St. J., June 3, 1991, at A1. Neither this article nor another Wall Street Journal article, \textit{see} Milo Geyelin & Arthur S. Hayes, \textit{Dalkon Shield Trust's Policies Attacked}, Wall St. J., Mar. 12, 1992, at B3, reflected extensive interviews with the author of this Essay or anyone else connected with the Trust. Nor did they convey the reality that tens of thousands of claimants are satisfied with their treatment and settlements. The Trust treats its correspondence with claimants as confidential. Thus, it is impossible to cite the numerous specific examples of claimant satisfaction.

\textsuperscript{132} McGovern, \textit{supra} note 130, at 7.

\textsuperscript{133} The Trust often is accused of a lack of willingness to compromise with lawyers concerning matters of Trust policy and procedure. For example, the Trust did not compromise on the question concerning to whom settlement checks should be made payable. Because the Trustees knew that some represented claimants were dissatisfied with their legal representation, and because the Trustees recognized that their primary obligation is to claimants, not their attorneys, the Trust decided that the best course of action would be to make checks payable to claimants. Although checks are made payable to claimants, they are mailed to the represented claimants' attorneys, as are all other correspondences from the Trust. Similarly, the Trust would not agree to allow lawyers access to the Trust's computer system, which could have resulted in destroying the integrity of the Trust's data and claimants' files. On the other hand, the Trust has received numerous thoughtful and useful suggestions over the years. Many suggestions have been considered carefully, and several have been implemented.

In another article in the Duke Symposium, Mark A. Peterson takes the Trust to task for not being more flexible, or more specifically, for not working with plaintiffs' lawyers.

\end{footnotesize}
Other accusations are equally problematic. While it is true that the Trust will not provide claimants, or their lawyers, with a roadmap as to how claims are evaluated, the Trustees have made numerous statements about the process. For example, the Trust has informed claimants as to what elements are considered and what elements are not considered. Also, possible statute of limitations defenses are not considered during the claims resolution process, while alternative causation problems are very important.

The statements reflect a bad game of semantics. "Administrative convenience" is set forth as the justification for the Trust's unpopular policies. In fact, the Trust's purpose is to operate as leanly as possible to protect the Trust's fund for distribution to claimants.

Similarly, it is difficult to understand what "insensitivity to the behavioral needs of claimants" means. Each claimant is provided a Personal Contact at the Trust who is well-trained to answer the claimant's questions about the claims resolution process. The Trust also has provided training to each Personal Contact to insure that they can treat claimants with dignity and empathy. In addition, any claimant who rejects her initial offer from the Trust is entitled to a face-to-face meeting with Trust representatives to discuss her claim in detail, and tell her story. As Karen Hicks pointed out in her dissertation, many Dalkon Shield claimants were just as concerned about achieving justice on a personal level as with being appropriately compensated.¹

Much of the criticism being leveled against the Trust appears to be designed to embarrass the Trust into more fully cooperating with those who have much to gain: the lawyers and other professionals who personally benefit if business is done in the usual adversarial fashion.

Certainly, claimants in current and future mass torts would be better served by a reasoned and balanced evaluation of the Trust's performance to assess what lessons have been learned and to determine whether the Trust can serve as a paradigm. This part of this Essay attempts to provide some balance, and thus the framework for further analysis, by providing a quantitative picture of the Trust's performance to date, a

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¹See Peterson, supra note 70, at 135. For example, Peterson states that the "trust . . . refuses to consult with or explain its policy positions to the plaintiffs' bar." Id. Apparently, Mr. Peterson was not aware that the Trustees met with hundreds of Dalkon Shield lawyers at the ATLA meetings in Boston in the summer of 1989 and in Orlando in January 1990. At the 1990 meeting, the major policies of the Trust were announced and explained. In addition, the Attorney Newsletter continually announces and explains all the Trust's major positions. See supra Part III.D.

As discussed earlier, the Trustees believed that all represented and unrepresented claimants should be treated equally. See supra Part III.C. Accordingly, the Trustees took great pains to provide all attorneys and claimants with the same information. The Trustees also sought to avoid the impression or appearance that any particular attorney had a special relationship with the Trust, as many attorneys reportedly claimed, because the Trustees wanted all claimants to understand that they all would be subject to the same rules and policies.

¹³₄See Hicks, supra note 6, at 227-28.
comparison of the Trust's performance with the Manville Trust's performance, and a further response to some of the criticisms of the Trust.

A. The Trust's Performance

The following data suggests that the Trust's philosophy is working well. About 350,000 timely and late claims have been filed. Over 106,000 of these claims were disallowed by the court in 1987 before the bankruptcy plan was approved. Roughly 60,000 Late Claims have been filed and will be reviewed for possible payment if there is any money remaining after paying the nearly 200,000 timely claims.

Since the Trust began resolving claims, it has settled over 145,000 claims at a total administrative cost of under $400 per claim. Over $410,800,000 has been paid to represented claimants. Thus, assuming a one-third contingency fee rate, represented claimants have received about $278,890,000. Unrepresented claimants have received approximately $226,100,000. In addition, claimants are currently considering Option 3 offers totalling almost $43,000,000 in the aggregate.

At first glance, the average payment to unrepresented claimants may appear far less than that for represented claimants. In fact, that is true, because 116,349 unrepresented claimants have been paid, while only 25,571 represented claimants have been paid. The average payment to unrepresented claimants must be evaluated in light of the fact that a far higher number of unrepresented claimants chose the $725 Option 1 pay-

135. The following summarizes the Trust's claims experience to date.

Option 1 - To date, approximately 115,000, or 64%, of the timely claimants have elected Option 1. Over 51% of foreign claimants and 65% of domestic claimants have elected Option 1. Not surprisingly, 89% of Option 1 claimants are unrepresented.

Option 2 - Almost 16,000 claimants, or 8.5%, have elected Option 2. The Trustees expected that Option 2 would prove to be relatively unpopular for two reasons. First, the payment scale was relatively low. Payments ranged from $850 to $5500, depending on the severity of the injury. The scale was low because this option was designed for plaintiffs with serious alternative causation problems who would have received much less, if anything, in the traditional tort system. Second, the Plan imposed rather stringent proof requirements. Specifically, a claimant could not elect Option 2 unless she had medical proof of Dalkon Shield use, which many claimants with alternative causation problems did not have. For an "Option 2" to be a more viable option for resolving more claims, the parameters would have to be less stringent. For example, if the Trust could have accepted non-medical proof of Dalkon Shield use, many claimants with more serious injuries, but alternate causation problems, could have chosen Option 2 instead of Option 3. Such claimants generally receive a lower Option 3 offer than the scheduled Option 2 amount for such injury claimed because of causation issues resulting in a substantial discount.

Option 3 - 44,446 (24%) Option 3 claims were filed. The Option 3 claim form is detailed and requires complete medical records. Payouts under Option 3 have ranged from $125 for claimants with no proof of Dalkon Shield use or injury to over $1,000,000 for certain injuries, typically claims involving infertility or injury to the fetus. Unrepresented as well as represented claimants have received six-figure offers.

Option 4 - 2,300 claimants have deferred making an election.

Option 5 - The Trust created Option 5 for those who wanted to withdraw their claims. Over 2,100 claimants have elected Option 5.
When payments under Option 3 are examined, however, unrepresented claimants are actually netting higher average amounts than the average amounts netted by represented claimants.136

Moreover, the processing of claims has moved efficiently, allowing injured persons to be compensated without undue delay. The Trust is paying about $1,000,000 in claims per day, and sometimes as much as $10,000,000 per week, and will make offers on all remaining timely claims in approximately two years.

Further, the Trust's offers of compensation appear to be perceived as fair and just, given the acceptance rate of Option 3 offers. The acceptance rate on the Trust's Option 3 offers is over 82%. Taking into account those claimants who rejected their Option 3 offer but who accepted the ADR option, the acceptance rate is approximately 85%. Moreover, most of the rejections (approximately 60%) are by claimants who receive offers of less than $6,000. Additionally, 37% of those claimants who initially reject the Trust's Option 3 offer change their decision and accept the Trust's offer after the settlement conference, at which the Trust's offer is explained. Because of the high acceptance rate, the Trust has been able to keep administrative and legal costs very low.

B. Comparison with the Manville Trust

The Trust recognizes that many Dalkon Shield claimants suffered their injuries as long as twenty years ago and regrets any further delays in payment. Since the Trust was fully funded in December 1989, however, it appears that it has been able to settle more claims faster than any other compensation system devised in the mass tort context even though Option 3 payments can be quite large and are based upon complex medical evidence.

By comparison, the Manville Trust has made offers to claimants over a longer period of time. The Manville Trust has reviewed approximately 28,000 claims out of 192,000 active claims in a five and one-half year period.137 The Dalkon Shield Claimants Trust, on the other hand, has processed almost 150,000 claims in four years. Many of these claims, about 115,000, were Option 1 claims. In the two and a half years that it has been processing the higher valued claims, the Trust has paid about

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136. The Trust does not disclose average settlement amounts because it does not want claimants to decide whether to accept their Option 3 offer based on other claimants' experiences. However, by dividing the total amount of accepted Option 3 offers and judgments obtained by the number of unrepresented claimants who have been paid and comparing this figure to the comparable figure for represented claimants, adjusted downward for an assumed 30% contingency fee, the Trust's data reveal that the actual average amount netted by represented claimants is approximately 88% of that paid to unrepresented claimants.

137. See Financial Statements and Report of Manville Personal Injury Settlement Trust for the period Ending June 30, 1992 Pursuant to Sections 3.02 (d)(ii) and (iii) of the Trust Agreement, In re Johns-Manville Corp. (Nos. 82-B-11656 (BRL) through 82-B-11676) [hereinafter Manville Trust Financial Statements].
16,000 Option 2 claims, which require an examination of medical records and a claim form. As of the end of October 1992, it also had made approximately 17,500 Option 3 offers, which require examination of voluminous medical records and a detailed claim form.

Moreover, the Manville Trust is now paying less than twenty-five cents on the dollar due to a lack of funds. In contrast, the Trust is paying 100 cents on the dollar to all claimants who accept their Option 3 offers. Another area of comparison is administrative costs. As of June 1991, Manville's transaction costs, including legal fees, were twenty-five times higher than those of the Dalkon Shield Claimants Trust. Manville's administrative cost per claim was $4,900, while the Dalkon Shield Claimants Trust's cost per claim was under $400. Although the Dalkon Shield Claimants Trust's cost per claim is likely to rise as it enters the litigation phase, the acceptance rate of its offers and its emphasis on cost effectiveness should result in significantly lower transaction costs than those of the Manville Trust.

C. Criticisms of the Trust

Curiously lacking in the criticisms of the Trust is any suggestion of a motive for the Trustees to act against the interests of the claimants. The fund belongs to the claimants, not the Trustees. The Trustees have only one motive: to see the fund distributed as fairly and efficiently as possible.

One article criticizing the Trust makes erroneous and misleading statements about the Trust's holdback policy. The article states that if a claimant refuses the Trust's offer and wins a larger recovery at trial or arbitration, the Trust will pay only $10,000 at the time of judgment and hold back the rest. This statement is inaccurate. The Trust will pay either $10,000 or the Option 3 offer amount, whichever is higher. Thus, if the Trust offered a woman $125,000, and she obtained a jury verdict of $350,000, she would be paid $125,000 at the time of the judgment, and the balance when the Trust is assured that there will be enough money to pay all claimants their settlement amounts.

The negative impression created by this inaccuracy is compounded by the article's misleading impression as to why the Trust has decided to implement the “holdback” provision of the bankruptcy plan establishing the Trust. The author states that the purpose is simply to “preserve as-

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139. Manville's costs will go down significantly because Judge Weinstein has intervened in that case and has imposed conditions, such as a holdback, similar to the policies adopted by the Dalkon Shield Claimants Trust. See id. at 905-08.
140. This calculation can be made by comparing the number of settled claims to the Trust's financial statements. See Manville Trust Financial Statements, supra note 137.
141. See Geyelin & Hayes, supra note 131, at B3.
In fact, the purpose of the "holdback" is to ensure that all claimants receive a fair proportion of the $2.3 billion settlement fund. Indeed, it would be a gross violation of the Trust's fiduciary duty to the entire claimant population to risk bankrupting the fund by paying large sums to those at the head of the line when that might mean there is no money for those at the end of the line.

The article also ignores another fundamental point. Every single penny of the Trust fund, except those needed for administrative expenses, will be distributed to claimants. Any money left over after all settlement judgments and late claimants are paid, will be distributed to all claimants on a pro rata basis. By making fair offers to claimants and by creating the incentive to settle now by paying claimants the full amount of the offer, the Trust saves huge amounts in transaction costs by avoiding additional attorneys fees and other defense costs. If all or most claimants accepted their settlement offers, there would be substantially more money to be distributed on a pro rata basis.

Finally, if the Trust is prohibited from implementing the "holdback" in the manner in which it has decided is in the best interests of the claimant population as a whole, it will be forced to hold back some amount of its Option 3 settlement offers. Why should claimants who want to settle, some of whom have been waiting since the early 1970s, have to wait another minute to receive their entire settlement because of a relatively small number of claimants who wish to litigate their claims? Why should the majority who want to settle get only 12%, 25%, or 50%, or some other portion now, to preserve assets for the minority who want to litigate?

Indeed, the Trust's policies are designed to achieve a resolution of all claims in the shortest possible period of time. If more claimants were to elect trial or arbitration, rather than to settle at Option 3, the Trust would be in business for a far longer time. Thus, the Trust's policies which provide incentives to settle, rather than to litigate, should result in the Trust going out of business sooner rather than later.

The question, once again, is one of control: who should make the ultimate decisions concerning the distribution of the fund? It seems perfectly obvious that those who are in business to give all the money away are in control.

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142. Id.

143. Obviously, a rational economic actor may not want to sacrifice the possible "extra" share obtained by trial or arbitration in order to insure additional payments to other claimants. But there is certainly nothing wrong with seeking to establish a model in which altruism could pay dividends. This is why the Trust's policies need to be examined from the law and economics and feminist jurisprudence perspectives. See supra notes 16-27 and accompanying text.

144. This fact tends to disprove the suggestion that the Trustees have an incentive to stay in business for the purpose of earning fees for as long as possible. See Sobol, supra note 29, at 330. The Trustees could have adopted policies designed to prolong the process. Instead, they chose policies, such as paying settlement amounts in full and the holdback, which are designed to encourage early settlement.
the best position to make decisions to protect the interests of the whole. They certainly are in a better position to make these sorts of decisions than those who want to maximize individual recoveries and who have a financial stake in those recoveries.

CONCLUSION

The Dalkon Shield Claimants Trust was established to compensate women and their families who were injured by the Dalkon Shield. Several factors should be considered when analyzing the performance of the Trust. First, the Trust made serious and exhaustive attempts to insure a high degree of claimant satisfaction with its claims resolution process.145

Second, the Trust has operated on a lean administrative budget, holding total administrative costs to under $400 per claim. Moreover, in the typical tort case, the defendant's costs consume about 35% of the litigation expense and recovery pie. After plaintiffs' attorneys take approximately 35%, plaintiffs are left with roughly 30%. In contrast, a Dalkon Shield claimant can expect to receive about 65% of the amount offered if she is represented by a lawyer, or 100% less approximately $400 if she represents herself.

The fact that women were the primary victims in the Dalkon Shield case motivated many of the Trustees' decisions. These decisions and the success of the CRF have serious implications for resolving claims of women and other traditionally less powerful persons, or for any victims of a mass tort. When disaster strikes along the lines of the Dalkon Shield, asbestos, etc., there will eventually be millions or billions of dollars at stake. The question should be how to distribute the most money to the victims in such a way that the victims feel that justice has been served.

Only Tom Tyler's article146 in the Duke Symposium focused on this mat-

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145. Examples of these attempts include the following. The Trust's claims evaluation rules were tested by a large group of experienced Dalkon Shield plaintiffs' lawyers. Moreover, because at the time the Trust was developing the Option 3 claims form, approximately 60% of Dalkon Shield claimants were not represented by lawyers, the Trust tested its claims evaluation forms with members of claimants groups from all socio-economic and educational backgrounds. See supra Part III.C. The Trust also developed a program designed to help claimants obtain their medical records from doctors or hospitals who refused to release them to the claimants. See id. Furthermore, the Trust absorbed the cost of translating into English the medical records of foreign claimants who were unable to do so themselves. There are other policies too numerous to mention here that are designed to assist claimants whenever possible during the claims resolution part of the process. See supra Part III.C-D.

Each of the Trust's claims evaluation experts either served on the Claimants Committee during the bankruptcy estimation proceeding or worked for the leading law firm representing Dalkon Shield claimants in pre-petition litigation. See supra Part III.A.3.

Finally, at conferences for plaintiffs' lawyers and in our written communications to claimants, the Trustees have explained the basis for each of their policies and have been receptive to suggestions that would be helpful to the claimant population as a whole. See supra Part III.D.

ter of deep concern to the Trustees. It was always the Trustees’ view that claimants were concerned not simply with money, but also with dignity and justice.

The Trust believes, as does the law and economics scholarship, that the claimants are in the best position to make their own choices concerning settlement options if they receive accurate information about the process and if no special expertise is required to complete the process. To further maximize each claimant’s position, the Trust relies on the submissions of each claimant and then subjects each claimant’s materials to the same claims evaluation process. This creates an efficient system that protects the good of the whole, arguably a goal in accordance with feminist philosophy.

The operation of the Trust can further bridge the gap between the law and economics school and feminist jurisprudence. Both law and economics and feminist jurisprudentialists should agree that the Trust serves as an example of the need to create new ways of looking at legal problems to ensure their just resolution. There is a need to re-examine notions of individual prerogatives, sometimes forsaking them for more collective, and efficient, resolution.

Reliance on a law and economics perspective may seem “sterile,” however, or lacking in feminist values of care. For instance, Professor Bender suggests that

[In the Dalkon Shield cases, corporate defendants might be ordered by law to fulfill their care-giving responsibilities by finding openings in infertility clinics for victims, arranging their appointments and transportation for the necessary visits, organizing necessary clinics if what already exists is inadequate, locating competent marriage and psychological counseling, developing private adoption alternatives for those women who want children but cannot conceive, and the like.]

These suggestions are valuable. In addition, however, there are other ways to demonstrate this care-giving ethic through a claims evaluation process. By ensuring such qualities as timely and fair processing of claims, effective communication lines between the Trust and the claimants, staff members willing to assist claimants, and settlement conferences whereby the Trust explains to a claimant, face-to-face, the strengths and weaknesses of her claim, the Trust is, in fact, able to act in a caring, responsive manner while still preserving efficiency in claims resolution and administrative operation.

148. See Minda, supra note 25, at 646-50 (discussing similarities and differences of the law and economics, feminist, and Critical Legal Studies movements).
149. See id. at 648.
150. See West, supra note 17, at 1450.
In sum, the Trust encountered resistance to its policies\textsuperscript{152} because the system devised to implement the Plan differs significantly from the traditional adversarial model. Those who historically have had much to gain in mass tort cases—namely, lawyers and other professionals—would lose much of their power if the Dalkon Shield Claimants Trust succeeds in its goal of distributing the settlement fund as fairly and efficiently as possible.

It is indeed likely that, without court involvement in future cases, the claims resolution paradigm the Trustees hoped to create may well be lost. It is unlikely that those who have much to lose would agree to another Plan, like the Dalkon Shield Claimants Trust Plan, which provides the tools with which independent trustees can seek to protect the interests of a whole class of claimants.

This Essay raises numerous questions and presents the factual and conceptual materials that provide the basis for beginning a reasoned and academic discussion of all the issues presented by the Dalkon Shield case, as well as other mass torts. Further articles by this author, and hopefully by her colleagues, can explore fully the Dalkon Shield Claimants Trust experience from the three jurisprudential perspectives discussed earlier in this Essay—professional ethics, feminist jurisprudence, and law and economics.\textsuperscript{153} Perhaps then we will know whether the Dalkon Shield Claimants Trust represents a paradigm lost or found.

\textsuperscript{152} See, e.g., Geyelin, \textit{supra} note 131, at A1 (contending that claimants complain that Trust officials are tightfisted and secretive); Geyelin & Hayes, \textit{supra} note 131, at B3 (claimants charge they were forced to accept unfair settlements); Ruth Richman, \textit{Dalkon Shield Fund Unfair, Critics Say}, Chi. Trib., June 30, 1991, Womanews, at 1 (contending that claimants complain that Option 3 Settlements have been secretive, unfair and confusing).

\textsuperscript{153} See \textit{supra} notes 8-27 and accompanying text.