

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

In re:

Case No. 90-10016-8G1  
Chapter 11

THE CELOTEX CORPORATION,

Debtor.

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**ORDER ON (1) MOTION OF THEARTHUR  
AARON AND OTHER SIMILARLY SITUATED  
SETTLED CLAIMANTS FOR THE ENTRY OF AN  
ORDER DIRECTING THE TRUST TO MAKE  
THE FINAL PAYMENT DUE UNDER  
SETTLEMENT AGREEMENTS FOR PERSONAL  
INJURY CLAIMS, AND (2) REQUEST OF THE  
TRUSTEES OF THE CELOTEX ASBESTOS  
SETTLEMENT TRUST FOR INSTRUCTIONS AS  
TO THE APPROPRIATE MANNER TO HANDLE  
CERTAIN ASBESTOS PERSONAL INJURY  
CLAIMS THAT LACK RELIABLE AND  
CREDIBLE MEDICAL EVIDENCE**

**THIS CASE** came before the Court for hearing to consider (1) the Motion of Thearthur Aaron and other Similarly Situated Settled Claimants for the Entry of an Order Directing the Trust to Make the Final Payment Due under Settlement Agreements for Personal Injury Claims, and (2) the Request of the Trustees of the Celotex Asbestos Settlement Trust for Instructions as to the Appropriate Manner to Handle Certain Asbestos Personal Injury Claims that Lack Reliable and Credible Medical Evidence.

The Claimants contend that 5,335 Personal Injury Claims were settled and partially paid by the Asbestos Settlement Trust (the Trust). According to the Claimants, however, the second and final installments owed to them under the Settlements became due more than one year ago, and have not been paid by the Trust.

The Trust contends that it determined, after the Settlements were reached, that the medical evidence submitted in connection with the Personal Injury Claims

was unreliable. According to the Trust, therefore, it is withholding the final payments due under the Settlements because it is bound by the Plan Documents to pay only valid Claims.

The issue at this time is whether the Trust is authorized by the Plan Documents to withhold the final payment of the Settled Personal Injury Claims on the basis of information acquired post-Settlement which indicates that the Claims were not supported by credible medical evidence.

**Background**

**A. The Plan Documents**

The Celotex Corporation (Celotex) was engaged in the business of manufacturing, marketing, and distributing building materials. Carey Canada Inc. (Carey Canada) was engaged in the business of asbestos mining until it ceased operations in 1986. In re The Celotex Corporation, 204 B.R. 586, 590 (Bankr. M.D. Fla. 1996).

Celotex and Carey Canada filed petitions under Chapter 11 of the Bankruptcy Code on October 12, 1990.

At the time the petitions were filed, Celotex and Carey Canada had been named as defendants in thousands of lawsuits filed by Asbestos Personal Injury Claimants, and in hundreds of lawsuits filed by Asbestos Property Damage Claimants. Celotex, 204 B.R. at 604-05.

On December 6, 1996, the Court entered an Order Confirming the Modified Joint Plan of Reorganization for Celotex and Carey Canada.

A principal feature of the confirmed Plan is the creation of the Asbestos Settlement Trust. "The Plan establishes a Trust to address, liquidate, resolve, and disallow or allow and pay Asbestos Claims, which will operate in accordance with the Asbestos Claims Resolution Procedures." Celotex, 204 B.R. at 602.

The Trust Agreement was attached as Exhibit 1 to the Modified Joint Plan of Reorganization.

The purpose of the Trust, according to the Trust Agreement, is to:

assume the liabilities of the Debtors,  
their successors in interest and their

affiliates, arising from or relating to Asbestos Claims and to use the Trust's assets and income to pay holders of Allowed Asbestos Claims in accordance with the Trust Agreement .

...

(Second Amended and Restated Asbestos Settlement Trust Agreement, §2.2).

Article 3 of the Trust Agreement sets forth the powers of the Trustees of the Trust. Such powers include the power to “establish, supervise and administer the Trust in accordance with the CRP (the Claims Resolution Procedures) and to administer, amend, supplement or modify the APICRP (Asbestos Personal Injury Claims Resolution Procedures).” (Trust, §3.1(c)(viii))(Emphasis supplied).

Pursuant to the Plan and Trust Agreement, it is clear that the Trust is the entity that administers Personal Injury Claims. “PI Claims are administered by the Trustees under the Asbestos Personal Injury Claims Resolution Procedures.” In re The Celotex Corporation, 487 F.3d 1320, 1325 (11<sup>th</sup> Cir. 2007).

In fact, §3.3(b)(iii) of the Trust Agreement specifically provides that the Trustees shall “administer the processing and payment of Asbestos Personal Injury Claims in accordance with the APICRP, as the same may be amended from time to time, in accordance with the provisions hereof and thereof.” (Trust, §3.3(b)(iii)). The Trustees have discretion to determine the timing and method for making payments, “subject to the requirements of the CRP with respect to the processing and ordering of claims for payment.” (Trust, §3.4(c)). Additionally, “the Trustees shall make payments to holders of Allowed Asbestos Claims promptly as funds become available.” (Trust, §3.4(e)(iii)).

The APICRP was attached to the Trust Agreement as Annex B.

The purpose of the APICRP is to “provide prompt payment to valid Asbestos Personal Injury Claims and provide reasonable assurance that the Trust will value and be in a financial position to pay similar present Asbestos Personal Injury Claims and Future Asbestos Injury Demands in substantially the same manner.” (APICRP, §2.1).

Section V of the APICRP sets forth various methods that a Personal Injury Claimant may elect to establish the amount that will be received from the Trust on account of the Claim. (APICRP, §5.1).

One method that may be elected by a Claimant is the Individualized Review Process. Section 5.1(c) of the APICRP explains the Individualized Review Process in part as follows:

(c) Individualized Process. The individual review provides a claimant with an individual consideration and evaluation of his or her claim. . . . Because the detailed examination and individualized valuation of Asbestos Personal Injury Claims require greater time and effort, claims electing individualized review will be processed and paid after claims filed at the same time electing discounted cash payments.

Individualized review is designed for claimants with serious or fatal asbestos-related injuries whose Asbestos Personal Injury Claims require the added effort and expense of individualized evaluation.

(APICRP, §5.1(c)).

Sections V, VI, and VII of the APICRP contain the specific steps that are involved in evaluating a Claim under the Individualized Review process. Generally, it appears that the steps are as follows:

1. The Trust mails “Claims Materials” to all claimants who are identified to the Trust. The Claims Materials include a description of the Procedures, instructions, and a claim form. The Claimant must return the information requested in the Claims Materials within six months, or the Claim will be automatically disallowed. (APICRP, Section VI).

2. A Claimant receiving the Claims Materials may elect the Individualized Review process.

3. A Claimant who elects Individual Review must provide (1) evidence that the Claim establishes a valid cause of action, (2) convincing evidence of exposure to a Celotex or Carey Canada asbestos product, and (3) convincing evidence of an asbestos-related disease. (APICRP, §§5.3(b), 5.4(b)). The Claimant must also document one of the seven disease categories set forth in the APICRP. (APICRP, §5.4(b)).

4. The Trustees must conduct random or other audits to verify information submitted in connection with the Claims Procedures. (APICRP, §7.3).

5. If the Claim satisfies the criteria required by the APICRP, the Trust will offer to liquidate the value of the Claim based on the Scheduled Value established for the particular disease. (APICRP, §§5.1(c), 5.4(b), 5.4(f)).

6. If the Claimant rejects the offer made by the Trust, he may negotiate or arbitrate the Trust's determination of the disease category or the amount of the proposed value of the Claim. (APICRP, §§5.4(b), 5.4(h), 5.4(l)).

7. If a Claimant accepts the Trust's offer, the Claimant must execute a Release and deliver the Release to the Trust in order to receive payment on the Claim. (APICRP, § 5.4(m)).

Generally, claimants who accept the Trust's offer are paid in two installments, with the second installment due two years after payment of the first installment. (APICRP, §5.4(k)).

## **B. The Settled Claims**

The issue currently before the Court involves 5,335 Personal Injury Claims (the Settled Claims) that were submitted to the Trust pursuant to the APICRP.

All of the Claimants had elected evaluation of their Claims under the Individual Review process, and provided documentation to support their Claims.

The Trust's reviewers examined the claims for the information required to support the claims, but did not "second guess" the medical information supplied with the claims. (Doc. 13951, Declaration of Richard R. Winner, ¶ 7).

After the Claims were reviewed by the Trust, the Trust offered to settle the Claims in accordance with the procedures established in the APICRP. The offers of settlement identified the respective Claimant, the "confirmed injury," and the current Liquidation Value of the Claim. (Doc. 13920, Exhibit C).

The Claimants accepted the Trust's offers of settlement. All of the Claimants signed a document entitled "Celotex Release and Settlement of Individually Reviewed Personal Injury Claim," and returned the Releases to the Trust. (Doc. 13920, Exhibit D).

The Settlements provided that the Current Liquidated Value of the Settled Claims would be paid in two installments. (APICRP 5.4(k); Doc. 13920, Exhibit D). The first payments were due in 2003, 2004, or the first half of 2005. (Doc. 13920, Exhibit A). The Claimants acknowledge that the first installments were paid by the Trust. (Doc. 13920, p. 8).

The final payments under the Settlements were due in the last six months of 2005 or later. (Doc. 13920, Exhibit A).

On June 30, 2005, however, an opinion was issued by the United States District Court in the Southern District of Texas in the case styled In re Silica Products Liability Litigation, 398 F.Supp.2d 563 (S.D. Tx. 2005). One of the issues before the Court in Silica Products was "whether the doctors who diagnosed Plaintiffs with silicosis employed a sufficiently reliable methodology for their testimony to be admissible." In re Silica Products, 398 F.Supp.2d at 567. The court answered the question in the negative, concluding that "on a number of different levels, the claims in this [multi-district litigation] defy all medical knowledge and logic." Id. at 620.

Doctors and screening companies that were involved in the Silica Products case also provided the medical diagnoses and medical records used to support the Settled Claims in this case. The opinion of the District Court in Silica Products expressed critical conclusions regarding the evidence submitted to support certain silica claims. Since evidence submitted to support many asbestos claims was the product of the same sources, the Trustees were understandably concerned. According to the Trust, therefore, the opinion issued in the Silica Products case:

caused the Trust to believe that the medical information submitted from certain doctors and screening companies (“Challenged Doctors and Screening Companies”) in support of claims was unreliable, and that the Trust had likely acted on unreliable medical information. Additional information continued to come to light about the Challenged Doctors and Screening Companies that further heightened the Trust's concerns.

(Doc. 13951, p. 1).

Consequently, in “July 2005, in order to allow the Trust to examine the ramifications of the June 30 Silica MDL decision, the Trust placed an administrative hold on claims that relied upon medical reports by the nine doctors and three screening companies challenged in the Silica MDL proceedings.” (Doc. 13951, Declaration of Richard Winner, ¶ 10).

The Trust indicates that it then took several steps “to determine whether there was reason to believe that the conduct by the Challenged Doctors and Screening Companies involving Silicosis claims also extended to asbestos claims filed with the Trust.” (Doc. 13951, Winner Declaration, ¶ 11). Initial steps included reviewing the silica proceedings, systematically auditing the medical evidence submitted by the Challenged Doctors and Screening Companies, and conferring with other asbestos trusts claims facilities. (Doc. 13951, Winner Declaration, ¶ 12). The Trust issued a notice explaining that it would no longer accept medical reports from the Challenged Doctors and Screening Companies, and informing claimants that it had placed an administrative hold on all payments on claims that depended upon the Challenged Doctors and Screening

Companies for medical support. (Doc. 13951, Winner Declaration, ¶ 13, Attachment F).

The Trust indicates that it then took several steps “to clear as many of the holds and pay as many claims as possible by establishing the reliability of the medical information submitted.” (Doc. 13951, Winner Declaration, ¶ 16). These steps included requesting additional medical information, re-reviewing all claims subject to the hold, sampling across the entire base of the administrative hold claims employing a complex, multi-layered technique in an attempt to gain new medical evidence suggesting that the medical evidence supporting the claim was reliable even though submitted by a Challenged Doctor or Screening Company, testing the reliability of Challenged Doctors in different roles, attempting to clear claims on a law-firm specific basis among firms willing to participate in the sampling program, requesting re-certification, and requesting all original underlying medical evidence to support claims. (Doc. 13951, Winner Declaration, ¶¶ 16-25).

The Trust indicates that it resolved many claims in this process, but that in large part the Claimants involved in the Settled Claims at issue did not participate in these efforts by the Trust. (Doc. 13951, Winner Declaration, ¶¶ 16-25).

Accordingly, the administrative hold continues to apply to the final payment owed on account of the Settled Claims. The average amount of the final payment owed under the Settlements is approximately \$1,600.00 per Claimant. Consequently, the total amount directly at issue for all of the Settled Claims exceeds the sum of \$8,500,000.00 (5,335 Claims x \$1,600.00 = \$8,536,000.00). (Transcript, pp. 27, 62).

### **The Issue**

The issue at this time is whether the Trust is authorized by the Plan Documents to withhold payment of the final installment due on the Settled Claims based on information acquired post-Settlement which indicates that the Claims were not supported by credible medical evidence. (See Transcript, p. 37).

The Claimants contend that the Settled Claims are “allowed” claims within the meaning of the Plan Documents, and that the Claims therefore constitute final judgments against the Trust pursuant to §1.9 of the Plan. Since the Settled Claims are final, enforceable judgments against the Trust, the Claimants assert that the Trust is

obligated to promptly pay the final installment owed to them under the Settlement agreements. According to the Claimants, the Plan Documents do not permit the Trust to withhold payment of settled claims. (Transcript, p. 29).

The Trust, on the other hand, contends that Section 7.2 of the APICRP requires the Trust to have reasonable confidence that a Claim is supported by credible medical evidence before making any payment to the claimant. (APICRP, §7.2). Since §7.2 refers to “any payment” instead of “allowance” or “settlement,” the Trust asserts that the section permits it to review a claimant's medical evidence at any time before the claimant receives full payment on its claim. (Transcript, p. 36).

At this time, the Trust requests a determination of whether the Plan Documents require payment of the final installment, or permit the Trust to continue to withhold payment of the final installment of the Settled Claims.

The Trust further asserts that the settlements are subject to rescission based on the doctrines of fraudulent or innocent misrepresentation, and that it may also consider the possibility of recovering the first installment payment as well as costs from the claimants. (Doc. 13951, p. 36). Although the right to seek rescission has been reserved, however, the Trust has not yet sought formal rescission or asked the Court to consider the availability of rescission as a remedy at this time. (Transcript, pp. 36-37).

At this time, the Court reviews the Plan Documents to determine whether the Plan Documents permit the Trust to withhold the final payments on Settled Claims.

To resolve this issue, the Court is guided by the fundamental principle articulated by the Eleventh Circuit Court of Appeals, that the “Plan Documents must be construed as a whole, with each provision given reasonable meaning and effect.” In re Celotex, 487 F.3d at 1333.

The Plan Documents include the Modified Joint Plan of Reorganization, the Trust Agreement, and the Asbestos Claims Resolution Procedures (CRPs). (Plan, §§1.106, 1.146).

The Court has considered the Plan, the Trust Agreement, and the CRPs in their entirety, and concludes that the Plan Documents do not authorize the Trust to withhold payment of the Settled Claims. Despite the use

of the word “payment” in §7.2 of the APICRP, the overall design of the claims review system does not permit the Trust to reexamine Personal Injury Claims after they have been settled and allowed.

Based on the Plan Documents as a whole, it is clear that a settlement in favor of a claimant is intended to be a final resolution of the claim that ends the claims review process.

## Discussion

### A. The Settled Claims are “Allowed” Claims for purposes of the Plan.

The Claimants contend that the Settled Claims must be paid because they are “allowed” claims that constitute final judgments against the Trust pursuant to §1.9 of the Plan. (Doc. 13920, pp. 3-4, 10; Transcript, pp. 28, 69).

The APICRP, however, does not refer to Claims that are settled in favor of the Claimants as “allowed” Personal Injury Claims.

Instead, the APICRP focuses on establishing the “liquidated value” of claims that are subject to the Individual Review process. Section 5.1(c), for example, states that individualized review is intended to result in payments equal to the “full liquidated value” of each claim, and that the Trust will offer to liquidate the value of each individually reviewed claim based on the liquidated values of similar claims. (APICRP, §5.1(c)). Section 5.4(b) states that a claimant with an individually reviewed claim will be offered a Scheduled Value of his disease as the Liquidated Value of the Claim. (APICRP, §5.4(b)). Section 5.4(f) states that the Trust shall process individually reviewed claims and make offers to establish “liquidated values.” (APICRP, §5.4(f)). Section 5.4(k) provides that payment of individually reviewed claims will be based on their “liquidated value.” (APICRP, §5.4(k)).

Further, in the section entitled “General Guidelines for Liquidating and Paying Individually Reviewed Claims,” the APICRP refers to the “validity” of the claims, instead of the “allowability” of the claims. Section 7.1 discusses the showing required to establish a “valid” Personal Injury Claim. (APICRP, §7.1). Section 7.5 provides that the Trustees shall consider the costs of investigating and uncovering “invalid” Claims, so that the payment of “valid” claims is not impaired. (APICRP, §7.5). Section 7.6 provides that the Trustees shall

proceed as quickly as possible to liquidate claims, and to make payment to holders of “valid” Personal Injury Claims. (APICRP, §7.6).

The guidelines in Section VII are consistent with the overall purpose of the APICRP to provide prompt payment to “valid” Asbestos Personal Injury Claims. (APICRP, §2.1).

### **1. The terms of the Plan control the terms of the Trust Agreement and the CRPs.**

The Claimants contend that their Settled Claims should be treated as “allowed” Claims under §1.9 of the Plan. Section 1.9 of the Plan defines an “allowed” claim as any Asbestos Claim that is liquidated and allowed pursuant to the CRPs. (Plan, §1.9).

The APICRP, however, does not refer to individually reviewed claims as “allowed” claims. Instead, the APICRP describes individually reviewed claims in terms of their “liquidated value” or their “validity.”

Neither “liquidated value” nor “valid claim” is a defined term in the Plan.

A preliminary issue for the Court, therefore, is whether the Claimants' Settled Claims are “allowed” claims within the meaning of the Plan Documents.

To resolve this issue, the Court looks to the undisputed principle that the Plan controls any discrepancy among the Plan Documents.

“In the event of a conflict between the terms or provisions of the Plan and the Trust Documents, the terms of the Plan shall control the Trust Documents.” (Plan, §13.8)(See also, Order Confirming Plan, ¶79). “Notwithstanding anything else herein contained, to the extent any provision of this Trust Agreement is inconsistent with any provision of the Plan, the Plan shall control.” (Trust, §9.13). “In the event of inconsistencies, the Plan controls.” Celotex, 487 F.3d at 1326.

### **2. The Plan refers only to the allowance or disallowance of Asbestos Personal Injury Claims.**

After considering the terms of the Plan, the Court finds that the Settled Claims are “allowed” claims for purposes of the Plan Documents. In reaching this

conclusion, the Court is persuaded by three specific provisions of the Plan.

First, §1.9 of the Plan provides in part:

1.9 . . . “Allowed” means, with respect to any Asbestos Claim other than a Bonded Claim, any Asbestos Claim that is liquidated and allowed pursuant to the applicable Asbestos Claims Resolution Procedures or, if applicable, pursuant to a Final Order of the Bankruptcy Court (but only to the extent so allowed).

(Plan, §1.9)(Emphasis supplied). This section applies to all Asbestos Claims that are “liquidated and allowed” pursuant to the Asbestos Claims Resolution Procedures. By definition, the Asbestos Claims Resolution Procedures include the APICRP. (Plan, §1.13).

Second, Article 4 of the Plan is entitled “Treatment of Claims and Interests.” Celotex Asbestos Personal Injury Claims are classified as Class 6 creditors for purposes of their treatment under the Plan. (Plan §3.3(a)(6)). Section 4.2(a)(6) sets forth the treatment to be provided to Class 6 creditors:

(6) Celotex Class 6 – Celotex Asbestos Personal Injury Claims. As of the Confirmation Date, liability for all Asbestos Personal Injury Claims against Celotex shall be automatically and without further act or deed, transferred to, vested in and assumed by the Trust. Each Asbestos Personal Injury Claim against Celotex shall be addressed (i.e., Allowed or disallowed and, if Allowed, paid) by the Trust pursuant to and in accordance with the Asbestos Personal Injury Claims Resolution Procedures. This Class is impaired.

(Plan, §4.2(a)(6))(Emphasis supplied). This section, which is the operative provision for the treatment of Personal Injury Claims under the Plan, states that the Claims will be either “Allowed” or “disallowed” pursuant to the APICRP. The section does not refer to the liquidation of the claims or the validity of the claims. Instead, the section clearly contemplates that Personal Injury Claims that are processed pursuant to the APICRP

will be either “Allowed,” as defined in the Plan, or disallowed.

Third, Section 5.1 of the Plan relates to the establishment and purpose of the Trust. The Trust is the entity that was created to assume the Debtors' liabilities related to Asbestos Claims, and to use the Trust's assets to pay Allowed Asbestos Claims in accordance with the Asbestos Claims Resolution Procedures. (Trust, §2.2). Section 5.1 of the Plan provides in part:

5.1 . . . The Asbestos Claims Resolution Procedures shall provide for the allowance and payment or disallowance of Asbestos Claims pursuant to the terms of the Trust Documents.

(Plan, § 5.1)(Emphasis supplied). Pursuant to this section, the Claims Resolution Procedures, including the APICRP, “shall provide for the allowance and payment or disallowance” of asbestos claims. Again, the provision does not refer to the liquidation of the claims or the validity of the claims. Instead, this section of the Plan contemplates that claims processed under the APICRP must be either allowed or disallowed.

In conclusion, the APICRP refers to the “liquidated value” or “validity” of Personal Injury Claims. Those terms do not appear in the Plan. Instead, the Plan refers only to the allowance or disallowance of Asbestos Personal Injury Claims after they have been processed under the APICRP.

In the event of a disparity between the Plan and the Trust Documents, the terms of the Plan control the terms of the Trust Documents. Consequently, the Court finds that a Personal Injury Claim that has been liquidated in favor of a Claimant pursuant to the APICRP is an “Allowed” claim for purposes of the Plan.

“An Asbestos Claim liquidated pursuant to the Asbestos Claims Resolution Procedures shall be deemed an Allowed Claim for all purposes, including, but not limited to, Section 502 of the Bankruptcy Code.” Celotex, 204 B.R. at 613.

**B. The “allowance” of a Claim in favor of a Claimant is a final resolution of the Claim that ends the review process.**

As discussed above, a Personal Injury Claim that has been liquidated in favor of a Claimant is an “Allowed” Claim under the Plan. The Court further finds that the allowance of a Personal Injury Claim pursuant to the APICRP is a final resolution of the Claim that ends the review process.

The Court bases this decision on three primary grounds: (1) the Plan Documents provide detailed procedures to evaluate Claims prior to allowance; (2) the Plan Documents do not provide for any further review of a Personal Injury Claim by the Trust after the Claim has been allowed; and (3) the termination of the review process upon the allowance of a Claim is consistent with the “low transaction cost” approach to the CRPs.

**1. The Plan Documents provide procedures for the review and evaluation of Personal Injury Claims prior to allowance.**

The Trust contends that it is permitted to withhold payment of the Settled Claims because it is obligated to pay only valid claims. Since the Settled Claims are now suspect, the Trust contends that it is prohibited from making any further payment to the Claimants.

In a separate proceeding, the Trust previously made a similar argument with respect to certain Property Damage Claims that had been allowed by the Property Damage Claims Administrator and later disputed by the Trust. Specifically, the Trust asserted that it retained supervisory authority over the Property Damage Claims because of a key purpose of the Trust to pay only “valid” claims. Celotex, 487 F.3d at 1335.

The Eleventh Circuit Court of Appeals disagreed with the Trust's contention, stating:

The Plan Documents are designed to achieve these goals [paying only valid claims and treating all Asbestos Claims in a substantially similar manner] through means other than centralizing all authority over PI and PD claims. For instance, the APICRP and the APDCRP set forth detailed procedures and standards for determining the validity of claims. In confirming both sets of CRP along with the Plan, the bankruptcy court found that they 'are fair and reasonable and provide mechanisms for substantially similar

treatment of the holders of Asbestos Claims.'

Id.(Emphasis supplied). Although the decision arose in the context of a dispute involving Property Damage Claims, the Eleventh Circuit clearly included the APICRP in its determination that the procedures are intended to resolve all questions concerning the validity of the Claims.

In other words, the APICRP and APDCRP were developed, after extensive negotiations, to provide specific mechanisms to evaluate Asbestos Claims, and to make final determinations as to whether the claims should be allowed and paid by the Trust. See Celotex, 487 F.3d at 1335.

With respect to the Individual Review process under the APICRP, for example, the mechanisms include the solicitation of information from all claimants identified to the Trust. (APICRP, § VI).

If a claimant returns the Claims Form, the information produced to the Trust must first establish the "eligibility" of the Claim. Information supporting the Claim's "eligibility" includes (1) evidence of exposure to a Celotex asbestos product, and (2) evidence of an asbestos-related disease. Evidence of an asbestos-related disease includes a diagnosis of the disease by a specialist based on a physical examination of the Claimant, or a chest x-ray indicating a non-malignant disease. (APICRP, §5.3(b)).

In addition to information regarding the eligibility of the Claim, a Claimant must also produce information to document the existence of one of the seven disease categories set forth in the APICRP. For certain disease categories, the documentation includes a diagnosis based on an x-ray, CT scan, HRCT scan, or pathological evidence. For other disease categories, the documentation includes other medical reports demonstrating the existence of the disease. (APICRP, §5.4(b)).

According to the APICRP, the documents submitted by claimants under the Individual Review process are independently reviewed. The APICRP states that claims submitted under the Individual Review process are subject to "an individual consideration and evaluation." The APICRP further states that:

(c) Individualized Process. . . .

Because the detailed examination and individualized valuation of Asbestos Personal Injury Claims require greater time and effort, claims electing individualized review will be processed and paid after claims filed at the same time electing discounted cash payments.

Individualized review is designed for claimants with serious or fatal asbestos-related injuries whose Asbestos Personal Injury Claims require the added effort and expense of individualized evaluation.

(APICRP, §5.1(c))(Emphasis added).

As part of the examination of individually reviewed claims, the Trust is required to conduct periodic audits of the information provided with the claims. The function of the required audits is set forth in §7.3 of the APICRP:

**7.3 Auditing, Monitoring and Verifying**. The Trustees shall conduct random or other audits to verify information submitted in connection with these Claims Procedures. The Trust shall develop methods for auditing information about exposures to Celotex or Carey Canada asbestos and other asbestos products and for auditing the reliability of medical evidence, including independent reading of x-rays, tissue samples or other laboratory tests, review of complete pulmonary function test data, or requiring a claimant to submit to an independent medical examination which may include a physical examination or further x-rays or pulmonary function tests. The purpose of the medical audits is to identify possible sources of information that are not sufficiently reliable. If its audits show an unacceptable level of reliability for medical evidence submitted by specific doctors, laboratories or medical facilities, the Trust shall refuse to accept medical

evidence from such doctors or facilities.

(APICRP, §7.3)(Emphasis supplied).

As stated in the APICRP, the purpose of the examination and audit procedure is to enable the Trust to have “reasonable confidence that the medical evidence provided in support of the claim is credible and consistent with recognized medical standards.” (APICRP, §7.2).

If it is determined that a claim is based on information that is generally unreliable, the Trust may disallow the claim. (APICRP, §7.3).

If a claim that has been individually reviewed meets the qualifications of a categorized disease, however, the Trust offers to liquidate the value of the claim.

In conclusion, the APICRP provides procedures for the evaluation of Personal Injury Claims prior to allowance. Claimants are required to document their exposure to a Celotex asbestos product, and are also required to furnish specific medical evidence of their asbestos-related disease. Claims that are submitted under the Individual Review process receive individual consideration and evaluation by the Trust. The independent evaluation includes an audit requirement that is expressly intended to test the reliability of the medical evidence submitted by the Personal Injury claimants, and to identify sources of information that are not sufficiently credible.

The Plan Documents provide procedures for the evaluation of Personal Injury Claims, and for the discovery of deficient Claims, prior to allowance or disallowance.

**2. The Plan Documents do not provide for any further review of a Personal Injury Claim by the Trust after the Claim has been allowed.**

As shown above, the APICRP sets forth a procedure for the evaluation of Personal Injury Claims prior to the time that the Trust offers to allow them. The Plan Documents, however, do not provide for any further review of Personal Injury Claims by the Trust after the Claims have been allowed.

According to the Plan Documents, the Trust must pay Allowed Personal Injury Claims. The Plan

Documents do not provide for any other action by the Trust after a Claim has been allowed.

Section 4.2(a)(6) of the Plan, which sets forth the treatment of Claims under the Plan, states that “[e]ach Asbestos Personal Injury Claim against Celotex shall be addressed (i.e., Allowed or disallowed and, if Allowed, paid) by the Trust pursuant to and in accordance with” the APICRP. (Plan, §4.2(a)(6))(Emphasis supplied).

Section 5.1 of the Plan, regarding the creation of the Trust, states that the “Asbestos Claims Resolution Procedures shall provide for the allowance and payment or disallowance of Asbestos Claims pursuant to the terms of the Trust Documents.” (Plan, §5.1)(Emphasis supplied).

The Findings of Fact and Conclusions of Law Regarding the Plan provide that the “Plan establishes a Trust to address, liquidate, resolve, and disallow or allow and pay Asbestos Claims, which will operate in accordance with the Asbestos Claims Resolution Procedures.” Celotex, 204 B.R. at 602(Emphasis supplied). The Findings of Fact and Conclusions of Law also provide that a “principal purpose of the Trust is to preserve, manage and maximize Trust Assets for use in paying and satisfying Allowed Asbestos Claims.” Id. at 604(Emphasis supplied).

Similarly, the Trust Agreement provides that the purpose of the Trust is to assume the liabilities of the Debtors with respect to Asbestos Claims and to “use the Trust's assets and income to pay holders of Allowed Asbestos Claims . . . .” (Trust Agreement, §2.2)(Emphasis supplied). The Trust also provides that “the Trustees and the PDCA shall proceed as quickly as possible to liquidate claims, and the Trustees shall make payments to holders of Allowed Asbestos Claims promptly as funds become available.” (Trust Agreement, §3.4(e)(iii))(Emphasis supplied).

Once an Asbestos Personal Injury Claim is allowed, it must be paid by the Trust. The Eleventh Circuit Court of Appeals considered parallel Plan language regarding Asbestos Property Damage Claims (i.e. §4.2(a)(8) of the Plan), and concluded that “once a claim is allowed by the Administrator and submitted to the Trustees, there is little for the Trustees to do beyond applying the payment percentage and paying the claim.” Celotex, 487 F.3d at 1330.

Significantly, the Eleventh Circuit also noted that the Plan Documents only provide for the de novo review of allowed Property Damage Claims when that review is sought “by individuals other than the Trustees.” Celotex, 487 F.3d at 1334(Emphasis in original). In other words, the Asbestos Property Damage Claims Resolution Procedures contain express provisions for a Claimant to seek review of the disallowance or partial disallowance of its Claim, but the APDCRP does not contain any comparable provision for the Trust to seek review of a Claim that had been allowed.

Clearly, the Eleventh Circuit was addressing the administration of claims by the Property Damage Facility, and not the Personal Injury Facility. The Property Damage Facility was established to operate differently from the Personal Injury Facility, in that the allowance of Property Damage Claims is administered exclusively by a Property Damage Claims Administrator rather than the Trustees. (Trust Agreement, §3.3(c)).

Nevertheless, it is significant that the APICRP, like the APDCRP, only provides for the review of processed claims when the review is requested by a claimant who is aggrieved by the disallowance of his claim. Section 5.4(g) of the APICRP, for example, allows a claimant to dispute the Trust's categorization of his claim. Further, §5.4(k) of the APICRP states that a Claimant who rejects the Trust's offer must initiate one of the alternative dispute resolution procedures established under §7.8 of the APICRP. If alternative dispute resolution is unsuccessful, the claimant must initiate an arbitration proceeding under §7.10 of the APICRP.

There is no corresponding procedure in the APICRP for the Trust to reverse an offer that has been accepted, or to seek reconsideration of its own decision to liquidate a particular claim. There is no procedure, for example, setting forth the grounds upon which such a reconsideration may be sought, the time period in which the reconsideration must be sought, the type of notice that must be provided to the claimant, or the type of proceedings that must be conducted to resolve the issue.

The Release and Settlement document that is required from the claimants provides that the Trust will mail the first payment upon return of the signed document, and will mail the final payment two years later. (Doc. 13920, Exhibit D).

The provision allowing payment of certain claims in installments is not included to allow continued or

subsequent review of claims, but rather to further the purpose of equal treatment of claimants and the application of equivalent payment percentages to claimants. A purpose of the Trust is to pay holders of claims in such a way that all holders of personal injury claims are treated “in a substantially equivalent manner.” (Trust, § 2.2). “To ensure substantially equivalent treatment, the Trustees must determine the percentage of the Allowed Amount of all present and future Asbestos Claims that would likely be paid to holders of such Claims (‘Payment Percentage’) prior to making distributions to claimants . . . . Therefore, . . . no less frequently than once every two (2) years, the Trustees shall consider their determination of the Payment Percentage to assure that it is based on credible, current information and forecasts, and may, after such consideration, change the Payment Percentage.” (Trust, § 3.4(a)). Claims paid in installments must be paid using the Payment Percentage in effect at the time such installment payment is made. (Trust, § 3.4(c)). To further the purpose of payment in a substantially equivalent manner, “the last installment will be in an amount that would produce a total payment to the claimant equal to the Allowed Amount of the Claim times the Payment Percentage in effect at the time of such last payment.” (Trust, § 3.4(c)).

The Plan Documents do not provide for any further review of Personal Injury Claims by the Trust after the Claims have been allowed. On the contrary, the Plan Documents provide only that the Trust must pay allowed Personal Injury Claims. They do not contain any procedures for the Trust to reopen the claims administration process after a Claim has been liquidated and allowed.

### **3. The termination of the review process upon the allowance of a Claim is consistent with the “low transaction cost” approach to the CRPs.**

As set forth above, the Plan Documents do not provide for any further review of Personal Injury Claims by the Trust after the Claims have been allowed. The allowance of a Claim is a final resolution that ends the review process. Further, the termination of the review process upon the allowance of a Claim is consistent with the “low transaction cost” approach to the resolution of Claims.

In the Findings of Fact and Conclusions of Law Regarding the Plan, for example, the Court found that the Plan was designed and intended, among other things, to

“provide a simple, economical procedure for obtaining and encouraging the prompt, efficient and equitable resolution of all Asbestos Claims.” Celotex, 204 B.R. at 597. Similarly, the Trust Agreement provides that the Trustees are to favor the fair and efficient resolution of all Asbestos Claims. (Trust, §3.3(b)(1)).

The APICRP contains specific guidelines for the efficient resolution of Personal Injury Claims. Section 7.5 of the APICRP provides:

**7.5 Costs Considered.**

Notwithstanding any provision of these Claims Procedures to the contrary, the Trustees shall always give appropriate consideration to the cost of investigating and uncovering invalid Asbestos Personal Injury Claims so that the payment of valid Asbestos Personal Injury Claims is not further impaired by such processes. In issues related to the validity of Asbestos Personal Injury Claims, e.g., exposure to Celotex or Carey Canada asbestos or asbestos-containing products and medical evidence of injury, the Trustees shall have the latitude to make judgments regarding the amount of transaction costs to be expended by the Trust so that valid Asbestos Personal Injury Claims are not further impaired by the costs of additional investigation.

(APICRP, §7.5)(Emphasis supplied). Further, §7.9 if the APICRP provides:

**7.9 Settlement Favored.**

Settlements shall be favored over all other forms of Asbestos Personal Injury Claim resolution. The lowest feasible transaction costs for the Trust should be incurred in order to conserve resources and ensure funds to pay all valid Asbestos Personal Injury Claims.

(APICRP, §7.9)(Emphasis supplied).

The policy reflected by §7.5 and §7.9 of the APICRP supports the conclusion that the claims review process is not intended to remain open indefinitely.

Consistent with the “lowest feasible transaction cost” method, the allowance of a Personal Injury Claim following Individual Review should constitute a final resolution of the Claim under the APICRP.

**Conclusion**

The issue at this time is whether the Trust is authorized by the Plan Documents to withhold payment of the Settled Personal Injury Claims on the basis of information acquired post-Settlement which indicates that the Claims were not supported by credible medical evidence.

The Plan Documents do not authorize the Trust to withhold payment of the Settled Claims.

First, the Settled Claims are “allowed” Claims for purposes of the Plan. The Plan refers only to the allowance or disallowance of Personal Injury Claims after they have been processed under the APICRP. Consequently, the Court finds that a Personal Injury Claim that has been liquidated in favor of a Claimant pursuant to the APICRP is an allowed Claim for purposes of the Plan.

Second, the “allowance” of a Claim in favor of a Claimant is a final resolution of the Claim that ends the review process. The Court reaches this conclusion because (1) the Plan Documents provide detailed procedures for the evaluation of Personal Injury Claims, and for the discovery of deficient Claims, prior to allowance or disallowance; (2) the Plan Documents do not provide for any further review of Personal Injury Claims by the Trust after the Claims have been allowed; and (3) the termination of the review process upon the allowance of a Claim is consistent with the “low transaction cost” approach to the CRPs.

The Trust has not yet sought formal rescission or asked the Court to consider the availability of rescission as a remedy at this time. (Transcript, pp. 36-37).

Accordingly:

**IT IS ORDERED** that:

1. The Plan Documents do not authorize the Celotex Asbestos Settlement Trust to withhold payment of the Settled Claims.

2. The Motion of Thearthur Aaron and other Similarly Situated Settled Claimants for the Entry of an Order Directing the Trust to Make the Final Payment Due under Settlement Agreements for Personal Injury Claims is granted in part, to the extent set forth in this Order.

3. The Request of the Trustees of the Celotex Asbestos Settlement Trust for Instructions as to the Appropriate Manner to Handle Certain Asbestos Personal Injury Claims that Lack Reliable and Credible Medical Evidence is granted in part, as set forth in this Order.

4. This Order is without prejudice to the Trust's right to seek any other remedies that it might have under applicable law.

**DATED** this 28th day of January, 2009.

**BY THE COURT**

*/s/Paul M. Glenn*  
PAUL M. GLENN  
Chief Bankruptcy Judge