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Asbestos Bankruptcy Report

June 2013 Volume 12, Issue #11

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WASHINGTON, D.C. — The U.S. Supreme Court should deny a bid for *certiorari* by Pfizer Inc. for a ruling allowing state court asbestos personal injury lawsuits to proceed against the pharmaceutical giant because the decision is correct and does not conflict with any Supreme Court ruling, the United States says in a May 23 *amicus curiae* brief filed at the court's invitation. **SEE PAGE 5.**

GM Reports $161 Million In Trust Assets In 2012, But No Claims Paid

NEW YORK — Although the asbestos personal injury trust established in General Motors Corp.'s Chapter 11 bankruptcy case had more than $161 million in net assets at the end of 2012, it paid no claims during the year, according to the trust's annual report filed April 29. **SEE PAGE 7.**

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Bankruptcy Judge Orders Law Firm To Show Why Brief Should Not Be Stricken

NEW YORK — A New York federal bankruptcy judge on June 17 ordered a New Jersey law firm to show cause why its brief opposing confirmation of a plan of reorganization for Chapter 11 debtor Quigley Co. Inc., filed on the verge of the plan confirmation hearing, should not be stricken. **SEE PAGE 9.**

Trustee: Skinner's Case Should Be Dismissed Despite 28,000 Asbestos Claims

PITTSBURGH — With Skinner Engine Co. Inc. failing to reorganize in the dozen years since filing for bankruptcy protection, the Chapter 7 trustee on May 24 sought to dismiss the case and leave the 28,000 asbestos personal injury claims filed against the company to be resolved by Skinner's insurers. **SEE PAGE 10.**

Lawyers Again Seek Summary Judgment On Garlock's Fraud, Conspiracy Claims

CHARLOTTE, N.C. — Allegations by Garlock Sealing Technologies LLC that attorneys fraudulently obtained a settlement from Garlock for a mesothelioma victim should be dismissed because Garlock fails to provide evidence to create a genuine issue of material fact for a claim of fraud, the attorneys say June 14 in their second bid for summary judgment in North Carolina federal bankruptcy court. **SEE PAGE 11.**

Bankruptcy Judge Rejects Barclays' Fee Enhancement For Work On ASARCO Case

CORPUS CHRISTI, Texas — Barclays Capital Inc. was adequately compensated for the 14 months of financial advisory services it provided in ASARCO LLC's bankruptcy case and is not entitled to a fee enhancement because Barclays should have anticipated the complicated developments in the case when it was hired, a Texas federal bankruptcy judge held May 30 in taking away a previously approved $975,000 fee enhancement award on remand. **SEE PAGE 13.**

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News

Specialty Products Seeks Expedited Appeal Of $1.16 Billion Finding

WILMINGTON, Del. — Specialty Products Holding Corp. and Bondex International Inc. on June 18 sought to appeal directly to the Third Circuit U.S. Court of Appeals a Delaware federal bankruptcy court ruling setting their asbestos liabilities at $1.16 billion, saying "prompt guidance" from the appellate court is needed to resolve an issue at the heart of the debtors' bankruptcy case and important to the public (In re: Specialty Products Holding Corp., et al., No. 10-11780, D. Del. Bkcy.; See May 2013, Page 4).

(**Motion for certification of decision for immediate appeal available.** Document #48-130624-026M. **Motion to stay decision pending appeal available.** Document #48-130624-027M.)

Expert Opinions

Specialty Products and subsidiary Bondex filed voluntary Chapter 11 bankruptcy petitions in the U.S. Bankruptcy Court for the District of Delaware in 2010 due to thousands of asbestos personal injury lawsuits filed against the companies. A trial was held in January 2013 to estimate the dollar amount of present and future mesothelioma claims caused by exposure to the debtors' asbestos-containing products. The estimate will be used to determine how much money will be needed to fund a trust under Section 524(g) of the Bankruptcy Code to evaluate and pay asbestos claims.

At the hearing and in post-trial briefing, the debtors argued that, rather than their estimated liability being based only on their past settlements of asbestos claims in the tort system, their historical payments to claimants should be reduced for various reasons to assess their present and future claims. By making such reductions, the debtors' expert, economist Charles H. Mullin, estimated the debtors' total current and future liabilities at $300 million to $575 million "net present value."

By contrast, lawyer and behavioral scientist Mark Peterson, the expert for the asbestos creditors' committee (ACC), pegged the debtors' liability for mesothelioma claims at $1.25 billion, and economist Thomas Vasquez, the expert for the future claimants' representative (FCR), testified that the debtors' estimated total mesothelioma liability is $1.1 billion.

Appeal Notices

On May 20, Bankruptcy Judge Judith K. Fitzgerald, who has since retired, sided with the ACC and FCR and refused to accept the debtors' "novel approach" to estimating their liability. Adopting for the most part Vasquez's findings, the bankruptcy judge said "an appropriate estimate for mesothelioma claims, pending and future, is $1.1 billion net present value." The parties previously agreed that 6 percent would be added to the mesothelioma estimate to cover all other asbestos personal injury claims, bringing the total estimate for the debtors' asbestos personal injury liability to $1,166,000,000.

Bankruptcy Judge Fitzgerald rejected all of the debtors' arguments as to why their past settlement amounts should be reduced for the purpose of estimating future liability. The bankruptcy judge rejected Mullin's attempts to minimize the debtors' asbestos liability by categorizing the companies' historical settlement payments as either indemnity payments or implicit defense costs to reduce the debtors' settlement payments by an amount that the debtors now say represented their effort to avoid legal fees.

The debtors and their corporate parent, RPM International Inc., filed separate notices of appeal of the bankruptcy judge's ruling, saying in a news release that they anticipate the appeal process to take two to three years.

Section 502(c)

The debtors say that the appeal process should be expedited because it will materially advance their bankruptcy case and allow the Third Circuit — and possibly the U.S. Supreme Court — to decide a question of law for which there is no precedent in those courts — whether the requirements for estimating claims in Bankruptcy Code Section 502(c) apply to estimation of asbestos claims.

"Because the appeal addresses issues fundamental to the estimation of asbestos claims, its disposition not only will have a substantial impact on the outcome of this case but also will set an important precedent for other chapter 11 cases, both pending and future, particularly those involving asbestos liability," the debtors say.

The debtors also ask the Bankruptcy Court to stay the estimation ruling or at least suspend or continue any proceedings related to the estimation decision because there is "a strong likelihood" that the appeal will succeed. The debtors say that they "will be irreparably harmed in the absence of a stay, particularly given the risk that the appeal could become equitably moot" and that "a stay will not harm any other parties because the businesses of Specialty Products Holding Corp.'s subsidiaries are continuing to generate positive cash flow and run profitably, and, in fact, all parties will benefit from the cost savings that will result from the stay."

The debtors further argue that a stay "will promote the public interest by assuring the preservation of an appeal that presents significant issues regarding the estimation of asbestos liability (a substantial public policy issue in its own right), the meaning of section 502(c) generally, public policy protecting and promoting settlements, and the public's interest in the transparency of asbestos litigation, including with respect to amounts recovered by claimants from asbestos trusts."

Counsel

The debtors are represented by Daniel J. DeFranceschi, Paul N. Heath and Zachary I. Shapiro of Richards, Layton & Finger in Wilmington and Gregory M. Gordon, Dan B. Prieto and Paul M. Green of Jones Day in Dallas.

The committee is represented by Natalie D. Ramsey and Davis Lee Wright of Montgomery, McCracken, Walker & Rhoads in Wilmington, Mark B. Sheppard and Lathrop B. Nelson III of the firm's Philadelphia office and Nathan D. Finch of Motley Rice in Washington, D.C. The FCR is represented by James L. Patton Jr., John T. Dorsey, Edwin J. Harron and Sharon M. Zieg of Young Conaway Stargatt & Taylor in Wilmington.

(Additional documents available: **Bankruptcy Court's May 20 memorandum opinion.** Document #48-130528-028Z. **Bankruptcy Court's May 20 order.** Document #48-130528-029R. **Debtors' amended post-trial brief.** Document #48-130225-013B. **Official Committee of Asbestos Personal Injury Claimants and future claimants' representative's post-trial brief.** Document #48-130225-014B.) ■

United States: Review Of Ruling Pinning Asbestos Liability On Pfizer Not Warranted

WASHINGTON, D.C. — The U.S. Supreme Court should deny a bid for *certiorari* by Pfizer Inc. for a ruling allowing state court asbestos personal injury lawsuits to proceed against the pharmaceutical giant because the decision is correct and does not conflict with any Supreme Court ruling, the United States says in a May 23 *amicus curiae* brief filed at the court's invitation (Pfizer Inc. v. Law Offices of Peter G. Angelos, No. 12-300, U.S. Sup.; 2013 U.S. S. Ct. Briefs LEXIS 2447; See January 2013, Page 13).

(***Amicus curiae* brief in Section A.** Document #48-130624-009B.)

State Court Suits

After Pfizer acquired Quigley Co. in 1968, some of Quigley's asbestos-containing products began to include Pfizer's name and trademark. When Quigley filed for Chapter 11 protection in 2004 in the U.S. Bankruptcy Court for the Southern District of New York, both companies were facing more than 100,000 asbestos personal injury actions. Due to the bankruptcy filing, the court issued an injunction enjoining most asbestos-related claims against Quigley and Pfizer under Section 524(g) of the U.S. Bankruptcy Code.

The Law Offices of Peter G. Angelos began filing lawsuits in Pennsylvania in 1999 on behalf of numerous plaintiffs against Pfizer and others, identifying Pfizer as the manufacturer of various asbestos products. The Angelos firm moved for summary judgment against Pfizer in many of the actions on the theory that Pfizer is liable as the "apparent manufacturer" of the products under Restatement (Second) of Torts Section 400 (1965), as incorporated into the common law of

Pennsylvania, which imposes liability in certain circumstances on the apparent manufacturer of a defective product. Pfizer then filed a motion in the Bankruptcy Court to enforce the injunction against the Angelos firm.

In 2008, the Bankruptcy Court held that the Angelos firm's Section 400 claims were subject to the injunction because they arose out of Quigley's conduct and could be asserted against a trust established under Quigley's proposed Chapter 11 plan of reorganization. The court, finding that Pfizer's Section 400 liability arose from ownership of Quigley and fell within the realm of Section 524(g), directed the Angelos firm to stop prosecuting the claims against Pfizer.

But in May 2011, the U.S. District Court for the Southern District of New York reversed the ruling, holding that the Section 400 claims do not arise out of Pfizer's ownership of Quigley and, therefore, do not fall within the scope of Section 524(g) or the injunction (In re Quigley Company, Inc., No. 10-1573, S.D. N.Y.; See June 2011, Page 10). The court said, "Pfizer's liability arises out of its sponsorship of a defective product, not its corporate affiliation . . . with the manufacturer." Because Quigley's injunction does not cover claims based on Pfizer's name being on Quigley's products, the Angelos firm "is free to pursue its § 400 claims in Pennsylvania state courts," the court ruled.

Petition For Certiorari

On April 10, 2012, the Second Circuit U.S. Court of Appeals affirmed the District Court's ruling, holding that under Section 524(g)(4)(A)(ii)(I) of the Bankruptcy Code, the Angelos firm's lawsuits "do not attempt to fix on Pfizer liability 'arising by reason of' Pfizer's 'ownership of a financial interest in' " Quigley and that, therefore, the actions are not barred by Quigley's injunction.

Pfizer filed a petition for writ of *certiorari* with the Supreme Court, presenting the following question: "Whether the Second Circuit erred by failing to apply as written a federal statute, 11 U.S.C. § 524(g)(4)(A)(ii), by limiting its scope in a manner that is contrary to its plain terms and that frustrates the congressional purposes of the statute."

In its response in opposition, the Angelos firm says that the question presented is: "Whether the determination of the Second Circuit Court of Appeals — i.e., that the preliminary injunction entered by the bankruptcy court in Quigley Company, Inc.'s pending bankruptcy case does not enjoin state law claims brought against Quigley's non-debtor parent Pfizer Inc. pursuant to Section 400 of the Restatement (Second) of Torts (1965) — was correct."

'By Reason Of'

The Supreme Court invited the U.S. solicitor general to file a brief in the case expressing the views of the United States. The United States says in its *amicus curiae* brief that the question presented is: "Whether, for purposes of 11 U.S.C. 524(g)(4)(A)(ii), a corporate parent's potential liability in tort arises 'by reason of' its relationship with a subsidiary-debtor when the actions of the corporate parent that resulted in potential liability were motivated in part by that relationship, but the relationship is not legally relevant to the determination whether liability exists."

The United States says that further review is not warranted because the Second Circuit correctly held that, based on Section 524(g)(4)(A)(ii), a corporate parent's liability does not arise "by reason of" its relationship with a subsidiary-debtor unless that relationship is legally relevant to the plaintiff's allegation that the parent is liable.

Certiorari also should be denied because the phrase "by reason of" in Section 524(g)(4)(A)(ii) has never been construed by the Supreme Court or any circuit court, the United States says.

"Other federal statutes use that phrase, but they do so in markedly different contexts, and this Court has recognized that the phrase's meaning depends on the statutory context in which it appears," the United States argues. "And while Section 524(g) performs a critical role in assessing liability for asbestos-related claims, this case presents a narrow question that has arisen infrequently."

Conference

On June 4, the case was distributed for conference of June 20.

The United States is represented by Solicitor General Donald B. Verrilli Jr., Acting Assistant Attorney General Stuart F. Delery, Deputy Solicitor General Malcolm L. Stewart, Assistant to the Solicitor General

Jeffrey B. Wall and Michael S. Raab and Jeffrey Clair of the Department of Justice in Washington.

Pfizer is represented by Sheila L. Birnbaum, Jay M. Goffman, Bert L. Wolff and Paul A. LaFata of Skadden, Arps, Slate, Meagher & Flom in New York.

The Angelos firm is represented by James W. Stoll, Jeffrey L. Jonas and Thomas H. Montgomery of Brown Rudnick in Boston and Edward S. Weisfelner of Brown Rudnick in New York.

(Additional documents available: **Pfizer's supplemental brief.** Document #48-130624-025B. **Petition for writ of *certiorari*.** Document #48-120924-031B. **Angelos firm's response brief in opposition.** Document #48-130128-006B. **Pfizer's reply brief.** Document #48-130128-007B. **Order denying petition for rehearing.** Document #48-120625-017R. **Petition for panel rehearing and rehearing *en banc*.** Document #48-120529-019X. **Second Circuit's April 10, 2012, opinion.** Document #48-120423-012Z. **District Court's memorandum opinion and order.** Document #48-110627-001R. **Bankruptcy Court's 2008 opinion.** Document #48-080610-120Z. **Motion to enforce injunction.** Document #48-080610-021M.) ■

GM Reports $161 Million In Trust Assets In 2012, But No Claims Paid

NEW YORK — Although the asbestos personal injury trust established in General Motors Corp.'s Chapter 11 bankruptcy case had more than $161 million in net assets at the end of 2012, it paid no claims during the year, according to the trust's annual report filed April 29 (In re: Motors Liquidation Co., et al., No. 09-50026, S.D. N.Y. Bkcy.).

(**Annual report and financial statements in Section B.** Document #48-130624-010X.)

Asbestos Trust

GM and affiliates filed for Chapter 11 bankruptcy in June 2009 in the U.S. Bankruptcy Court for the Southern District of New York. The renamed debtor, Motors Liquidation Co. (MLC), retained certain assets and liabilities, including liability for asbestos personal injury claims against GM, which was facing 29,000 such claims when it filed for bankruptcy.

The debtors' joint plan of reorganization was confirmed and became effective in March 2011. Under the plan, the MLC Asbestos Personal Injury Trust was created to assume the liabilities of MLC and its affiliated debtors for asbestos claims and use the trust's assets to pay current and future claimants "in such a way that holders of Asbestos Personal Injury Claims are treated fairly, equitably, and reasonably in light of the finite assets available to satisfy such claims," according to the trust's report.

The trust is to be funded with $2 million in cash and a $625 million allowed unsecured claim, an amount equivalent to the debtors' agreed-to estimate of their total current and future asbestos-related liabilities. The reorganization plan and trust received the backing of the court-appointed Official Committee of Unsecured Creditors Holding Asbestos-Related Claims and future claimants' representative.

Securities, Stock

According to the trust's report, the trust, like other general unsecured creditors, is to receive a *pro rata* share of New GM securities and a combination of GM common stock, stock rights and stock warrants. The trust's funding also will consist of units from the General Unsecured Creditors Trust, another trust established by the reorganization plan.

The trust says that in 2012, the trust received securities valued at $7,875,000. The previous year, the trust received the initial $2 million cash contribution plus $161,362,976 in securities. After deductions and adjustments, the trust had $161,493,595 in net assets at the end of 2012 available for the payment of claims, compared to $120,085,658 at the end of 2011.

The trust reported a net depreciation in the fair value of its investments in 2011 of more than $41 million but a net appreciation of the investments' value in 2012 of more than $34 million.

Payment Percentage

The trust says that while it began to accept claims for processing last year, it had not yet set a payment percentage for those claims. The trust's claims processor, MFR Claims Processing Inc., also began preliminarily reviewing claims in 2012, the trust says.

"As the Trust was still working to establish the payment percentage and to obtain certain data from New GM necessary for the evaluation of claims, no claims were paid during the Reporting Period," the trust reports.

Cambridge Associates LLC of Boston served as the trust's investment adviser. At the end of 2012, the trust's investable assets were allocated as follows: 47 percent in GM stock or GM warrants; 8 percent to other GM-related securities; 25 percent to municipal bonds; and 1 percent to hedge funds. The remaining 19 percent of the trust's assets are held in cash or equivalent short-term U.S. treasuries or a U.S. Treasury money market fund, the trust says.

Trust Officials

Texas attorney and state Sen. Kirk P. Watson served as the sole trustee of the trust in 2012. Analysis Research Planning Consulting served as the trust's executive director, and the Trust Advisory Committee consisted of Steven Kazan, John Cooney and Perry Weitz. Retired Cook County, Ill., Circuit Court Judge Dean M. Trafelet served as the legal representative for future asbestos claimants.

The trust is represented by Patrick J. Orr of Klestadt & Winters in New York, Kathleen Campbell Davis of Campbell & Levine in Wilmington, Del., and Douglas A. Campbell and Stanley E. Levine of Campbell & Levine in Pittsburgh. ■

Insurers Seek Reconsideration Of Pittsburgh Corning's Confirmation Rulings

PITTSBURGH — Two insurance companies that are among the last objectors to Pittsburgh Corning Corp.'s Chapter 11 plan of reorganization asked a Pennsylvania federal bankruptcy court on June 6 to reconsider its recent confirmation of the plan (In re: Pittsburgh Corning Corporation, No. 00-22876, W.D. Pa. Bkcy.; See May 2013, Page 5).

(**Motion to reconsider in Section D.** Document #48-130624-039M.)

The other remaining objector, fellow asbestos bankruptcy company Garlock Sealing Technologies LLC, on June 7 filed a notice of appeal of the plan confirmation rulings but on June 20 moved to stay the appeal until the insurers' motion for reconsideration is resolved.

(**Notice of appeal available.** Document #48-130624-040X. **Motion to stay appeal available.** Document #48-130624-041M.)

Confirmation

Facing hundreds of thousands of asbestos personal injury claims, Pittsburgh Corning (PCC) filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code in 2000 in the U.S. Bankruptcy Court for the Western District of Pennsylvania. PCC's reorganization plan under Section 524(g) of the Bankruptcy Code provides for the channeling of asbestos personal injury claims to a multibillion dollar trust for evaluation and payment.

In May, Bankruptcy Judge Judith K. Fitzgerald, who twice denied confirmation of PCC's reorganization plan, confirmed a revised plan over the objections of Mt. McKinley Insurance Co. and Everest Reinsurance Co. (collectively, Mt. McKinley) and Garlock, finding that the plan is insurance neutral and that Mt. McKinley and Garlock do not have standing to object to the plan.

Bankruptcy Judge Fitzgerald then retired and transferred the case to Chief Bankruptcy Judge Thomas P. Agresti (See story, this issue).

'Hearsay' Affidavits

Mt. McKinley says that the confirmation rulings should be reconsidered, its objections should be sustained and plan confirmation should be denied. Mt. McKinley says that the bankruptcy judge erred by selectively reopening the evidentiary record to admit "facially defective hearsay" affidavits on whether hundreds of nondebtor affiliate companies qualify for injunctive relief in PCC's plan under Section 524(g).

The insurer says that the Bankruptcy Court "should reconsider its reliance on these affidavits and exclude them from the evidentiary record. Not only are the affidavits untimely, coming nearly three years after the close of evidence on the prior plan . . . but they are also inadmissible under the rules of evidence."

Mt. McKinley further argues that plan confirmation should be denied because the scope of the plan's injunction protecting hundreds of PCC affiliates is still unclear.

The insurer says that the injunction is confusing "because there is no evidence supporting § 524(g) relief for the hundreds of non-debtor affiliates identified" in the plan exhibits. "Instead, there is only the representation of counsel and two defective affidavits filed the same day the Court's Opinion issued," Mt. McKinley says.

Discovery

Mt. McKinley says that it should be allowed to take discovery on how PCC intends the plan to operate and hold a proper evidentiary hearing on the plan. The insurer says that the Bankruptcy Court has erred for years by refusing to permit it to conduct discovery related to its allegations that there was collusion in the formulation of the reorganization plan, including whether PCC and other parties colluded in the development of overly lenient procedures that would permit payment of invalid and fraudulent claims.

"Despite repeated requests over the last decade, and despite continuing developments in the law designed to curb such abuses of the bankruptcy system and an ever-increasing awareness by courts and legislative bodies across the United States of the problem of fraudulent asbestos claims, the Bankruptcy Court continually refused to permit such discovery in this case," Mt. McKinley says.

Meanwhile, Garlock says that if the Bankruptcy Court grants Mt. McKinley's motion to reconsider, Garlock's appeal may become moot. So "to save judicial resources," the appeal should be stayed pending the outcome of Mt. McKinley's motion, Garlock says.

Counsel

Mt. McKinley and Everest are represented by James R. Walker of Buchanan Ingersoll & Rooney in Pittsburgh, Fred L. Alvarez of Walker Wilcox Matousek in Chicago and Tony L. Draper and Britt Walther of Walker Wilcox Matousek in Houston.

Garlock is represented by Justin T. Romano and Arthur H. Stroyd Jr. of Del Sole Cavanaugh Stroyd in Pittsburgh and Garland S. Cassada and Richard C. Worf of Robinson, Bradshaw & Hinson in Charlotte, N.C.

PCC is represented by James J. Restivo Jr., David Ziegler, Douglas E. Cameron and Andrew J. Muha of Reed Smith in Pittsburgh. ■

Bankruptcy Judge Orders Law Firm To Show Why Brief Should Not Be Stricken

NEW YORK — A New York federal bankruptcy judge on June 17 ordered a New Jersey law firm to show cause why its brief opposing confirmation of a plan of reorganization for Chapter 11 debtor Quigley Co. Inc., filed on the verge of the plan confirmation hearing, should not be stricken (In re Quigley Company Inc., No. 04-15739, S.D. N.Y. Bkcy.).

(**Order to show cause available.** Document #48-130624-028R. **Motion to strike available.** Document #48-130624-029M.)

Support Of Confirmation

Quigley, a subsidiary of Pfizer Inc., filed a Chapter 11 bankruptcy petition in 2004 in the U.S. Bankruptcy Court for the Southern District of New York due to asbestos personal injury claims. The confirmation hearing for Quigley's fifth amended reorganization plan is scheduled for June 26. Confirmation of a previous plan was denied by Bankruptcy Judge Stuart M. Bernstein, who found that the plan was not proposed in good faith.

On June 12, Pfizer filed a brief in support of plan confirmation, saying that the latest plan addresses all of the concerns that the bankruptcy judge had with the prior plan, including a more than $500 million increase in Pfizer's contribution to "provide immediate and substantial liquid assets to satisfy asbestos claims."

On June 13, Quigley filed its memorandum in support of confirmation, arguing that the plan is proposed in good faith, is feasible and now meets all requirements of the Bankruptcy Code.

"Quigley has complied with Code § 524(g), as intended by Congress," the debtor says. "Quigley seeks to use the Bankruptcy Code's trust/injunction structure to treat present and future holders of asbestos personal injury claims fairly and equitably, as many other debtors have done before."

Final Tabulation

Quigley also says that the plan "remedies any infirmities in the Prior Plan," including separately classifying in Class 4A holders of asbestos personal injury claims who were found to be "motivated to accept the Fourth Plan by virtue of the financial incentive under the [pre-petition settlement agreements with Pfizer]." By doing this, Quigley says, claimants who were not part of the settlements are not bound by Class 4A's affirmative vote.

According to a declaration also filed June 13 by BMC Group Inc., Quigley's claims, tabulation and noticing agent, the final tabulation of votes cast on the amended reorganization plan shows that 99.99 percent of Class 4A claimants voted to accept the plan and 98.01 percent of other asbestos claimants voted to accept the plan. In Class 4A, the count was 136,381 to 13, and in Class 4B the count was 150,603 to 3,059.

The same day, the law firm Wilentz, Goldman & Spitzer, which represents asbestos personal injury claimants and is the only remaining objector to Quigley's plan, filed a brief in opposition to plan confirmation. The law firm says that the plan, rather than being a graceful Chapter 11 swan for Quigley, "looks like a Pfizer duck, walks like a Pfizer duck and quacks like a Pfizer duck. The court must see it is a Pfizer duck, and a lame one at that, walking and quacking only for the benefit of some individuals holding pre-confirmation claims against Pfizer as well as the debtor."

'Improper Filing'

Quigley says in a June 17 motion that the law firm's brief should be disregarded and stricken from the record because it was filed nearly two months after the deadline for filing such a brief in violation of a court scheduling order and Federal Rules of Civil Procedure governing any modification of that order.

"The filing of the objector's Additional Brief which contains no 'material developed through discovery,' does not comport with the limited provision permitting supplemental papers set forth in the Scheduling Order," Quigley says. "Further, not only has Wilentz never advanced to the Court (or the parties) any cause, let alone good cause, for its improper filing, but the time for doing so has passed."

Bankruptcy Judge Bernstein ordered that all parties in interest show cause at a hearing June 20 why he should not enter an order granting the relief Quigley requests in its motion.

Counsel

Wilentz Goldman is represented by Deirdre Woulfe Pacheco of the Woodbridge, N.J., firm.

Quigley is represented by Michael L. Cook and Lawrence V. Gelber of Schulte Roth & Zabel in New York. Pfizer is represented by Jay M. Goffman, George A. Zimmerman, Jonathan L. Frank and Suzanne D.T. Lovett of Skadden, Arps, Slate, Meagher & Flom in New York and Sheila L. Birnbaum and Bert L. Wolff of Quinn Emanuel Urquhart & Sullivan in New York.

(Additional documents available: **Wilentz Goldman & Spitzer's brief in opposition.** Document #48-130624-030B. **Declaration on final tabulation of votes.** Document #48-130624-031X. **Quigley's brief in support of plan confirmation.** Document #48-130624-032B. **Pfizer's brief in support of plan confirmation.** Document #48-130624-033B.) ■

Trustee: Skinner's Case Should Be Dismissed Despite 28,000 Asbestos Claims

PITTSBURGH — With Skinner Engine Co. Inc. failing to reorganize in the dozen years since filing for bankruptcy protection, the Chapter 7 trustee on May 24 sought to dismiss the case and leave the 28,000 asbestos personal injury claims filed against the company to be resolved by Skinner's insurers (<u>In re: Skinner Engine Company, Inc.</u>, No. 01-23987, W.D. Pa. Bkcy.).

(**Motion available.** Document #48-130624-045M.)

'Lack Of Funds'

Skinner, which manufactured steam engines and parts that contained asbestos and were used on merchant ships, and parent American Capital Equipment LLC (ACE) filed voluntary Chapter 11 bankruptcy petitions in 2001 in the U.S. Bankruptcy Court for the Western District of Pennsylvania. Approximately 28,000 direct and indirect claims, including indemnification claims, were filed against the debtors based on alleged exposure to asbestos containing products manufactured or sold by the companies.

In 2009, the Bankruptcy Court rejected Skinner's fifth amended plan of reorganization and converted the Chapter 11 case into a Chapter 7 petition, saying that Skinner and the asbestos claimants were unable to effectuate a confirmable plan within a reasonable period of time. The conversion to Chapter 7 was upheld, first by the U.S. District Court for the Western District of Pennsylvania and then, in 2012, by the Third Circuit U.S. Court of Appeals (In re: American Capital Equipment, et al., Nos. 10-2239, 10-2240, 3rd Cir.; 2012 U.S. App. LEXIS 15333; See August 2012, Page 4).

Chapter 7 trustee Jeffrey J. Sikirica, citing In re Commercial Oil Service, Inc. (88 B.R. 126, 129 [N.D. Ohio 1987]), says that there is cause to dismiss Skinner's case pursuant to Section 707(a) of the Bankruptcy Code because the case "is impossible to administer because of a lack of funds" and the trustee cannot operate the debtors' business.

Remaining Assets

Sikirica says that the debtors' estates have about $61,500 in liquid assets while administrative expenses for claims filed, as well as fee applications and yet unfiled claims for legal fees, are estimated to exceed $1 million.

"Any effort by the Trustee to analyze, reconcile and possibly object to administrative expense claims from the Chapter 11 Cases would, in the Trustee's judgment, exhaust the remaining liquid assets and thus permit no distribution on account of such claims from the Chapter 11 Cases," Sikirica says.

The trustee adds that there is no money in the estates to pay general unsecured claims, including asbestos personal injury claims, so any administration of the estates would provide no benefit to unsecured creditors, including the holders of asbestos injury claims.

The debtors' only other assets are insurance policies that will remain in place after dismissal date for the defense and satisfaction of covered claims, including asbestos claims, Sikirica says.

5 Insurers

"It is in the best interest of the Debtors' estates, their creditors and other parties in interest for the case to be dismissed while preserving all rights and defenses with respect to claims of creditors and parties in interest, including, by way of example, the rights of claimants and insurers with respect to Asbestos Personal Injury Claims," the trustee argues.

Sikirica says that five of the debtors' insurers — Travelers Casualty and Surety Co., Hartford Accident and Indemnity Co., Hartford Fire Insurance Co., First State Insurance Co. and National Union Fire Insurance Company of Pittsburgh, Pa. — have acknowledged that they are prepared to defend any potentially covered asbestos personal injury claims asserted against the debtors in the tort system after the case is dismissed.

A hearing on the trustee's motion is scheduled for Sept. 10. Responses are due by Aug. 30.

Sikirica is represented by Law Office of Jeffrey J. Sikirica in Gibsonia, Pa.

(Additional document available. **Third Circuit's 2012 opinion.** Document #48-120827-003Z.) ■

Lawyers Again Seek Summary Judgment On Garlock's Fraud, Conspiracy Claims

CHARLOTTE, N.C. — Allegations by Garlock Sealing Technologies LLC that attorneys fraudulently obtained a settlement from Garlock for a mesothelioma victim should be dismissed because Garlock fails to provide evidence to create a genuine issue of material fact for a claim of fraud, the attorneys say June 14 in their second bid for summary judgment in North Carolina federal bankruptcy court (Garlock Sealing Technologies, LLC, et al. v. Chandler, et al., No. 12-03137, W.D. N.C. Bkcy.; See January 2013, Page 7).

(**Renewed motion for summary judgment available.** Document #48-130624-024M.)

Texas Case

Garlock, Garrison Litigation Management Group and The Anchor Packing Co. (collectively, Garlock) filed for protection under Chapter 11 of the U.S. Bankruptcy Code in 2010 in the U.S. Bankruptcy Court for the Western District of North Carolina due to an estimated 100,000 asbestos personal injury claims — including about 5,000 mesothelioma claims — pending against the companies.

In 2008, John A. Phillips and his wife sued Garlock and other companies in the Harris County, Texas, District Court, alleging that Phillips contracted mesothelioma because of asbestos fibers that he breathed into his lungs as a teenager while cutting gaskets from gasket sheet material manufactured by Garlock and Johns-Manville Corp. Phillips' attorneys, Troy D. Chandler, Charles D. Finley and Samantha Flores of Williams Kherkher Hart Boundas in Houston, said Phillips' mesothelioma was caused by a rare type of asbestos called crocidolite that was contained in Garlock's and Johns-Manville's products. The case ended in a settlement from Garlock.

On June 4, 2012, Garlock sued the attorneys and law firm, saying they committed fraud to boost the amount of money they could receive from settling Phillips' case. Garlock alleges that at the same time the attorneys were suing Garlock, they were pursuing claims for Phillips in the bankruptcy case of ASARCO LLC and related entities that manufactured pipes that also contained crocidolite. Garlock says it recently acquired ballots that were cast in ASARCO's bankruptcy case showing that Phillips' attorneys verified that he had been exposed to ASARCO's products.

Garlock says that when it requested in discovery in Phillips' case that his attorneys disclose any other exposures to asbestos, the attorneys repeatedly signed discovery responses concealing the exposures that were the basis for their claims in ASARCO's bankruptcy, even though the attorneys were legally obligated to disclose the exposures.

Motions For Judgment

The attorneys moved for judgment on the pleadings, arguing that Garlock's claims are barred by Texas law and fail anyway because Garlock provided no evidence to prove fraud. The attorneys also moved for summary judgment, arguing that Garlock failed to raise a genuine issue of material fact demonstrating any misrepresentation by the attorneys.

On Jan. 28, Bankruptcy Judge George R. Hodges granted the attorneys judgment on Garlock's claim for negligent misrepresentation. However, the bankruptcy judge denied the attorneys judgment on Garlock's fraud and civil conspiracy claims.

In addition, the bankruptcy judge denied the attorneys' motion for summary judgment "without prejudice to Defendants' right to re-assert the Motion at a later time."

Renewed Motion

In their renewed motion for summary judgment, the attorneys again say the evidence shows that they made no misrepresentations and that Garlock did not rely on the attorneys' representations in any event.

"Therefore, Plaintiffs cannot come forward with admissible evidence to create a genuine issue of material fact with respect to at least two of the essential elements required to prove their claim of fraud," the attorneys say.

And because Garlock cannot prove that fraud and its conspiracy claim is premised on the existence of fraud, the conspiracy claim fails as well, the attorneys say.

"Furthermore, because the individual defendants were employees of Williams Kherkher Hart Boundas, LLP at the time of the events in question, the conspiracy claim is impermissibly premised on the notion of an entity conspiring with itself and must be dismissed for that reason as well," the attorneys argue.

Under Seal

The attorneys' memorandum in support of their motion was filed under seal, as was a joinder to the motion and memorandum in support of the motion filed by the Official Committee of Asbestos Personal Injury Claimants.

The attorneys and law firm are represented by Raymond E. Owens Jr. and Sara W. Higgins of Higgins & Owens in Charlotte.

Garlock is represented by Garland S. Cassada, D. Blaine Sanders, Jonathan C. Krisko and Richard C. Worf Jr. of Robinson Bradshaw & Hinson in Charlotte.

The Official Committee is represented by Trevor W. Swett III and Jeffrey A. Liesemer of Caplin & Drysdale in Washington, D.C., Elihu Inselbuch of the firm's New York office and Travis W. Moon of Moon Wright & Houston in Charlotte.

(Additional documents available: **Bankruptcy Court's Jan. 28 order granting in part motion for judgment on the pleadings.** Document #48-130128-022R. **Bankruptcy Court's Jan. 28 order denying motion for summary judgment.** Document #48-130128-023R. **Amended complaint.** Document #48-120924-002C. **Answer.** Document #48-120924-001W.) ■

Bankruptcy Judge Rejects Barclays' Fee Enhancement For Work On ASARCO Case

CORPUS CHRISTI, Texas — Barclays Capital Inc. was adequately compensated for the 14 months of financial advisory services it provided in ASARCO LLC's bankruptcy case and is not entitled to a fee enhancement because Barclays should have anticipated the complicated developments in the case when it was hired, a Texas federal bankruptcy judge held May 30 in taking away a previously approved $975,000 fee enhancement award on remand (<u>In re: ASARCO LLC, et al.</u>, No. 05-21207, S.D. Texas Bkcy.; See May 2013, Page 22).

(**Supplemental findings of fact and conclusions of law in Section C.** Document #48-130624-008Z.)

'Full-Payment' Plan

Mining company ASARCO, a subsidiary of Grupo Mexico, filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of Texas in 2005. ASARCO then hired Lehman Brothers as its financial adviser and investment banker. In 2008, the Bankruptcy Court approved a $1 million fee enhancement for Lehman for work related to fraudulent-transfer proceedings that was outside the scope of the engagement letter.

After Lehman filed its own Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of New York, Barclays acquired Lehman's investment banking and financial advisory businesses. Barclay's then renegotiated its work agreement with ASARCO, signing an engagement letter that provided for a monthly advisory fee of $225,000, up from $75,000 a month, and a transaction fee of $5 million.

ASARCO's "full-payment" plan of reorganization was confirmed in 2009, with creditors being paid 100 cents on the dollar and ASARCO's parent retaining ownership of the company. Barclays then submitted a final fee application requesting $1,202,500 for "unanticipated" services, a $2 million "success fee" based on the overall outcome of ASARCO's reorganization and a $6 million "auction fee" for Barclays' assistance in marketing and auctioning one of the bankruptcy estate's largest assets.

In 2010, the Bankruptcy Court awarded Barclays $975,000 under Section 328(a) of the U.S. Bankruptcy Code for unanticipated services but denied Barclays' request for the success fee and auction fee. Both sides appealed to the U.S. District Court for the Southern District of Texas, which affirmed all of the Bankruptcy Court's decisions.

On Remand

Both parties then appealed to the Fifth Circuit U.S. Court of Appeals, which on Dec. 11, 2012, reversed the $975,000 fee award, finding that the Bankruptcy Court erred in awarding the enhanced fees because all of the developments in the ASARCO bankruptcy proceeding were "capable of being anticipated" within the meaning of 11 U.S. Code Section 328(a) (<u>ASARCO LLC v.</u>

Barclays Capital Inc. [In The Matter of ASARCO LLC], No. 11-41010, 5th Cir.; See December 2012, Page 10). Barclays had abandoned its $6 million auction fee claim, so the Fifth Circuit remanded the case to the Bankruptcy Court to consider whether a success fee was appropriate in light of the panel's conclusion that the $975,000 fee enhancement award was made in error.

On remand, ASARCO argued that Barclays was not entitled to the award of a discretionary fee pursuant to paragraph 6(f) of the Barclays engagement letter. ASARCO said the Bankruptcy Court, in its original ruling, correctly held that while Barclays contributed to ASARCO's successful reorganization, other factors contributed much more to that success, such as a well-timed and substantial rise in copper prices in 2009 and a fraudulent conveyance action that resulted in one of the largest actual damage awards in U.S. history that returned $6 billion to $9 billion in stock in a Peru copper company and $1 billion in cash to ASARCO.

Barclays argued that because it was compensated at far below the market rate, it was entitled to a success fee award of not less than $975,000, the original amount.

'Paid Generously'

But in his supplemental findings, Bankruptcy Judge Richard S. Schmidt agreed with the Fifth Circuit that Barclays' work does not entitle it to an enhanced fee under paragraph 6(f) of the engagement letter or a discretionary fee pursuant to Section 330 of the Bankruptcy Code. The judge denied Barclays' fee enhancement claims in their entirety and dismissed its remaining fee claims with prejudice.

"As the District Court observed, paragraph 6(f) 'does not mandate that a simple finding that [Barclays] provided creative advice and high-quality service automatically entitled [it] to a discretionary fee,'" Bankruptcy Judge Schmidt said. "After all, Barclays was hired to do precisely that — to provide effective, creative, and wide-ranging financial-advisory and investment-banking services — and was paid generously to do so. Barclays received . . . a total of $8,150,000 for the fourteen-month period."

ASARCO is represented by Marty L. Brimmage Jr. and Lacy M. Lawrence of Akin Gump Strauss Hauer & Feld in Dallas and Benjamin L. Mesches of Haynes and Boone in Dallas.

Barclays is represented by Kevin J. Terrazas of Yetter Coleman in Austin, Texas.

(Additional documents available: **ASARCO's proposed findings of fact and conclusions of law.** Document #48-130528-024X. **Barclays' proposed findings of fact and conclusions of law.** Document #48-130528-025X. **Fifth Circuit opinion.** Document #80-121219-027Z.) ■

Asbestos Coverage Disputes Between Flintkote, Insurers Head To Binding Arbitration

WILMINGTON, Del. — A Delaware federal bankruptcy judge on June 20 granted relief from the automatic stay in The Flintkote Co.'s Chapter 11 case so that Flintkote and certain London market insurance companies can participate in binding arbitration to resolve disputes over insurance coverage for asbestos bodily injury claims (In re: The Flintkote Co., et al., No. 04-11300, D. Del. Bkcy.).

(**Order available.** Document #48-130624-042R.)

Wellington Agreement

Facing more than 150,000 asbestos personal injury claims, Flintkote and Canadian affiliate Flintkote Mines Ltd. (collectively, Flintkote), filed for Chapter 11 protection in 2004 in the U.S. Bankruptcy Court for the District of Delaware. Flintkote's plan of reorganization, which creates a trust under U.S. Bankruptcy Code Section 524(g) to process and pay asbestos claims, was confirmed Dec. 21, 2012, and is under appeal.

On May 24, Flintkote sought to lift the automatic stay to pursue binding arbitration with respect to all asbestos-related insurance coverage disputes between the debtor and insurers Indemnity Marine Assurance Co., Winterthur Swiss Insurance Co. and INA UK (collectively, the London companies).

Flintkote says that in the early 1980s, the London companies subscribed to the same set of insurance policies issued in the London insurance market to provide coverage to the debtor for asbestos-related claims. In 1985, Flintkote and the London companies entered into an agreement concerning asbestos claims called the Wellington agreement.

Flintkote says that after asbestos and other claims exhausted its insurance below the London policies in 2002, it began billing the London companies for defense costs and indemnity payments for asbestos claims that were filed and resolved by the debtor before its bankruptcy petition. However, Flintkote says, the London companies refused and raised a number of alleged defenses and offset claims, so Flintkote commenced an alternative dispute resolution (ADR) proceeding pursuant to the Wellington agreement.

Binding Arbitration

Flintkote says that it has engaged in mediation and negotiation with the London companies in the first stage of the ADR proceeding but has been unable to resolve the disputes, so it seeks to move on to the next steps of the process — binding arbitration and, if necessary, appeal.

"Granting the requested relief from stay will not only allow the Debtor to move forward with binding arbitration in order to collect any amounts due on the outstanding billings, but also to resolve all other disputes relating to coverage for asbestos-related claims by permitting the London Companies to assert any offsets or counterclaims," Flintkote says.

On June 14, the London companies filed a limited response to Flintkote's motion, saying that while they dispute certain facts and legal conclusions presented by Flintkote, they agree that the automatic stay should be lifted to allow binding arbitration to proceed so the insurance coverage issues can be resolved.

No Determination

In granting the motion, Bankruptcy Judge Mary F. Walrath said that her order does not constitute a determination of any of the facts in dispute between Flintkote and the London companies.

The bankruptcy judge further held that lifting the automatic stay does not "prejudice the rights and defenses of the London Companies in the Arbitration, the [Federal Arbitration Act] Action or in any other coverage matter between the parties, and/or shall [not] have any preclusive effect (via *res judicata*, collateral estoppel or otherwise) in the Arbitration" or any other action.

Flintkote is represented by Kevin T. Lantry, Jeffrey E. Bjork and Shawn C. Luna of Sidley Austin in Los Angeles and Laura Davis Jones and James E. O'Neill of Pachulski, Stang, Ziehl & Jones in Wilmington.

The London companies are represented by Kristi J. Doughty of Whittington & Aulgur in Middletown, Del., Michael A. Shiner of Tucker Arensberg in Pittsburgh and Fred L. Alvarez of Walker Wilcox Matousek in Chicago.

(Additional documents available: **Motion for relief from stay.** Document #48-130624-043M. **Limited response.** Document #48-130624-044B.) ■

Retiring Jurist Fitzgerald Transfers Pittsburgh Corning Chapter 11 Case

PITTSBURGH — Seven days after issuing final rulings confirming the plan of reorganization for Chapter 11 debtor Pittsburgh Corning Corp. (PCC), Pennsylvania federal Bankruptcy Judge Judith K. Fitzgerald, who is retiring from the bench, on May 31 transferred the case to another bankruptcy judge (In re: Pittsburgh Corning Corporation, No. 00-22876, W.D. Pa. Bkcy.).

(**Order available.** Document #48-130624-001R.)

Plan Confirmation

PCC filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code in 2000 in the U.S. Bankruptcy Court for the Western District of Pennsylvania as a result of hundreds of thousands of asbestos personal injury claims. PCC's reorganization plan under Section 524(g) of the Bankruptcy Code provides for the channeling of asbestos personal injury claims to the multibillion dollar Pittsburgh Corning Corporation Asbestos Personal Injury Settlement Trust for evaluation and payment.

Bankruptcy Judge Fitzgerald, who twice denied confirmation of the plan, confirmed PCC's revised plan over the objections of nonsettling insurers Mt. McKinley Insurance Co. and Everest Reinsurance Co. (collectively, Mt. McKinley) and fellow Chapter 11 asbestos products company Garlock Sealing Technologies LLC. The bankruptcy judge held that the plan is insurance neutral and that Mt. McKinley and Garlock do not have standing to object to the plan.

After entertaining motions for reconsideration on only technical changes to her plan confirmation decision, Bankruptcy Judge Fitzgerald on May 24 issued a revised memorandum opinion (2013 Bankr. LEXIS 2124) and a final order confirming PCC's plan. She also issued orders denying requests by Mt. McKinley for reconsideration of a previous plan denial ruling and for a case management order to conduct discovery.

(**Revised memorandum available.** Document #48-130624-002Z. **Final plan confirmation order available.** Document #48-130624-003R. **Order denying motion for reconsideration available.** Document #48-130624-004R. **Order denying motion for case management order available.** Document #48-130624-005R.)

Judgeship Vacancy

The bankruptcy judge then transferred PCC's case and any adversary actions to Chief Bankruptcy Judge Thomas P. Agresti. The Bankruptcy Court posted the judgeship vacancy created by Bankruptcy Judge Fitzgerald's retirement and the application process for a bankruptcy judgeship in October.

Bankruptcy Judge Fitzgerald was appointed to the Bankruptcy Court in 1987 and reappointed to a second 14-year term in 2001. She served as chief judge from 2000 through 2004 and sits by designation in the U.S. Bankruptcy Courts for the District of Delaware and the U.S. Virgin Islands and formerly sat by designation in the Eastern District of Pennsylvania.

Before her appointment to the bench, Bankruptcy Judge Fitzgerald served nearly 12 years as an assistant U.S. attorney in the Western District of Pennsylvania, handling civil and criminal cases. She graduated from the University of Pittsburgh and its School of Law.

Law School

According to a news release, Bankruptcy Judge Fitzgerald will join the full-time faculty of Indiana Institute of Technology's new School of Law in Fort Wayne, Ind.

"Indiana Tech is very excited to have Judge Fitzgerald become a part of our community," law school Dean Peter C. Alexander said. "She is an excellent jurist whom I've known, worked with, and respected for many years."

Bankruptcy Judge Fitzgerald has served as a lecturer on the national, state and local levels for the National Conferences of Bankruptcy Judges, the Pennsylvania Bar Institute and other organizations. She also has taught bankruptcy and commercial law courses as an adjunct professor at the University of Pittsburgh School of Law and conducted classes at the Duquesne University School of Law, both in Pittsburgh, and at the University of Miami. Alexander said "the judge is very comfortable in the classroom, and our students will benefit from her years of experience training lawyers and law students."

Next Chapter

Bankruptcy Judge Fitzgerald said she is looking forward to "the next exciting chapter" in her career.

"I have always appreciated how difficult it is for students to learn to think and act like lawyers and for professionals to stay current in their practice areas. I am devoted to finding ways to bridge the gap between the theory of the law and how it plays out in the real world," she said. "A primary mission of Indiana Tech Law School is to teach students to comprehend legal theory through clinics, practicums, and in-class assignments — something right in line with what I believe is fundamental to legal education. I'm thrilled to have this opportunity and look forward to meeting the inaugural class."

PCC is represented by James J. Restivo Jr., David Ziegler, Douglas E. Cameron and Andrew J. Muha of Reed Smith in Pittsburgh.

(Additional document available. **Amended reorganization plan.** Document #48-120924-039X.) ■

Asbestos Bankruptcy Cases In Delaware Get New Judges

WILMINGTON, Del. — The chief judge of the U.S. Bankruptcy Court for the District of Delaware on June 5 reassigned eight asbestos bankruptcy cases that were assigned to Bankruptcy Judge Judith K. Fitzgerald, who retired at the end of May.

(**Order available.** Document #48-130624-037R.)

Open/Closed

Four of the cases are open, and four are closed. The open cases reassigned by Chief Bankruptcy Judge Kevin Gross are:

- In re: W.R. Grace & Co., et al., No. 01-1139, to Bankruptcy Judge Kevin J. Carey.
- In re: Federal-Mogul Global, Inc., et al., No. 01-10578, to Bankruptcy Judge Christopher S. Sontchi.
- In re: The Flintkote Company, No. 04-11300, to Bankruptcy Judge Mary F. Walrath.
- In re: Specialty Products Holding Corp., et al., No. 10-11780, to Bankruptcy Judge Peter J. Walsh.

The reassigned closed cases are:

- In re: Swan Transportation Company, No. 01-11690, to Bankruptcy Judge Brendan L. Shannon.
- In re: A-Best Products Company, Inc., No. 02-12734, to Bankruptcy Judge Carey.
- In re: Combustion Engineering, Inc., No. 03-10495, to Bankruptcy Judge Walrath.
- In re: ABB Lummus Global, Inc., No. 06-10401, to Bankruptcy Judge Walrath.

Status Of Cases

Among Bankruptcy Judge Fitzgerald's recent rulings are a May 20 decision setting Specialty Products' asbestos liability at $1.16 billion and a Dec. 21 ruling confirming Flintkote's Chapter 11 plan of reorganization. Both decisions are under appeal, as is the former bankruptcy judge's confirmation of W.R. Grace's reorganization plan in 2011.

Federal-Mogul's plan was confirmed in 2007, but the case remains open. On June 17, Bankruptcy Judge Sontchi issued an order requesting a status report from the reorganized debtor and the Federal-Mogul Global U.S. Asbestos Personal Injury Trust pursuant to 11 U.S. Code Section 105(d).

(**Order available.** Document #48-130624-038R.) ■

Federal Judge Again Affirms Confirmation Of Thorpe's Section 524(g) Plan

LOS ANGELES — A California federal judge on June 6 affirmed confirmation of the Chapter 11 plan of reorganization for Thorpe Insulation Co. and subsidiary Pacific Insulation Co. for a second time (In re Thorpe Insulation Co., No. 10-1493, C.D. Calif.).

(**Order available.** Document #48-130624-036R.)

Previous Approvals

Thorpe and Pacific filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in 2007 in the U.S. Bankruptcy Court for the Central District of California. In 2010, the Bankruptcy Court confirmed Thorpe's reorganization plan pursuant to Section 524(g) of the Bankruptcy Code, and the U.S. District Court for the Central District of California affirmed the plan confirmation.

The plan established the Thorpe Insulation Settlement Trust to pay current and future asbestos personal injury claims. In establishing the plan and trust, the debtors reached settlements with 13 insurers that provided for more than $600 million in cash and securities to fund the trust in exchange for releases of claims and protection of Section 524(g) injunctions. The debtors also contributed to the trust.

In affirming the reorganization plan, the District Court held that it was "insurance neutral," so nonsettling insurance companies did not have standing to object to the plan. The court also held that the plan preempted the insurers' state law contract rights.

The plan became effective in October 2010, and implementation of the plan began. Also on the effective date, the two debtors merged, and the surviving corporation, Thorpe, was renamed Pacific Insulation Co.

On Remand

Two groups of nonsettling insurers then appealed the District Court's ruling to the Ninth Circuit, which in January 2012 reversed in part approval of Thorpe's plan and remanded the case to the Bankruptcy Court so the insurers' arguments could be heard. The appellate panel held that because the plan could harm the nonsettling insurers, it is not insurance neutral and, therefore, the insurers had standing to object to it.

At the time of the Ninth Circuit ruling, about $135 million had been transferred to the debtors' asbestos trust, and $15 million had been distributed to asbestos claimants. On remand, Bankruptcy Judge Sheri Bluebond allowed the trust to continue to operate, and the objecting insurers filed several appeals to the Ninth Circuit of the bankruptcy judge's orders on the trust's operation and post-remand reports.

The debtors then reached three settlements with the remaining objecting insurers — National Fire Insurance Company of Hartford, Continental Insurance Co., Century Indemnity Co., Central National Insurance Company of Omaha, Motor Vehicle Casualty Co., Middlesex Insurance Co. and Sentry Mutual Co. — that will provide a total of $93 million to the asbestos trust.

Plan Confirmation

With no more objections to the plan for Bankruptcy Judge Bluebond to consider, she held a one-day confirmation hearing and then on May 8 entered findings of fact and conclusions of law in support of plan confirmation and an order confirming the debtor's sixth amended plan on remand (See May 2013, Page 7). According to the findings, most of the plan's modifications reflect implementation of the sale of the insurance policies under the three settlements entered into during the remand proceedings. The plan also designates the insurers as settling asbestos insurers protected by the plan injunctions. In addition, the revised plan includes provisions concerning Medicare claims reporting.

The findings further state that the pending Ninth Circuit appeals by the last objecting insurers of the bankruptcy judge's trust operation rulings on remand will be withdrawn once the latest reorganization plan becomes effective.

The debtors then filed a motion in the District Court for affirmation of the bankruptcy judge's plan confirmation, stating that the plan complies with the Ninth Circuit's remand and all applicable provisions of the Bankruptcy Code.

All Respects

Judge Dale S. Fischer affirmed the confirmation order in all respects, finding that the affirmation is in accordance with 11 U.S. Code Section 524(g) and 28 U.S. Code Section 1334(b) and that the requirements for issuance of the plan injunctions pursuant to Section 524(g) have been met.

Thorpe and Pacific are represented by Kenneth N. Klee, Daniel J. Bussel and Thomas E. Patterson of Klee, Tuchin, Bogdanoff & Stern in Los Angeles, Jeremy V. Richards and Henry C. Kevane of Pachulski Stang Ziehl & Jones in Los Angeles and John A. Lapinski of Clark & Trevithick in Los Angeles.

(Additional documents available: **Motion to affirm plan confirmation.** Document #48-130528-034M. **Bankruptcy Court's findings of fact and conclusions of law in support of confirmation.** Document #48-130528-019X. **Confirmation order.** Document #48-130528-020R. **Sixth amended plan of reorganization.** Document #48-130325-030X. **Motion for order confirming plan of reorganization.** Document #48-130325-031M.) ■

Chapter 11 Cases For GIT, NARCO, 29 Affiliates Closed

PITTSBURGH — A Pennsylvania federal bankruptcy judge on May 24 issued final decrees closing the Chapter 11 cases of refractory products manufacturers Global Industrial Technologies Inc. (GIT) and North American Refractories Co. (NARCO) and 28 affiliates (In re: Global Industrial Technologies, Inc., et al., No. 02-21626, and In re: North American Refractories Co., et al., W.D. Pa. Bkcy.).

(**Order available.** Document #48-130624-019R.)

Reconfirmed

GIT, NARCO and the related entities filed voluntary bankruptcy petitions in 2002 in the U.S. Bankruptcy Court for the Western District of Pennsylvania due to hundreds of thousands of asbestos personal injury claims.

In 2007, Bankruptcy Judge Judith K. Fitzgerald confirmed the debtors' plan of reorganization over objections of insurance companies, which appealed to the Third Circuit U.S. Court of Appeals. In 2011, in a 6-4 *en banc* opinion, the Third Circuit held that the insurers had standing to object to the plan (In re: Global

Industrial Technologies, Inc., et al., No. 08-3650, 3rd Cir.; See May 2011, Page 4). After the U.S. Supreme Court denied GIT's bid for *certiorari*, the Third Circuit remanded the case to the Bankruptcy Court to conduct "a more searching review" of the insurers' allegations of collusion between the debtors and counsel for silica claimants.

After the remand, the debtors and the objecting insurers entered into settlement agreements under which the insurers agreed to withdraw all of their remaining objections to the reorganization plan. The bankruptcy judge then reconfirmed the plan, finding that the Third Circuit's concerns about the legitimacy of a bankruptcy trust to resolve silica personal injury claims were "unfounded, mistaken, and without record support" (See February 2013, Page 4).

'Leave The Shadows'

The reorganization plan, which became effective April 30, creates several trusts, including a $330 million asbestos trust and the $39 million silica trust.

On May 13, the debtors sought a final decree, saying that the cases should be closed because they are fully administered and the plan is substantially consummated. The debtors said that pursuant to the plan's terms, they have satisfied or waived the conditions to substantial consummation — such as funding the trusts and issuing stock — and made all distributions to unsecured creditors.

(**Motion for final decree available.** Document #48-130624-020M.)

The debtors said that the cases are fully administered because the confirmation orders are final and nonappealable and the reorganized debtors have paid allowed claims of unsecured creditors and assumed the day-to-day business operations and management decisions of the debtors. In addition, the debtors said, there are no unresolved motions, contested matters or adversary proceedings in the bankruptcy cases.

"Although there remains a remote possibility that this Court may be asked to determine issues in connection with the Plans in the future, the Bankruptcy Cases of the Reorganized Debtors have been fully administered and should be closed," the debtors said. "As one court explained, there comes a 'time for the [d]ebtor to get on with its business and leave the shadows of the court.' "

28 Affiliates

Bankruptcy Judge Fitzgerald granted the motion, finding that the reorganized debtors' estates have been fully administered and that issuing a final decree is appropriate under Section 350(a) of the U.S. Bankruptcy Code and Bankruptcy Rule 3022.

In addition to GIT and NARCO, the final decree closes the bankruptcy cases of InterTec Co., I-Tec Holding Corp., Tri-Star Refractories Inc., Harbison-Walker Refractories Co., Indresco International Ltd., Harbison-Walker Refractories Europe Ltd., Harbison-Walker International Refractories Inc., Global Industrial Technologies Service Co., GPX Corp., GIX Foreign Sales Corp., Global Processing Systems Inc., TMPSC Inc., GPX Forge Inc., GPX Forge-Acquisition Inc., GPX Forge-U Inc., A.P. Green Industries Inc., A.P. Green Services Inc., APG Development Corp., Detrick Refractory Fibers Inc., APG Refractories Corp., Intogreen Co., A.P. Green International Inc., A.P. Green Refractories Inc., Lanxide Thermocomposites, Chiam Technologies Inc., RHI Refractories America Inc., RHI Services Inc., and RHI America Receivables Corp.

The debtors are represented by James J. Restivo, Robert P. Simons, David Ziegler, Andrew Muha, Luke Sizemore, Greg Taddonio, Ron Frank and Leo Hitt of Reed Smith in Pittsburgh.

(Additional documents available: **District Court's order affirming plan confirmation.** Document #48-130422-026R. **Motion for order affirming plan confirmation.** Document #48-130422-027M. **Bankruptcy Court's findings of fact and conclusions of law confirming plan.** Document #48-130225-011Z. **Bankruptcy Court's revised confirmation order.** Document #48-130225-012R. **Third Circuit's 2011 decision.** Document #48-110523-009Z.) ■

Reinsurer Says Insurer Did Not Give Prompt Notice Of Yarway Asbestos Claims

NEW YORK — A reinsurer argues in a May 22 brief in New York federal court that it should be granted judgment on the pleadings because its reinsured did not supply prompt notice of an underlying asbestos-related loss involving new Chapter 11 bankruptcy debtor Yarway Corp.

(Century Indemnity Company, as successor-in-interest to California Union Insurance Company v. Global Reinsurance Corporation of America, as successor-in-interest to Constitution Reinsurance Corporation, No. 13-cv-0797, S.D. N.Y.).

(**Brief in support of motion for judgment on the pleadings available.** Document #12-130607-006B.)

Century Indemnity Co., as successor in interest to California Union Insurance Co., sued Global Reinsurance Corporation of America, as successor in interest to Constitution Reinsurance Corp., in the U.S. District Court for the Southern District of New York on Feb. 4, claiming that Global failed to honor certain reinsurance billings. Century brought a claim of breach of contract against Global.

Century notes that it insured Yarway, which filed a voluntary Chapter 11 petition in April due to thousands of asbestos personal injury claims (See May 2013, Page 11), and reinsured the policies under two facultative reinsurance certificates issued by Global.

Century explains that it disputed its liability under the policies for certain asbestos claims but settled with Yarway for $24 million in exchange for full release of all claims under the policies.

Global filed counterclaims in which it notes that Century advised it that Century was first notified of Yarway's asbestos claims when Yarway sent a letter to a company affiliated with Century in 2004.

First Notified

"Century first notified Global of the underlying asbestos liabilities . . . by letter dated January 3, 2006," Global notes.

Global counterclaimed for declaratory relief concerning notice condition precedent.

In its brief in support of its motion for judgment on the pleadings, Global says, "The reinsurance contracts between GLOBAL and Century . . . unambiguously require — as an expressed condition precedent — that Century 'promptly' provide GLOBAL with a 'definitive statement of loss' on certain claims that involve 'death, serious injury or lawsuit.' "

"By 2004, Century became aware of claims involving 'death[s], serious injur[ies] or lawsuit[s]' in connection with the policies that GLOBAL reinsured. Century, however, failed to provide GLOBAL with the required 'definitive statement of loss' at that time," Global claims.

"Instead, Century waited until January 2006 to provide GLOBAL with its first notice of the claims," Global says.

Delay

"Century's delay in notifying GLOBAL of the Yarway asbestos claims constitutes a breach of the condition precedent in the reinsurance contracts," Global contends.

"New York law is clear that when a cedent breaches a condition precedent of a reinsurance contract, the reinsurer is entitled to judgment in its favor," Global says, citing Constitution Reins. Corp. v. Stonewall Ins. Co. (980 F. Supp. 124 [S.D. N.Y. 1997]).

"Because the law is clear and because the relevant facts are established by the pleadings, GLOBAL is entitled to judgment on the pleadings," Global argues.

Entire Action

"[B]y granting this motion, the Court will resolve the entire action. Century's single-count complaint alleges that GLOBAL breached the Certificates by not paying Century's billings. If GLOBAL receives judgment on its counterclaim based on Century's breach of the condition precedent in the Certificates, it would necessarily follow that GLOBAL's obligations on the Certificates never arose, and Century would be entitled to no relief on its complaint," Global contends.

Century is represented by Harry P. Cohen and Michael Keith Robles of Crowell & Moring in New York.

Global is represented by David Louis Pitchford and Daniel Steven Brower of Pitchford Law Group in New York and Bonny S. Garcha and Mark Sheridan of Bates Carey Nicolaides in Chicago. ■

Bankruptcy Judge Approves Deal Between Insurer, Former Refractory Companies

OAKLAND, Calif. — A deal that will provide nearly $800,000 to a trust to pay asbestos personal injury claims filed against two defunct refractory manufacturers received final approval June 1 from a California federal bankruptcy judge (In re CFB Liquidating Corporation, f/k/a Chicago Fire Brick Co., et al., No. 01-45483, N.D. Calif. Bkcy.).

(**Order available.** Document #48-130624-017R.)

Chapter 11

Chicago Fire Brick Co. in Chicago and Wellsville Fire Brick Co. in Wellsville, Mo., once made ceramic refractory products for use in high-temperature furnaces and other industrial equipment. Some of their products contained asbestos. Facing more than 20,000 asbestos personal injury claims asserting millions of dollars of liability, the companies' successors, CFB Liquidating Corp. and WFB Liquidating Corp., filed for Chapter 11 protection in 2001 in the U.S. Bankruptcy Court for the Northern District of California. The debtors' parent, National Refractories and Minerals Corp., and two National Refractories affiliates filed voluntary Chapter 11 petitions on the same day.

CFB's plan of reorganization, filed in 2009, received objections from insurers. CFB and WFB then filed a joint plan, which was last modified on June 1, 2012. The companies received 4,374 ballots from holders of Class 3 Bar Date asbestos personal injury claims and 664 ballots from holders of Class 4 Supplemental Bar Date asbestos personal injury claims, all in favor of the plan.

Bankruptcy Judge Roger L. Efremsky held a confirmation hearing and issued a decision and order confirming the plan (See September 2012, Page 4). The plan created the CFB/WFB Liquidating Trust, to which all asbestos personal injury claims will be channeled for resolution. The plan also includes proposed insurance policy buyback settlement agreements with four insurance carriers that will provide $16 million in initial funding for the trust.

Medicare Provisions

One of the insurers, ACE Property & Casualty Insurance Co., filed a motion April 26 in the joint bankruptcy case for approval of the final, executed version of the settlement between ACE, the debtors and the trust. ACE says that since the reorganization plan was confirmed, the settlement agreement was modified, although the settlement amount of $797,296.54 is the same.

(**Motion for final approval of settlement available.** Document #48-130624-018M.)

ACE says that the main focus of the modifications was to more closely conform the original settlement agreement to the final terms of the reorganization plan and to incorporate Medicare-related provisions that are included in a settlement with another insurer, Safety National Casualty Co., that was negotiated after the original settlement agreement was drafted.

ACE says that the changes to the settlement agreement "are non-material and do not affect the economics of the settlement with ACE" as approved by the confirmation order.

In approving the revised settlement *nunc pro tunc* to the date of the confirmation order, Bankruptcy Judge Efremsky said that a hearing was held May 29 on the agreement and that no objections to the deal were filed.

Counsel

ACE is represented by Armen K. Hovannisian of Aiwasian & Associates in Los Angeles, Leonard P. Goldberger of Stevens & Lee in King of Prussia, Pa., and John D. Demmy of Stevens & Lee in Wilmington, Del.

The debtors are represented by John Kennedy of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor in Los Angeles and Joseph D. Frank and Jeremy C. Kleinman of FrankGecker in Chicago.

(Additional documents available: **Decision confirming reorganization plan.** Document #48-120924-014Z. **Confirmation order.** Document #48-120924-015R. **Reorganization plan.** Document #48-120924-016X.) ■

G-I Holdings Settles Response, Cleanup Claims For New Jersey Sites

NEWARK, N.J. — Reorganized Chapter 11 debtor G-I Holdings Inc. will pay more than $28,000 to settle claims related to environmental damage at sites in New Jersey, according to a stipulation and order entered May 21 in New Jersey federal bankruptcy court (In re: G-I Holdings, Inc., et al., Nos. 01-30135 and 01-38790, D. N.J. Bkcy.).

(**Stipulation and order available.** Document #48-130624-021R.)

Passaic River

G-I and a subsidiary, ACI Inc. (collectively, G-I), filed voluntary petitions in 2001 in the U.S. Bankruptcy Court for the District of New Jersey for relief under Chapter 11 of the U.S. Bankruptcy Code. The cases have been jointly administered, and the debtors' eighth amended joint plan of reorganization was approved in 2009.

In 2008, Tierra Solutions Inc. and Maxus Energy Corp. filed claims in G-I's bankruptcy case for an unknown amount for response and cleanup costs related to the remediation of the Passaic River and other areas in New Jersey.

In 2011, the reorganized debtors filed an omnibus objection to environmental claims pursuant to Section 502(b) of the Bankruptcy Code and Rules 3001 and 3007 of the Federal Rules of Bankruptcy Procedure. Under the environmental objection, the debtors objected to the Tierra and Maxus claims on various bases.

Final Satisfaction

To avoid continued expense and the risk of prolonged litigation concerning the Tierra and Maxus claims, the parties negotiated and agreed to settle the claims, according to a stipulation and order signed by Bankruptcy Judge Rosemary Gambardella.

Under terms of the settlement, the reorganized debtors will pay the claimants $28,294 in full and final satisfaction of their claims within 30 days of the date of the order. Once the settlement amount is paid, the claims will be expunged and removed from the claims register, and both parties will release all claims against each other.

G-I is represented by Dennis J. O'Grady and Mark E. Hall of Riker, Danzig, Scherer, Hyland & Perretti in Morristown, N.J., and Martin J. Bienenstock, Judy G.Z. Liu and Timothy Q. Karcher of Proskauer Rose in New York.

Tierra and Maxus are represented by Charles M. Crout of Andrews Kurth in Washington, D.C. ■

W.R. Grace To Pay $63,000 For Kentucky Superfund Site Claim

WILMINGTON, Del. — A defunct aluminum manufacturer's claim against Chapter 11 debtor W.R. Grace and Co. for more than $63,000 in remediation costs for a Kentucky Superfund site will be paid as an allowed, unsecured claim in W.R. Grace's bankruptcy, according to a claim settlement notice and stipulation filed May 28 in Delaware federal bankruptcy court (In re: W.R. Grace & Co., et al., No. 01-1139, D. Del. Bkcy.).

(**Notice available.** Document #48-130624-013X. **Stipulation available.** Document #48-130624-014P.)

Green River Superfund Site

W.R. Grace and 61 affiliates (collectively, Grace) filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in 2001 in the U.S. Bankruptcy Court for the District of Delaware. Confirmation of Grace's plan of reorganization is under appeal in the Third Circuit U.S. Court of Appeals.

W.R. Grace and National Aluminum Corp. (NAC) are among the more than 150 potentially responsible parties (PRPs) identified by the U.S. Environmental Protection agency for a former hazardous waste disposal site and landfill in Daviess County, Ky., known as the Green River Superfund Site.

According to the Kentucky Department for Environmental Protection, waste from Kentucky industries was disposed of at the facility from 1978 to 1984, some of which was generated by a W.R. Grace facility in Owensboro. NAC, its parent company, Avatex Corp., and four affiliates filed their own Chapter 11 petitions in 2002 in the U.S. Bankruptcy Court for the Northern District of Texas. Their reorganization plan, confirmed in 2003, created the Avatex Liquidating Trust for liquidation of the debtors' estates.

Proof Of Claim

In 2007, Grace agreed to pay more than $34 million to the EPA to settle environmental claims for pollution cleanup costs at 32 sites, including the Green River Site. As part of the settlement, NAC was designated a PRP entity entitled to receive payments or distributions from Grace in satisfaction of allowed claims.

NAC filed a proof of claim in 2003 in Grace's bankruptcy case asserting an unsecured nonpriority claim against the debtors in the amount of $63,921.62 arising from environmental response costs relating to the Green River Site.

According to the stipulation resolving the matter, NAC's claim will be allowed as an unsecured, prepetition, nonpriority claim against the Chapter 11 estates of the debtors in the full amount of the claim and will be paid in the same manner as all other similarly situated general unsecured claims pursuant to Grace's reorganization plan.

In return, NAC "agrees that it is forever barred, estopped, and enjoined from asserting any additional prepetition claims against the Debtors with respect to any costs relating to the Green River Site," the stipulation states. The stipulation was executed by the Avatex Liquidating Trust as disbursing agent on behalf of NAC.

Counsel

Grace is represented by John Donley and Adam Paul of Kirkland & Ellis in Chicago, Laura Davis Jones, James E. O'Neill, Kathleen P. Makowski and Timothy P. Cairns of Pachulski Stang Ziehl & Jones in Wilmington and Roger J. Higgins of Law Offices of Roger Higgins in Chicago.

NAC is represented by Robert H. Stone, trustee of the Avatex Liquidating Trust. ■

Successor Future Claimants' Representative Appointed In W.R. Grace Case

WILMINGTON, Del. — The attorney for the longtime future claimants' representative (FCR) in W.R. Grace and Co.'s bankruptcy case will now represent the claimants following the death of the FCR, a federal bankruptcy judge in Delaware ruled May 30 (In re: W.R. Grace & Co., et al., No. 01-1139, D. Del. Bkcy.).

(**Interim order available.** Document #48-130624-006R.)

David T. Austern

W.R. Grace and 61 affiliates (collectively, Grace) filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in 2001 in the U.S. Bankruptcy Court for the District of Delaware. Confirmation of Grace's plan of reorganization under Section 524(g) of the Bankruptcy Code is under appeal in the Third Circuit U.S. Court of Appeals.

David T. Austern was appointed the FCR in 2004. Austern, who also served as general counsel to the Manville Personal Injury Settlement Trust, FCR in Combustion Engineering Inc.'s bankruptcy and a consultant to the trustees of the North American Refractories Co. asbestos trust, died May 16.

On May 24, Grace moved to appoint Roger Frankel, a partner at Orrick, Herrington & Sutcliffe in Washington, D.C., as Austern's successor. Frankel, who also represented Austern in the Combustion Engineering case, served as Austern's lead counsel throughout his term as FCR in Grace's case and is therefore "uniquely suited" to succeed him in protecting the rights of those harmed in the future by any of the debtors' asbestos products, Grace says.

(**Motion to appoint successor FCR available.** Document #48-130624-007M.)

'No Disruption'

"To be sure, no other law firm or person has the institutional knowledge that Mr. Frankel and other lawyers at Orrick have with respect to the issues faced and decisions rendered by Mr. Austern and his counsel in these Chapter 11 Cases," Grace says. "Accordingly, appointing Mr. Frankel as the successor [personal injury] Future Claimants' Representative will result in a seamless transition and occasion no disruption as these Chapter 11 Cases near their ultimate conclusion."

Grace says Frankel's contributions to the debtors' Chapter 11 case includes his involvement in: contested asbestos liability estimation litigation proceedings; negotiations leading up to a global settlement that formed the basis for the reorganization plan; negotiation, drafting and finalization of the terms of the plan and related plan documents; extended litigation leading to confirmation of the plan; briefing and argument of the plan on appeal to the District Court; and briefing and preparation for oral argument in the appeal to the Third Circuit.

In her order appointing Frankel as FCR, Bankruptcy Judge Judith K. Fitzgerald said it is advisable that a successor FCR be appointed "due to the exigencies of the case including but not limited to the fact that oral argument before the Court of Appeals for the Third Circuit is scheduled for June 17, 2013."

Final Order

The bankruptcy judge said her interim order appointing Frankel as successor FCR *nunc pro tunc* to May 16 will become a final order on June 14 if no objections are filed by then.

Grace is represented by John Donley and Adam Paul of Kirkland & Ellis in Chicago, Laura Davis Jones, James E. O'Neill, Kathleen P. Makowski and Timothy P. Cairns of Pachulski Stang Ziehl & Jones in Wilmington and Roger J. Higgins of Law Offices of Roger Higgins in Chicago. ■

Veteran Asbestos Bankruptcy Attorney Appointed To Represent Yarway Claimants

WILMINGTON, Del. — A Delaware federal bankruptcy judge on May 28 approved a request by new Chapter 11 debtor Yarway Corp. to name veteran asbestos bankruptcy attorney James L. Patton Jr. as the legal representative for future asbestos claimants in the bankruptcy case (<u>In re: Yarway Corporation</u>, No. 13-11025, D. Del. Bkcy.).

(**Order available.** Document #48-130624-015R.)

Asbestos Claims

Yarway, a former manufacturer of parts for the steam power industry, filed a voluntary Chapter 11 petition April 22 in the U.S. Bankruptcy Court for the District of Delaware. The company says that more than 10,000 asbestos personal injury claims were asserted against it in the last five years and that it paid more than $128 million in asbestos settlement costs in those years, including more than $18 million in the current fiscal year. Yarway says it has 5,000 to 10,000 creditors and faces $100 million to $500 million in liabilities.

Yarway is a wholly owned indirect subsidiary of Swiss holding company conglomerate Tyco International Ltd. Yarway says that it filed for Chapter 11 protection because its insurance coverage for asbestos claims is drained while the claims continue to be filed.

Yarway also filed a motion to appoint Patton as the future claimants' representative (FCR), retroactive to the date of Yarway's petition. Patton is chairman of Young Conaway Stargatt & Taylor and a partner in the bankruptcy and corporate restructuring group of the Wilmington firm.

'Vigorous And Faithful'

Patton served as FCR in Leslie Controls Inc.'s asbestos bankruptcy case and for the Celotex Asbestos Settlement Trust. He continues to serve as FCR in the asbestos bankruptcy case of United Gilsonite Laboratories, whose plan of reorganization awaits confirmation. In addition, Patton and his firm have represented the FCR in a dozen past asbestos bankruptcy cases and currently represent the FCR in five such cases, including those of The Flintkote Co. and Pittsburgh Corning Corp.

In support of his nomination to serve as FCR in Yarway's case, Patton filed a brief May 24 titled "The Role of the Future Claimants' Representative in Reorganizations Under Section 524(g) of the Bankruptcy Code."

(**Brief available.** Document #48-130624-016B.)

"The appointment of an FCR is the only constitutionally-permissible means to discharge future claims and to satisfy Future Claimants' rights to due process," Patton said. "It is axiomatic that due process requires notice 'reasonably calculated under the circumstances to: (i) apprise the interested parties of the pending case; and (ii) provide them with enough information to prepare and present a response.' Moreover, in instances where the rights of unidentifiable parties are affected, due process is best served where procedures are utilized which ensure that such parties receive 'vigorous and faithful vicarious representation.' Here, the FCR will provide such representation for the future claimants."

Bankruptcy Judge Brendan L. Shannon approved the appointment of Patton as FCR, saying that it is in the best interest of Yarway and its estate.

Counsel

Patton is represented by Robert S. Brady, Edwin J. Harron, Sara Beth A.R. Kohut and Michael S. Neiburg of Young, Conaway, Stargatt & Taylor.

Yarway is represented by Norman L. Pernick, J. Kate Stickles and Therese A. Scheuer of Cole, Schotz, Meisel, Forman & Leonard in Wilmington and Larry J. Nyhan, Kenneth P. Kansa, Dennis M. Twomey and Allison Ross Stromberg of Sidley Austin in Chicago.

(Additional documents available: **Motion to appoint FCR.** Document #48-130528-005M. **Chapter 11 petition.** Document #48-130528-001X.) ■

A.L. Burbank Trustee Says Company May Have Money To Pay Creditors

NEW YORK — New Chapter 7 debtor A.L. Burbank & Co. Ltd. may have funds available in its estate to make distributions to creditors, according to a letter from the Chapter 7 trustee and subsequent June 6 notice of possible payment of dividends and last date to file claims (In re: A.L. Burbank & Company, Ltd., No. 13-11147, S.D. N.Y. Bkcy.).

(**Notice available.** Document #48-130624-034X. **Letter available.** Document #48-130624-035X.)

Unknown Asbestos Liability

A.L. Burbank, a New York steamship and maritime company that is a defendant in 28 cases in a multidistrict asbestos litigation (In re: Asbestos Products Liability Litigation [No. VI], MDL No. 02-875, E.D. Pa.), filed a voluntary petition for relief under Chapter 7 of the U.S. Bankruptcy Code on April 12 in the U.S. Bankruptcy Court for the Southern District of New York.

In the petition, A.L. Burbank lists estimated assets of $3,938.23 and liabilities of $290,000. The assets consist of $1,187.98 in a bank account and $2,750.25 in 75 shares of common stock of MetLife Inc., and the liabilities consist of cash advances from Shipcentral Ltd. in New York, which owns 100 percent of the debtor's common stock.

A.L. Burbank says it also has unknown liabilities from the MDL cases in which it is a defendant. However, in its notice of filing the petition, the company states that the asbestos cases are now enjoined by the automatic stay imposed by Section 362 of the Bankruptcy Code.

Proofs Of Claim

Although A.L. Burbank says that it has no income from the operation of its business, Chapter 7 trustee Alan Nisselson says in his May 31 letter to the Bankruptcy Court clerk that "there may be funds in the Debtor's case that may be used to make distributions to creditors." Therefore, Nisselson asked the clerk to send to creditors a notice of possible dividend and to issue a bar date for claims.

The clerk then sent out the notice, stating: "As a result of the administration of the debtor's estate, a dividend to creditors now appears possible." According to the notice, creditors must file proofs of claim whether or not the debt is included in the list of creditors filed by A.L. Burbank. The proofs of claim must be filed by Sept. 4.

A.L. Burbank is represented by Nancy Lynne Kourland and Sanford P. Rosen of Rosen & Associates in New

York and Harold W. Henderson, Richard C. Binzley and Susan K. Dirks of Thompson Hine in Cleveland.

(Additional document available. **Chapter 7 petition.** Document #48-130422-035X.) ■

United Gilsonite Receives Extension For Unused $8.2 Million Credit Facility

WILKES-BARRE, Pa. — A Pennsylvania federal bankruptcy judge on June 6 gave Chapter 11 debtor United Gilsonite Laboratories (UGL) another year to have access to an $8.2 million post-petition credit facility after UGL said that while it had not yet drawn any funds on the facility, it needed continued access to the financing while working on a plan of reorganization (In re: United Gilsonite Laboratories, No. 11-2032, M.D. Pa. Bkcy.).

(**Order available.** Document #48-130624-022R.)

DIP Agreement

Wood and masonry finishing products manufacturer UGL filed a voluntary Chapter 11 petition in 2011 in the U.S. Bankruptcy Court for the Middle District of Pennsylvania due to asbestos personal injury claims. The company, in Dunmore, Pa., continues to operate as a debtor-in-possession.

Two months after filing for bankruptcy, UGL received approval from Bankruptcy Judge Robert N. Opel II for a debtor-in-possession (DIP) credit agreement with PNC Bank NA in the form of a revolving credit facility of up to $8.2 million. In exchange for making the proceeds of the DIP financing available to UGL, PNC Bank was granted a superpriority administrative expense claim and a senior, first-priority lien on all UGL property as collateral.

UGL said it would use the DIP financing to fund its working capital and general corporate needs and pay fees, costs and expenses for administration its bankruptcy "to ensure its ability to operate through the pendency of this Chapter 11 Case and to successfully reorganize."

Sufficient Liquidity

UGL filed a reorganization plan in September 2012 that includes establishment of a trust under Section 524(g) of the Bankruptcy Code to pay asbestos personal injury claims. The trust is to be funded in part by a $2 million contribution from UGL and an $8 million promissory note from the company. The trust funding also includes $1.75 million from UGL shareholders and cash from insurance proceeds.

On May 10, UGL sought a retroactive one-year extension of the DIP credit agreement with PNC Bank, which had expired March 23. In exchange for the extension, UGL will pay PNC a $40,000 agreement amendment fee, the debtor said.

(**Motion available.** Document #48-130624-023M.)

UGL said that although it has had no need to draw any funds from the DIP facility, the company needs continued access to its credit line under the facility to ensure its ability to operate through the bankruptcy case.

"Without obtaining a postpetition credit facility prior to the approval of the Plan and the Debtor's exit from bankruptcy, the Debtor is concerned that its cash on hand and operating revenues may not provide sufficient liquidity to satisfy its operating and administrative expenses during the pendency of this Case," UGL said. "Accordingly, the Debtor needs access to the line of postpetition financing provided by the DIP Facility to conclude this Case in a manner that will maximize the value of the Debtor's estate for the benefit of its creditors."

Amended Plan

UGL said it hopes to reach an agreement with the asbestos creditors committee and the future claimants' representative on an amended reorganization plan and have the plan confirmed within the one-year DIP facility extension period.

Bankruptcy Judge Opel granted the motion in its entirety, finding that there is "good and sufficient cause" to extend the credit agreement.

UGL is represented by Mark B. Conlan, Frank J. Vecchione and Karen A. Giannelli of Gibbons in Newark, N.J.

(Additional document available. **Plan of reorganization.** Document #48-121126-011X.) ■

Widow, Son Of Meso Victim Withdraw Bid To Alter Pittsburgh Corning Injunction

PITTSBURGH — A Pennsylvania federal bankruptcy judge on May 24 withdrew a motion filed by a mesothelioma victim's relatives seeking to modify the injunction in the Chapter 11 case of Pittsburgh Corning Corp. (PCC) so they could pursue claims against PCC affiliate PPG Industries Inc. The motion was withdrawn at the request of the relatives who had filed a notice of withdrawal of the motion a day before, stating only that they had resolved their dispute with PPG (In re: Pittsburgh Corning Corporation, No. 00-22876 [Pittsburgh Corning Corp. v. Jerry Sonnier, et al., No. 00-2161], W.D. Pa. Bkcy.; See December 2012, Page 17).

(**Order available.** Document #48-130624-011R. **Notice of withdrawal of motion available.** Document #48-130624-012X.)

State Court Action

Facing hundreds of thousands of asbestos personal injury claims, PCC filed a voluntary petition in 2000 for relief under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Western District of Pennsylvania. The debtor's plan of reorganization, which establishes a multibillion dollar trust to resolve current and future asbestos claims, received final confirmation May 24 from Bankruptcy Judge Judith K. Fitzgerald.

When PCC filed its Chapter 11 petition, it also filed an adversary complaint against Jerry Sonnier and other asbestos plaintiffs seeking injunctive relief from its asbestos liability, including derivative liability for its products. The Bankruptcy Court issued a temporary restraining order enjoining the commencement and continuation of pending and future asbestos-related claims against the debtor and its two affiliates and shareholders, PPG and Corning Inc. After a series of orders extending the injunction, the court ordered that it remain in effect until 30 days after PCC's reorganization plan is confirmed.

Rosa and Gary Blum, the widow and son of Osias Blum, filed a lawsuit in Texas state court seeking damages for Osias Blum's death from mesothelioma in 2001 and survival damages for his estate. The Blums alleged that Osias Blum contracted his fatal disease through his exposure to dust from asbestos-containing insulation products, including PPG's Pyrocal, while working for years in a warehouse.

'Moot' Motion

In December 2012, the Blums filed a motion in the adversary proceeding to modify to dissolve the injunction in PCC's bankruptcy case, arguing that because PCC's reorganization plan does not call for claims such as theirs against PPG to be channeled to an asbestos trust for resolution, the injunction was no longer needed.

PPG objected to the motion, saying that there were no new facts or "dire circumstances" that would warrant altering the injunction. PPG further argued that the Blums' claims implicate liability insurance coverage that PPG shares with PCC and is part of the debtor's reorganization.

In their May 23 notice of withdrawal of the motion, the Blums state: "Movant and PPG have reached a resolution of this matter and so this motion is now moot."

Bankruptcy Judge Fitzgerald withdrew the motion without comment.

Counsel

The Blums are represented by Charles S. Siegel of Waters & Kraus in Dallas.

PPG is represented by David F. McGonigle, Michael S. Nelson and David M. Aceto of K&L Gates in Pittsburgh. PCC is represented by James J. Restivo Jr., Douglas A. Cameron, Andrew J. Muha and David Ziegler of Reed Smith in Pittsburgh.

(Additional documents available: **Motion to modify injunction.** Document #48-121218-006M. **PPG's objection to the motion.** Document #48-121218-007B.) ■

Briefs

*[Editor's Note: Complete coverage of these cases appeared in **Mealey's Litigation Report: Asbestos** and **Mealey's Litigation Report: International Asbestos Liability.** The reports provide comprehensive coverage of asbestos and international asbestos litigation. Customer Support: 1-800-833-9844.]*

California Jury Awards $27,342,500 In Take-Home Asbestos Case

OAKLAND, Calif. — A California jury on June 5 imposed $11 million in punitive damages on a company accused of exposing a worker's wife to asbestos, bringing the total award to $27,342,500 (Rose-Marie and Martin Grigg v. Owens-Illinois Inc., No. RG12629580, Calif. Super., Alameda Co.).

Rose-Marie and Martin Grigg sued numerous companies in the Alameda County Superior Court, alleging that she suffered exposure to asbestos on clothing her husband wore home from work. Martin Grigg worked as an insulator for a company that used Owens-Illinois Inc.'s Kaylo-brand insulation between 1950 and 1958.

At trial, only the Griggs' claims against Owens-Illinois remained.

The jury awarded the Griggs $27,342,500 consisting of $12 million in pain and suffering, $4 million in loss of consortium, $342,500 in economic damages and $11 million in punitive damages.

(**Punitive damages verdict sheet available.** Document #01-130619-008V.) ■

Top Court Won't Review Reversal Of $17.4M Verdict Against Ship Owner

RICHMOND, Va. — The U.S. Supreme Court on June 10 declined to review a divided Virginia Supreme Court ruling that exclusion of evidence of a shipyard's knowledge of the dangers of asbestos required reversing a jury's $17.4 million verdict against a ship owner (Connie Minton v. Exxon Mobil Corp., No. 12-1319, U.S. Sup.).

The Mintons petitioned the U.S. Supreme Court for review after Virginia's top court concluded in January that although mesothelioma sufferer Rubert Minton demonstrated that ship owner Exxon Mobil Corp. had duty to protect him from asbestos, the $17.4 million verdict against it must be reversed based on the judge's improper exclusion of evidence of the shipyard's knowledge and conduct from the trial.

The court also reversed a $12.5 million punitive award, later reduced to $5 million, to Minton and Linda C. Minton.

The Mintons filed suit under the Longshore and Harbor Workers' Compensation Act (LHWC) in the Newport News Circuit Court, alleging that numerous defendants' conduct exposed him to the asbestos that caused his mesothelioma. Minton claimed exposure while employed as a repair supervisor on commercial vessels at Newport News Shipbuilding from 1966 to 1977.

At trial, only the Mintons' claims against Exxon Mobil remained. The Mintons claimed that during Bert Minton's employment at Newport News Shipbuilding, he worked on 17 Exxon commercial oil tankers. They claimed that although Exxon took steps to protect its refinery workers beginning in 1937, it did not take the same precautions for shipyard workers or crew members.

During the three-week trial, Exxon argued that under the LHWC, the duty to protect the workers fell to the shipyard and not the ships' owner. The jury awarded $12 million in compensatory damages, $12.5 million in punitive damages and $430,961 in medical damages, plus interest. Connie Minton continued the action after her husband's death. Post-trial motions were denied except that the punitive damages were reduced to $5 million, leaving a $17.4 million verdict.

Exxon appealed. The Virginia Supreme Court found sufficient evidence from which a jury could conclude that Exxon maintained active control over the worksite and owed a duty to the decedent.

However, Virginia's top court said the trial judge improperly excluded evidence regarding the shipyard's knowledge and its remediation efforts, which go to the question of whether Exxon had a duty to intervene and protect the decedent, the court said.

(**Orders list available.** Document #01-130619-010X.) ■

California Top Court Agrees To Decide Whether Asbestos Supplier Had Duty To Warn

LOS ANGELES — The California Supreme Court on June 12 agreed to hear a case involving a more than $5 million verdict against an asbestos fiber supplier on failure-to-warn claims and whether procedural errors prevented granting it post-verdict relief, according to its docket (William Webb and Jacqueline Webb v. Special Electric Company Inc., No. S209927, Calif. Sup.).

William and Jacqueline Webb filed suit in the Los Angeles County Superior Court against numerous companies whose conduct allegedly exposed William Webb to asbestos. The Webbs claimed that the exposure occurred while William Webb was working with asbestos-containing friction products and Transite pipe.

The case proceeded to trial, and a jury found for Special Electric Co. Inc. on the product liability claims and for the Webbs on the failure-to-warn and negligence claims. Special Electric allegedly brokered sales of asbestos to Johns-Manville for use in its Transite pipe.

The jury awarded the couple $5,004,695, consisting of $1,004,695 in economic damages to William Webb, $2 million in noneconomic damages to William Webb and $2 million to Jacqueline Webb for loss of consortium. The jury apportioned 18 percent of the liability to Special Electric and issued a defense verdict for Pep Boys Manny Moe & Jack of California. The trial judge converted Special Electric's pretrial motions for nonsuit and directed verdict to a motion for judgment notwithstanding the verdict (JNOV). Concluding that Special Electric had no duty to warn the more sophisticated Johns-Manville, the judge granted the motion. The Webbs appealed.

In reversing, a majority of the Second District Court of Appeal found that the judge violated legislative guidelines in granting Special Electric's motion. Although judges are free to grant JNOV motions, they must first provide notice to the parties and wait 15 days from the entry of judgment, the majority said.

In its April 22 petition for review, Special Electric argued that "there should be no duty to warn a sophisticated manufacturer of dangers it already knows." Special Electric argued that Johns-Manville was the largest supplier of raw asbestos in the United States between 1920 and the 1970s and that there is no question that it was a sophisticated user fully aware of the hazards. ■

New York Justice: Railroad Owed Duty To Cashier At Company-Exclusive Diner

NEW YORK — A railroad can be held liable for asbestos exposures suffered by a cashier at a diner operated exclusively for the employees of that railroad, a New York justice held in an opinion posted June 6 (Morton Frieder and Rosalind Frieder v. Long Island Railroad, et al., No. 190212/12, N.Y. Sup., New York Co.).

New York Supreme Court Justice Sherry Klein Heitler said "it is evident that [the defendant] controlled the circumstances of the diner and was in the best position to identify and remedy the dangerous condition."

Morton and Rosalind Frieder filed suit in April 2012 claiming that Morton Frieder contracted mesothelioma after exposure to asbestos.

The Frieders alleged that Morton Frieder suffered his exposure while employed as a cashier at the Dashing Dan Diner. The diner was a small trailer located near the Long Island Railroad's Morris Park maintenance facility. The Frieders claimed that Dashing Dan provided exclusive dining services for the Morris Park employees, which included electricians, carpenters, machinists and metal workers. The Frieders claimed that Morton Frieder suffered his exposure when the Long Island Railroad employees wore their asbestos-covered clothing into the diner.

Defendants Long Island Railroad and Metropolitan Transportation Authority (collectively, LIRR) moved for summary judgment, arguing that there was no evidence that Morton Frieder actually suffered exposure to asbestos and that it owed no duty to prevent Morton Frieder's alleged exposure.

However, Justice Heitler noted that LIRR prohibited entry onto its facility and controlled the work conditions within. Further, LIRR provided heat and power to the diner and its employees constituted 100 percent of the diner's patrons, Justice Heitler said.

(**Opinion available.** Document #01-130619-004Z.) ■

Australian Court Vacates $1.3 Million Meso Verdict For Transportation Worker

SYDNEY, Australia — An Australian appeals court on June 3 vacated a $1,318,506.24 verdict awarded to a former public transportation worker for his mesothelioma, allowing an appeal filed by the State of New South Wales in relation to certain damages that were awarded for gratuitous domestic services he provided to family members (State of New South Wales v. Perez, No. [2013] NSWCA 149, New South Wales App.).

Mario Hernan Perez worked for the Public Transportation Commission of New South Wales. In 1987, the commission removed and replaced an asbestos roof at a bus depot without preventing workers from inhaling asbestos. Perez subsequently contracted mesothelioma. The State of New South Wales inherited the liabilities of the commission under the Transport Administration Act 1988.

Perez sued the state in the Dust Diseases Tribunal of New South Wales (DDT). Judge J.P. Curtis accepted that Perez's mesothelioma was caused by asbestos exposure at work. The state argued that tumors on Perez's spine were not the result of his mesotheolioma. However, Judge Curtis found that the tumors were the result of mesothelioma.

Judge Curtis awarded Perez $1,318,506.24 in damages from the state and found that Perez was entitled to $290,000 in general damages, plus interest and $11,400 for the loss of expectation of life. The judge ordered the state to pay Perez $10,280.40 for past gratuitous care and $9,971 for future care.

Judge Curtis found that Perez's wife was entitled to $65,873.64 for her own future care. In addition, he awarded two of Perez's grandchildren $742,543.79 and two other grandchildren a total of $186,187.40 in damages.

The state appealed to the Court of Appeals of New South Wales. The state argued that the trial court misconstrued Section 15B, specifically Section 15B(2)(d), of the Civil Liability Act for "gratuitous domestic services," or services provided to family members. The appeals court said Perez's claim was handled in three categories. The first category included an award of damages for Marlene Perez, the claimant's wife. The second category involved an award of damages for Perez's two grandchildren in relation to care he provided them. The third category involved an award of damages for two additional grandchildren.

The appeals court said the state focused on paragraph (d) of Section 15B, which requires that the need be "reasonable in all the circumstances."

(**Judgment available.** Document #64-130618-003X.) ■

English Justice Finds Mesothelioma Was Not Caused By Playground Asbestos Exposure

LONDON — After finding that there was not sufficient evidence to prove that a woman's mesothelioma was caused by exposure to asbestos that came from a demolition site next to a playground that she played at as a child, an England and Wales justice on June 13 dismissed her claim for damages against a local council and a contractor (Penelope Garner v. Salford City Council, et al., No. [2013] EWHC 1573 [QB], England and Wales High, QBD).

Penny Garner was diagnosed with mesothelioma in May 2011. Garner claimed that she was exposed to asbestos as a child, during the demolition of The Seedley Baths, which were located next to her school and its playground. Garner could not recall any other instance of asbestos exposure in her life.

Garner sued the Salford City Council, which owned the swimming baths and commissioned their demolition, and P. McGuiness and Co. Ltd., the demolition contractors, in the England and Wales High Court, Queen's Bench Division, seeking damages for her mesothelioma.

The council submitted that fact finding in mesothelioma claims in which the asbestos exposure is low presents various challenges. Citing the ruling in Sienkiewicz v. Greif (UK) Ltd. ([2011] 2 AC 229), Justice Sir Brian Richard Keith said, "There are cases where, as a matter of justice and policy, a court should say that the evidence adduced (whatever its type) is too weak to prove anything to an appropriate standard, so that the claim should fail."

Justice Keith said there were several problems with Garner's case, including that the action was not one of primary exposure or even secondary exposure. Justice Keith said Garner's alleged exposure occurred while she was playing on a playground and was a case of bystander exposure. Justice Keith said the action also involved a demolition, which generated dust. The dust that Garner was exposed to did not necessarily contain asbestos, and witnesses were recalling events that occurred about 35 years ago and were not particularly memorable, Justice Keith said.

(**Judgment available.** Document #64-130618-005X.) ■

Commentary

Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance

By
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and
Peter R. Kelso

[Editor's Note: Marc C. Scarcella and Peter R. Kelso, Managers at the Washington, DC office of Bates White Economic Consulting. The views of the authors do not reflect the opinions of their firm, their clients, or Mealey's Publications. *Responses are welcome.]*

Introduction

In 2009, we began compiling detailed information on asbestos bankruptcy trust activity from publically available sources. Our initial work served as the foundation for the 2010 study by the RAND Institute for Civil Justice on *Asbestos Bankruptcy Trusts* that included trust asset and compensation data through 2008.[1] Since then we have consulted on issues related to asbestos bankruptcy trust compensation and governance for defendants and insurers, provided resources to the Government Accountability Office ("GAO") for their 2011 study on the asbestos bankruptcy trust system, and provided legislative testimony on asbestos trust transparency bills at both the state and federal level.

Last year we published a Mealey's commentary based on trust information and data through 2011 to serve as a brief update to the comprehensive work previously conducted by RAND.[2] The following commentary is a continuation of our work with data and information through 2012. While detailed information about individual claims made to and payments made from asbestos trusts is limited, this paper intends to serve as a resource by providing a general overview of the information that is currently disclosed by the 524(g) asbestos trust compensation system. The paper will summarize the latest financial and claim information provided by the trusts through their 2012 annual reports, including changes in trust payments made to current and future asbestos claimants, and the ratio of payments to malignant and non-malignant claimants. It will also highlight statistics on the operations and current governance of asbestos trusts, including examples of information disclosure policies that have been the focus of recent legislative efforts intended to provide a greater level of transparency to trust activities and claim filings.

The statistics and other information in this paper are derived from the publicly available documentation produced by various asbestos bankruptcy trusts established pursuant to Section 524(g) of the U.S. bankruptcy code and the publicly available documentation produced during the proceedings of various Section 524(g) bankruptcy reorganizations.

Background

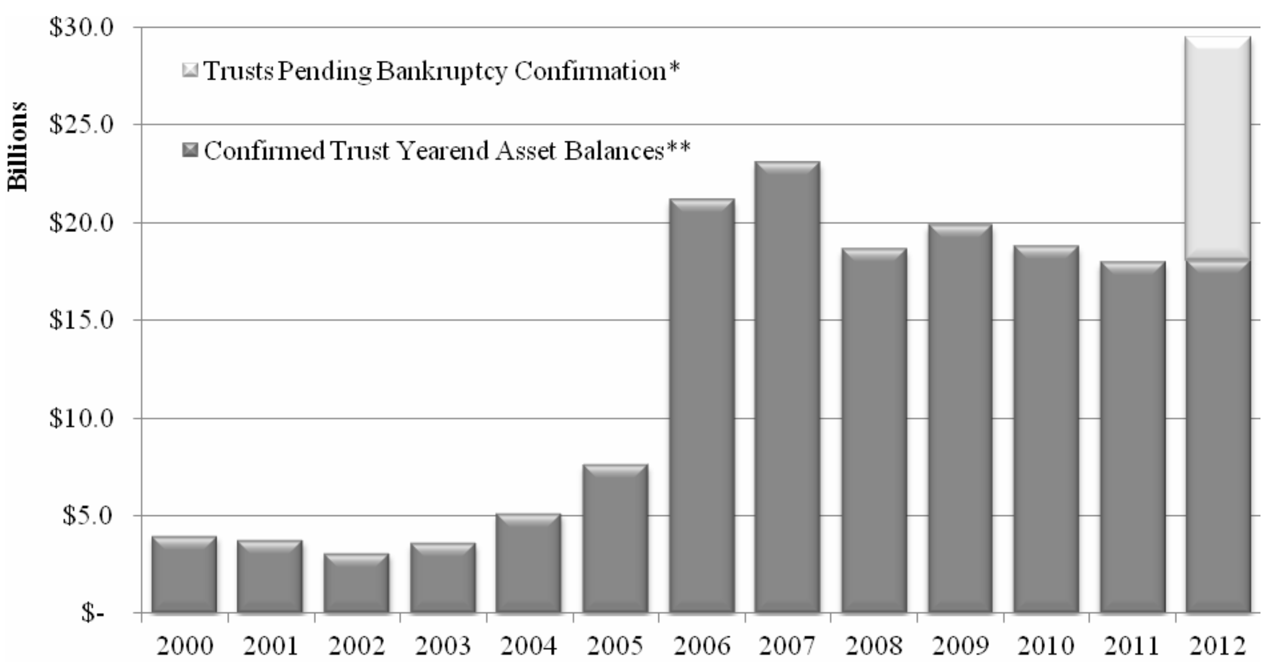
In the three decades since Johns Manville and UNR Industries filed the first asbestos bankruptcy cases, nearly 100 companies have filed for bankruptcy protection due, in part, to asbestos litigation.[3] The vast majority of these companies utilized section 524(g) to reorganize and establish a bankruptcy trust to pay current and future asbestos claimants and channel claims away from the reorganized company. Today, many of these companies have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims. Since 2006 more than 30 trusts have been created through bankruptcy reorganization, funding the trust system with an additional $20 billion in assets. From 2006 through 2012 the entire trust system has paid out over $15 billion to asbestos claimants, with remaining assets as of yearend totaling over $18 billion.[4] In addition, there is approximately $11 to $12 billion in proposed funding from bankruptcies still pending confirmation.[5]

With that amount of money at stake, it is not surprising that there has been recent state and federal legislative efforts as well as growing interest from academic researchers and the press aimed at examining the transparency of asbestos bankruptcy trusts and what is currently known about 524(g) bankruptcies. Courts in the civil justice system have echoed similar interest in asbestos trust transparency as those entities strive to properly allocate liability in the underlying tort litigation between both culpable solvent companies and bankruptcy trusts.

Bankruptcy trust assets

Asbestos bankruptcy plans formed under section 524(g) involve the creation of trusts designed to compensate similarly situated current and future asbestos plaintiffs in an equitable manner.[6] The trusts are often funded with cash, reorganized debtor stock, insurance, and other assets provided by the debtor company (or parent company), and exist to expeditiously pay current and future claims. Beginning with the codification of section 524(g) in 1994 and predominantly during the years 2000-2003, nearly 70 companies filed for bankruptcy protection.[7] Today, over $18 billion in assets currently reside in the trust system. Another $11 to $12 billion in additional assets is designated for trusts pending completion of the 524(g) bankruptcy reorganization process.[8] Exhibit 1 shows the growth of the trust system over time and the assets earmarked for pending but not yet confirmed 524(g) trusts.

Exhibit 1: Trust Yearend Assets



**Estimated present value of proposed funding based on bankruptcy disclosures*
***As reported in financial statements and does not include deferred funding. As of 2012 this deferred funding amount is estimated to be a least $640 million (see exhibit 2)*

Exhibit 2: Confirmed Trust Annual Financial Activity *(dollars in millions)*

Balance	2006	2007	2008	2009	2010	2011[9]	2012[10]	Total
Beginning Assets	$7,641	$21,217	$23,117	$18,660	$19,907	$18,810	$17,986	
Funding Received	$12,081	$2,944	$1,055	$3,078	$640	$795	$286	$20,879
Investment Gains/Income	$897	$670	($1,971)*	$2,363	$1,306	$766	$1,449	$5,480
Other Additions	$1,223	($16)	($70)	$25	($58)	($86)	($77)	$941
Claim Payments	($463)	($1,450)	($3,360)	($3,927)	($2,779)	($2,041)	($1,251)	($15,270)
Trust Expenses	($95)	($132)	($156)	($147)	($180)	($176)	($172)	($1,057)
Taxes/Other Deductions	($68)	($115)	$44	($145)	($26)	($81)	($150)	($541)
Ending Assets	$21,216	$23,118	$18,660	$19,907	$18,810	$17,986	$18,072	
Deferred funding and settlements[11]							$638	
Current Confirmed Trust Assets							**$18,710**	

**Includes $166 million in special dividends received by the Armstrong World Industries Asbestos PI Settlement Trust that we previously classified as "Other Additions" in our 2012 commentary.*

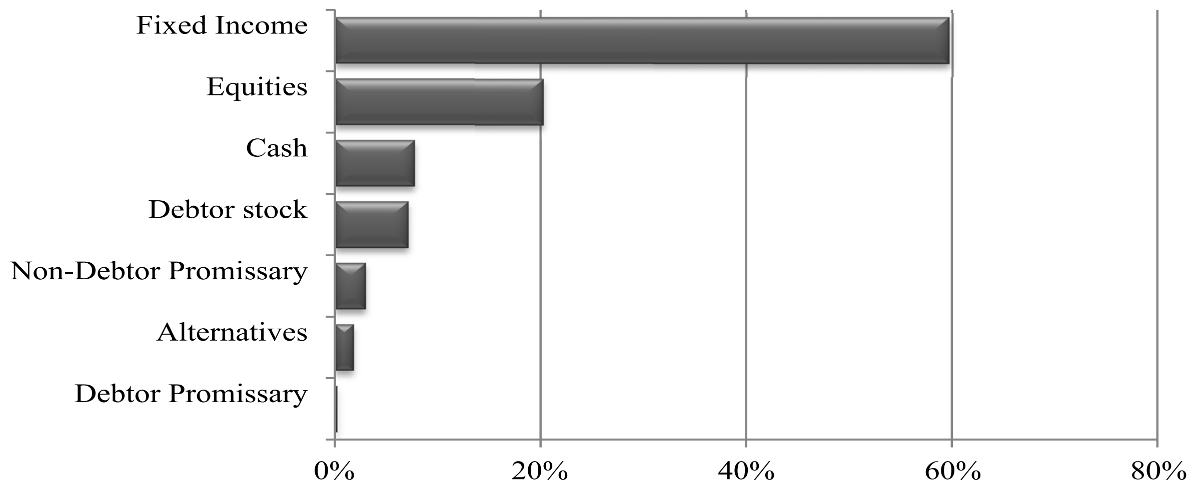
Exhibit 2 shows how rapidly the trust compensation system has grown in recent years. As of yearend 2005, the entire trust system only had $8 billion in assets. From 2006 through 2012, asbestos trust assets have grown by more than $27 billion while paying out over $15 billion to claimants. Including operational costs and other non-claim expenses, the net growth in trust assets since 2005 has exceeded $10 billion.

In 2012, asset levels remained relatively constant as claim payments dropped to $1.25 billion and were completely offset by $1.45 billion in realized and unrealized investment gains and income. In fact, the trust system has recovered from the 2008 recession by earning over $5.9 billion in realized and unrealized investment gains and income since 2009 for an annual return on investment ("ROI") of nearly 8%. Taking into account the 2008 recession the trust system as a whole has earned an annual ROI of approximately 4% since 2006. Exhibit 3 summarizes the weighted-average asset allocation from 2007 through 2012 for 15 of the largest trusts as measured by total fair market value of investments as of yearend 2012.[12] The 2012 fair market value of investments totaled over $15 billion across the 15 trusts, representing more than 80% of confirmed trust assets. The data shows that trusts tend to allocate a majority of assets in conservative fixed income holdings as opposed to equities that are subject to more potential volatility. The data also shows that while many trusts emerge from bankruptcy with significant equity in the reorganized debtor, most of those shares are liquidated following confirmation.

Bankruptcy trust claim payments

As the bankruptcy trusts assets have grown over time, so have payments to asbestos claimants. Beginning in 2006, dozens of trusts came "online" and distributed over $15 billion in claim payments through 2012. This dramatic increase in claim payments was due, in part, to the resolution of substantial claim inventories that built up during the lengthy bankruptcy process, some of which dated back to the late 1990s and included tens of thousands of non-malignant claims. As illustrated in Exhibit 4, as these claim inventories have been paid down the amount of aggregate annual claim payments has decreased significantly. However, annual claim payments should increase once the pending bankruptcies of Pittsburgh Corning, North American Refractories ("NARCO"), and W.R. Grace are confirmed and trusts are established to begin paying claims.[13]

Exhibit 3: Trust average asset allocation from 2007 through 2012



In the thirteen years since the bankruptcy wave began, the trust system has paid out over $18 billion to claimants with an additional $5 to $6 billion paid by certain debtors prior to confirmation as part of bankruptcy pre-packaged ("Pre-Pack") settlement negotiations. These Pre-Pack payments were not made through an operating trust. The largest contributor to Pre-Pack payments was Halliburton, which committed $2.7 billion in Pre-Pack funds around 2004. It is more common today for Pre-Pack payments to be negotiated pre-confirmation but the assets sufficient to cover the cost of these settlements are funded to the trust post-confirmation for immediate distribution. For example, the T H Agriculture & Nutrition, LLC Industries Asbestos Personal Injury Trust distributed nearly $400 million in Pre-Pack negotiated payments in the months following the trust's effective date in fourth quarter of 2009. In these instances the Pre-Pack payments are reported on trust annual reports and accounted for in Exhibit 4 as part of Confirmed Trust Claim Payments.

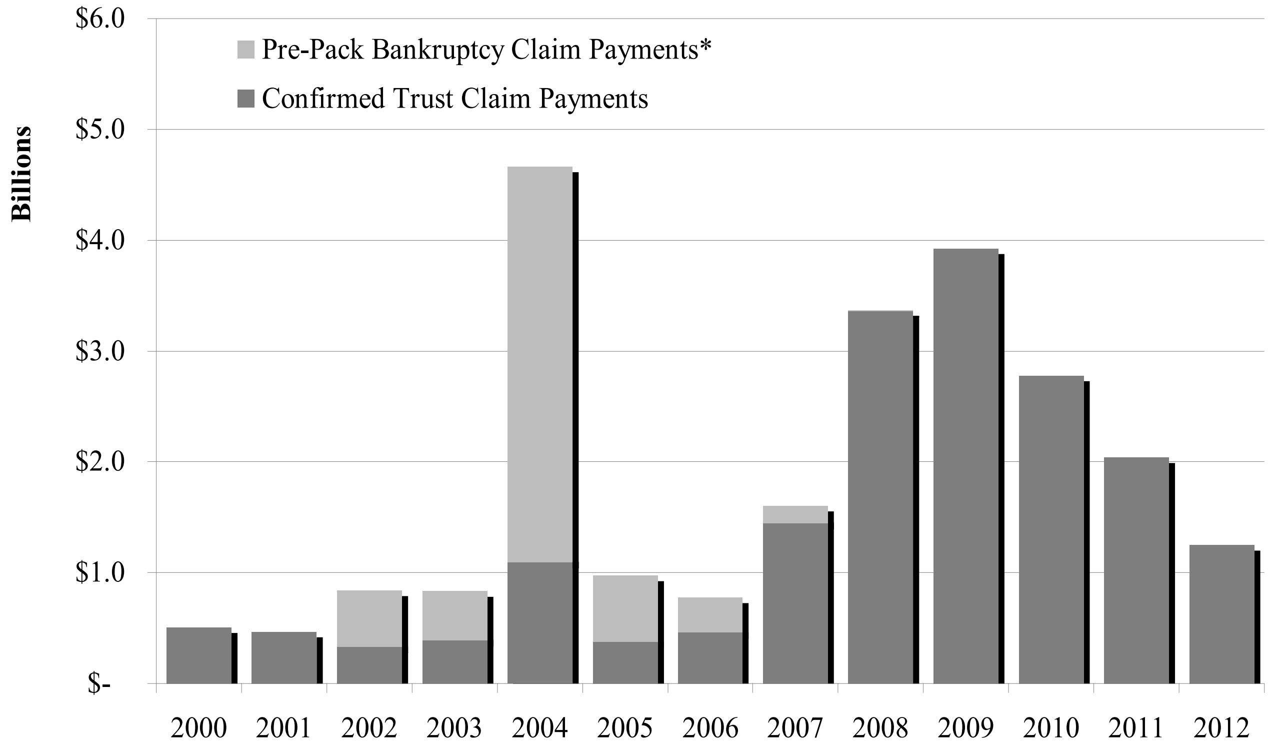
Bankruptcy trust claim valuation

The procedures that determine the payment an individual claim will receive are outlined for each trust in documents typically titled Trust Distribution Procedures ("TDP").[14] These procedures describe the processes in which claims are reviewed, qualified, and paid if compensable. A TDP will provide a list of compensable disease categories that may range from malignant asbestos-related injuries such as mesothelioma and lung cancer to less severe non-malignant respiratory injuries such as asbestosis and pleural plaques.

Trusts typically provide two processes under which a claim can be qualified and paid. The first process is often referred to as "Expedited Review" and is based on a minimum set of presumptive medical and exposure criteria. Claims that qualify for payment and file under Expedited Review will receive a schedule amount that is not negotiated. Alternatively, many trusts will offer an "Individual Review" option allowing for claim amounts up to a published maximum. Factors that determine the actual amount an Individual Review claim receives may include, but are not limited to, age at diagnosis, jurisdiction, and settlement history of the plaintiff's counsel.[15] The average amount for all claims paid under either Expedited or Individual Review is often represented by a published average, representing the most likely amount for a typical claim. Trusts that are unable to pay claimants 100% of the specified claim amount will establish a "Payment Percentage" that uniformly reduces the actual payment by a fixed percentage.

Trust Payment Percentages are subject to change over time based on projections of future claim obligations. If future liability expectations increase, then trusts will likely decrease individual claim payments in an attempt

Exhibit 4: Trust and Bankruptcy Pre-Pack Claim Payments



**Pre-pack settlement amounts for Combustion Engineering, NARCO, DII (Halliburton), Congoleum and Pfizer (Quigley). These amounts paid or committed outside of the 524(g) Trust funds total between $5 and $6 billion.*

to maintain assets far enough into the future to be in a position to pay all claims in an equitable manner. Conversely, if future liability expectations decrease, then trusts will likely increase individual claim payments. This is done to maximize claim payments while ensuring that trust assets will be sufficient to pay all future claimants. For many trusts, when payments increase, prior claimants are given retroactive, or "True-Up" payments equal to the difference between what they previously received from the trust and what the trust is currently paying similarly situated claimants. As a result, there is no downside risk to pursing payment from a trust as quickly as possible. Rather, there is only downside risk of waiting to pursue a trust claim as values may decrease over time. Exhibit 5 summarizes the Payment Percentages for the twenty-seven trusts that have made Payment Percentage adjustments since 2008.

To quantify the impact these changes in Payment Percentages can have on net claim payments, Exhibit 6 summarizes the net claim payment for 6 large trusts (8 potential payments) that were processing and paying claims at the Delaware Claims Processing Facility ("DCPF") as of 2008. Significant decreases in Payment Percentages result in a decline of nearly 40% in net claim payments to a claimant collecting all 8 potential payments across the 6 trusts. In fact, the average Payment Percentage across all trusts weighted by each trust's annual claim payments has decreased by 30% since 2008.

Bankruptcy trust payments to malignant and non-malignant claims

Of the $18.7 billion in current and deferred confirmed trust assets, $16.4 billion is associated with twenty-three trusts that govern annual aggregate claim payments to

Exhibit 5: Summary of Payment Percentage Changes as of Yearend

Trust	Initial Pay%	12/31 2008	12/31 2009	12/31 2010	12/31 2011	12/31 2012
A-Best Asbestos Settlement Trust	3.6%	3.6%	17.4%	17.4%	17.4%	17.4%
API, Inc. Asbestos Settlement Trust	13.5%	13.5%	55.0%	55.0%	30.0%	30.0%
ARTRA 524(g) Asbestos Trust	7.5%	7.5%	7.5%	7.5%	0.5%	0.5%
Babcock & Wilcox Company Asbestos PI Settlement Trust	34.0%	34.0%	15.0%	15.0%	11.9%	7.5%
C. E. Thurston & Sons Asbestos Trust	40.0%	40.0%	40.0%	40.0%	80.0%	25.0%
Celotex Asbestos Settlement Trust [16]	12.0%	14.1%*	14.1%	9.4%	9.4%	9.4%
Combustion Engineering 524(g) Asbestos PI Trust	48.3%	48.3%	48.3%	48.3%	48.3%	44.0%
DII Industries, LLC Asbestos PI Trust [17]	100%	100%	52.5%*	52.5%	52.5%	52.5%
Eagle-Picher Industries PI Settlement Trust	31.9%	38.0%	38.0%	38.0%	31.0%	31.0%
G-I Asbestos Settlement Trust	8.6%	--	8.6%	8.6%	7.4%	7.4%
H. K. Porter Asbestos Trust	4.6%	4.6%	6.3%	6.3%	6.3%	4.0%
J.T. Thorpe Settlement Trust	50.0%	40.0%	40.0%	45.0%	45.0%	45.0%
JT Thorpe Company Successor Trust	18.5%	38.0%	57.0%	57.0%	57.0%	57.0%
Kaiser Asbestos PI Trust	39.5%	39.5%	39.5%	39.5%	35.0%	35.0%
Keene Creditors Trust	1.1%	1.1%	1.1%	0.8%	0.8%	0.8%
Lummus 524(g) Asbestos PI Trust	100%	100%	100%	100%	10.0%	10.0%
Manville PI Settlement Trust	10%	7.5%	7.5%	7.5%	7.5%	7.5%
NGC Bodily Injury Trust [18]	55.6%	55.6%	55.6%	55.6%	18.0%	18.0%
Owens Corning Fibreboard Asbestos PI Trust - FB Subfund	25.0%	25.0%	11.0%	11.0%	9.5%	7.6%
Owens Corning Fibreboard Asbestos PI Trust - OC Subfund	40.0%	40.0%	10.0%	10.0%	10.0%	8.8%
Plibrico Asbestos Trust	1.1%	8.5%	8.5%	8.5%	1.2%	1.0%
Raytech Corporation Asbestos PI Settlement Trust	2.0%	2.0%	2.0%	2.0%	0.8%	0.8%
Shook & Fletcher Asbestos Settlement Trust	65.0%	100%	100%	100%	100%	70.0%
T H Agriculture & Nutrition Industries Asbestos PI Trust	100%	--	100%	100%	30.0%	30.0%
U.S. Gypsum Asbestos PI Settlement Trust [19]	45.0%	45.0%	45.0%	30.0%	30.0%	20.0%
UNR Asbestos-Disease Claims Trust	18.6%	1.1%	1.1%	1.2%	0.8%	0.8%
Western MacArthur-Western Asbestos Trust	31.5%	40.0%	40.0%	44.0%	44.0%	44.0%

**Amendments to TDP increasing gross payment values in conjunction with, or in lieu of a Payment Percentage change. See endnote for more detail.*

Exhibit 6: Net Mesothelioma Claim Payments from DCPF trusts *(dollars in thousands)*

Trust	12/31 2008	12/31 2009	12/31 2010	12/31 2011	12/31 2012
Armstrong World Industries Asbestos PI Settlement Trust	$26	$26	$26	$26	$26
Babcock & Wilcox Company Asbestos PI Settlement Trust	$41	$18	$18	$14	$9
Celotex Asbestos Settlement Trust	$18	$18	$12	$12	$12
DII Industries, LLC Asbestos PI Trust - Halliburton	$29	$40	$40	$40	$40
DII Industries, LLC Asbestos PI Trust - Harbison-Walker	$68	$96	$96	$96	$96
Owens Corning Fibreboard Asbestos PI Trust – FB Subfund	$45	$20	$20	$17	$14
Owens Corning Fibreboard Asbestos PI Trust - OC Subfund	$108	$27	$27	$27	$24
United States Gypsum Asbestos PI Settlement Trust	$101	$101	$68	$68	$45
Total Net Payment	**$437**	**$346**	**$306**	**$300**	**$265**
Percent Change from 2008	**--**	**21%**	**30%**	**31%**	**39%**

malignant and non-malignant claim groups through the application of a Claims Payment Ratio. The Claims Payment Ratio mandates that a percentage of annual claim payments are made to either Category A or Category B claims as defined in the Trust Distribution Procedures.[20] In all cases, Category A claims include malignant disease categories, and in most cases also include severely disabling asbestosis claims. Conversely, Category B claims typically include less impaired or unimpaired non-malignant claims. For the group of twenty-three trusts, the Category A Claim Payment Ratio ranges from as low as 60% to as high as 90% with an average of 73.4% when weighted by 2012 year end trust asset balances. At a minimum, this means that nearly $4.4 billion in confirmed trust assets are earmarked for less impaired non-malignant asbestosis and pleural claims. Exhibit 7 summarizes these figures.

Exhibit 8 summarizes trust claim payments by disease groupings since 2008. Many trusts choose not to disclose disease or disease groups for claim payments made to pre-petition or Pre-Pack settlements that are distributed through the trust. As a result there are significant payments made to claims with no disease or disease group classification and are denoted as "Not Specified" in Exhibit 8. Absent payments made to the Not Specified group, Exhibit 8 suggests that at minimum $2.6 billion in payments have been made since 2007 to non-malignant claims. Assuming that the payments made to the Not Specified group were distributed at the same ratio as the malignant and non-malignant groups (~76%/24%) then the total amount paid to non-malignant claims during the period would be over $3.5 billion.

The percent of total payments made to non-malignant claims has decreased since 2007 as large inventories of non-malignant claims once pending litigation prior to and during bankruptcy reorganizations continue to be paid down. In fact, since 2009 the ratio of malignancy to non-malignancy payments has been relatively constant at 82%, suggesting that many of the trust Claim Payment Ratios may need to be adjusted to allow more annual funding for malignant claims.

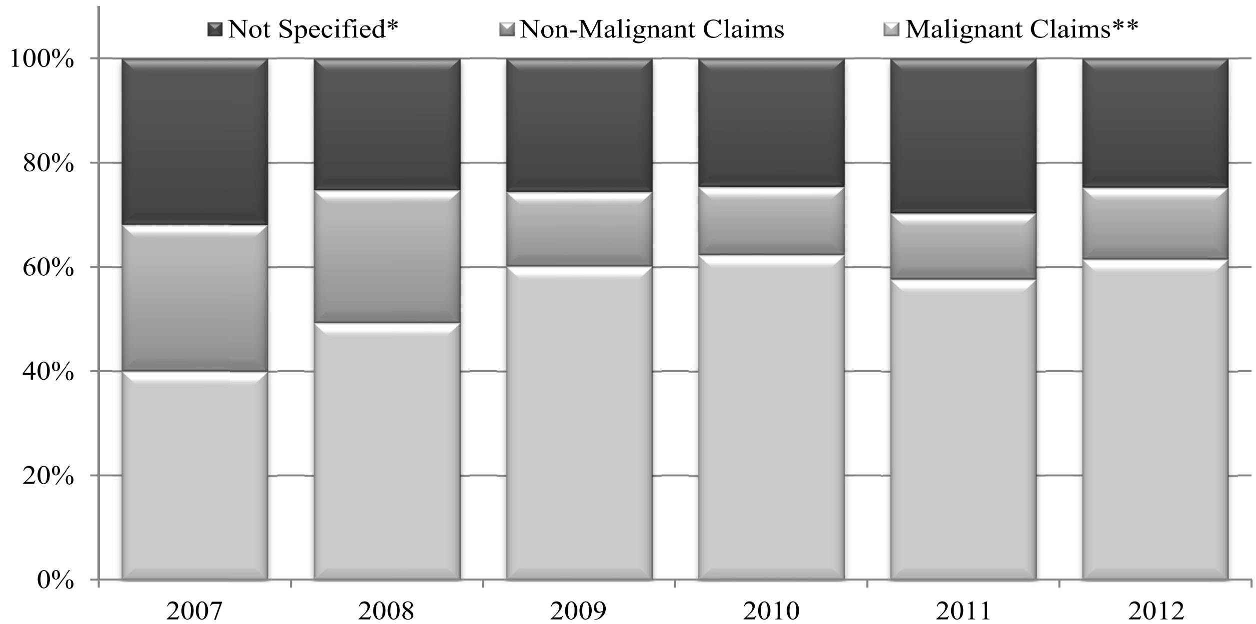
As noted previously, detailed information about individual claims made to and payments made from asbestos trusts is limited. Furthermore, most trusts choose not to report injury level statistics beyond the disease groups summarized in Exhibit 8. In fact, of the hundreds of annual reports we reviewed, only 54 annual reports across 13 trusts provided injury level statistics on the number of claims paid and corresponding

Exhibit 7: Summary of Trust Claim Payment Ratios *(dollars in millions)*

Trust	2012 YE Assets	Category A	Category B
AC&S Asbestos Settlement Trust	$282	82.9%	17.1%
Armstrong World Industries Asbestos PI Settlement Trust	$2,653	65.0%	35.0%
ARTRA 524(g) Asbestos Trust	$24	65.0%	35.0%
ASARCO LLC Asbestos PI Settlement Trust	$1,034	90.0%	10.0%
Babcock & Wilcox Company Asbestos PI Settlement Trust	$645	62.0%	38.0%
Burns and Roe Asbestos PI Settlement Trust	$154	60.0%	40.0%
Christy Refractories Asbestos PI Trust	$17	90.0%	10.0%
Combustion Engineering 524(g) Asbestos PI Trust	$951	87.0%	13.0%
Congoleum Plan Trust	$235	75.0%	25.0%
DII Industries, LLC Asbestos PI Trust	$2,091	60.0%	40.0%
Federal Mogul U.S. Asbestos PI Trust [21]	$780*	63.1%	36.9%
G-I Asbestos Settlement Trust	$618	85.0%	15.0%
J.T. Thorpe Settlement Trust	$149	90.0%	10.0%
Kaiser Asbestos PI Trust	$746	70.0%	30.0%
Leslie Controls, Inc. Asbestos PI Trust	$63	80.0%	20.0%
Lummus 524(g) Asbestos PI Trust	$29	80.0%	20.0%
Owens Corning Fibreboard Asbestos PI Trust	$323	80.0%	20.0%
Motors Liquidation Co. PI Trust	$1,688	65.0%	35.0%
Plibrico Asbestos Trust	$115	65.0%	35.0%
T H Agriculture & Nutrition Industries Asbestos PI Trust	$501	80.0%	20.0%
Thorpe Insulation Company Asbestos PI Settlement Trust [22]	$543*	84.0%	16.0%
U.S. Gypsum Asbestos PI Settlement Trust	$1,975	85.0%	15.0%
Western MacArthur-Western Asbestos Trust [23]	$783	82.5%	17.5%
Total / Dollar Weighted Average	**$16,399**	**73.4%**	**26.6%**
	Category A and B Funding	**$12,030**	**$4,369**

**Asset totals include deferred or outstanding payment commitments not currently included as part of net claimant equity on trust audited financials. See endnotes for more details.*

Exhibit 8: Trust Claim Payments by Disease Group as a Percent of Total Claim Payments[24]



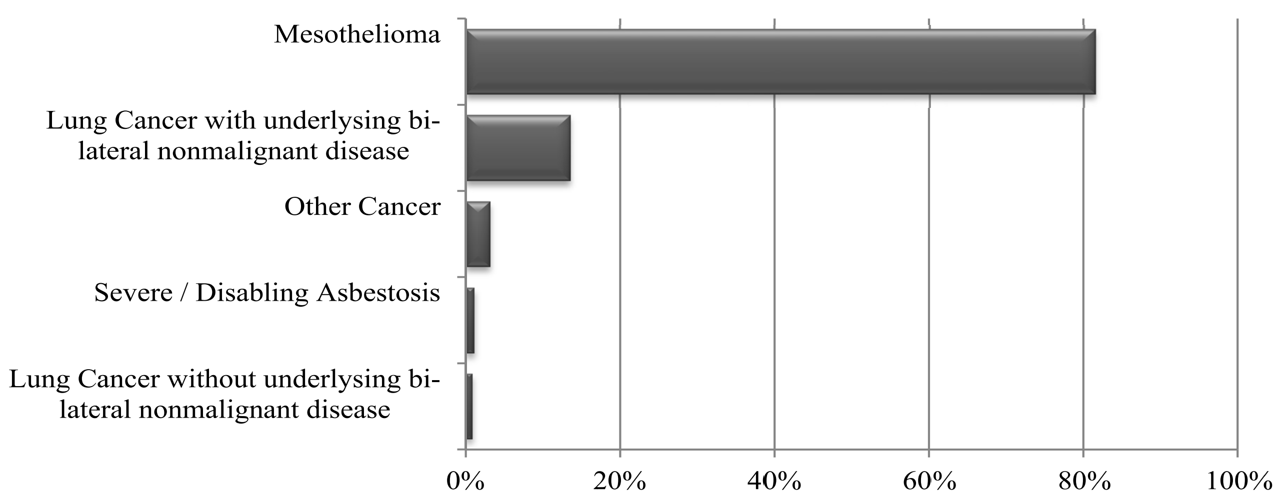
**Pre-petition and Pre-confirmation settled claims are typically not reported by trusts at the disease category level.*
***Malignant claim category may include severely disabled asbestosis claims for certain trusts.*

payments.[25] As illustrated in Exhibit 9, the limited data shows that from 2007 through 2012 approximately 80% of payments made to malignant and severely disabling asbestosis injuries have gone to mesothelioma claims.

Bankruptcy trust claim processing facilities

Bankruptcy trusts under 524(g) are designed to compensate claimants expeditiously and at a minimal cost. Many trusts seek to accomplish this at an administrative level by contracting with existing asbestos

Exhibit 9: Breakdown of malignant claim payments from 2007 through 2012*



**Malignant claim category may include severely disabled asbestosis claims for certain trusts.*

Exhibit 10: Trust Assets and Claim Payments by Claims Administrator *(dollars in millions)*

Claims Processing Administrator	No. of Trusts	2012 YE Assets	2012 Claim Payments	2006-12 Claim Payments
Delaware Claims Processing Facility[26]	7	$10,326	$486	$10,250
Verus Claims Services [27]	15	$4,778	$432	$2,270
Western Asbestos Settlement Trust[28]	3	$1,475	$71	$776
Claims Resolution Management Corp.	3	$891	$153	$1,128
Claims Processing Facility [29]	4	$465	$46	$238
Trust Services Inc.	3	$327	$28	$421
MFR Claims Processing, Inc.	4	$364	$30	$115
Other [30]	7	$83	$4	$71
Total*	**46**	**$18,710**	**$1,251**	**$15,270**

**Totals for 2012 YE Assets and Claim Payments include estimates for a few Trusts that have not made 2012 annual reports available. See endnote 7 that provides detail on how estimates for these missing annual reports have been applied.*

claim facilities such as Verus, LLC ("Verus"), or by partnering with one another to establish a multiple trust processing facility like the before mentioned DCPF. These facilities reduce administrative and processing expenses by leveraging overhead and other fixed costs across multiple trusts. In doing so, these facilities create a "one-stop shop" allowing plaintiff attorneys to electronically file bulk claim submissions against multiple trusts. Verus and DCPF represent the two largest facilities both on number of trusts and total assets. In fact, as of year end 2012, of the $18.7 billion in confirmed trust assets, $15.1 billion is associated with one of these two facilities. The two facilities were responsible for over 70% of all trust claim payments in 2012, and over 80% since 2006. Exhibit 10 provides a summary of these figures.

Bankruptcy trust expenses and claim review

To further expedite the processing of claims, most trusts have established presumptive medical and exposure criteria to quickly determine if a claim qualifies for payment. The resolution procedures developed to govern

Exhibit 11: Trust expenses category as a percent of total Trust expenses [31]

Trust Expenses Category	2006	2007	2008	2009	2010	2011	2012
Trustee Fees and Expenses	9.7%	8.7%	7.6%	8.1%	7.1%	7.6%	7.4%
TAC Fees and Expenses	3.0%	1.8%	1.6%	1.4%	1.7%	1.5%	0.9%
FCR Fees and Expenses	1.8%	1.7%	1.3%	1.1%	2.0%	1.6%	1.7%
Legal and Professional Fees	30.9%	26.7%	25.2%	26.9%	34.9%	30.4%	25.5%
Investment Fees	8.1%	19.0%	19.0%	16.3%	16.5%	17.9%	19.0%
Insurance Expense	6.4%	3.5%	2.5%	2.5%	2.2%	2.4%	2.8%
General Administration Expense	14.5%	10.3%	9.3%	9.5%	7.3%	7.4%	9.9%
Claim Processing Costs	21.1%	28.5%	33.9%	34.7%	27.0%	30.9%	32.2%
Other Expenses [32]	4.6%	-0.1%	-0.4%	-0.5%	1.3%	0.3%	0.5%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Exhibit 12: Summary of Trust Assets and Claim Payments by TAC Firm *(dollars in millions)*[33]

TAC Member Firm / Affiliation	No. of Trusts	2012 YE Assets	2012 Claim Payments	2006-12 Claim Payments
Kazan, McClain, Lyons, Greenwood & Harley	19	$14,880	$900	$13,010
Baron & Budd, P.C.	15	$12,510	$720	$11,990
Motley Rice, LLC	11	$12,040	$720	$11,700
Cooney & Conway	15	$12,270	$710	$10,180
Weitz & Luxenburg	14	$11,780	$650	$11,140

this process are often standardized across trusts allowing plaintiff attorneys to utilize the same claims material for multiple trust submissions, thus minimizing their filing costs per claim. This is not a negotiated or compromising process. Our review of these procedures has shown that for mesothelioma claims the minimum medical and exposure criteria are virtually the same across many trusts. As a result, trusts spend little on claim processing costs relative to claim payments. Exhibit 2 above shows that over $1 billion has been spent since 2006 on trust expenses. The figures in Exhibit 11 below suggests that over this same period, approximately 30% of trust expenses were associated with claim processing costs, or roughly $320 million. When compared to the $15.3 billion in claim payments made over that same span, it suggests that the trusts are spending approximately 2 cents to review, process, and pay $1.00 in claim payments.

Bankruptcy trust governance

The formation of a reorganization plan and resultant trust under section 524(g) involves negotiations with representatives of asbestos personal-injury claimants, the debtor, the legal representative for future claimants ("FCR") and other creditor constituencies with standing in the bankruptcy. Subsequent to the establishment of the trust following plan confirmation, it is often the representatives of asbestos claimants who assume the leadership roles in advising the management of trust assets and distribution of claim payments over time. These representatives make up the Trust Advisory Committee ("TAC"). Exhibit 12 summarizes the law firms that have attorneys as TAC members on the highest frequency of trusts and the recent assets held and claim payments made collectively across those trusts.

The administration of the bankruptcy trust once it becomes operational is split between the trustees, the TAC and the FCR. The trustees are the primary trust fiduciaries and handle reporting requirements, meeting with trust investment managers, and establish, supervise and administer the trust under the provisions of the TDP.[34] The TAC members represent the fiduciary interest of current asbestos claimants and the FCR represents the interests of future demand holders.[35] As typically outlined in the Trust Agreements that are confirmed as part of the bankruptcy Plan of Reorganization ("POR"), trustees have the ability to amend trust operating procedures and policies post-confirmation with the consent of the TAC and FCR.[36]

As outlined this commentary's 2012 predecessor, in recent years several trusts have amended their TDPs post-confirmation to include a "Confidentiality" provision and a "Sole Benefit" clause. The Confidentiality provision mandates that a claimant's submission to a respective trust and all associated information is to be treated in the course of settlement negotiations and is afforded all the applicable confidentiality privileges and protections. The Sole Benefit clause states that evidence submitted to a respective trust to establish proof of claim is for the sole benefit of the respective trust, not third parties or defendants in the tort system.

Example of a Confidentiality provision:

"Confidentiality of Claimants' Submissions. All submissions to the Asbestos PI Trust by a holder of an Asbestos PI Claim or a proof of claim form and materials related thereto shall be treated as made in the course of settlement discussions between the holder and the Asbestos PI Trust and intended by the parties to be confidential and to be protected by all applicable state and federal privileges,

including, but not limited to, those directly applicable to settlement discussions. The Asbestos PI Trust will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only (a) with the permission of the holder, to another trust established for the benefit of asbestos personal injury claimants pursuant to section 524(g) and/or section 105 of the Bankruptcy Code or other applicable law, (b) to such other persons as authorized by the holder, (c) in response to a valid subpoena of such materials issued by the Bankruptcy Court, (d) as provided in Section 2.2(c) above and (e) as provided in Section 1.4(f) of the Asbestos PI Trust Agreement. Furthermore, the Asbestos PI Trust shall provide counsel for the holder a copy of any subpoena referred to in (c) immediately upon being served. The Asbestos PI Trust shall on its own initiative or upon request of the claimant in question take all necessary and appropriate steps to preserve said privilege before the Bankruptcy Court and before those courts having appellate jurisdiction related thereto."[37]

Example of a Sole Benefit clause:

"Evidence submitted to establish proof of exposure to Kaiser products is for the sole benefit of the Asbestos PI Trust, not third parties or defendants in the tort system. The Asbestos PI Trust has no need for, and therefore claimants are not required to furnish the Asbestos PI Trust with evidence of exposure to specific asbestos products other than those for which Kaiser has legal responsibility, except to the extent such evidence is required elsewhere in the Asbestos TDP. Similarly, failure to identify Kaiser products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the Asbestos PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of the Asbestos TDP."[38]

These types of amendments made following confirmation of the POR by the bankruptcy and district courts raise questions about the overall lack of transparency and external oversight of trust operations.

Legislative efforts and bankruptcy trust transparency

Given the amount of assets concentrated across a limited number of trustees and advisors, legislative efforts have been initiated recently at both the state and federal level in an attempt to establish a reasonable level of public accountability and oversight that is currently lacking in the trust system.

State bills

Trust transparency legislation proposed on the state level seeks to address the issue defendants and courts have been wrestling with for the past few years – how to compel plaintiff counsel to produce information regarding exposures to the products of reorganized companies into tort proceedings in a timely manner so liability can be allocated among the full complement of culpable solvent and bankrupt defendants. Over the past decade, many asbestos dockets had previously established case management orders ("CMO") mandating the timely disclosure of trust claims and exposure information. However, lengthy statute of limitation provisions adopted by most trusts allow claims to be filed up to three years after the date the plaintiff was diagnosed with an asbestos-related disease. As a result, plaintiff attorneys have very little economic incentive to pursue trust claims until after the lawsuit in the civil tort has been resolved. This renders basic discovery procedures and CMOs in many courts ineffective, because plaintiff attorneys can not disclose trust claim filings that have not been made yet. The emergence of trust transparency legislation in the states stems from these early efforts by the judiciary and the importance the state courts recognized in mandating the systematic production of bankruptcy trust claim and exposure information early in tort proceedings.

On Dec. 20, 2012, Ohio Governor John R. Kasich signed into law H.B 380, state legislation in Ohio that gives plaintiff counsel 30 days from filing a tort complaint to disclose any trust claims and payments they have already made or will likely make in the future to collect from 524(g) asbestos bankruptcy trusts. Where the CMOs lacked an enforcement mechanism to enforce the production of trust claim information, the Ohio legislation gives the state court judge the ability to extend a trial date for plaintiff counsel that don't comply with the new trust disclosure rules. The bill also gives defendants the ability to introduce evidence to the court regarding which trusts the plaintiff may be eligible to collect from and move for a stay in the proceedings if the defendants don't believe that plaintiff counsel has been forthright and made a good-faith effort to produce their client's bankruptcy trust claims.

The Ohio bill was followed by passage of similar trust transparency legislation earlier this year by the Oklahoma state legislature. On May 7, Oklahoma Governor Mary Fallin signed a bill requiring asbestos plaintiffs to disclose trust claims submitted to bankruptcy trusts within 90 days of filing a tort complaint and 180 days before the trial date. The legislation entitles offsets for defendants found liable at trial for recoveries from the trusts based on the current trust values for the claim and category of disease. Proposals for similar trust transparency legislation have been introduced over the past year in Wisconsin, Illinois, Louisiana, Mississippi and Pennsylvania. Bills in several of those states are still pending.

Federal bill

In parallel to the legislative efforts in the states, a federal bill has been introduced in the U.S. House of Representatives that would require asbestos bankruptcy trusts to produce quarterly reports publically detailing the plaintiffs who have filed with bankruptcy trusts, been paid by bankruptcy trusts and information regarding the basis for payment. Originally introduced in 2012, the Furthering Asbestos Claim Transparency Act of 2013 ("FACT Act"), was reintroduced by House Judiciary Committee Chairman Robert W. Goodlatte on March 6, 2013. Chairman Goodlatte described the bill as;

". . . common-sense legislation that is designed to promote transparency, discourage fraud and ensure that funds meant to benefit legitimate future asbestos victims are not used to pay abusive claims. If asbestos trusts are to have assets available to pay the claims of deserving future claimants tomorrow, Congress must take steps to assure that trust assets will be better protected today."[39]

The FACT Act seeks to amend title 11 of the U.S. bankruptcy code and require the public disclosure by 524(g) trusts of quarterly reports that "contain detailed information regarding the receipt and disposition of claims for injuries based on exposure to asbestos." In addition to the quarterly reports, the FACT Act would allow defendants, at their own expense, to submit to the trusts inquiries regarding the claim status of individual claimants. As proposed, the bill would apply to all 524(g) asbestos bankruptcy trusts and require that the trusts post quarterly reports on the bankruptcy court's public website.

On May 21, 2013, the FACT Act passed out of the House Committee on the Judiciary by a vote of 17-14. The bill now heads to the House floor for full consideration.

Conclusion

It has been 30 years since Johns Manville filed for bankruptcy and 25 years since its trust began paying claimants. More than 800,000 claims later, the Manville trust continues to compensate asbestos victims and has been joined by dozens of other trusts who collectively hold over $18 billion in confirmed assets with an additional $11 to $12 billion pending bankruptcy confirmation. With trust claim payments exceeding $15 billion since 2006, the trust system has become a substantial, alternative source of compensation to what plaintiffs are already receiving in the tort system. As a result, tort defendants, state courts and legislators have been faced with the challenge of finding effective and efficient methods of integrating these dual compensation systems into one. Moreover, with bankruptcy trusts now representing a significant share of overall plaintiff recoveries, questions and concerns have been raised about trust claiming and compensation trends that have resulted in a 30% to 40% decrease in the amount trust claimants are receiving today relative to just 5 years ago. If trust assets are mismanaged and subsequently depleted then future claimants will be deprived of the equitable treatment that 524(g) was intended to preserve.

As the trust transparency issue continues to evolve and legislatures, courts, academics and other interested parties strive to learn more about the trust disclosures, we plan to update this paper going forward to provide the most current snapshot as possible of what is known about the asbestos bankruptcy trust compensation system.

Endnotes

1. Dixon, Lloyd, et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trust*, RAND Institute of Civil Justice (2010).

2. Scarcella, Marc C. and Peter R. Kelso. "Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance." Mealey's Asbestos Bankruptcy Report 11, no. 11 (2012).

3. "Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases," Mealey's Asbestos Bankruptcy Report, Vol. 11, No. 7 (February 2012).

4. Figures based on information gathered from Section 524(g) trust annual reports.

5. Estimated present value of proposed funding based on bankruptcy disclosures from W.R. Grace, Pittsburgh Corning, North American Refractories, Flintkote, Quigley, Plant Insulation, and AP Green. There are other pending 524(g) bankruptcy reorganizations currently active but no estimates of proposed trust funding has been disclosed in publically available bankruptcy documents that we were able to find.

6. 11 U.S.C. Section 524(g)(2)(B)(i)(1); 11 U.S.C. Section 524(g)(2)(B)(ii)(V).

7. *Supra* 1.

8. *Supra* 4.

9. 2011 annual reports were not available for H.K. Porter, Keene, Rutland Fire, and M.H. Detrick Trusts. In order to estimate the aggregate balances for 2011 we applied the average asset and liability flows from the prior 3-years for these specific Trusts.

10. 2012 annual reports were not available for H.K. Porter, Keene, Rutland Fire, and M.H. Detrick Trusts. In order to estimate the aggregate balances for 2011 we applied the average asset and liability flows from the prior 3-years for these specific Trusts.

11. Deferred note payments and insurance settlements that are not included as part of net claimant equity on trust financials but are due in the future. For example, the Federal Mogul U.S. Asbestos Personal Injury Trust, T&N sub-fund has outstanding note payment due totaling $240M that are reported in the notes of the trust annual report financial statements, but are not included in the trust accounting of Net Claimant Equity.

12. Armstrong World Industries Asbestos Personal Injury Settlement Trust; Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust; Celotex Asbestos Settlement Trust; Combustion Engineering 524(g) Asbestos PI Trust; DII Industries, LLC Asbestos PI Trust; Eagle-Picher Industries Personal Injury Settlement Trust; Kaiser Asbestos Personal Injury Trust; Manville Personal Injury Settlement Trust; NGC Bodily Injury Trust; Owens Corning Fibreboard Asbestos Personal Injury Trust - FB Subfund; Owens Corning Fibreboard Asbestos Personal Injury Trust - OC Subfund; United States Gypsum Asbestos Personal Injury Settlement Trust; Western MacArthur-Western Asbestos Trust; ASARCO LLC Asbestos Personal Injury Settlement Trust (2010-2012); T H Agriculture & Nutrition, LLC Industries Asbestos Personal Injury Trust (2010-2012).

13. The North American Refractories Company Asbestos PI Settlement Trust is scheduled to commence claim processing in August 2013.

14. Some trusts refer to their procedures as Claim Resolution Procedures ("CRP").

15. First Amended and Restated Combustion Engineering 524(g) Asbestos PI Trust Distribution Procedures, Section 5.3(b)(2).

16. In June 2008 the Celotex Trust increased its TDP values in lieu of increasing the Payment Percentage from 14.1% to 18.3%. Notice is available on Celotex Trust website.

17. In October 2009 the DII Trust increased its TDP values by more than double (e.g. Harbison-Walker Mesothelioma average value increased from $68K to $182K), prior to decreasing the Payment Percentage from 100% to 52.5%.

18. NGC trust decreased its Payment Percentage twice in 2011 (First to 41% in July and then to 18% in November).

19. United States Gypsum trust decreased its Payment Percentage twice in 2010 (First to 35% in April and then to 30% in November).

20. United States Gypsum Asbestos Personal Injury Settlement Trust Distribution Procedures, Section 2.5.

21. 2011 YE balance of $540M, plus the outstanding principle on the Thornwood promissory note totaling $240M as of 12/31/2012 per Note 3 of the 2012 of the trust audited financials. As of 12/31/2012, the portion of the $413M from insurance settlements was approximately $128M. Assuming these settlements represent the portion of trust funds associated with the FMP (Wagner) liability, then the asset weighted average Claim Payment Ratio for the T&N(60%) and FMP(79%) is 63.1% for Category A Claims and 36.9% for Category B Claims.

22. Page 10 of the Court of Appeals opinion by Judge Gould in the Thorpe Insulation bankruptcy reorganization, suggests that $600M in insurance had been settled to fund the trust plus an additional $1.75M in funding. To date, the trust has received $202M, so for purposes of this paper we have added the difference of $398M to the 2012 ending balance of $145M to represent the current total of committed trust funding.

23. Section 2.5 of the TDP allocates annual claim payments of 88.35% to Western Asbestos/Western MacArthur (CA) claims and the remaining balance for MacArthur claims from either MN or ND. The Category A Claims Payment Ratio for CA claims is 84%, and for MN and ND claims it is 71.5%, which when weighted by the 88.35%/11.65% split yields an average Category A Claims Payment Ratio for the entire trust of 82.5% with the balance of 17.5% for Category B Claims.

24. Claim payments by disease category are sometimes reported by trusts on a payment basis as opposed to an accrual basis that is typically used in the trust financials. As a result, the claim payment commitments reported in Exhibit 2 and 3 from the trust financials may differ from claim summary level in Exhibit 4.

25. The trust annual reports with disease level claims paid and payment summary data include A-Best Asbestos Settlement Trust (2008,2010-2012); API, Inc. Asbestos Settlement Trust (2007-2012); Armstrong World Industries Asbestos Personal Injury Settlement Trust (2007); Bartells Asbestos Settlement Trust (2007-2012); C. E. Thurston & Sons Asbestos Trust (2007-2012); DII Industries, LLC Asbestos PI Trust (2007-2012); H. K. Porter Asbestos Trust (2007-2010); Hercules Chemical Company, Inc. Asbestos Trust (2011-2012); Keene Creditors Trust (2007-2010); Plibrico Asbestos Trust (2007-2012); Porter Hayden Bodily Injury Trust (2009-2012); Raytech Corporation Asbestos Personal Injury Settlement Trust (2007-2010); United States Mineral Products Company Asbestos Personal Injury Settlement Trust (2010,2012).

26. Figure includes an estimate of deferred assets for the Federal Mogul U.S. Asbestos PI Trust. *See* endnote 11 for more detail.

27. The 2012 annual report for the H.K. Porter Asbestos Trust was not available for download. As a result the YE 2012 asset and claim payment balances in this table include estimates for this trust.

28. Figure includes an estimate of deferred assets for the Thorpe Insulation Company Asbestos PI Settlement Trust. *See* endnote 22 for more detail.

29. The 2012 annual report for the Keene Creditors Trust was not available for download. As a result the YE 2012 asset and claim payment balances in this table include estimates for this trust.

30. The 2012 annual report for the M.H. Detrick and Rutland Fire Trusts were not available for download. As a result the YE 2012 asset and claim payment balances in this table include estimates for these trusts.

31. Percentages based on approximately 40 Trusts that provided sufficient expense detail as part of the annual report. The trust financials we reviewed included additional line-item detail on expenses totaling $899 million, or approximately 85% of the total expenses reported in Exhibit 2.

32. Other expenses may include refunds and other similar accounting entries that may create negative balances.

33. *Supra* 26-30.

34. United States Gypsum and Armstrong World Industries 2011 trust annual reports.

35. *Ibid.*

36. *See for example* Section 7.3 of the Armstrong World Industries, Inc. Asbestos PI Settlement Trust Agreement.

37. *See for example* Section 6.5 of the Kaiser Aluminum & Chemical Corporation 3rd Amended Asbestos Distribution Procedures.

38. *See for example* Section 5.7(b)(3) of the Kaiser Aluminum & Chemical Corporation 3rd Amended Asbestos Distribution Procedures.

39. Press release of Congressman Blake Farenthold, "House Judiciary Committee Approves Rep. Farenthold's Fact Act." ■

Documents

PFIZER v. ANGELOS — U.S. AMICUS BRIEF

No. 12-300

In the Supreme Court of the United States

PFIZER INC., PETITIONER

v.

LAW OFFICES OF PETER G. ANGELOS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, for purposes of 11 U.S.C. 524(g)(4)(A)(ii), a corporate parent's potential liability in tort arises "by reason of" its relationship with a subsidiary-debtor when the actions of the corporate parent that resulted in potential liability were motivated in part by that relationship, but the relationship is not legally relevant to the determination whether liability exists.

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In the Supreme Court of the United States

No. 12-300

PFIZER INC., PETITIONER

v.

LAW OFFICES OF PETER G. ANGELOS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Chapter 11 of the Bankruptcy Code allows a debtor to reorganize its affairs or to engage in an orderly liquidation of its property. See 7 *Collier on Bankruptcy* ¶ 1100.01, at 1100-4 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. rev. 2009). As part of that process, subject to exceptions not relevant here, the confirmation of a plan in a Chapter 11 case discharges the debtor from any pre-confirmation debts. See 11 U.S.C. 1141(d)(1)(A). The discharge in turn "operates as an injunction against the commencement or continuation" of any action to collect on claims against the debtor or its property. See 11 U.S.C. 524(a)(2) and (3). As a general

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rule, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. 524(e).

In the asbestos context, however, Section 524(g) of the Bankruptcy Code establishes an exception to the general rule that a discharge in bankruptcy does not affect the obligations of persons other than the debtor. Under Section 524(g), the debtor's plan of reorganization may provide for the establishment of a trust that is funded by the debtor's assets, assumes the debtor's asbestos-related liability, and pays asbestos claimants. See 11 U.S.C. 524(g)(1)(B) and (2)(B)(i). Once a bankruptcy court confirms such a reorganization plan, it may "supplement the injunctive effect of a discharge," 11 U.S.C. 524(g)(1)(A), by entering an injunction against legal actions that seek to collect claims payable from the trust, 11 U.S.C. 524(g)(1)(B). To issue such a channeling injunction, the court must determine that various conditions are satisfied, among them that the debtor is likely to be subject to substantial future asbestos liability in an uncertain amount, see 11 U.S.C. 524(g)(2)(B)(ii)(I)-(II); that the injunction's terms are clearly set out in the plan and are supported by at least 75% of affected claimants, see 11 U.S.C. 524(g)(2)(B)(ii)(IV)(aa)-(bb); and that the injunction's terms treat current and future claimants substantially the same, see 11 U.S.C. 524(g)(2)(B)(ii)(V).

Section 524(g) allows a bankruptcy court to enjoin (and channel to the trust) asbestos-related actions against certain third parties as well as those against the debtor. Specifically, a channeling injunction under Section 524(g)

> may bar any action directed against a third party who * * * is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on

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> the debtor to the extent such alleged liability of such third party arises by reason of—
>
> (I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
>
> (II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
>
> (III) the third party's provision of insurance to the debtor or a related party; or
>
> (IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party[.]

11 U.S.C. 524(g)(4)(A)(ii). Section 524(g) thus permits a court to enjoin an asbestos-related action against a third party whose alleged liability "arises by reason of" one of four listed relationships to the debtor.

2. From the 1930s through the early 1970s, the debtor in this case, Quigley Co., Inc., manufactured an insulating product called Insulag that contained asbestos. Insulag did not contain any warnings about the dangers of asbestos. As the health effects of asbestos became known, tens of thousands of individuals brought lawsuits against Quigley. By the time that Quigley filed for Chapter 11 bankruptcy in 2004, it was defending more than 160,000 asbestos-related suits and claims. Petitioner Pfizer Inc. was named as a co-defendant in many of those suits. Petitioner had acquired Quigley in 1968, and petitioner's name, logo, or trademark appeared on Insulag packaging and marketing materials following the acquisition. See Pet. App. 37a-38a.

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When Quigley filed for bankruptcy, it requested an injunction that would bar the commencement or continuation of asbestos-related actions against both Quigley and petitioner. Quigley's main assets are its interests in joint insurance policies that it shares with petitioner. See Pet. App. 2a-3a, 38a. Those policies satisfy asbestos-related claims "on a first billed, first paid basis, irrespective of amounts previously billed by or paid to [petitioner] or Quigley." *Id.* at 90a. As a result, any insurance payment on asbestos claims made against petitioner diminishes the sum available to pay present and future claims against Quigley. See *ibid.* Quigley therefore proposed to place the insurance policies and associated funds in a trust, and it asked the bankruptcy court to enjoin all asbestos-related actions against petitioner as well as those against itself. See *id.* at 38a.

3. Based on that proposal, on the day that Quigley filed for bankruptcy, the bankruptcy court entered an order pursuant to Sections 105(a) and 362(a) of the Bankruptcy Code that enjoined the prosecution of asbestos-related claims against petitioner. See Pet. App. 87a-96a. In December 2007, the court narrowed its injunction to track the language of Section 524(g)(4)(A)(ii). See *id.* at 81a-82a. The amended injunction thus "provided [petitioner] with the same protection it would receive under 11 U.S.C. 524(g) if Quigley confirms its proposed plan." *Id.* at 62a. In the meantime, respondent Law Offices of Peter G. Angelos continued to prosecute claims that it had previously asserted against petitioner under the Restatement (Second) of Torts § 400 (1965), as incorporated into the common law of Pennsylvania, which imposes liability in certain circumstances on the "apparent manufacturer" of a defective product. See Pet. App. 62a, 64a, 70a. Petitioner filed a motion in the

bankruptcy court to enforce the amended injunction, arguing that the Pennsylvania claims fall within the terms of Section 524(g) as incorporated into the injunction. See *id.* at 66a.

4. The bankruptcy court agreed and enjoined respondent from pursuing its Section 400 claims in Pennsylvania courts. Pet. App. 61a-78a. The court held that petitioner's "Section 400 liability 'arises by reason of' its corporate connection to Quigley," because "[b]ut for [petitioner's] ownership and/or management of Quigley, its name and logo would never have been used." *Id.* at 72a. The court observed that Pennsylvania considers liability under Section 400 to be a form of derivative liability, see *id.* at 74-75a, and the court viewed it as anomalous to enjoin claims based on other types of derivative liability while not enjoining Section 400 claims, see *id.* at 73a-74a. The bankruptcy court therefore concluded that petitioner's alleged liability "'arises by reason of' [petitioner's] ownership or management of Quigley," and that "[c]onsequently, the Section 400 claim[s] may be channeled into the Quigley trust." *Id.* at 75a.

5. The district court reversed. Pet. App. 36a-60a. The court explained that "[f]or a third-party action to be enjoinable" under Section 524(g), "the action must allege that [petitioner] is 'directly or indirectly liable' for the conduct of Quigley," and "the action must 'arise by reason of' [petitioner's] ownership of Quigley." *Id.* at 48a-49a (quoting 11 U.S.C. 524(g)(4)(A)(ii)). The court found that respondent's suits seek to hold petitioner indirectly liable for Quigley's conduct, and that the first requirement for a Section 524(g) injunction was therefore satisfied, because "in the absence of a defective product, [petitioner] committed no tort by placing its name and logo on Insulag packaging." *Id.* at 49a. The

court further held, however, that petitioner's alleged liability does not arise "by reason of" its ownership of Quigley because "[petitioner's] affiliation with Quigley was legally irrelevant to its sponsor liability." *Id.* at 51a. Rather, the district court explained, respondent "seeks to bring separate direct actions against [petitioner] for the harm claimants suffered because [petitioner] breached an independent legal duty not to employ its name and logo in the marketing of a defective product." *Id.* at 56a-57a. For that reason, the court concluded, respondent's Section 400 claims "do not arise out of [petitioner's] ownership of Quigley and, therefore, do not fall within the scope of [Section] 524(g)." *Id.* at 60a.

6. The court of appeals affirmed. Pet. App. 1a-35a. The court held that for liability to arise "by reason of" one of the four enumerated relationships in Section 524(g),

> the liability sought to be imposed must arise as a *legal* consequence of one of the four enumerated relationships (or, stated differently, * * * the relationship, in light of the debtor's conduct or the claims asserted against it, must be a legal cause of or a legally relevant factor to the third party's alleged liability).

Id. at 30a. Applying that test here, the court observed that "[petitioner] does not argue that its ownership of Quigley is pertinent in any legal sense to the claims asserted in [respondent's] suits." *Id.* at 35a. The court therefore concluded that respondent's claims do not fall within the terms of Section 524(g) as incorporated into the injunction. See *ibid.* Because that analysis provided a sufficient ground for holding that the injunction does not encompass respondent's current claims, the court declined to "address whether [respondent's] suits seek to hold [petitioner] directly or indirectly liable for the

conduct of Quigley." *Id.* at 29a n.17; see 11 U.S.C. 524(g)(4)(A)(ii).

DISCUSSION

The court of appeals correctly held that, for purposes of 11 U.S.C. 524(g)(4)(A)(ii), a corporate parent's liability does not arise "by reason of" its relationship with a subsidiary-debtor unless that relationship is legally relevant to the plaintiff's allegation that the parent is liable. Neither this Court nor any other court of appeals has construed the phrase "by reason of" in Section 524(g)(4)(A)(ii). Other federal statutes use that phrase, but they do so in markedly different contexts, and this Court has recognized that the phrase's meaning depends on the statutory context in which it appears. And while Section 524(g) performs a critical role in assessing liability for asbestos-related claims, this case presents a narrow question that has arisen infrequently. Further review is not warranted.

A. The Decision Below Is Correct

1. a. Section 524(g)(4)(A)(ii) provides that, if certain conditions are satisfied, a bankruptcy court may enjoin "any action directed against a third party who * * * is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of" one of four listed relationships to the debtor. 11 U.S.C. 524(g)(4)(A)(ii). The question presented here concerns the meaning of the phrase "by reason of" in Section 524(g)(4)(A)(ii). The court of appeals correctly interpreted that phrase to mean that "the liability sought to be imposed must arise as a legal consequence of one of the four enumerated relationships." Pet. App. 30a (emphasis omitted). "[O]r, stated differently," the

court explained, "the relationship, in light of the debtor's conduct or the claims asserted against it, must be a legal cause of or a legally relevant factor to the third party's alleged liability." *Ibid.*

That is the most natural interpretation of the statutory language. The application of Section 524(g)(4)(A)(ii) depends not on whether some factual event (here, the placement of petitioner's name and logo on Quigley's products) occurred "by reason of" petitioner's ownership interest in Quigley, but on whether petitioner's "alleged *liability* * * * arises by reason of" that corporate relationship. 11 U.S.C. 524(g)(2)(A)(ii) (emphasis added). Because the inquiry concerns the factors that cause legal liability to arise, the court of appeals correctly focused on whether the parent-subsidiary relationship was "a legal cause of or a legally relevant factor to" the nondebtor's alleged liability. Pet. App. 30a. That approach permits a bankruptcy court to enjoin an asbestos-related claim against a corporate parent only when the parent's relationship to the debtor actually forms part of the basis for the claim.

By way of analogy, suppose a statute provided that "no person may be held liable for money damages by reason of his attendance at a religious ceremony." Such a law would not naturally be construed to shield from tort liability a parishioner who negligently rear-ended another vehicle while driving home from church. In that circumstance, the accident itself could perhaps be said to have occurred "by reason of" the negligent driver's attendance at church, since church attendance was the but-for cause of the driver's presence at the relevant location. But so long as the driver's attendance at church was not treated as legally relevant to the determination of fault or the computation of damages, the parishioner

would not naturally be said to "be held liable by reason of" that attendance.

Or to take another analogy proffered by the court of appeals, if the successor to a bankrupt's assets unlawfully discriminated in the "hir[ing] [of] new employees to administer these assets," the acquisition of the assets might be a but-for cause of the discriminatory acts (since without the acquisition there would be no need to hire new employees), but the company would not be "liable * * * by reason of its becoming * * * a transferee or successor." Pet. App. 33a (quoting 11 U.S.C. 524(g)(3)(A)(ii)). Indeed, petitioner appears to acknowledge (Pet. 24) that liability in that circumstance would not be "by reason of" the company's succession to the bankrupt's assets. Petitioner offers no coherent way, however, of reconciling that concession with its overarching position that the phrase "by reason of" mandates a but-for causation test. As these examples demonstrate, where (as here) the phrase "by reason of" is used to require a causal link between a particular event or relationship and a defendant's "liability," the inquiry appropriately centers on factors that are alleged to be legally relevant to the liability determination.

b. Petitioner focuses (Pet. 21) on the court of appeals' statement that "to fit within the parameters of [Section] 524(g), the liability sought to be imposed must arise as a *legal consequence* of one of the four enumerated relationships." Pet. App. 30a (partial emphasis added). As the court explained in the rest of that sentence, this test does not require that the relationship, standing alone, must give rise to liability. Rather, the relationship must be "a legal cause of or a legally relevant factor to" the third party's alleged liability: the relationship must form some part of the basis for the plaintiff's claim.

Ibid. The court of appeals' analysis allows for the possibility that the nondebtor's liability also has additional legal causes or legally relevant factors. Contrary to petitioner's contention (Pet. 21), the court of appeals did not thereby rewrite or add language to the statute. The court merely interpreted the phrase "by reason of," as it appears in a specific statutory context, to refer to legal rather than factual causation.

Petitioner argues (Pet. 21) that if Congress had intended to refer to legal causation, it would have used the phrase "legal effect and consequences." As petitioner correctly observes (*ibid.*), that phrase appears three times in other provisions of Section 524. But all three usages—which are the only occurrences of that phrase in the Bankruptcy Code—require the debtor's attorney or the bankruptcy court to advise the debtor of "the legal effect and consequences" of a reaffirmation agreement. See 11 U.S.C. 524(c)(3)(C), (d)(1)(B) and (k)(5)(A). Petitioner is thus correct that the phrase "legal effect and consequences" has a specialized meaning in the bankruptcy context, but it is not the meaning that petitioner ascribes to it. The phrase refers to instructing a debtor about the legal consequences of a certain agreement. It does not refer—as does the phrase "by reason of" in Section 524(g)(4)(A)(ii)—to whether a relationship with a debtor has resulted in legal liability for a nondebtor.

c. The court of appeals' interpretation is supported by the surrounding language of Section 524(g). See, *e.g.*, *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Pursuant to its

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opening clause, Section 524(g) applies "[n]otwithstanding the provisions of [S]ection 524(e)." Subsection (g) is thus an exception to the general rule in Subsection (e) that a Chapter 11 discharge does not affect the obligations of persons other than the debtor. See 11 U.S.C. 524(e). The exception allows a bankruptcy court to enjoin an asbestos-related action against a nondebtor if two requirements are satisfied: (i) the third party is "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor"; and (ii) that alleged liability "arises by reason of" one of the four listed relationships. 11 U.S.C. 524(g)(4)(A)(ii).

Accordingly, Section 524(g) authorizes the bankruptcy court to enjoin a suit against a third party who is alleged to *share* asbestos-related liability with the debtor *for a particular reason*. The first of those requirements ensures that Section 524(g) does not apply to tort actions based solely on a third party's independent conduct. Rather, the action must allege that the third party is "directly or indirectly liable for the conduct of, claims against, or demands on the debtor." 11 U.S.C. 524(g)(4)(A)(ii). Moreover, Section 524(g) does not encompass all actions involving that type of shared liability, but only suits where the nondebtor's liability "arises by reason of" a particular relationship between the third party and the debtor. The fact that the statute picks out only certain types of shared liability reinforces the conclusion that the nondebtor-debtor relationship must be "a legally relevant factor to the third party's alleged liability." Pet. App. 30a.

That inference is strengthened by the nature of the four relationships listed in Section 524(g)(4)(A)(ii)(I)-(IV): the third party's ownership of a financial interest in the debtor; its involvement in the debtor's management, including service as an officer or director; its provision of insurance to the debtor; or its involvement in a loan or financial transaction affecting the debtor. See 11 U.S.C. 524(g)(4)(A)(ii)(I)-(IV). As the court of appeals explained, outside of bankruptcy, each of those relationships commonly is legally relevant "to the liability of the one party for the conduct of or claims or demands against the other." Pet. App. 32a. If "by reason of" in this context required nothing more than but-for causation, it would be "surprising that each enumerated relationship * * * just happens to correspond to a previously-recognized relationship that may, in appropriate circumstances, give rise to * * * legal liability." *Id.* at 32a-33a. The more natural explanation is that Congress selected particular types of relationships precisely because those relationships are often "a legal cause of or a legally relevant factor to [a] third party's alleged liability." *Id.* at 30a.

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d. Section 524(g)(4)(A)(ii) refers to suits in which a third party "is *alleged* to be directly or indirectly liable * * * to the extent such *alleged* liability * * * arises by reason of" one of four specified relationships. 11 U.S.C. 524(g)(4)(A)(ii) (emphasis added). Congress's use of the word "alleged" indicates that the plaintiff's theory of the case should be taken at face value, and that a channeling injunction should bar a particular suit against a third party only if the plaintiff himself has invoked one of the enumerated relationships as a factor supporting third-party liability. Under that approach, the decision whether to enjoin a particular suit can generally be based on the pleadings in that suit. Under petitioner's theory, by contrast, the bankruptcy court in this case was required to determine, as a factual matter, whether petitioner would have allowed its name and logo to be placed on Quigley's products if the parent-subsidiary relationship did not exist. That approach departs from Congress's focus on the grounds of liability "alleged" in the relevant suit, and requires the bankruptcy court to decide questions that would be irrelevant to that suit's disposition.

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2. Applying its test to the circumstances of this case, the court of appeals correctly held that respondent's tort claims do not arise "by reason of" petitioner's ownership of debtor Quigley. Under Pennsylvania law, a party may be held liable as the "apparent manufacturer" of a defective product if it authorizes its name or trademark to appear on that product. See *Forry* v. *Gulf Oil Corp.*, 237 A.2d 593, 599 (Pa. 1968) (adopting Restatement (Second) of Torts § 400 & cmt. d (1965)). According to the Pennsylvania Supreme Court, "[t]he reasons for the extension of liability in such situation are sound: (a) the name and the trademark of the sponsor, plus the reputation of the sponsor, constitute 'an assurance to the user of the quality of the product' and (b) 'reliance (by the user) upon a belief that (the sponsor) has required (the product) to be made properly for him.'" *Ibid.* (internal citations omitted) (quoting Restatement (Second) of Torts § 400 cmt. d (1965)).

Petitioner did not contend in the court of appeals that its ownership of Quigley was legally relevant to whether it was the "apparent manufacturer" of Insulag under Pennsylvania law. See Pet. App. 35a ("[Petitioner] does not argue that its ownership of Quigley is pertinent in any legal sense to the claims asserted in the Angelos suits."). Petitioner thus did not dispute that, as the district court explained, the relevant question under Pennsylvania law is whether petitioner allowed its name or trademark to appear on Insulag as a defective product—

not whether petitioner owned or had any other corporate affiliation with Quigley. See *id.* at 51a. Pennsylvania law appears to permit the imposition of liability on an apparent manufacturer that licenses the use of its name or trademark to an unaffiliated actual manufacturer. See, *e.g.*, *Carter* v. *Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103, 1107 (E.D. Pa. 1973). The courts below therefore correctly concluded, based on the record before them, that petitioner's ownership of Quigley is legally irrelevant to respondent's claims.

B. This Court's Review Is Not Warranted At This Time

Apart from the merits of the court of appeals' decision, that decision does not warrant this Court's review for several reasons.

1. The court of appeals' decision does not conflict with any decision of this Court. This Court has never addressed the meaning of the phrase "by reason of" in Section 524(g)(4)(A)(ii).

a. Petitioner asserts both that the decision below "directly conflicts" with this Court's decision in *Travelers Indemnity Co.* v. *Bailey*, 557 U.S. 137 (2009) (*Travelers*), Pet. 14, and that the question presented was "left open" in *Travelers*, Pet. 16. Because the Court in *Travelers* expressly declined to address the scope of Section 524(g)(4)(A)(ii), the decision in that case has no bearing on the question presented here.

Travelers involved the reorganization in bankruptcy of the Johns-Manville Corporation (Manville). As part of that reorganization process, the bankruptcy court created a trust to pay asbestos claims against Manville. See *Travelers*, 557 U.S. at 141. In 1986, the court also enjoined and channeled to the trust all claims against Manville's insurer, Travelers Indemnity Company (Travelers), that were "based upon, arising out of or re-

lating to" Travelers' insurance coverage of Manville. *Id.* at 141-142, 148. The question before this Court in *Travelers* was whether the 1986 order barred subsequent state-law actions against Travelers. The Court held that it did. See *id.* at 148-149.

Petitioner contends that because Section 524(g) was modeled on the injunction at issue in *Travelers*, "[t]his Court's broad construction of the injunctive language in *Travelers* is directly applicable here." Pet. 14. The injunction in *Travelers*, however, was quite different from what Congress authorized in Section 524(g)(4)(A)(ii). The *Travelers* injunction governed claims "based upon, arising out of or relating to" Travelers' insurance coverage of Manville. See 557 U.S. at 148 ("In a statute, the phrase 'in relation to' is expansive.") (internal brackets and quotation marks omitted). The Court held that the injunction "contain[ed] nothing limiting it to derivative actions," but rather by its terms unambiguously encompassed suits "to recover against Travelers either for supposed wrongdoing in its capacity as Manville's insurer or for improper use of information that Travelers obtained from Manville as its insurer." *Id.* at 149. By contrast, Section 524(g)(4)(A)(ii) governs only actions in which the plaintiff seeks to hold a third party "directly or indirectly liable for the conduct of, claims against, or demands on the debtor," and only "to the extent such alleged liability * * * arises by reason of" a particular relationship that between the third party and the debtor. 11 U.S.C. 524(g)(4)(A)(ii). Since the injunction at issue in *Travelers* contained neither of those limitations, this Court's interpretation of that injunction sheds no meaningful light on the proper construction of Section 524(g)(4)(A)(ii).

The injunction in *Travelers* was issued in 1986, eight years before Section 524(g) was enacted. See *Travelers*, 557 U.S. at 155. The question before the Court was not whether the injunction was properly entered, or whether it would have been authorized by Section 524(g)(4)(A)(ii) if that provision had been in effect at the time of entry, but whether the injunction could be collaterally attacked in subsequent lawsuits after the time for direct appeal had expired. The Court held that it could not. See *id.* at 151-154. The Court further observed that, "owing to the posture of this litigation, we do not address the scope of an injunction authorized by [Section 524(g)(4)(A)(ii)]." *Id.* at 155. Neither in *Travelers* nor in any subsequent decision has this Court addressed the proper interpretation of Section 524(g)(4)(A)(ii).

b. Petitioner contends that this Court has repeatedly held that "Congress's use of the phrase 'by reason of' entails 'but for' causation." Pet. 19. To the contrary, the Court has said only that "the phrase, 'by reason of,' requires *at least* a showing of 'but for' causation." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (emphasis added). In *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992), the Court interpreted the phrase "by reason of" in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(c), to require not only but-for causation but also proximate causation. See *Holmes*, 503 U.S. at 268. The Court observed that the statutory language "hardly compelled" a but-for standard, and that "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading." *Id.* at 266 (footnote omitted); see *Associated Gen. Contractors of Cal., Inc.* v. *California*

State Council of Carpenters, 459 U.S. 519, 534-538 (1983) (interpreting the phrase "by reason of" to require proximate causation).

Similarly here, the unlikelihood that Congress meant to bar "the prosecution of claims bearing only an accidental nexus to an asbestos bankruptcy" weighs against adoption of a but-for causation standard. Pet. App. 34a. In any event, this Court's decisions reject any suggestion that the phrase "by reason of" bears a single meaning regardless of context. Rather, the Court has made clear that the phrase's meaning depends on the statutory setting in which it appears.

2. Petitioner argues (Pet. 19-21) that the decision below conflicts with various decisions of other courts of appeals, which have construed the phrase "by reason of" in other statutes to mean but-for causation. Petitioner's argument again overlooks the importance of examining the particular context in which the phrase "by reason of" appears. Like the RICO provision at issue in *Holmes*, virtually all of the statutes, regulations, and contracts at issue in the circuit decisions on which petitioner relies refer to situations in which some factual event occurs "by reason of" another event.[1] In assessing whether a

[1] See *Holmes*, 503 U.S. at 267 (whether an injury to business or property occurred by reason of a RICO violation); see also *Viacom Int'l, Inc.* v. *YouTube, Inc.*, 676 F.3d 19, 38-39 (2d Cir. 2012) (whether copyright infringement occurred by reason of storage of information on particular systems or networks); *UMG Recordings, Inc.* v. *Shelter Capital Partners LLC*, 667 F.3d 1022, 1031 (9th Cir. 2011) (same); *Robinson Knife Mfg. Co., Inc.* v. *CIR*, 600 F.3d 121, 131-132 (2d Cir. 2010) (whether certain costs were incurred by reason of the performance of production activities); *Spirtas Co.* v. *Insurance Co. of the State of Pa.*, 555 F.3d 647, 652 (8th Cir. 2009) (whether attorney and expert witness fees were incurred by reason of having executed a bond); *New Directions Treatment Servs.* v. *City of Reading*, 490 F.3d 293, 301 n.4 (3d Cir. 2007) (whether discrimination against an individual occurred by reason of a covered disability); but see *Pacific Ins. Co.* v. *Eaton Vance Mgmt.*, 369 F.3d 584, 587-589 (1st Cir. 2004) (whether, for purposes of an insurance policy, loss or liability was incurred by reason of a failure to discharge certain legal obligations).

factual effect has resulted "by reason of" some cause, the context will often (though not invariably) indicate that but-for factual causation is the appropriate standard.

By contrast, Section 524(g)(4)(A)(ii) applies when the alleged *legal liability* of the relevant third party "arises by reason of" specified relationships between the third party and the debtor. In that context, for the reasons given above, the appropriate standard is legal causation, *i.e.*, whether the relationship between the nondebtor and debtor was "a legal cause of or a legally relevant factor to" the nondebtor's alleged liability. Pet. App. 30a. In any event, petitioner does not identify any analogous federal statute that uses the phrase "by reason of" in connection with the imposition of legal liability. There simply is not any circuit conflict warranting this Court's review.

3. Far from presenting a question of exceptional importance, this case presents a narrow question about whether a particular cause of action under Pennsylvania law falls within Section 524(g)(4)(A)(ii)'s scope. That cause of action is itself unusual. Although most jurisdictions have adopted some version of the apparent manufacturer theory of liability described in Restatement (Second) of Torts § 400, most of those jurisdictions require that the apparent manufacturer have participated in the sale or distribution of the defective product. See Pet. App. 48a; *Reiss* v. *Korematsu Am. Corp.*, 735 F. Supp. 2d 1125, 1133 (D. N.D. 2010) (collecting

cases). Pennsylvania appears to have adopted the minority view that an apparent manufacturer may be held liable solely for allowing its name or trademark to be affixed to another's product. See Pet. App. 48a. This case thus involves an unusual cause of action that exists only in a minority of jurisdictions.

The difference between those two approaches is potentially significant to the application of Section 524(g)(4)(A)(ii). Under that provision, actions against third parties may be enjoined only when the third party "is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor." 11 U.S.C. 524(g)(4)(A)(ii). In those jurisdictions that have adopted the majority view, under which an apparent manufacturer can be held liable only if it has participated in the sale or distribution of the defective product, a suit brought against a corporate parent alleged to be liable as an apparent manufacturer of a subsidiary's defective product would seek to hold the parent liable *for its own conduct*, *i.e.*, for its participation in the sale or distribution of the defective product. Such a suit therefore could not be enjoined under Section 524(g)(4)(A)(ii), even if petitioner's interpretation of the phrase "by reason of" were adopted. Accordingly, the question presented in this case will not arise in the majority of jurisdictions. And the practical effect of the decision below is that apparent-manufacturer claims will be treated the same for purposes of Section 524(g)(4)(A)(ii) regardless of the jurisdiction in which they are brought.

Although Section 524(g) has played an important role in the resolution of asbestos-related liability, see Pet. 12-13, the Executive Office of the United States Trustee Program has informed this Office that the number of asbestos-related bankruptcy filings appears to have been decreasing. The number of asbestos cases filed in New Jersey, Delaware, and Pennsylvania—which have a high concentration of such cases—has decreased significantly during the past few years. From 2006 to the present, reorganization plans have been confirmed in 19 asbestos cases in that region.[2] There are currently four pending cases in that region without confirmation orders. There is no indication that the question presented here has arisen frequently or that any ambiguity in the phrase "by reason of" in Section 524(g)(4)(A)(ii) has impaired the effective operation of the statutory scheme.

4. Finally, it remains possible that petitioner could obtain relief at a later date from the bankruptcy court depending on how the litigation in Pennsylvania proceeds. The court of appeals decided this case on the assumption, which petitioner did not challenge, that liability as an apparent manufacturer under Pennsylvania law can be determined without reference to the parent-subsidiary relationship between petitioner and Quigley. See Pet. App. 35a ("[Petitioner] does not argue that its ownership of Quigley is pertinent in any legal sense to the claims asserted in [respondent's] suits."); pp. 13-14, *supra*. If respondent advances a theory of liability that renders that assumption inaccurate, the channeling injunction would allow petitioner to return to the bankruptcy court and seek to enjoin the claims. For instance, if petitioner denies that it authorized Quigley to place petitioner's name and logo on Quigley's products,

[2] Two of those confirmation orders are pending on appeal in the court of appeals or the district court. See *In re W.R. Grace & Co.*, appeal pending, No. 12-1402 (3d Cir. filed Feb. 23, 2012) (oral argument scheduled for June 17, 2013); *In re Flintkote Co.*, No. 1:13-cv-00227-LPS (D. Del. filed Feb. 13, 2013) (oral argument scheduled for July 31, 2013).

and respondent argues that the requisite authorization can be inferred from the parent-subsidiary relationship alone, petitioner would have a new ground for contending that its alleged liability "arises by reason of" its ownership of Quigley.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Assistant Attorney General
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MICHAEL S. RAAB
JEFFREY CLAIR
Attorneys

MAY 2013

GM — ANNUAL TRUST REPORT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	: Chapter 11
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	: Case No. 09-50026 (REG)
	: (Jointly Administered)
Debtors.	:

NOTICE OF FILING OF ANNUAL REPORT AND ACCOUNT OF THE MLC ASBESTOS PI TRUST FOR THE FISCAL YEAR ENDING DECEMBER 31, 2012

The MLC Asbestos PI Trust (the "Trust") hereby files its Annual Report, Financial Statements, and Claims Summary for the fiscal year ending December 31, 2012. The Annual Report and Financial Statements are attached hereto as Exhibit 1.

Pursuant to the provisions of the MLC Asbestos PI Trust Agreement (the "Trust Agreement"), the Trust is providing copies of the Annual Report and the Financial Statements to the Trust Advisory Committee, the Future Claims Representative, and the Office of the United States Trustee.

Dated: New York, New York
April 29, 2013

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EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*,	) Chapter 11 Case No.
	) 09-50026 (REG)
	) (Jointly Administered)

ANNUAL REPORT AND ACCOUNT OF THE
MLC ASBESTOS PI TRUST
FOR THE FISCAL YEAR ENDING DECEMBER 31, 2012

Kirk Watson, the Asbestos Trust Administrator and Trustee of the MLC Asbestos PI Trust (the "Trust"), created pursuant to the Debtors' Second Amended Joint Chapter 11 Plan (the "Plan") submits this Annual Report, Financial Statements, and Claims Summary for the fiscal year ending December 31, 2012.

I. INTRODUCTION

The purpose of this Annual Report is to fulfill the reporting requirements of the MLC Asbestos PI Trust Agreement (the "Trust Agreement") and to report to the Court on the actions taken by the Trustee on behalf of the Trust during the period January 1, 2012 to December 31, 2012 (the "Reporting Period").

Section 2.2(c) of the Trust Agreement provides:

The Trustee shall timely account to the Bankruptcy Court as follows:

(i) The Trustee shall cause to be prepared and filed with the Bankruptcy Court, as soon as available, and in any event within one hundred and twenty (120) days following the end of each fiscal year, an annual report (the "Annual Report") containing financial statements of the PI Trust (including, without limitation, a balance sheet of the PI Trust as of the end of such fiscal year and a statement of operations for such fiscal year) audited by a firm of independent certified public accountants selected by the Trustee and accompanied by an opinion of such firm as to the fairness of the financial statements' presentation of the cash and investments available for the payment of claims and as to the conformity of the financial statements with generally accepted accounting principles. The Trustee shall provide a copy of such Annual Report to the TAC and the Futures Representative when such reports are filed with the Bankruptcy Court.

(ii) Simultaneously with the filing of the Annual Report, the Trustee shall cause to be prepared and filed with the Bankruptcy Court a report containing a summary regarding the number and type of claims disposed of during the period covered by the financial statements. The Trustee shall provide a copy of such report to the TAC and the Futures Representatives when such report is filed.

(iii) All materials required to be filed with the Bankruptcy Court by this Section 2.2(c) shall be available for inspection by the public in accordance with procedures established by the Bankruptcy Court and shall be filed with the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee").

The Trust Agreement further provides for the inclusion of a description of the amounts paid to the Trustees, TAC, and FCR in the accounts filed with the Bankruptcy Court. See Sections 4.5(c), 5.6, and 6.5.

II. BACKGROUND

On June 1, 2009,[1] Motors Liquidation Company ("MLC") and its affiliated debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* in the United States District Court for the Southern District of New York (the "Bankruptcy Court"). On March 29, 2011, the Bankruptcy Court entered an order confirming the Plan. On March 31, 2011 (the "Effective Date"), the Plan became effective and the Trustee began to operate the Trust.

The purpose of the Trust is to assume the liabilities of MLC and its affiliated debtors for all Asbestos Personal Injury Claims, as defined in the Plan, and to use the Trust's assets and the

[1] Remediation and Liability Management Company, Inc. and Environmental Corporate Remediation Company, Inc filed voluntary petitions on October 9, 2009.

proceeds and income from such assets to pay both present and future asbestos claimants in accordance with the Trust Agreement and the Trust Distribution Procedures (the "Trust Documents"), in such a way that holders of Asbestos Personal Injury Claims are treated fairly, equitably, and reasonably in light of the finite assets available to satisfy such claims.

On or after the Effective Date, the Trust was funded as provided for in Section 6.3 (d) of the Plan and the Stipulation and Order Fixing Asbestos Trust Claim and Resolving Debtors' Estimation Motion approved by this Court on February 14, 2011.

III. TRUST ADMINISTRATION

A. Trustees

Kirk Watson served as the sole Trustee of the Trust during the Reporting Period.

1. Meetings

During the Reporting Period, the Trustee did all of the substantial work required to begin operation of the Trust. The Trustee held formal meetings, or obtained waivers of the formal meeting requirement, in accordance with the requirements of the Trust Agreement. In addition to these formal meetings, the Trustee met individually with Trust advisors, held special purpose meetings, and devoted considerable time to Trust matters outside of scheduled meetings. Activities included receiving and deploying trust assets with investment managers, ensuring compliance with the Trust Documents, communicating with claimants, and designing and implementing processes to receive, process, and pay claims pursuant to the Trust Distribution Procedures.

2. Compensation

The compensation and expenses paid to the Trustee during the Reporting Period are set forth in the Trust's financial statements attached hereto as Exhibit "A." The inclusion of this

information in the Trust's financial statements satisfies the requirements of Section 4.5 of the Trust Agreement. All distributions related to Trustee compensation and expense reimbursements were made in accordance with the Trust Agreement guidelines.

B. Trust Officers

Analysis Research Planning Consulting ("ARPC") served as the Trust's Executive Director during the Reporting Period.

C. Trust Advisory Committee

Steven Kazan, John Cooney, and Perry Weitz served as Members of the Trust Advisory Committee ("TAC Members") during the Reporting Period. The compensation and expenses paid to the TAC Members during the Reporting Period are set forth in the Trust's financial statements. The inclusion of this information in the Trust's financial statements satisfies the requirements of Section 5.6 of the Trust Agreement. All distributions related to TAC Member compensation and expense reimbursements were made in accordance with the Trust Agreement guidelines.

D. Legal Representative for Future Claimants

Hon. Dean M. Trafelet (Ret.) served as the Legal Representative for Future Claimants (the "FCR") during the reporting period. The compensation paid to the FCR during the Reporting Period is set forth in the Trust's financial statements. The inclusion of this information in the Trust's financial statements satisfies the requirements of Section 6.5 of the Trust Agreement. All distributions related to FCR compensation and expense reimbursements were made in accordance with the Trust Agreement guidelines.

E. Claims Processing

The Trust engaged MFR Claims Processing, Inc. as claims processor for the Trust and began accepting and preliminarily reviewing claims during the Reporting Period. As the Trust was still working to establish the payment percentage and to obtain certain data from New GM necessary for the evaluation of claims, no claims were paid during the Reporting Period.

F. Investment Management

Cambridge Associates, LLC of Boston, Massachusetts served as the Trust's investment advisor. Cambridge Associates represents other asbestos settlement trusts and has experience advising such trusts regarding investment management. Cambridge Associates advises the Trustee on the single stock holding/warrants, asset allocation, meeting liquidity needs, and the selection and oversight of individual investment managers for the investable portions of the Trust's portfolio. The Trust Agreement sets forth certain general investment guidelines, primarily addressing credit quality and asset diversification. In accordance with the recommendation of Cambridge Associates, the currently anticipated liquidity needs, and the Trust's status as a "Qualified Settlement Fund" under Section 468B of the Internal Revenue Code, the Trust's investable assets are generally allocated among investment categories in the following approximate percentages at year-end 2012: 47% of the Trust's assets are in GM stock or GM warrants (of which 2% are in GM stock and 45% are in GM warrants), 8% to other GM-related securities (MLC GUC Trust), 25% to municipal bonds, 1% to hedge funds, and the remaining 19% of the Trust's assets are held in cash or equivalents (short-term U.S. Treasuries or a U.S. Treasury money market fund).

The Trust continues to retain Income Research & Management as a municipal bond manager, and Force Capital and Taconic Capital as hedge fund managers in 2012.

During the reporting period, the Trustee regularly met with Cambridge Associates to review investment performance and strategy, as well as to receive an update on the current market environment.

G. General Counsel

Campbell & Levine, LLC of Pittsburgh, Pennsylvania and Wilmington, Delaware served as general counsel to the Trust.

IV. ANNUAL REPORT AND ACCOUNT

A. Summary of Claims

As of December 31, 2012, the Trust had begun to accept claims for processing, but had not set a payment percentage.

B. Financial Information

The Trust's audited financial statements for the Reporting Period are attached hereto as Exhibit "A." The financial statements were audited by BDO USA, LLC.

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MLC ASBESTOS PI TRUST

AUDITED SPECIAL-PURPOSE
FINANCIAL STATEMENTS WITH
SUPPLEMENTARY INFORMATION

DECEMBER 31, 2012 AND 2011

BDO

MLC ASBESTOS PI TRUST

AUDITED SPECIAL-PURPOSE FINANCIAL STATEMENTS WITH SUPPLEMENTARY INFORMATION

DECEMBER 31, 2012 AND 2011

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INDEPENDENT AUDITOR'S REPORT

Trustees
MLC Asbestos PI Trust
Wilmington, Delaware

We have audited the accompanying special-purpose financial statements of MLC Asbestos PI Trust (the Trust) (a statutory Trust created under the laws of the State of Delaware), which comprise the special-purpose statement of assets, liabilities, and net assets available for the payment of claims as of December 31, 2012, and the related special-purpose statement of changes in net assets available for the payment of claims and the special-purpose statement of cash flows for the year then ended, and the related notes to the special-purpose financial statements.

Management's Responsibility for the Financial Statements

Management is responsible for the preparation and fair presentation of the special-purpose financial statements in accordance with the special-purpose basis of accounting described in Note 2; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of special-purpose financial statements that are free from material misstatement, whether due to fraud or error.

Auditor's Responsibility

Our responsibility is to express an opinion on these special-purpose financial statements based on our audit. We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the special-purpose financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the special-purpose financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the special-purpose financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the special-purpose financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the special-purpose financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

In our opinion, the special-purpose financial statements referred to above present fairly, in all material respects, the financial position of MLC Asbestos PI Trust as of December 31, 2012, and the results of its operations and its cash flows for the year then ended in accordance with the basis of accounting described in Note 2.

Basis of Accounting

We draw attention to Note 2 of the special-purpose financial statements, which describes the basis of accounting. As described in Note 2 to the special-purpose financial statements, the special-purpose financial statements were prepared on a special-purpose basis of accounting which is a basis of accounting other than accounting principles generally accepted in the United States of America. Our opinion is not modified with respect to this matter. The special-purpose basis of accounting has been used in order to communicate the amount of net assets presently available to fund current and future claimants.

Other Matter

The 2011 special-purpose financial statements of the Trust were audited by other auditors whose report dated April 17, 2012, expressed an unmodified opinion on those statements.

Restriction of Use

Our report is intended solely for the information and use of the management of the Trust, the Trustees, the Future Claimants' Representative, the Trust Advisory Committee, the beneficiaries of the Trust, and the United States Bankruptcy Court for the District of Delaware and is not intended to be and should not be used by anyone other than these specified parties. This restriction is not intended to limit the distribution of this report which, upon filing with the United States Bankruptcy Court for the District of Delaware, is a matter of public record.

BDO USA, LLP

McLean, Virginia
April 18, 2013

MLC ASBESTOS PI TRUST

SPECIAL-PURPOSE STATEMENTS OF ASSETS, LIABILITIES AND
NET ASSETS AVAILABLE FOR THE PAYMENT OF CLAIMS

DECEMBER 31, 2012 AND 2011

	2012	2011
Assets		
Cash and cash equivalents	$ 30,283,570	$ 31,678,748
Investments, at fair value		
Equity securities	88,912,091	46,539,251
Investments in bonds	39,680,017	40,000,000
Investments in hedge funds	2,262,025	2,000,000
Interest receivable	423,592	621
Total assets	161,561,295	120,218,620
Liabilities		
Accrued expenses and accounts payable	67,700	132,962
Total liabilities	67,700	132,962
Net assets available for the payment of claims	$ 161,493,595	$ 120,085,658

The accompanying notes are an integral part of these special-purpose financial statements.

MLC ASBESTOS PI TRUST

SPECIAL-PURPOSE STATEMENTS OF CHANGES IN
NET ASSETS AVAILABLE FOR THE PAYMENT OF CLAIMS

YEAR ENDED DECEMBER 31, 2012 AND THE PERIOD FROM
MARCH 31, 2011 (INCEPTION) THROUGH DECEMBER 31, 2011

	2012	2011
Additions		
Funding under joint plan of reorganization	$ 7,875,000	$ 163,362,976
Net appreciation (depreciation) in fair value of investments	34,663,732	0
Interest and dividend income	462,729	9,394
Total additions	43,001,461	163,372,370
Deductions		
Net depreciation in fair value of investments	0	41,569,005
Operating expenses	1,593,524	1,717,707
Total deductions	1,593,524	43,286,712
Increase in net assets available for the payment of claims	41,407,937	120,085,658
Net assets available for the payment of claims		
Beginning of the year/period	120,085,658	0
End of the year/period	$ 161,493,595	$ 120,085,658

The accompanying notes are an integral part of these special-purpose financial statements.

MLC ASBESTOS PI TRUST

SPECIAL-PURPOSE STATEMENTS OF CASH FLOWS

YEAR ENDED DECEMBER 31, 2012 AND THE PERIOD FROM
MARCH 31, 2011 (INCEPTION) THROUGH DECEMBER 31, 2011

	2012	2011
Cash flows from operating activities:		
Increase in net assets available for the payment of claims	$ 41,407,937	$ 120,085,658
Adjustments to reconcile increase in net assets available for the payment of claims to net cash (used in) provided by operating activities:		
Trust funding received in stocks, rights and warrants	(7,875,000)	(161,362,976)
Net (appreciation) depreciation in fair value of investments	(34,663,732)	41,569,005
Amortization of premiums on bonds, net	135,522	0
Changes in operating assets and liabilities		
Interest receivable	(422,971)	(621)
Accrued expenses and accounts payable	(65,262)	132,962
Net cash (used in) provided by operating activities	(1,483,506)	424,028
Cash flows from investing activities:		
Unsettled purchase of investments in bonds	0	(40,000,000)
Unsettled purchase of investments in hedge funds	0	(2,000,000)
Sales and maturities of bonds	1,910,228	73,254,720
Purchases of bonds	(1,821,900)	0
Net cash provided by investing activities	88,328	31,254,720
Net (decrease) increase in cash and cash equivalents	(1,395,178)	31,678,748
Cash and cash equivalents at the beginning of the year/period	31,678,748	0
Cash and cash equivalents at the end of the year/period	$ 30,283,570	$ 31,678,748

The accompanying notes are an integral part of these special-purpose financial statements.

MLC ASBESTOS PI TRUST

NOTES TO THE SPECIAL-PURPOSE FINANCIAL STATEMENTS

DECEMBER 31, 2012 AND 2011

NOTE 1 - DESCRIPTION OF THE TRUST

On June 1, 2009, Motors Liquidation Company (MLC) (formerly known as General Motors Corporation) and certain of its subsidiaries (collectively, the Debtors), filed voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code (Bankruptcy Code) in the United States Bankruptcy Court for the Southern District of New York (Bankruptcy Court). On October 9, 2009, two additional Debtors, Remediation and Liability Management Company, Inc. (REALM) and Environmental Corporate Remediation Company, Inc. (ENCORE) filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court.

On December 7, 2010, the Debtors filed a Disclosure Statement (the Disclosure Statement) with the Bankruptcy Court describing the Debtors' Amended Joint Chapter 11 Plan. On March 29, 2011, the Bankruptcy Court confirmed the Second Amended Joint Chapter 11 Plan (the Plan). The Plan has become final and can no longer be appealed.

The essential elements of the Plan include, among other things, the creation of the MLC Asbestos PI Trust (the Trust) on March 31, 2011, pursuant to which the Trust assumes all liabilities for Asbestos Personal Injury Claims in accordance with the Plan. Governance of the Trust is dictated by the terms and provisions of the Trust Agreement, which provides, *inter alia*, for the appointment of a trustee. The processing and payment of Asbestos Personal Injury Claims is, in turn, determined by reference to the detailed provisions of the Trust Distribution Procedures (the TDP).

The trustee is responsible for supervising and administering the Trust and utilizing the Trust's assets and income to pay the holders of all Asbestos Personal Injury Claims in accordance with the Trust Agreement and the TDP in such a way that holders of such claims are treated fairly, equitably, and reasonably in light of the limited assets available to satisfy such claims.

NOTE 2 - SIGNIFICANT ACCOUNTING POLICIES

Basis of presentation

The Trust's financial statements are prepared using special-purpose accounting methods adopted by the Trust, which differ from accounting principles generally accepted in the United States of America (GAAP). The special-purpose accounting methods were adopted in order to communicate to the beneficiaries of the Trust the net assets available for the payment of claims and the related operating expenses of the Trust. Since the accompanying special-purpose financial statements and transactions are not based upon GAAP, the accounting treatment by other parties for these same transactions may differ as to timing and amount. The special-purpose accounting methods include the following:

- Assets are generally recorded when they are received by the Trust and are available for the payment of asbestos claims.
- Future fixed liabilities under contractual obligations and other agreements entered into by the Trust are recorded as deductions from net assets available for the payment of claims in the same period that such contractual obligations or agreements are signed. Under GAAP, liabilities and contractual obligations are recorded over the period that is benefited by the underlying contract or agreement.
- The full amounts of claims will be expensed in the period in which the confirmed claims are settled. A settled claim is a claim that has been allowed by the Trust and accepted by the claimant, with an approved release. Under GAAP, a liability would be recorded for an estimate of the amount to be paid for claims that have been incurred but not yet reported, and for those claims that have been submitted but not yet approved for payment by the Trust. No claims were

settled or paid during the year ended December 31, 2012, and during the period from March 31, 2011 (inception) through December 31, 2011.

- Payments for services to be received over an extended period in the future are expensed as paid because these amounts are no longer available for the payment of claims. Under GAAP, an asset would be recorded and amortized over the period in which the related benefits are received.
- Payments for property and equipment are expensed as incurred. Under GAAP, payments for property and equipment are capitalized and depreciated over the useful lives of the assets. To date, the Trust has incurred no expenses related to purchases of property and equipment.
- Income tax expense is estimated and recorded as incurred in the period in which certain income and expense items affect current federal income taxes payable. Under GAAP, the provision for income taxes is recorded based upon income reported for financial statement purposes, and federal and state income taxes both currently payable and changes in deferred taxes due to differences between financial reporting and tax bases of assets and liabilities. Under GAAP, deferred taxes include a provision for taxes attributable to changes in unrealized gains and losses on investments.
- Under GAAP, for financial statement disclosure purposes all investments would be categorized based on the priority of inputs used to measure fair value. Under GAAP, inputs used in measuring fair value are categorized into three levels. Level 1 includes inputs that are based upon quoted prices for identical instruments traded in active markets. Level 2 includes inputs that are based upon quoted prices for similar instruments in active markets, quoted prices for identical or similar investments in markets that are not active, or models based on valuation techniques for which all significant assumptions are observable in the market or can be corroborated by observable market data for substantially the full term of the investment. Level 3 includes inputs that are generally unobservable and typically reflect management's estimates of assumptions that market participants would use in pricing the asset or liability. The fair values are therefore determined using model-based techniques that include option pricing models, discounted cash flow models, and similar techniques. The accompanying special-purpose financial statements do not categorize investments into these levels.
- Under GAAP, disclosure is made about contractual maturities of investments in debt securities as of the date of the latest balance sheet presented. Such disclosures are not included in these special-purpose financial statements.

Use of estimates

The preparation of financial statements in conformity with the special-purpose accounting methods described above requires the Trust to make estimates and assumptions that affect the reported amounts of certain assets and liabilities and the disclosures of contingent assets and liabilities at the date of the special-purpose financial statements, as well as the reported amounts of additions and deductions to the net assets available for the payment of claims during the reporting period. Actual results could differ from those estimates and such differences could have a material effect on the net assets available for the payment of claims.

Cash equivalents

The Trust considers all highly liquid instruments with original maturities of three months or less to be cash equivalents.

Investments

Investment securities are stated at fair market value. Fair market value for investment securities, other than hedge funds, are based on quoted market prices for identical or similar instruments traded in active markets as of the date of the special-purpose financial statements. The fair market value for hedge funds is based on the Trust's proportionate share of each funds' net assets, as reported as of the date of the special-purpose financial statements. The net appreciation or depreciation in fair market value of investments in the accompanying special-purpose statement of changes in net assets available for the payment of claims consists of realized gains or losses on sales of investments and the changes in

unrealized gains or losses on investments held. Investment income is recognized when earned. All interest and dividend income, net of investment expenses, are included in interest and dividend income in the accompanying special-purpose statement of changes in net assets available for the payment of claims. Gains and losses on sales of investment securities are determined using the average cost method.

Accrued expenses and accounts payable

Accrued expenses and accounts payable consist of accruals and outstanding invoices associated with managing and operating the Trust.

Operating expenses

Operating expenses of the Trust are paid from the net assets available for the payment of claims when invoices are received.

Income taxes

The Trust is classified as a Qualified Settlement Fund pursuant to the Internal Revenue Code and Regulations (the Code) thereunder (the Code). The Trust is subject to federal income taxes based on modified gross income, as defined by the Code. In the opinion of the Trustee and advisors, the Trust is not subject to state income taxes and, therefore, the special-purpose financial statements do not include any provision or liability for state income taxes.

Income tax expense is estimated and includes amounts payable or receivable under current federal income taxes.

The Trust records income tax expense (or benefit) associated with amounts payable (or receivable) under current federal income taxes, and does not record a provision for (or benefit from) deferred taxes. Accordingly, there is no provision for deferred taxes associated with changes in cumulative unrealized gains and losses on investments (see Note 4). The income taxes associated with gains on investments will be recorded in the Trust's financial statements when the net gains are realized (i.e. the securities are sold) and the taxes become currently payable.

Risks and uncertainties

The Trust's assets that are exposed to credit risk consist primarily of cash and cash equivalents and investments in equity securities, municipal bonds, and hedge funds. Cash and cash equivalents are maintained at financial institutions and, at times, balances may exceed federally insured limits. The Trust has never experienced any losses related to these balances. All non-interest bearing cash balances were fully insured at December 31, 2012 due to a temporary federal program in effect from December 31, 2010 through December 31, 2012. Under the program, there is no limit to the amount of insurance for eligible accounts. Beginning in 2013, insurance coverage will revert to $250,000 per depositor at each financial institution, and the Trust's non-interest bearing cash balances may again exceed federally insured limits. Interest-bearing amounts on deposit in excess of federally insured limits at December 31, 2012 approximates $29.4 million.

The Trust invests in a professionally managed portfolio that contains equity securities, municipal bonds, and hedge funds. Such investment securities are exposed to various risks such as interest rate, market, and credit risks. Due to the level of risk associated with certain investments securities, it is at least reasonably possible that changes in the values of investment securities will occur in the near term and that such changes could materially affect the Trust's account balance and the amounts reported in the special-purpose statements of assets, liabilities and net assets available for the payment of claims.

Subsequent events

The Trust has evaluated its December 31, 2012 special-purpose financial statements for subsequent events through April 18, 2013, the date the special-purpose financial statements were available to be issued. The Trust is not aware of any subsequent events that would require recognition or disclosure in the special-purpose financial statements.

Reclassifications

Certain amounts presented in the 2011 special-purpose financial statements have been reclassified to conform to the 2012 presentation. These reclassifications have no effect on the previously recorded increase in net assets available for the payment of claims.

NOTE 3 - FUNDING UNDER JOINT PLAN OF REORGANIZATION

In accordance with the Plan and Stipulation and Order Fixing Asbestos Trust Claim and Resolving Debtor's Estimation Motion (the Stipulation) entered by the Bankruptcy Court on February 14, 2011, the Trust was funded with the Asbestos Trust Assets that are comprised of cash in the amount of $2,000,000 and an allowed general unsecured claim of $625,000,000. The Plan provides that general unsecured creditors, including the Trust, shall receive a pro rata share of New GM Securities (a combination of General Motors Company common stock, stock rights, and stock warrants) and General Unsecured Trust (the GUC Trust) Units in accordance with the terms of the Motors Liquidation Company GUC Trust Agreement (the GUC Trust Agreement). The initial distribution on the Trust's general unsecured claim was made directly to the Trust rather than through the GUC Trust pursuant to the terms of the Stipulation. All subsequent distributions were made in accordance with the Plan. During the year ending December 31, 2012 the Trust received equity securities with a fair value of $7,875,000 as of the date the securities were transferred to the Trust. During the period from March 31, 2011 (inception) through December 31, 2011, the Trust received cash proceeds of $2,000,000 and equity securities with a fair value of $161,362,976 as of the date the securities were transferred to the Trust. Future distributions from the GUC Trust will be recorded by the Trust when received.

NOTE 4 - INVESTMENTS

Investment securities consist of the following at December 31:

2012	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Fair Market Value
Equity securities	$ 96,735,019	$ 0	$ (7,822,928)	$ 88,912,091
Municipal bonds	39,780,525	0	(100,508)	39,680,017
Hedge funds	2,000,000	262,025	0	2,262,025
	$ 138,515,544	$ 262,025	$ (7,923,436)	$ 130,854,133

2011	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Fair Market Value
Equity securities	$ 88,860,019	$ 0	$ (42,320,768)	$ 46,539,251
Municipal bond deposits in transit	40,000,000	0	0	40,000,000
Hedge funds	2,000,000	0	0	2,000,000
	$ 130,860,019	$ 0	$ (42,320,768)	$ 88,539,251

The Trust recorded realized gains from sales of equity securities of $4,375 and $751,763 during the year ending December 31, 2012 and the period from March 31, 2011 (inception) through December 31, 2011, respectively.

The table below sets forth a summary of changes in the fair value of the Trust's investment in hedge funds for the year ended December 31:

	Investment in Hedge Funds 2012	2011
Balance, beginning of year	$ 2,000,000	$ 0
Purchases	0	2,000,000*
Redemption	0	0
Income allocations, net of fees	262,025	0
Balance, end of year	$ 2,262,025	$ 2,000,000

* Purchases of investments in hedge funds considered to be in-transit.

The major categories of the Trust's hedge fund investments, including general information related to each category, are as follows:

	Fair Value 2012	2011	Redemption Frequency (If Currently Eligible)	First/Next Redemption	Notice Period (days)	Gate
(a) Long/short fund ; U.S. Equity	$ 1,168,278	$ 1,000,000	Not eligible	December 31, 2014	45	0%
(b) Multi-strategy, event driven; global sector	1,093,747	1,000,000	Annually	December 31, 2013	60	10%
	$ 2,262,025	$ 2,000,000				

(a) This category includes investments in hedge funds that hold securities traded primarily in the U.S. equity market. The investment strategy is managed by engaging in short-sale equity transactions based on individual company fundamentals and to a far lesser extent by shorting board market and sector indices. The fair value of the hedge fund investments in this category was estimated based on the Trust's proportionate share of each funds' net assets, as reported on the respective funds' financial statements for the year ended December 31, 2012 and 2011.

(b) This category includes hedge funds that focus on event investment which is defined as investing in securities and instruments of companies undergoing extraordinary events that affect the value of one or more securities of a company. Mergers and acquisitions, corporate restructurings and spin-offs, credit investments, and capital structure arbitrage are the primary focuses of the hedge funds in this category. The fair value of the hedge fund investments in this category was estimated based on the Trust's proportionate share of each funds' net assets, as reported on the respective funds' financial statements for the year ended December 31, 2012 and 2011.

NOTE 5 - INCOME TAXES

During the year ended December 31, 2012 and the period from March 31, 2011 (inception) through December 31, 2011, the Trust paid no income taxes and recorded no income tax expense.

The Trust has a net operating loss carryforward of approximately $3,100,000 that is available to offset future taxable income from operations and/or realized gains on investments.

NOTE 6 - CONTINGENT LIABILITIES

The Plan Documents (as defined in the Confirmed Plan) subject the Trust to certain reimbursement and indemnification obligations that may result in future claims against the Trust.

The probability of such claims cannot be reasonably determined. Accordingly, no associated liability has been recorded in the accompanying special-purpose financial statements. Such claims, if any, are not expected to be material. The Trust has obtained insurance for purposes of supporting its obligation to indemnify the Trustee.

NOTE 7 - TRUST LIABILITY INSURANCE

The Trust purchased liability insurance requiring a premium of $86,100 and $119,147 during the year ended December 31, 2012 and the period from March 31, 2011 (inception) through December 31, 2011 respectively. The current policy term is from March 3, 2012 through March 3, 2013. The Trust's accounting policy is to expense in the current period any amounts that will not be available to pay future Asbestos Personal Injury Trust Claims or expenses of the Trust. Accordingly, $86,100 and $119,147 were recorded as deductions in net assets available for the payment of claims for the year ended December 31, 2012 and during the period from March 31, 2011 (inception) through December 31, 2011, respectively.

NOTE 8 - TRUSTEE, TRUST ADVISORY COMMITTEE, AND TRUST ADVISORY COMMITTEE COUNSEL

Fees and expenses of the Trustee, Trust advisory committee, and future claimants' representative for the year ended December 31, 2012 and the period from March 31, 2011 (inception) through December 31, 2011 were as follows:

2012	Fees	Retainer	Expenses	Total
Trustee	$ 79,088	$ 81,250	$ 9,326	$ 169,664
Trust Advisory Committee Counsel	59,575	0	2,350	61,925
Trust Advisory Committee	375	0	0	375
Future Claimants' Representative	44,275	0	8,898	53,173
Future Claimants' Representative Counsel	25,438	0	0	25,438
	$ 208,751	$ 81,250	$ 20,574	$ 310,575

March 31, 2011 (inception) through December 31, 2011	Fees	Retainer	Expenses	Total
Trustee	$ 137,250	$ 56,250	$ 11,628	$ 205,128
Trust Advisory Committee Counsel	123,318	0	890	124,208
Trust Advisory Committee	1,234	0	251	1,485
Future Claimants' Representative	49,525	0	3,838	53,363
Future Claimants' Representative Counsel	60,983	0	14	60,997
	$ 372,310	$ 56,250	$ 16,621	$ 445,181

The above amounts are included in operating expenses in the special-purpose statements of changes in net assets available for the payment of claims for the years ended December 31, 2012 and the period from March 31, 2011 (inception) through December 31, 2011.

SUPPLEMENTARY INFORMATION

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8405 Greensboro Drive
Suite 700
McLean, VA 22102

INDEPENDENT AUDITOR'S REPORT ON SUPPLEMENTARY INFORMATION

Trustees
MLC Asbestos PI Trust
Wilmington, Delaware

Our audit of the special-purpose financial statements as of and for the year ended December 31, 2012 included in the preceding section of this report was conducted for the purpose of forming an opinion on those statements as a whole. The 2012 supplementary information presented in the following section of this report is presented for purposes of additional analysis and is not a required part of those financial statements. Such information is the responsibility of management and was derived from and relates directly to the underlying accounting and other records used to prepare the 2012 special-purpose financial statements. The information has been subjected to the auditing procedures applied in the audit of the special-purpose financial statements and certain additional procedures, including comparing and reconciling such information directly to the underlying accounting and other records used to prepare the special-purpose financial statements or to the special-purpose financial statements themselves, and other additional procedures in accordance with auditing standards generally accepted in the United States of America. In our opinion, the information is fairly stated in all material respects in relation to the 2012 special-purpose financial statements as a whole.

The 2011 supplementary information presented in the following section of this report was included in the 2011 special-purpose financial statements of the Trust, which were audited by other auditors whose report on supplementary information included in those special-purpose financial statements expressed an unmodified opinion on the supplementary information in relation to the 2011 financial statements as a whole.

BDO USA, LLP

April 18, 2013

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MLC ASBESTOS PI TRUST

SUPPLEMENTARY SCHEDULE OF OPERATING EXPENSES

YEARS ENDED DECEMBER 31, 2012 AND THE PERIOD FROM
MARCH 31, 2011 (INCEPTION) THROUGH DECEMBER 31, 2011

	2012	2011
Investment manager fees	$ 553,718	$ 523,067
Consulting expenses	241,780	145,857
Administration and reporting	198,661	96,957
Trustee fees and expenses	169,664	205,128
General legal fees	107,593	214,661
Trust liability insurance	86,100	119,147
Claims processing and analysis	65,819	25,253
TAC counsel fees	61,925	124,208
Future claimants' representative	53,173	53,363
Future claimants' representative counsel	25,438	60,997
Trust meetings and expenses	13,655	18,695
Other legal fees	8,670	118,806
Office expenses	6,953	10,083
TAC fees and expenses	375	1,485
Total operating expenses	$ 1,593,524	$ 1,717,707

See independent auditor's report on supplementary information.

ASARCO — SUPPLEMENTAL FINDINGS-BARCLAYS FEES

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ENTERED
05/30/2013

In re:	§	
	§	
ASARCO LLC, et al.,	§	Case No. 05-21207
	§	
Debtors	§	

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court are: (1) the Amended Preliminary Application of Barclays Capital Inc. for Allowance of Award of Discretionary Fee (Docket No. 13408); and (2) Barclays Capital Inc.'s Motion for Allowance of a Fee Enhancement (Docket No. 13850).

Two objections to the Fee Motions were previously filed: (1) the Objection of the United States Trustee to Barclays Capital Inc.'s Motion for Allowance of a Fee Enhancement, as amended and restated by the Corrected Objection of the United States Trustee to Barclays Capital Inc.'s Motion for Allowance of a Fee Enhancement; and (2) the Objection of ASARCO, LLC, ASARCO Incorporated and Americas Mining Corporation to Barclays Capital Inc.'s Preliminary and Final Requests for Fee Enhancement (Docket No. 14110), as corrected by Corrected Objection of ASARCO LLC, ASARCO Incorporated and Americas Mining Corporation to Barclays Capital Inc.'s Preliminary and Final Requests for Fee Enhancement (the "Parent Objection," and collectively with the U.S. Trustee Objection, the "Objections").

On June 16, June 18, June 25, and June 28, 2010, this Court conducted evidentiary hearings (collectively, the "Hearing") to consider the Fee Motions. In connection with the Hearing, the Court heard testimony (whether live or by proffer) from three fact witnesses and three expert witnesses and admitted more than 230 documentary exhibits. This Court also held evidentiary hearings in connection with fee-related motions filed by other professionals in the Chapter 11 Cases.

On August, 19, 2011, this Court issued its decision, granting Barclays $975,000, based on services incapable of anticipation and, alternatively, on paragraph6(f) of the Barclays Engagement Letter. ASARCO appealed this award and Barclays cross-appealed. The district court affirmed in full. (*See generally* Dist. Ct. Op. & Order).

The Fifth Circuit reversed and remanded, concluding that a fee enhancement based on services incapable of anticipation was unwarranted but remanding in light of its opinion. (*See generally* Fifth Cir. Op.)

In addition to the briefing on this issue, the Court has taken judicial notice of the prior proceedings, the Bankruptcy Court docket, the decisions on appeal, all pleadings and other documents filed therein, all previous orders entered, and all prior hearings, evidence and argument presented in these bankruptcy cases and all associated adversary proceedings.

The Court now makes the following findings of fact and conclusions of law.

Any finding of fact that may be properly construed as a conclusion of law shall be so construed, and vice versa.

For the reasons set forth below, the Court concludes that Barclays is not entitled to any additional compensation and that its request for a fee enhancement is denied in its entirety.

FINDINGS OF FACT

A. ASARCO's bankruptcy filing and the retention of Lehman.

ASARCO LLC ("ASARCO") filed for Chapter 11 bankruptcy protection in this Court in 2005. On August 30, 2005, ASARCO executed an engagement letter with Lehman Brothers ("Lehman") to retain Lehman as its financial advisor and investment banker (the "Lehman Engagement Letter"). Pursuant to the Lehman Engagement Letter, Lehman agreed to provide the following broad scope of services:

- Advise and assist the Company in formulating a plan of reorganization and/or analyzing any proposed plan, including assisting in the plan negotiation and confirmation process of a Restructuring Transaction under Chapter 11 of the Bankruptcy Code;
- In connection therewith, provide financial advice and assistance to the Company in structuring any new securities to be issued in a Restructuring Transaction;
- Participate in negotiations among the Company and its creditors, unions, suppliers, lessors and other interested parties relating to the Chapter 11 Case;
- Participate in hearings before the bankruptcy court with respect to the matters upon which Lehman Brothers has provided advice, including, as relevant, coordinating with the Company's counsel with respect to testimony in connection therewith;

- Provide expert witness testimony concerning any of the subjects encompassed by the other financial advisory services;
- Upon request, review and analyze any proposals the Company receives from third parties in connection with a Transaction, including, without limitation, any proposals for debtor-in-possession ("DIP") financing and/or exit financing;
- Assist the Company in connection with the Company's liquidity analysis;
- Review and analyze the Company's business, operations, properties, financial condition and prospects and financial projections (including business plans provided by the Company);
- Evaluate the Company's debt capacity in light of its projected cash flows and assist in the determination of an appropriate capital structure for the Company;
- Analyze various restructuring scenarios and the potential impact of these scenarios on the recoveries of those stakeholders impacted by any Transaction;
- Provide strategic advice with regard to restructuring or refinancing the Company's financial obligations;
- Assist in the drafting, preparation and distribution of selected information and other related documentation describing the Company and the terms of a potential Transaction;
- Assist the Company in identifying, contacting and evaluating potential purchasers for any Sale Transaction; and
- Provide such other advisory services as are customarily provided in connection with the analysis and negotiation of a Restructuring Transaction or a Sale Transaction, as requested.

On September 19, 2005, ASARCO filed its motion to retain Lehman *nunc pro tunc* to August 30, 2005, when Lehman began work on the engagement (the "Lehman Engagement Application"). Mark Shapiro, Managing Director of

Lehman, submitted an Affidavit dated September 19, 2005 in support of the Lehman Engagement Application (the "First Lehman Affidavit"). The compensation ASARCO agreed to and this Court approved was as follows: (1) a $100,000 monthly fee for the first twenty-four months of the engagement and $75,000 per month thereafter; and (2) a $4 million transaction fee, with 100% of the monthly fees during the first twenty-four months of the engagement and 50% of those fees in the later months credited against the transaction fee.

In paragraph 15 of the First Lehman Affidavit, Shapiro testified that the proposed fee structure was "fair and reasonable." In later testifying about the proposed compensation, Gil Sanborn, Managing Director of Lehman, testified that the proposed economic terms were: (1) fair and reasonable to both ASARCO and Lehman, and (2) at "that point in time on the low end of the range of what [Lehman] saw in the market." In doing so, Lehman confirmed that the economic terms of the Lehman Engagement Letter were within the market range at that time.

In September 2005, ASARCO's chief executive officer resigned and the board of directors was replaced. In October 2005, one of the new board members resigned and the debtor-in-possession financing was approved with the assistance of Lehman.

On October 12, 2005, Shapiro submitted a second Affidavit in support of the Lehman Engagement Application (the "Second Lehman Affidavit"). On October 13, 2005, this Court approved the engagement of Lehman and the

Lehman Engagement Letter nunc pro tunc to August 30, 2005 and ordered that:

- "[T]he terms of the [Lehman] Engagement Letter are reasonable terms of employment for purposes of Section 328(a) of the Bankruptcy Code"; and
- "[T]he Fee Applications filed by Lehman Brothers shall be subject to review pursuant to the standards set forth in Section 328(a) of the Bankruptcy Code and not subject to the standard of review set forth in Section 330 of the Bankruptcy Code."

B. Lehman attempts to increase its compensation.

In early 2008, Lehman filed an application to amend the Lehman Engagement Application (the "Amended Engagement Application"). In the Amended Engagement Application, Lehman sought: (1) an increase in its fee for the April 2007-September 2008 time period to $150,000; (2) a discretionary fee based on the successful outcome of the ASARCO bankruptcy; and (3) $1 million for services related to fraudulent-transfer litigation. On February 22, 2008, Sanborn executed an affidavit in support of that amended application. Sanborn subsequently testified that: (1) the increased compensation sought by Lehman at that time was clearly within the market range; and (2) the fee structure was fair and reasonable to both ASARCO and the financial advisor.

In May 2008, the Court declined to increase Lehman's compensation as requested but did approve the $1 million in fees for the fraudulent transfer work that was outside the scope of the Lehman Engagement Letter. The Court found that Lehman's compensation was limited by Section 328(a) to its previous agreement, except that the Court may authorize additional compensation at the conclusion of the employment if the terms and conditions of the employment prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

C. Lehman collapses; Barclays acquires Lehman, and ASARCO retains the same investment banking team under the Barclays banner.

In September 2008, in the midst of the global financial crisis, Lehman's parent company filed bankruptcy as well. Barclays Capital, Inc. ("Barclays") acquired Lehman's investment-banking business as part of the bankruptcy process. Using the same team of financial advisors and investment bankers that had been advising ASARCO under the Lehman name, Barclays told ASARCO it would not continue to work on the ASARCO engagement under the terms of the Lehman Engagement Letter.

Barclays treated the negotiations with ASARCO as a new engagement. The former Lehman and now Barclays financial-advisory team had "a general directive from senior [Barclays] management that engagements, prospectively Barclays engagements, needed to be at market-based fees going forward." As a result, Barclays set forth economic terms that it contended reflected the current market for a new engagement.

On October 16, 2008, ASARCO agreed to the economic terms exactly as demanded by Barclays and entered into a new engagement letter. Under the terms of the Barclays Engagement Letter, Barclays would be entitled to substantially increased compensation—$225,000 per month—in exchange for the exact same work performed by the exact same team of financial professionals who had been working at $75,000 per month in the months immediately preceding

Lehman's bankruptcy. Barclays would also receive a transaction fee of $5 million. The monthly fees under the Barclays Engagement Letter were not credited against the transaction fee.

Barclays also obtained a provision that authorized it to seek a "discretionary" fee at the conclusion of the bankruptcy case. In short, the investment-banking team obtained an increase of $150,000 per month and the possibility of an additional $5 million that would not have been available under the terms of the Lehman Engagement Letter.

On November 26, 2008, this Court approved the engagement of Barclays and the Barclays Engagement Letter *nunc pro tunc* to September 22, 2008 and ordered that:

- "the terms of the [Barclays] Engagement Letter are reasonable terms of employment for purposes of Section 328(a) of the Bankruptcy Code"; and
- "the fee applications filed by [Barclays] shall be subject to review pursuant to the standards set forth in Section 328(a) of the Bankruptcy Code and not subject to the standard of review set forth in Section 330 of the Bankruptcy Code."

Barclays received an assignment of the Lehman Engagement Letter, which was assumed and assigned as modified by the Barclays Engagement Letter. As this Court previously found, there was no evidence that Barclays would have designated the Lehman Engagement Letter as an assigned contract if it had not expected to reach acceptable future compensation terms going forward.

After being engaged, Barclays repeatedly represented to this Court that

the "amount of fees" it was seeking were "consistent with market practices for investment banking firms both in and out of a bankruptcy context."

D. The Parent's plan of reorganization.

In August 2009, the Court recommended confirmation of the Parent's plan of reorganization. (See Bankr. Ct. Report & Recommendation, ECF No. 12748.) Under the terms of this plan, creditors were paid at 100 cents on the dollar, and the Parent retained ownership of ASARCO. This Court found that the successful confirmation of the Parent's full-payment plan was the result of a "coalescence of factors" (hereinafter the "Coalescence of Factors"):

- A well-timed and substantial rise in copper prices in 2009;
- The SCC Judgment;
- The Parent's desire to retain ownership and control of ASARCO LLC and move to a full-payment plan;
- The Parent's strong desire to bring an end to costly, time-consuming and distracting litigation involving the environmental claims and asbestos claims;
- This Court and how this Court conducted the case; and
- Other participants, constituents, professionals and attorneys. (Id.)

The District Court later adopted this Court's recommendation and entered judgment confirming the Parent's plan and adopting the Coalescence of Factors.

E. Barclays asserted more than $9 million in fee enhancement claims and obtained a $975,000 enhancement.

After the plan went into effect, Barclays submitted a final fee application seeking more than $9 million in fee enhancements: (1) $1,202,500 for alleged "unanticipated" services performed by Lehman; (2) a $2 million discretionary fee based on the three nonexclusive factors set forth in ¶ 6(f) of the Barclays Engagement letter; and (3) a $6 million fee related to a purported "auction" of the SCC judgment.

This Court awarded Barclays $975,000 under Section 328(a) of the Bankruptcy Code for "unanticipated" services but declined to award a discretionary fee or an "auction" fee.. On appeal to the District Court, ASARCO challenged the $975,000 enhancement. The District Court affirmed this Court's ruling in its entirety. Both parties cross appealed, with Barclays abandoning its claim to a $6 million fee for the auction.

F. The Fifth Circuit reverses the award of $975,000.

The Fifth Circuit reversed the $975,000 enhancement award finding that "all of the subsequent developments in the ASARCO bankruptcy proceeding were 'capable of being anticipated' within the meaning of § 328(a)" of the Bankruptcy Code. (Fifth Cir. Op. at 24.) The Fifth Circuit emphasized that "none of the facts on which the $975,000 enhancement is based satisfy § 328(a)'s improvidence exception" and held that "the developments giving rise to the need for Barclays's additional services were capable of being anticipated and, therefore, fail to satisfy § 328(a)'s

improvidence exception." (*Id.* at 19.) According to the Fifth Circuit, it was "foreseeable that such problems [ASARCO's status as a non-public subsidiary of a foreign corporation; management challenges; and leadership changes], once discovered, could transform what was expected to be a pit-stop into a lengthy reorganization process, requiring considerably more work than was initially expected." In particular, the Court noted:

- ASARCO faced a union-led strike and it was unclear when employees would come back to work. (Id. at 20.)

- The bankruptcy filing was prompted by a labor crisis, billions of dollars in environmental and asbestos liability and a decline in copper prices. (Id. at 20.)

- "Barclays was capable of anticipating that its plans for a quick pit-stop reorganization could be slowed by the problems of which it was aware, like the labor strike, as well as other foreseeable problems—such as inadequate leadership, management, internal controls, and reporting systems—that it had not yet discovered." (Id. at 20.)

- The Lehman "Engagement Letter itself undermines Barclays's contention that a protracted reorganization could not have been anticipated [and] demonstrates the parties' own understanding that the engagement could last for more than two years." (Id. at 21.)

- "Because Barclays knew when it signed the Engagement Letter that it lacked complete information, it cannot now seek additional compensation simply because the previously undisclosed information reduced Barclays's projected bottom-line." (Id. at 22.)

- "We conclude . . . they could have anticipated that executives, board members, and salaried employees would depart the company after it filed a Chapter 11 petition." (Id. at 23.)

- "[W]e conclude that the bankruptcy court erred in granting fee enhancements that fell outside the scope of Barclays's engagement." (Id. at 24.)

G. The Fifth Circuit affirmed the denial of the $2 million discretionary fee.

This Court rejected the $2 million discretionary-fee claim, as the Court found that the Parent's plan was attributable to the Coalescence of Factors and not sufficiently the result of Barclays "quality of service" and "creativity of advice." In addition, this Court found that no additional compensation was warranted for the discretionary fee.

Barclays appealed the denial of the $2 million fee to the District Court. The District Court affirmed the bankruptcy court's ruling in its entirety.

Barclays appealed to the Fifth Circuit, maintaining that it was entitled to a $2 million success fee based on its argument that the Court was required to apply § 330 to this claim. The Fifth Circuit rejected this argument, instead adhering to the plain language of the Barclays Engagement Letter and the order approving the engagement:

> Nothing in Paragraph 6(f) required the bankruptcy court to consult § 330(a)(3) and, more importantly, the Revised Engagement Letter explicitly disclaims consideration of that provision. Paragraph 11 of the Revised Engagement Letter provides that Barclays's retention would be "subject to the standard of review provided for in Section 328(a) of the Bankruptcy Code, and not subject to any other standard of review under section 330 of the Bankruptcy Code." We adhere to the parties' wishes as expressed in the Revised Engagement Letter.

(Fifth Cir. Op. at 26.)

The Fifth Circuit also disagreed with Barclays's alternative positions about market rates, including Barclays's arguments that: (1) this Court "incorrectly focused on ¶ 6(f)'s 'comparable market rates' factor and (2) this

Court's finding that Barclays "had received market rate [compensation]" was clearly erroneous." Stated differently, the Fifth Circuit ruled that this Court appropriately considered market rates and correctly ruled that Barclays was compensated at market levels. The Fifth Circuit opted to remand the case to this Court in light of its opinion.

H. After this Court rejected Barclay's $6 million "auction" claim, Barclays ultimately abandoned it on appeal.

This Court rejected the $6 million "auction" claim because: (1) this Court never approved Barclays's engagement for this activity; (2) the underlying activity was covered by the services required to be performed under the Barclays Engagement Letter; and (3) the "auction" process did not yield a bid or sale that would qualify for an additional fee under the supplemental and unapproved engagement letter. Barclays appealed this ruling to the District Court and the District Court affirmed the Bankruptcy Court's ruling in its entirety. Barclays abandoned the $6 million auction claim on appeal to the Fifth Circuit.

CONCLUSIONS OF LAW

A. Barclays is not entitled to a fee enhancement under ¶6(f) of the Barclays Engagement Letter.

Paragraph 6(f) of the Barclays Engagement Letter governs whether Barclays is entitled to a discretionary fee. Under the terms of this provision, Barclays may:

> apply to the court for final approval of an additional discretionary fee based upon the successful outcome of the Chapter 11 case. This fee shall be based upon a variety of factors including but not limited to quality of

> service, creativity of advice, and comparable market rates, all of which should be evaluated by the most objective standard available.

The Court has wide discretion to consider these non-exclusive factors. As found by the Fifth Circuit in previously denying Barclays's discretionary fee request, this Court considered "the nonexclusive factors set out in the" Barclays Engagement Letter. (Fifth Cir. Op. at 27.) After carefully considering the Fifth Circuit's decision, the governing law, the evidence, and the ¶ 6(f) factors evaluated under the most objective standard available, this Court reaffirms its prior conclusion that Barclays is not entitled a discretionary fee for the reasons that follow.

Barclays's efforts—while commendable—did not warrant an enhancement. Although Barclays's work benefited the estate, the Court could not conclude that those services warranted any further compensation under ¶ 6(f). Specifically, this Court credited the success of the bankruptcy to the Coalescence of Factors. Barclays would be included in the other "professionals" identified in the sixth catch-all factor. However, this does not entitle Barclays to additional compensation under ¶ 6(f).

As the District Court observed, ¶ 6(f) does not "mandate that a simple finding that [Barclays] provided creative advice and high-quality service automatically entitled [it] to a discretionary fee." After all, Barclays was hired to do precisely that—to provide effective, creative, and wide-ranging financial-advisory and investment-banking services—and was paid generously to do so.

Barclays received $225,000 month for fourteen months plus a $5 million transaction fee for a total of $8,150,000 for the fourteen-month period.

The Court therefore finds that Barclays was adequately compensated for what it characterizes as high quality and creative financial-advisory services under the terms of the Barclays Engagement Letter and is therefore is not entitled to any further compensation for these services.

B. Barclays is not entitled to a discretionary fee pursuant to Section 330 of the Bankruptcy Code.

To the extent Barclays maintains that it is entitled to the discretionary fee under ¶ 6(f) of the Barclays Engagement Letter pursuant to the standards set forth in Section 330 of the Bankruptcy Code, this Court—as the Fifth Circuit recognized is proper—declines to apply Section 330. The Fifth Circuit expressly stated that "[i]n this case, however, there is no question that Barclays's engagement was governed by §328(a). (Fifth Cir. Op. at 26.)

CONCLUSION

Taking into account the nonexclusive factors set forth in ¶ 6(f) in light of the most objective standard, the Court concludes that Barclays is not entitled to any enhancement. Based on the Fifth Circuit's reversal of the $975,000 enhancement award and the findings and conclusions set forth above, the Court denies Barclays's fee enhancement claims in their entirety and hereby dismisses Barclays's remaining fee claims with prejudice.

Dated: May 30, 2013

Richard S. Schmidt
United States Bankruptcy Judge

PCC — MT. MCKINLEY MOTION RECONSIDER

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

In re:	
PITTSBURGH CORNING CORPORATION, Debtor.	Case No. 00-22876-TPA Chapter 11 Jointly Administered
MT. MCKINLEY INSURANCE COMPANY AND EVEREST REINSURANCE COMPANY, Movants	
v.	
PITTSBURGH CORNING CORPORATION, Respondent.	Relates to Docket Nos.: 8781, 8459, 8485, 8928, 8955-8957, 9060, 9066, 8369, 8370, 8845, 8984, 9402, 9443-9447

MT. McKINLEY INSURANCE COMPANY'S AND EVEREST REINSURANCE COMPANY'S MOTION TO RECONSIDER (I) REVISED MEMORANDUM OPINION SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CONFIRMATION OF THE MODIFIED THIRD AMENDED PLAN OF REORGANIZATION AS MODIFIED THROUGH MAY 15, 2013, AND THE ASBESTOS PERMANENT CHANNELING INJUNCTION; (II) FINAL ORDER CONFIRMING MODIFIED THIRD AMENDED PLAN OF REORGANIZATION AS MODIFIED THROUGH MAY 15, 2013, AND, PURSUANT TO 11 U.S.C. § 524(g), ISSUING ASBESTOS PERMANENT CHANNELING INJUNCTION; (III) ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR RECONSIDERATION OF MEMORANDUM OPINION AND INTERIM ORDER FILED AT DOC. NOS. 9409, 9410; (IV) ORDER DENYING MOTION FOR RECONSIDERATION OF 2011 MEMORANDUM OPINION AND ORDER; AND (V) ORDER DENYING MOTION FOR ENTRY OF CASE MANAGEMENT ORDER

COME NOW Mt. McKinley Insurance Company, formerly known as Gibraltar Casualty Company, and Everest Reinsurance Company, formerly known as Prudential Reinsurance Company (collectively, "Mt. McKinley") and, for the reasons set forth below, file this Motion for Reconsideration (the "Motion"), pursuant to Federal Rules of Bankruptcy Procedure 7052, 8002, 9014, 9023 and/or 9024, Federal Rules of Civil Procedure 52, 59 and/or 60, and such other provisions of law as may be applicable.

I. Introduction

1. Mt. McKinley seeks reconsideration, amendment, and alteration of this Court's: (i) *Revised Memorandum Opinion Setting Forth Findings of Fact and Conclusions of Law Regarding Confirmation of the Modified Third Amended Plan of Reorganization as Modified Through May15, 2013, and the Asbestos Permanent Channeling Injunction Signed on May 24, 2013* [Dkt. 9443, herein "Opinion"]; (ii) *Final Order Confirming Modified Third Amended Plan of Reorganization as Modified Through May 15, 2013, and, Pursuant to 11 U.S.C. §524(g), Issuing Asbestos Permanent Channeling Injunction* [Dkt. 9444, herein "Confirmation Order"]; (iii) *Order Granting in Part and Denying in Part Motions For Reconsideration of Memorandum Opinion and Interim Order filed at Doc. Nos. 9409, 9410* [Dkt. 9445, herein, "Order on Interim Motion"]; (iv) *Order Denying Motion for Reconsideration of 2011 Memorandum Opinion and Order* [Dkt. 9446, herein "Order on 2011 Motion for Reconsideration"];[1] and (v) *Order Denying Motion for Entry of Case Management Order* [Dkt. 9447, herein "CMO Order"] issued on May 24, 2013 (collectively, the "Confirmation-Related Orders").

2. On May 16, 2013, this Court entered an interim opinion on confirmation and a

[1] On June 16, 2011, the Court denied confirmation of the Third Amended Plan. Dkt. No. 8321. Mt. McKinley moved for reconsideration of certain aspects of the Court's June 2011 confirmation ruling (the "2011 Motion for Reconsideration"). Dkt. No. 8347. The 2011 Motion for Reconsideration was taken under advisement by the Court which indicated that it would rule on that motion in connection with confirmation of the current plan. The Court issued a separate order denying Mt. McKinley's 2011 Motion for Reconsideration for the reasons set out in the Opinion and Confirmation Order [*see* Dkt. 9446]. To avoid and otherwise preclude any argument that the Court's prior opinion on another plan (as to which confirmation was denied) has a preclusive effect on any of Mt. McKinley's objections to confirmation of the Plan, Mt. McKinley includes the ruling on the 2011 Motion for Reconsideration here. The Court, throughout its Opinion, cites to and seems to incorporate some or all of its 2011 opinion, so it is unclear what, if any, of the 2011 opinion is still operative for purposes of appeal and/or for purposes of the instant Opinion.

related order. *See* Dkt. Nos. 9409, 9410. These interim rulings were interlocutory on their face[2] and, therefore, the traditional vehicles available for reconsideration which apply to final orders – Fed.R.Civ.P. 59(e) Fed.R.Civ.P. 60(b) – were inapplicable. *See Confer v. Custom Eng'g Co. Employee Health Ben. Plan*, 760 F. Supp. 75, 77 (W.D. Pa. 1991), *aff'd in part, appeal dismissed in part sub nom. Confer v. Custom Eng'g Co.*, 952 F.2d 41 (3d Cir. 1991). The Court "provided the parties the opportunity to file motions for reconsideration so that this Court could correct any typographical or scrivener's errors or any omissions or inaccuracies." Opinion at 3. Mt. McKinley filed such a limited purpose motion, explicitly preserving its rights to file a motion for reconsideration in connection with a final order. Dkt. 9420 at 2-3 ("Interim Motion").

3. On May 24, 2013, the Court entered the Confirmation-Related Orders. As final orders, these orders are properly the subject of this traditional motion for reconsideration. Accordingly, Mt. McKinley files the Motion, asking the Court to reconsider the Confirmation-Related Orders. Mt. McKinley reserves the right to pursue all of its appellate remedies with regard to issues addressed in and related to the Confirmation-Related Orders, including rulings throughout the thirteen year history of this case denying Mt. McKinley discovery into the negotiation of this Plan and prior plans, particularly to the extent that certain provisions of prior plans were carried forward in this Plan.

II. Standard for Motion for Reconsideration

4. The purpose of a motion to reconsider is to correct manifest errors of fact or law or to present newly discovered evidence. *See, Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d. Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). A motion to reconsider is appropriate, among other things, where the court has misapprehended either a party's position, the facts or the law.

[2] *See* Opinion at 3 and at n.6.

Refrigeration Sales Co. v. Mitchell-Jackson, Inc., 605 F.Supp. 6, 7 (N.D.Ill.1983), *aff'd* 770 F.2d 98 (7th Cir. 1985). A judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999), *citing North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir.1995).

III. Argument

A. The Court should reconsider its ruling selectively re-opening the evidentiary record to admit facially defective hearsay testimony regarding whether hundreds of non-debtors qualify for injunctive relief under 11 U.S.C. § 524(g).

5. Mt. McKinley has long-raised objections that the scope of the injunction is overbroad, including that it is improper to provide § 524(g) protection to hundreds of non-debtor affiliates of the Plan Supporters that are not entitled to protection under the Bankruptcy Code. *See, e.g.*, Dkt. Nos. 7132 at p. 29, 8984 at pp. 56-58, and 9386 at pp. 3-5. The Court agreed in part by finding that non-debtor affiliates which did not fall within the Code's definition of "affiliate" – specifically with reference to entities which were limited partnerships – were not entitled to § 524(g) protection. 5/13/13 Tr. at 32:20-33:2.

6. Subsequently, on May 15, 2013, the Plan Parties filed "technical amendments" to the Plan that included revisions to Exhibits K and L, omitting more than 15% of the entities previously identified. Dkt. 9402, 9405. The Court's interim confirmation ruling was issued the next day. Dkt. No. 9409.

7. Mt. McKinley pointed out in its Interim Motion that the technical amendments did nothing to clarify the scope of the injunction and in fact caused further confusion. Dkt. 9420 at pp. 5-7. Mt. McKinley noted that Corning's revised exhibit to the Plan, Exhibit K, continued

to contain three entities expressly identified previously as "(Partnerships)" with the exhibit merely being revised to omit the parenthetical identifying them as such. *Id.* PPG's revised exhibit, Exhibit L, failed to omit a single one of the disqualified entities from the two tables in the exhibit and, instead, added two additional tables with the entities that (allegedly) actually qualify for 524(g) protection. PPG also slightly revised two of the Plan's myriad interrelated definitions to indicate that the two corrected tables should be utilized in interpreting part (b) of the definition of Asbestos Protected Party, with the implication being that at all other times the defective tables should continue to be utilized. *Id*. The Court responded at the May 23, 2013 by asking counsel for PPG and Corning to represent the correctness of the schedules and, then, in apparent recognition of the deficiency of the evidentiary record, asked the Plan Supporters to submit affidavits that none of the entities in Exhibits K and L were limited partnerships. 5/23/13 Tr. at 36-39.

8. The next day, hours before the Court entered the Opinion and Order, the Plan Supporters filed affidavits that none of the entities on Exhibits K and L are limited partnerships. Dkt. Nos. 9441 (Affidavit of Greg Gordon) and 9442 (Affidavit of Linda Jolly). Without giving Mt. McKinley the opportunity to take discovery to test the assertions and underlying facts therein, the Court relied on these affidavits in its confirmation ruling issued hours later. Opinion at 115, ¶ 366.

9. Respectfully, it was manifestly unjust for the Court to selectively re-open the long-closed evidentiary record[3] to admit facially defective affidavits. *Id*. Accordingly, the Court should reconsider its reliance on these affidavits and exclude them from the evidentiary record.

[3] 6/3/10 Tr. at 164:1-2 ("Your Honor, with respect to the plan proponents' and supporters' case in chief, we rest."); 6/10/10 Tr. at 149:17-18 (resting rebuttal case).

Not only are the affidavits untimely, coming nearly three years after the close of evidence on the prior plan – there being no evidentiary hearing on the Plan actually confirmed by the Court on May 24, 2013 – but they are also inadmissible under the rules of evidence.

10. The Federal Rules of Evidence apply in all bankruptcy cases; and evidence supporting or contesting the plan thus must be submitted in admissible form. Fed. R. Bank. Proc. 9017, Fed. R. Evid. 1101. The affidavits are in and of themselves hearsay and should be excluded under Fed. R. Evid. 801(c), and potentially hearsay within hearsay to the extent they are based on information and belief. Fed. R. Evid. 801, Fed. R. Evid. 1101, *see also*, David F. Binder, HEARSAY HANDBOOK § 46:1 (West 4th Ed.) ("[a]n affidavit is written hearsay under oath. It is just as excludable as oral hearsay not under oath"), *citing, inter alia*, *Travelers Cas. & Sur. Co. of Am. v. Wells Fargo Bank N.A.*, 374 F.3d 521, 524 (7th Cir. 2004). Moreover, the affidavits are not competent evidence because they are not based on personal knowledge but, instead, on "information and belief." The affidavits fail to set out what facts are relied upon for the conclusory certifications therein. For example, the Gordon affidavit at Dkt. 9441 purports to "certify" that "none of the entities or affiliates that appear on Tables 3 and 4 are limited partnerships" [see ¶ 4] without setting out any facts, whatsoever. Instead, it appears that Mr. Gordon merely "oversaw" the preparation of the corrected Tables 3 and 4. In other words, he managed the people that actually put the schedules together; however, there is no indication that he reviewed the corporate records of the specific entities.

11. At the other end of the spectrum, the Jolly affidavit at Dkt. 9442 fails to set out specific facts and instead purports to be "based on **all of the information that I have received** as the Corporate Secretary of Corning." *Id.* at ¶ 4 (emphasis added). Such a generalization is virtually meaningless. Interpreted literally, it suggests the conclusion at ¶ 4 is based on

everything "received" by Ms. Jolly in her capacity as corporate secretary, without any indication that *anything* was actually reviewed.

12. The witnesses purporting to testify were never disclosed[4] in accordance with the case management order governing the prior confirmation hearing [Dkt. No. 7652, ¶ 3], nor has Mt. McKinley had the opportunity to depose these witnesses to assess the foundation of this testimony.

13. The Court's request for the affidavits at the May 23, 2013 hearing highlights that the evidentiary record does not support – indeed there is *no evidence* – a finding that the hundreds of non-debtors in Exhibits K and L (either in the admittedly defective Tables 1 and 2 or the allegedly corrected Tables 3 and 4) are entitled to the broad protections afforded them under the Plan, including as relates to § 524(g). Mt. McKinley, of course, could not have anticipated that the Plan Supporters would put forward facially defective affidavits or that the Court would not allow even 12 hours prior to a holiday weekend to pass within which Mt. McKinley might have filed an objection before incorporating this "evidence" into its final ruling.

14. The Court should reconsider the Confirmation-Related Orders and exclude this inadmissible and untimely attempt to supplement the evidentiary record.

B. The scope of the injunction remains unclear.

15. The Court should reconsider the Confirmation-Related Orders because footnote 14 at p. 56[5] of the Confirmation Opinion further clouds the issue of which of the hundreds of non-debtor PPG affiliates identified in Exhibit L are being afforded protection under the Plan and

4 Dkt. No. 7686.

5 "References throughout this Memorandum Opinion to PPG Entities, PPG Affiliates, Corning Entities and Corning Affiliates shall be construed to refer only to revised Exhibits K and L as reflected in Doc. Nos. 9402 and 9405." Opinion at p. 56, n.14.

which of the findings allegedly support that relief.

16. As described above, at the time Plan Supporters were ordered by the Court to excise entities which were limited partnerships from Exhibits K and L, PPG's counsel proposed a purported "relatively simple" fix as to PPG. 5/13/13 Tr. at 32:20-33:10. Instead of amending Exhibit L to include only those entities that qualify for 524(g) relief, PPG proposed adding two tables with the qualifying entities to Exhibit L and modifying the Plan's definition of "PPG Affiliates" and "PPG Entities" to add a sentence that when used in subpart (b) of the Plan's definition of Asbestos Protected Party, the two new tables would be utilized. *Id.* at 33:11-34:18.

17. As Mt. McKinley demonstrated in the Interim Motion, the result of PPG's actions is that there are now an additional set of two tables that have to be utilized to understand the Plan with respect to the PPG Affiliates and PPG Entities. Specifically, the corrected tables, nominated Tables 3 and 4 in Ex. L, are to be used when construing subpart (b) of the definition of Asbestos Protected Party, while the defective tables (nominated Tables 1 and 2 in Ex. L) appear to apply elsewhere in the Plan.[6] Footnote 14 further confuses the construction of these defined terms. Footnote 14 states:

> References throughout this Memorandum Opinion to PPG Entities, PPG Affiliates, Corning Entities and Corning Affiliates shall be construed to refer only to revised Exhibits K and L as reflected in Doc. Nos. 9402 and 9405.

Opinion at p. 56, n.14. The only "revisions" to Exhibit L are reflected in Tables 3 and 4 – there were no changes to Tables 1 and 2, so they were not "revised." Paragraphs 367 and 368 of the Opinion continue to refer to Tables 1 and 2 in the construction of PPG Entities and PPG

6 This impacts the definitions of "Assigned Claims," "PPG-Affiliated Parties." PPG-Affiliated Parties, is utilized in part (b) of the definition of Asbestos Protected Party, rendering it unclear whether the corrected tables or defective tables should apply in construing this term. Also affected are the definitions of "PPG Parties" and "PPG Trust Contribution," and Plan §§ 8.1.15 and 8.1.22.

Affiliates. Since (1) Mt. McKinley specifically identified the confusion generated by PPG's use of two competing sets of tables in the Interim Motion, and (2) footnote 14 was added by the Court in the final version of the Opinion while ¶¶ 367 and 368 were unchanged between the interim and final versions, it appears the Court's intent was to strike Tables 1 and 2 and utilize only Tables 3 and 4. It is not clear.

18. For example, Paragraph 159 of the Opinion at p. 50 states that the PPG Trust Contribution is being made "by and/or on behalf of the PPG Entities, the PPG Affiliates…" Under the Plan, this means the PPG Affiliates and PPG Entities in Tables 1 and 2 of Ex. L. *See* Plan § 1.1 (definitions of PPG Affiliates and PPG Entities) as modified by technical amendments at Dkt. 9402 at pp. 3-4. Footnote 14 of the Opinion at p. 56, however, indicates that the Court intends to limit this finding to apply to those PPG Affiliate and PPG Entities in Tables 3 and 4 of Ex. L and not Tables 1 and 2 as stated in the Plan. Accordingly, these provisions are unclear and require Mt. McKinley be provided the opportunity to take discovery into this obvious ambiguity. It is manifestly unjust for the Court to have denied Mt. McKinley reasonable discovery on these significant issues.

19. Further, Paragraphs 176 and 177 of the Opinion at p. 56, make findings utilizing the defined terms "PPG Affiliates" and "PPG Entities." The Court cites as support Plan §§ 8.1.15 and 8.1.22. The problem is that the Plan and the Court use *different definitions* of the terms PPG Affiliates and PPG Entities. Plan §§ 8.1.15 and 8.1.22 – to which the Court cites as support for the findings in ¶¶ 176 and 177 – utilize the Plan's definitions of PPG Affiliates and PPG Entities which refer to the defective Tables 1 and 2 of Ex. L and include dozens of entities that do not qualify for § 524(g) relief. *See* Plan § 1.1 (definitions of PPG Affiliates and PPG Entities) as modified by technical amendments at Dkt. 9402 at pp. 3-4. Footnote 14 suggests the

Court may have rejected PPG's "simple fix" by utilizing the corrected Tables 3 and 4 of Ex. L. It is unclear, however, since the Court cites to the Plan §§ 8.1.15 and 8.1.22, which mean something different as it relates to PPG Affiliates and PPG Entities.

20. This confusion arises because there is no evidence supporting § 524(g) relief for the hundreds of non-debtor affiliates identified in Exhibits K and L to the Plan. Instead, there is only the representation of counsel and two defective affidavits filed the same day the Court's Opinion issued.

21. Therefore, the Court should reconsider the grant of § 524(g) relief to these hundreds of non-debtors, allow Mt. McKinley to take discovery into how the Plan Parties intend the Plan to operate, and hold an evidentiary hearing on this Plan.

C. The Court should reconsider its supplemental findings with regard to the ex post facto exclusion of the Garlock exhibits from the evidentiary record.

22. Since the earliest days of this bankruptcy case, Mt. McKinley and the other insurers have been greatly concerned about collusion in the formulation of the Plan and TDP, including whether Plan Supporters and other parties had colluded in the development of overly lenient procedures that would permit payment of invalid and fraudulent claims. Mt. McKinley and those other insurers propounded discovery requests to explore these concerns but were unable to obtain meaningful responses. A motion to compel was filed. During the hearing on that motion, the Bankruptcy Court emphatically refused to permit such discovery, holding that whether or not there was collusion was irrelevant to insurers and that providing for the payment of invalid claims did not go to the question of good faith. *See* Tr. 2/19/04 hearing, 74:23—79:6. During the same hearing, and in others that followed, the Court denied discovery into issues relating to the negotiation and formulation of the Plan—issues that go, among other things, to issues of collusion and bad faith. *See e.g., Id.* at 31:9-20. Despite repeated requests over the last

decade, and despite continuing developments in the law designed to curb such abuses of the bankruptcy system and an ever-increasing awareness by courts and legislative bodies across the United States of the problem of fraudulent asbestos claims, the Bankruptcy Court continually refused to permit such discovery in this case.

23. Mt. McKinley was denied the right to take such discovery even in the wake of the Third Circuit's decision in *In re Global Indus. Techs., Inc.*, 645 F.3d 201 (3d Cir. 2011) (*en banc*), *cert denied*, 132 S. Ct. 551 (2011) ("*GIT*"), where the Third Circuit held that "the integrity of the bankruptcy proceeding is called into question by nonfrivolous allegations of collusion" and remanded that case for a "more searching review" based on a fully developed evidentiary record. *Id.* at 214-15. Mt. McKinley had already raised non-frivolous allegations of collusion and fraud in this bankruptcy case, and the emergence of the Garlock exhibits during the 2010 confirmation hearing were clear proof that some amount of fraud was occurring.[7]

24. Accordingly, the Court should reconsider the supplemental findings in the new footnote 19 at p. 70 of the Opinion and the new paragraph added after ¶ 266 on pp. 70-71 revoking the Court's prior admission of the Garlock exhibits. In footnote 19, the Court suggests that certain of the Garlock exhibits were unsigned. This is incorrect. The relevant signature is that of the *attorney* for the firm that previously submitted master ballots in this case.[8] Those ballots, which were under oath, were diametrically contrary to what the same firm stated in

[7] Notably, the Garlock exhibits were fortuitously discovered by Garlock as part of its own asbestos-related litigation, but these exhibits represent but a small fraction of the total asbestos claims asserted in this bankruptcy. Without question, a more thorough and searching analysis—which has not been permitted—would in fairness provide the means and opportunity necessary to uncover a much greater incidence of such improprieties.

[8] The master ballots themselves are part of the record. 6/9/10 Tr. at 194:3-7, 197:5-14. The master ballots submitted by the law firms of Thornton & Naumes and The Shepard Law Firm relate to the exhibits at issue.

discovery in the tort system with regard to this debtor.[9] In short, *all* eleven were signed by the relevant persons.

25. The ellipses in the language quoted at footnote 19 of the Opinion omit significant clarifying language setting out what everyone – including the Plan Parties (see below) – understood at the time:

> THE COURT: You folks can brief this issue as part of your post-trial findings. I am reserving the issues with respect to any weight. I'm going to admit them for now. If that turns out to be incorrect, you can show me how in the post-trial submissions. The only ones I am admitting are those that have a different outcome in a request for admission signed and filed after the ballot in which somebody **submits a ballot in this case** that says that they have a claim against

[9] What they say about the Debtor is the only relevant inquiry. Although the Court seems to suggest at ¶ 226 of the Opinion that the exhibits are not relevant because they also contain references to other cases, the Court correctly understood at the time they were offered that the relevance was what the exhibits said about this case, not any of the others:

> MR. FINCH: And, for the record, Your Honor, may I still stand on my relevance objection because if you'll look at these, the ones that come in after the ballots, the vast majority of them do admit exposure to other bankrupt companies.
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> THE COURT: That's irrelevant.
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> * * *
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> THE COURT: We are not talking about the others.
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> THE COURT: They're being proffered for the fact that claimants will, I guess, take liberties with whether or not they have claims against Pittsburgh Corning. The relevance and the weight to be accorded to this because the claimants still have to file claims against the trust and the trust will still have to prosecute all of this I will have to take under advisement. But the issue is are they probative and the answer is, yes, they are. Therefore, Exhibit 203 is admitted. You have to tell me as to the others which are after the ballot date.

6/9/10 Tr. at 194:24-195:12. The Court should reconsider this finding as well.

> the debtor and the request for admission is to the contrary. That's what I'm willing to admit. I need a list as to what they are. I'm not wholesale admitting these documents, only those.

6/9/10 Tr. at 198:21-199:7 (emphasis added). The language the Court omits from its quote is key because the "**somebody** [who] submit[ted] a ballot in this case" in each instance was ***an attorney*** representing asbestos claimants in this case. This missing language is relevant because the individual asbestos claimants did not submit ballots in this case – the relevant ballots that relate to these specific exhibits, are the master ballots submitted by The Shepard Law Firm and Thornton & Naumes LLP.

26. The Court's admission of Garlock 203, which was the specific exhibit the Court examined at length at the June 9, 2010 hearing[10] and one of the allegedly "unsigned" exhibits, is telling. After examining this specific document at length, the Court clearly admitted it and those like it. The Court knew on June 9, 2010 that this exhibit was "unsigned" by the particular plaintiff's representative. However, at the time, the Court recognized that the "problem" was the representation by the attorney on Garlock 203 (and those like it) vis-à-vis the representation made on the master ballots submitted in this case and signed under penalty of perjury by attorneys at the very same firms:

> THE COURT: [The ballots] should be part of the record and so whether if, in fact, the folks voted and if also after their vote, ***which this particular document [Garlock 203] seems to be***, they assert that they can't yet say whether or not they have a claim, but they voted as though they do, there's a problem.

6/9/10 Tr. at 194:3-8 (emphasis added). The Court never raised a concern at the hearing as to whether the exhibits offered were somehow defective because they lacked the signature of a party representative – nor did any of the Plan Parties articulate an evidentiary objection on this

10 6/9/10 Tr. at 183:23-200:15.

point during the entire colloquy that consumes 18 pages of the June 9, 2010 transcript. Respectfully, the Court did not "conditionally admit" the exhibits based on an open-ended list of objections to be reconsidered later as suggested at p. 77 of the Opinion. Instead, it is clear from the transcript colloquy cited above that the Court was merely reserving the right to assess the materiality and the weight of the evidence presented.

27. Moreover, even if such an objection can be read into the penumbra of the Court's June 9, 2010 ruling and then attributed to the Plan Parties, it was subsequently waived when, the very next morning, the parties stipulated that the exhibits complied with the Court's ruling the day before. 6/10/10 Tr. at 6:15-17 (counsel for Garlock – "[w]e went through the Garlock exhibits last night and determined which ones were subject to Your Honor's ruling yesterday"); 7:9-12 (counsel for PCC agreeing that all of the exhibits – the eleven at issue – post-dated the balloting deadline and standing on "the objections that were raised and argued yesterday"); and 7:21-23 (admitting the exhibits). No one for any Plan Party asserted that the exhibits were defective for lack of a signature – the clear inference from their silence at the time was that the parties were standing only on the evidentiary objections "raised and argued" and no others. 6/10/10 Tr. at 6:7-7:23. Those objections "raised and argued" unquestionably did not include an objection that these exhibits were somehow incomplete because they lacked the signature of a party representative.

28. Finally, the admission of these exhibits was hard fought by the Plan Parties for a reason – it clearly demonstrates evidence at a minimum suggestive of fraud in the process.[11] It

11 In its Opinion at paragraph 226 and footnote 19, the Court suggests that it conditionally admitted the Garlock Exhibits subject to the Court's *sua sponte* reconsideration after the close of evidence. During the trial, however, the Court clearly admitted the exhibits as noted above. In doing so, the Court correctly held, among other things, that the exhibits were

highlights the harm caused to Mt. McKinley by the fact that there has not been *any* evidentiary hearing on *this* Plan. Indeed, Mt. McKinley has been denied discovery into how the Plan was negotiated for the last 13 years (*see supra*). The fact that "there's a problem" raised by these exhibits is the very reason the Court should reconsider the Confirmation-Related Orders, allow Mt. McKinley to take discovery to support its Plan objections – including the role of the attorneys who made the misrepresentations evidenced by Garlock Exhibits 121, 132, 147, 165, 167, 174, 178, 203, 245, 327, and 356 in the development of the Plan, take evidence at a hearing, and make the findings required by the Third Circuit's opinion in *GIT*. Respectfully, the Court should reconsider its finding that the Garlock exhibits are suddenly inadmissible and simply let the evidentiary record stand on the rulings made when these exhibits were admitted into evidence. The Court should not reconsider evidentiary rulings three years later based on evidentiary objections never raised by a party.

29. Moreover, it is manifestly unjust for the Court to find that the Plan was proposed in good faith when Mt. McKinley has been denied the opportunity to conduct discovery into how the Plan was negotiated and the extent to which the Plan permits the payment of fraudulent claims, particularly when these Garlock exhibits evidence fraud by attorneys whose role in the

"probative" to the issue of whether asbestos claimants were engaging in dishonesty or fraud. *See, e.g.,* 6/9/10 Tr. at 195:13-22. The only thing that was potentially "conditional" about the admission was when the Court said parties could seek reconsideration of the admission in their post-trial briefs. 6/9/10 Tr. at 198:21-25. The only preserved evidentiary objection raised by the Plan Parties in their Post-Trial Brief to the admission of the Garlock Exhibits was in a single footnote of their 50-page submission wherein they question the relevance of these exhibits. *See* Plan Parties' Post-Trial Brief, p. 34, n.49 (Dkt. 7904). Because these exhibits unequivocally evidence fraud or deceit in the balloting and claiming activities of those involved, they are clearly and indisputably relevant. The Plan Parties also note in footnote 49 of their Post-Trial Brief that some (not all) of the exhibits were unsigned by the plaintiff or plaintiff's representative. That evidentiary objection was not raised by the Plan Parties during trial, and it was therefore waived.

development of the Plan is unknown. Despite repeated requests, including in its 2011 Motion for Reconsideration [Dkt. No. 8347] and Motion for Entry of Case Management Order [Dkt. Nos. 8369 and 8370], Mt. McKinley has not been allowed to take discovery into these issues so that the Court may make rulings based on a fully developed evidentiary record. It is clear error under *GIT* for the Court not to make specific findings regarding allegations of fraud and collusion, and the Court cannot do that until Mt. McKinley has been given an opportunity to conduct discovery for the purpose of presenting the Court a complete record from which to make the findings required by *GIT*. *GIT* at 215, n.33. For this reason also, the Court should reconsider the Confirmation-Related Orders, including the 2011 Motion for Reconsideration and CMO Order, and allow Mt. McKinley the opportunity to conduct necessary discovery in order to present its objections on a fully developed record as required by the Third Circuit.

D. The Court should reconsider the findings in the Opinion related to the funding of the Plan.

30. In its Interim Motion, Mt. McKinley urged the Court to reconsider a number of findings in the Interim Opinion regarding the funding of the Plan because the PPG Trust Funding Agreement and Corning Trust Funding Agreement are unsigned and do not evidence binding commitments to fund the Plan. Dkt. No. 9420 at pp. 11-13. The Court's supplemental findings in the Opinion indicate the Court misapprehended Mt. McKinley's objection.

31. The Court added a new paragraph at p.49, below ¶ 156 which refers to Mt. McKinley's objection to the Plan's funding mechanism and states:

> In its motion for reconsideration Mt. McKinley argues that the PPG and Corning Trust Funding Agreements are not signed and therefore binding commitments to fund the Plan do not exist. However, *the obligation to fund* is dependent on entry of a final nonappealable order confirming the Plan. Thus, any commitment to fund is conditional on occurrence of that event and only those parties who do fund will receive the benefit of the channeling injunction.

Id. (emphasis added). The Court misapprehends Mt. McKinley's concern. Mt. McKinley's

point is not that the funding mechanism is conditional; it is that *there is no* "obligation to fund" because the PPG Trust Funding Agreement and Corning Trust Funding Agreement are *unsigned* and the parties to those agreements are under *no obligation* to ever sign them. If those agreements were *signed*, or if there was a mechanism in the Plan or Trust Funding Agreements by which the parties could be compelled to sign the agreements, the Court might be correct – there would be an obligation or a commitment to fund conditioned, in part, on a final nonappealable order. However, those agreements are not signed and may never be signed; therefore, there is no "obligation to fund" or "commitment to fund."

32. The Court's findings regarding the feasibility of the Plan based on unsigned and therefore non-binding funding agreements should be reconsidered and confirmation denied accordingly.

E. The Court should reconsider its rulings because express conditions precedent in the Plan preclude confirmation.

33. The Court should also reconsider the Confirmation-Related Orders because, by not making certain findings, the express terms of the Plan preclude the Court from confirming this Plan. Article VIII of the Plan is entitled "CONDITIONS PRECEDENT." Section 8.1 states:

> **Conditions Precedent to Plan Confirmation**
>
> The Confirmation Order shall be signed or affirmed by the District Court, and shall be, in form and substance, acceptable to the Plan Proponents, PPG and Corning. ***As a condition precedent to confirmation of the Plan***, the following findings or conclusions ***shall be contained in the Confirmation Order to be signed or affirmed by the District Court.***

Plan, § 8.1 (emphasis added). The Court's interim ruling was unclear as to whether the Court intended to make all of the findings in § 8.1. Although the Court's interim ruling contained a footnote that the Court was not making all of the findings in § 8.1, another finding in the body of the Court's interim ruling appeared to be explicitly to the contrary. *Compare* Dkt. 9409 at p. 82,

n.19 ("Court has not incorporated all of the 'Conditions Precedent to Plan Confirmation' as listed in §8.1") with ¶ 489 at p. 139 (noting that § 8.1 lists conditions precedent and then stating that the Court found it appropriate for the Confirmation Order to include "***those*** findings and conclusions from § 8.1 as modified herein") (emphasis added).

34. The Confirmation Order sought to clarify the Court's intent by modifying ¶ 489 to state:

> Section 8.1 of the Plan lists the findings and conclusions that are conditions precedent to confirmation of the Plan. For the reasons set forth above, the Court hereby finds and concludes that it is appropriate for the Confirmation Order to include those findings and conclusions from §8.1 as <u>expressly</u> modified herein. <u>*See* note 24, *supra*.</u>

Dkt. 9443 at p. 143 (underlining indicates Court's changes). The addition of the reference to the earlier footnote,[12] combined with the Court's statements on the record at the May 23 hearing, make the Court's intent reasonably clear – that the Court is not making certain of the findings in § 8.1 and is modifying others. Mt. McKinley agrees that those findings should not be made [Confirmation Opinion at ¶ 24, p. 13]; however, the terms of the Plan put forward by the Plan Parties explicitly provide in clear, concise, and mandatory language that "[a]s a condition precedent to confirmation" all of the findings in § 8.1 "shall be contained in the Confirmation Order."

35. Plans are to be construed using contract principles. *See In re Shenango Grp. Inc.*, 501 F.3d 338, 344 (3d Cir. 2007), *accord*, *In re Phoenix Petroleum Co.*, 278 B.R. 385, 399 (Bankr. E.D. Pa. 2001). "A condition precedent may relate either to the formation of contracts or to liability under them." 13 Williston on Contracts § 38:7 (4th ed.) (internal quotations omitted), *citing, inter alia*, *Auto. Mgmt. Sys., Inc. v. Tire Serv. Co., Inc.*, CIV. A. 85-5722, 1989 WL 11219

[12] Footnote 24 (formerly footnote 19 in the interim ruling).

(E.D. Pa. 1989) *aff'd,* 887 F.2d 260 (3d Cir. 1989) (finding it unnecessary "to explore the nice distinction between a condition the nonoccurrence of which prevents a contract from coming into being and a condition precedent, which, in its pure form (if it has not been fulfilled), excuses a party from performing a contract which has been created").

36. Plan § 8.4 states, in part, that "[i]f any one of the conditions set forth in Sections 8.1 and 8.2 cannot be satisfied and the occurrence of such condition is not waived by the Plan Proponents and by PP and Corning…" The clear import that the Plan Parties collectively can waive the conditions in § 8.1; however, nothing has been filed indicating that such a waiver has occurred. Because these two findings have not been made, the condition precedent in § 8.1 has not been met and the Court cannot confirm the Plan as drafted.

37. The potential impact on Mt. McKinley is not theoretical. This Court sustained Mt. McKinley's objections to §§ 8.1.18 and 8.1.28 at least in part, by finding that the "'inextricably intertwined' language in both sections is over-inclusive and the findings are not necessary for Plan confirmation." Confirmation Opinion at ¶ 24, p. 13. Indeed, the Court indicated that this finding is unintelligible. 5/23/13 Tr. at 25:22-26:1. The Plan is clear that all findings in § 8.1 ***shall*** be made as a condition precedent to confirmation. The Court did not make the findings at §§ 8.1.18 and 8.1.28; therefore, by its express terms, the conditions precedent to the Plan have not been met and the Plan cannot be confirmed. The Court should reconsider the Confirmation-Related Orders and deny confirmation of the Plan.

IV. Conclusion

WHEREFORE, for the reasons set forth above, Mt. McKinley Insurance Company and Everest Reinsurance Company respectfully request that the Court enter an order reconsidering and sustaining their objections, denying confirmation of the Plan, and granting all further and additional relief to which they are justly entitled.

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Respectfully submitted,

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