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**RECENT DEVELOPMENTS AFFECTING MASS TORT CASES**

**INSURANCE NEUTRALITY AND INSURER STANDING**

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Insurance often plays a key role in asbestos-related bankruptcies. Under many plans, liability insurance (and/or the right to receive the proceeds of liability insurance) is the principal asset of the trust established under § 524(g) of the Bankruptcy Code to pay asbestos claims following confirmation of a plan. It is not uncommon to see plans of reorganization in asbestos bankruptcies that contain a wide variety of provisions directly relating to insurance.

Such provisions can include some or all of the following:

- Provisions assigning insurance policies and/or proceeds of insurance policies to the § 524(g) trust;
- Provisions declaring that nothing in the plan or the plan process shall affect or impair the rights of any person under any insurance policy;
- Injunctions barring the assertion of claims against insurers or insurance policies;
- Provisions regulating where coverage litigation may proceed post-petition;
- Provisions requiring the bankruptcy court to make findings that, if given effect, could affect or even dictate the outcome of post-bankruptcy coverage litigation; and
- Provisions stating that an insurer is bound by the plan and the confirmation order.

In addition, other plan provisions may not directly mention insurance but may nevertheless significantly affect the interests of insurers. A prime example are the “trust

distribution procedures,” or TDPs, that govern how the post-bankruptcy § 524(g) trust will resolve and pay claims by asbestos claimants. Insurers often take the position that the TDPs deprive them of their contractual rights to participate in, or control, the defense and settlement of claims. Often, TDPs permit the payment of claims, for which insurance will be sought, that might not be compensable in the tort system (*e.g.*, claims that would be time-barred in the tort system, or claims by asymptomatic claimants that would be subject to “deferred docket” plans or “pleural registries” in some jurisdictions). To the extent the plan confirmation order expressly approves the TDPs, can insurers be obligated to indemnify claims paid under the TDPs even where those claims would not be compensable in the tort system?

Finally, the confirmation of an asbestos bankruptcy plan that encourages the rapid payment of claims may have the effect of accelerating the obligations of insurers to indemnify claims. The acceleration is even more acute to the extent the plan purports to require insurers, upon confirmation, to indemnify a bankruptcy court estimate of “future claims” which have not even been asserted. Any such acceleration alone has an economic impact on insurers.

It is therefore anomalous, at least in the eyes of insurers, that their standing to participate in asbestos bankruptcies is almost invariably challenged and sometimes precluded.

This paper lays out some of the relevant background and case law and identifies some relevant issues and considerations. Given the page constraints in effect here, it is admittedly a “breezy” overview of the issue rather than the sort of in-depth analysis to which dozens of pages are typically devoted when this issue is briefed in court.<sup>1</sup>

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<sup>1</sup> A sampling of recent briefs on standing filed by Crowell & Moring on behalf of insurers can be found at [www.crowell.com/bankruptcy](http://www.crowell.com/bankruptcy), “In Court.” In contrast, the statements made in this paper should not be attributed to any client of Crowell & Moring.

## ***Insurance Policy Background***

Liability insurance policies typically provide that they will – subject to the terms, conditions, exclusions, and other provisions of the policy – indemnify the policyholder for damages that the policyholder becomes legally liable to pay. Insurance policies are not like bank accounts that can be drawn down whenever the policyholder wishes. Rather, under most policies, an insurer is obligated to pay only if the amount of the policyholder’s “legal liability” is fixed in one of two ways: (i) through a judgment rendered “after an actual trial;” or (ii) if the policyholder, the claimant, **and the insurer** agree in writing to settle the claim.

A key feature of liability insurance is that the policyholder is not permitted – absent the insurers’ consent – to settle claims at the insurers’ expense. This reflects the heart of the “insurance bargain” – in exchange for the insurer assuming the risk of having to indemnify the policyholder’s legal liability, the policyholder agrees to cede to the insurer control over the defense and settlement of covered claims. Several policy provisions implement this aspect of the insurance bargain, including the following:

- Under most “primary” insurance policies and many “umbrella” policies, the insurer has the **right** to control the defense and settlement of claims tendered to the insurer for coverage;
- Under “excess” insurance policies, the insurer often has the right to “associate in” the defense and settlement of claims, and under some circumstances may have the right to consent to such settlements;
- “Cooperation” provisions that obligate the policyholder to cooperate with its insurers in defending against claims; and
- “No voluntary payment” provisions which typically provide that there is no coverage

for any amounts that the policyholder chooses to pay in settlement without the consent of the insurer.

Thus, any arrangement under which the policyholder decides, on its own or in conjunction with asbestos claimants, how insurance proceeds are to be made available for the payment of claims violates the terms and conditions of the policies, jeopardizing coverage. To the extent provisions of the plan or the confirmation order seek to (i) “bless” such breaches of the policy, (ii) declare that such breaches cannot be asserted successfully in subsequent coverage litigation, or (iii) declare that the policies and/or their proceeds are “assigned” to the trust notwithstanding the insurers’ lack of consent to the assignment, then the plan and/or confirmation order interfere with the insurers’ contractual and economic rights. Such interference ought to give rise to insurer standing.

The existence of TDPs also impacts insurers. In most § 524(g) plans, TDPs are established which provide rules for the payment of claims by the plan trust after the plan is confirmed. TDPs typically set forth what proof is required to pay a claim, how much a particular type of claim can be paid, and how payment determinations are to be made. Instead of a judicial process, TDPs establish an administrative process for paying claims. Instead of payment decisions being made by an independent judicial officer, payment decisions under TDPs are typically made by a claims reviewer, appointed by representatives of the claimants themselves, who is charged with making payment as quickly and as efficiently as possible. Often, the TDPs permit – even require – payment of claims that would not be compensable in the tort system because they are time-barred, because proof of exposure to the debtor’s products is not required, or because the claims would be subject to docket control plans in effect in many jurisdictions which preclude proceedings related to claims by asymptomatic

claimants. Further, the TDP process is one that, unlike a judicial process, allows no role for insurers – instead of defending claims and then choosing whether to settle and on what terms, which is the insurers’ role and contractual right in the tort system, TDPs typically deprive insurers of any role at all. The lack of any meaningful role in the defense and settlement of claims under TDPs – indeed, the lack of any involvement even in crafting the rules embodied in the TDPs – gives rise to insurer concerns and complaints. To the extent plans and/or confirmation orders adopt or approve TDPs that interfere with insurer contractual rights, insurers ought to have standing to oppose confirmation.

Most liability policies also contain clauses which expressly bar the policyholder from assigning the policies to a third party without insurer consent. Yet most asbestos bankruptcy plans either make just such an assignment to the § 524(g) trust or, in an attempt to not violate contractual anti-assignment provisions, purport to assign the proceeds of the policies to the trust. Plan proponents then typically seek a ruling by the bankruptcy court – almost invariably by way of a provision in the confirmation order, rather than through an adversary proceeding seeking a declaratory judgment (as required by Bankruptcy Rule 7001) – that the assignment is lawful and will not have any adverse consequences for coverage. Insurers ought to have standing to oppose both any assignment that is believed to be in violation of contractual anti-assignment provisions and any provision of a plan or confirmation order that purports to adjudicate the coverage consequences of such an assignment.

### ***General Bankruptcy Standing Law***

An entity has a statutory right to be heard “on any issue” in a Chapter 11 case if it is a “party in interest” under Code § 1109(b). *See, e.g.*, Code § 1112(b) (court may dismiss a Chapter 11 case “on request of a party in interest”); Code § 1128(b) (“[a] party in interest may

object to confirmation of a plan”). Section 1109(b) contains an illustrative list of who is included within the meaning of the term “party in interest” in a Chapter 11 case:

A party in interest, *including* the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter. (Emphasis supplied.)

As the Third Circuit emphasized in In re Amatex Corp., 755 F.2d 1034 (3d Cir. 1985), “[t]he term ‘party in interest’ is not limited by the small list of examples in § 1109(b).” *Id.* at 1042. Rather, standing under § 1109(b) extends to all persons or entities having “a practical stake in the outcome of the proceedings.” *Id.* at 1041.<sup>2</sup> The term “party in interest” in § 1109(b) employs “broad phrasing,” reflecting Congress’ intent to make the right to participate in bankruptcy cases “broadly available.” Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 7 (2000).

This grant of standing to persons with a “practical stake in the outcome of the proceedings” reflects a basic congressional policy judgment in favor of broad participation in bankruptcy cases. “[S]ection 1109(b) must be construed broadly to permit parties affected by a chapter 11 proceeding to appear and be heard.” Amatex, 755 F.2d at 1042, quoting 5 Collier on Bankruptcy ¶ 1109.2 (15th ed. 1984) (internal quotation marks omitted). This is a matter of longstanding policy. “The predecessor provisions of section 1109(b) of the Code constituted an effort to encourage and promote greater participation in reorganization cases,” and § 1109(b) “continues the pattern of permitting interested parties in bankruptcy cases the absolute right to be heard and insure their fair representation.” *Id.* at 1042. As the Third Circuit observed in

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<sup>2</sup> Insurers may have standing as parties expressly mentioned in § 1109(b). For example, insurers are often creditors of the estate, and have broad standing as such. This paper is limited to discussing the standing of insurers *qua* insurers.

Phar-Mor, Inc. v. Coopers & Lybrand, 22 F.3d 1228, 1240 (3d Cir. 1994), “efficiency and fair play underlie” § 1109(b). The Code’s broad grant of standing to parties in interest provides “an important counterweight to the power of the debtor-in-possession during reorganization” and “an important monitoring tool.” *Id.*

The recent decision in In re Combustion Engineering, Inc., 391 F.3d 190 (3d Cir. 2004), underscores the broad grant of standing at the bankruptcy court level. The Third Circuit in CE noted that there is a “broad right of participation” in bankruptcy court for all parties in interest, particularly “in the early stages of a bankruptcy proceeding.” *Id.* at 214 n.21.<sup>3</sup>

No one seriously disputes that parties whose contractual rights are affected by a Plan, or who would be bound by the bankruptcy court’s findings, are properly “parties in interest” in a bankruptcy case. Indeed, even though the court in In re Mid-Valley, Inc. 305 B.R. 425 (Bankr. W.D. Pa. 2004), an asbestos bankruptcy case, held that insurers lacked standing for certain purposes, the court emphasized that “insurers are a party in interest [sic] to the extent they face liability that could potentially arise from Debtors’ payment of asbestos claims.” *Id.* at 431. As the Third Circuit has ruled, it is precisely such a practical stake in the outcome of a Chapter 11 case that makes a person or entity a “party in interest” under § 1109(b). Amatex, 755 F.2d at 1041.<sup>4</sup>

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<sup>3</sup> The Third Circuit contrasted the broad grant of standing at the bankruptcy court level with standing at the appellate level, which is more restricted under the “person aggrieved” standard. *See, e.g., CE*, 391 F.3d at 214 n.21.

<sup>4</sup> Amatex illustrates the inclusionary purpose served by § 1109(b) and the “practical stake” requirement. The Third Circuit held that “future [asbestos] claimants” had a “practical stake” because they “*could be* adversely affected if Amatex failed to rehabilitate itself and was liquidated.” 755 F.2d at 1041. If that occurred, Amatex would not be around to pay if and when future claimants could and did assert claims. Although this interest was contingent, since the future claimants did not have, and had not asserted, any claims against Amatex, they nevertheless were  
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Insurers should have standing in bankruptcy court to participate in matters that affect their interests, in order to raise proper bankruptcy objections. Moreover, where the Code already imposes an independent obligation upon the bankruptcy court to make a particular determination, it would be anomalous to hold that a party in interest cannot bring relevant matters to the court's attention for its consideration.<sup>5</sup> The bankruptcy court may need such information and argument in order to fulfill properly its duties under the Code.<sup>6</sup>

### ***Different Approaches To Insurer Standing In Asbestos Bankruptcies***

Two recent bankruptcy court decisions from courts within the Third Circuit illustrate different approaches to insurers' standing in asbestos bankruptcies.

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“sufficiently affected by the reorganization proceedings to require some voice in them” and were, therefore, “parties in interest” under § 1109(b). *Id.* at 1042.

<sup>5</sup> For example, bankruptcy courts have an independent obligation to ensure that proposed plans comply with the Bankruptcy Code. *See, e.g., In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 599 (Bankr. D. Del. 2001) *appeal dismissed on other grounds*, 280 B.R. 339 (D. Del. 2002) (“The Code imposes an independent duty upon the court to determine whether a plan satisfies each element of Code § 1129”). For this reason, the courts in both *Mid-Valley* and *Western Macarthur*, both asbestos bankruptcy cases in which the courts limited insurers' standing, nevertheless permitted insurers to file briefs explaining why the plans in question did not meet the confirmation requirements of Code § 1129.

<sup>6</sup> Bankruptcy courts have routinely allowed insurers and other indemnitors of the debtor to participate in bankruptcy cases to protect their interests in connection with a settlement that they might be required to pay under their indemnification or insurance contracts. *See, e.g., In re Keck, Mahin & Cate*, 241 B.R. 583, 596 (Bankr. N.D. Ill. 1999) (“While ALAS is not a creditor of the Debtor, it is a third party indemnitor with rights that might be affected by the bankruptcy” and therefore has standing); *In re Marcus Hook Dev. Park, Inc.*, 153 B.R. 693, 700 (Bankr. W.D. Pa. 1993) (title insurer which was not a creditor had a “sufficient stake” in the outcome of the case to be a party in interest because it might be required to satisfy a tax lien); *In re Virginia Mansions Apartments, Inc.*, 102 B.R. 444, 445 (Bankr. W.D. Pa. 1989) (indemnitor has standing to contest a tax claim against debtor that would be indemnified if the claim was allowed); *In re Standard Insulations, Inc.*, 138 B.R. 947, 950 (Bankr. W.D. Mo. 1992) (insurers have standing based on their “responsib[ility] for payment of injury claims caused by exposure to debtors' products during covered periods”).

In In re Mid-Valley, Inc. 305 B.R. 425 (Bankr. W.D. Pa. 2004), the bankruptcy court held, in the context of a pre-packaged asbestos bankruptcy filed by several subsidiaries of Halliburton Company, that insurers lacked standing to move under Code § 1112(b) to dismiss the bankruptcy case or object to the court's appointment of a legal representative for future claimants. The court held that insurers lacked standing because the proposed plan was "insurance neutral," given that it did not assign insurance policies or proceeds to the plan trust, did not affect or adjudicate the rights of insurers under their policies, did not purport to bind insurers to the plan or any findings related to the plan, and did not prejudice insurers' ability to raise and prevail on contractual coverage defenses. The bankruptcy court noted that the Mid-Valley debtors and their parent company had expressly committed to make their plan entirely "insurance neutral," and the court emphasized its intent to ensure that the plan in that case would, in fact, be "insurance neutral."<sup>7</sup>

In light of the plan proponents' commitments that their plan would be "insurance neutral," the court held (and debtors agreed) that the insurers would be accorded standing to ensure that such neutrality was effectively provided under the plan. Thus, the court was careful to note that the insurers in that case would "have the opportunity to object to the Plan to the extent that it affects their interests." *Id.* at 427 ("a finding that Insurers have no standing to bring these motions [to dismiss] is *not* an adjudication that they have no standing at all with respect to these cases" (emphasis in original)).

In contrast, the court in In re Congoleum Corp., 2005 Bankr. LEXIS 556 (Bankr. D.N.J. March 24, 2005), another pre-packaged asbestos bankruptcy case, has repeatedly

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<sup>7</sup> As discussed below, not only is "insurance neutrality" not a concept found in the Code, it is questionable whether it can ever be achieved in the context of asbestos bankruptcy plans.

held that the insurers have standing to participate in confirmation proceedings. Closely analyzing several iterations of debtors' plan, the court concluded that various provisions of the plans did, in fact, adversely affect the insurers' interests, and that those adverse impacts were sufficient to give the insurers standing to object to the plan in general.

In its third and most recent standing ruling, the Congoleum court held that the debtors' insurers had standing to object to a plan which provided for a § 524(g) trust that was to be funded by insurance proceeds and an assignment of the right to receive insurance proceeds. The plan in that case contained a provision that purported to preserve all rights at law and in equity that the insurers would have under non-bankruptcy law – but excluded from those allegedly “preserved” rights any defense the insurers might wish to raise as a result of the drafting, proposing, confirmation, or consummation of the plan. *See id.* at \*7. The court ruled that the plan therefore left open the possibility that the insurers were being forced to give up defenses that they otherwise would have in coverage litigation, and concluded that this was enough to confer standing on the insurers to object to the plan. *See id.* at \*8-9. And once the insurers had standing on this issue, the court found that they had “plenary standing” to be heard on “any issue,” except those deemed “tangential” or “unrelated” to the insurers' interests. *See id.* at \*11-12 (citing 11 U.S.C. § 1109(b)).

There is some common ground between the Mid-Valley and Congoleum decisions. Both courts looked closely at the plans in question. Both seemed to agree that if the plans were “insurance neutral,” then the insurers would not have standing. But based on the terms of the plans before them, the courts drew different conclusions about whether the plans were, in fact, “insurance neutral.”

### ***“Insurance Neutrality”***

“Insurance neutrality” is a concept that is nowhere found in the Code. Indeed, prior to Combustion Engineering, it was unknown in bankruptcy law. In the CE case, the insurers participated without restriction in the confirmation proceedings, taking discovery, filing confirmation objections, and cross-examining witnesses and submitting evidence during the confirmation hearing. The debtor and its allies presumably did not challenge the insurers’ standing because the plan unmistakably sought to impair the insurers’ interests.

Subsequently, in response to insurer arguments that the plan’s impairment of their rights might give them the right to vote on the plan, CE attempted to neutralize the insurers’ arguments by making its plan “insurance neutral.” During the latter stages of the confirmation hearing, CE modified its plan by (i) removing certain provisions and findings meant to affect or adjudge the insurers’ rights and to bind insurers to the plan and (b) inserting what was termed a “super-preemptory clause,” because it was designed to preempt all potentially contrary language in the plan or confirmation order. The “super-preemptory” clause, which was added to both the plan and confirmation order, stated:

[N]otwithstanding anything to the contrary in this Order, the Plan or any of the Plan Documents, nothing in this Order, the Plan or any of the Plan documents (including any other provision that purports to be preemptory or supervening), shall in anyway operate to, or have the effect of, impairing the insurers’ legal, equitable or contractual rights, if any. The rights of insurers shall be determined under the Subject Insurance Policies or Subject Insurance Settlement Agreements.

On appeal, the Third Circuit held that this language barred the insurers’ appellate standing because “this language broadly preserves insurers’ prepetition rights under the subject insurance policies and settlements. The insurers are not obligated to pay amounts exceeding their pre-existing policy limits. . . . [T]hey may still dispute coverage under specific policies, and may raise any of the same challenges or defenses to the payment of claims available pre-

petition.” CE, 391 F.3d at 217.

It may be the case, at least in the Third Circuit, that the vague language of the CE “super-preemptory clause” may provide a form of “insurance neutrality” because of the judicial gloss overlaid on the clause by the Third Circuit’s ruling. But many insurers believe that asbestos bankruptcy plans cannot be deemed “insurance neutral” unless each of the following requirements is met.

- *First*, the plan must not contain any provisions that purport to bind insurers, adjudge their contractual rights or duties, or limit their ability to raise coverage defenses.
- *Second*, the plan and the confirmation order must contain affirmative provisions to protect insurers’ contractual rights and their ability to argue without impairment in coverage litigation that debtors’ actions in connection with plan formation bar coverage.
- *Third*, the bankruptcy court should take care to ensure that the plan and the court’s own confirmation order do not contain provisions that can be misused or misconstrued in a subsequent insurance coverage action. For example, when settlements are channeled through the bankruptcy court, the bankruptcy court’s own actions may become entangled with the settlements. Debtors (or the § 524(g) trust) may be tempted to argue in post-confirmation coverage litigation that the bankruptcy court’s approval of the plan or the appended TDPs has approved debtors’ settlements of asbestos claims or adjudicated that claim payments made pursuant to the TDPs are reasonable and appropriate, and that such bankruptcy court determinations are binding in the coverage suit. Insurers, in contrast,

believe that such issues should be determined in coverage litigation without any predetermination or influence by the bankruptcy court. Thus, the plan must exclude any provision that would allow debtors (or other plan proponents) to make such an argument, and/or include a provision specifically preventing such an argument.<sup>8</sup>

Illustrating the concerns insurers have about their standing being taken away because of the asserted “insurance neutrality” of plans, at least one state court has famously misconstrued the bankruptcy court’s role in connection with approving asbestos settlements, suggesting – notwithstanding express representations that the bankruptcy court’s confirmation of a plan would not adversely affect insurers – that plan confirmation constitutes an *adjudication* of the underlying asbestos claims, rather than merely an approval of a debtor’s voluntary *settlement* with asbestos claimants.<sup>9</sup> Such a misapprehension would have significant implications for coverage because voluntary settlements are generally treated differently for coverage

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<sup>8</sup> Indeed, several insurers take the position that asbestos bankruptcy plans by their very nature cannot be deemed “insurance neutral,” to the extent that confirmation orders place the imprimatur of bankruptcy courts (and, under § 524(g), district courts as well) on both debtors’ settlement of asbestos claims and the procedures established in TDPs for payment of claims. These insurers believe that the potential that the debtor or the trust will be able in later coverage litigation to argue (for coverage litigation purposes) that the settlements and/or TDP provisions are reasonable, as *shown by the judicial approval given in the bankruptcy case*, means that insurers should be always be given full standing in the bankruptcy court no matter what the plan may provide in terms of “insurance neutrality.” These insurers often advance two additional arguments: (i) since the harms that could befall them if the plan is confirmed will not occur if confirmation is denied, they should be able to oppose confirmation on any available ground; and (ii) bankruptcy court is the only place where they can advance *bankruptcy* arguments that, if accepted, would prevent the adverse impacts visited on them by confirmed asbestos bankruptcy plans. Such arguments simply cannot be advanced in coverage litigation following confirmation.

<sup>9</sup> See *Fuller-Austin Insulation Co. v. Fireman’s Fund Ins. Co.*, No. BC116835, 2002 WL 31005090 (Cal. Super. Ct., Los Angeles Cty., Aug. 6, 2002), *appeals pending* No. B170079 (Cal. App., 2d Dist.).

purposes than are formal adjudications of liability after an “actual trial” (*i.e.*, where the policyholder goes to trial and defends the claim, but loses, resulting in an adverse judgment). The Fuller-Austin case illustrates the need for specific, clearly-stated provisions in the plan and confirmation order to eliminate the potential effect of the bankruptcy on separate state court coverage litigation.

Moreover, as Fuller-Austin also illustrates, it is the *second* court that gets to construe the impact of the first court’s judgments and orders. Thus, even if the bankruptcy court and all parties are in accord during the bankruptcy case that the plan is, in fact, “insurance neutral,” it is possible that the coverage court in later litigation – perhaps spurred by arguments offered by a party that explicitly or implicitly agreed in bankruptcy court that the plan was “insurance neutral,” but subsequently urges a contrary construction of the plan – will construe the plan in a way not intended by the parties or the bankruptcy court. That risk is all the more reason why insurers should not be shut out of the bankruptcy court confirmation process.

### ***Insurer Appellate Standing***

In the Third Circuit, it is clear that insurers’ standing in asbestos bankruptcy cases is more restricted at the appellate level than at the bankruptcy court level, due to application of the “person aggrieved” standard. See Combustion Engineering, 391 F.3d at 214 n.21. But even under the “person aggrieved” standard, the insurers in CE were found by the court of appeals to have standing to raise several issues: (i) whether the district court’s modifications to the “super-preemptory clause” had adversely affected the insurers’ interests; and (ii) whether certain policies issued to non-debtors could be assigned to the estate as part of the bankruptcy case. See also Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm. (In re Congoleum Corp.), 321 B.R. 147 (D.N.J. 2005) (insurers had standing as appellees to defend a bankruptcy court order

granting their motion to enforce compliance with Bankruptcy Rule 2019 by lawyers representing multiple asbestos claimants); American Nuclear Insurers v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), 2002 U.S. Dist. LEXIS 2002 at \*7-10 (E.D. La. 2002) (insurers had standing to appeal bankruptcy court's order because the order adversely affected insurers' pecuniary interests), *aff'd mem.*, 2003 U.S. App. LEXIS 12157 (5th Cir. May 30, 2003).

That appellate standing is construed more narrow than bankruptcy court standing makes intuitive sense. On an appeal, the record is fixed, so it is easy to determine the parties' respective interests. In the free-for-all that takes place in bankruptcy court, however, everything is dynamic and fluid. Even a proposed plan that appears to not affect a party today can be changed to gore that party's ox tomorrow. *See, e.g., Baron & Budd*, 321 B.R. at 159. As a result, standing should not be doled out too parsimoniously in bankruptcy court.

In other appeals in asbestos bankruptcy cases, courts have recently found that insurers lacked standing. *See, e.g., Federal Ins. Co. v. W.R. Grace*, Civ. No. 04-844 (D. Del. Nov. 24, 2004) (insurers lack standing to appeal appointment of a future claimants representative to whom they objected in the bankruptcy court); Certain Underwriters at Lloyds, London v. Federal-Mogul Global, Inc., Civ. No. 04-890 (D. Del. Nov. 1, 2004) (non-voting insurers do not have standing to appeal bankruptcy court's voting procedures order).

### ***Conclusion***

Insurers will continue to fight for a voice in asbestos bankruptcies that they believe adversely affect their interests – and those who want access to the proceeds of insurance policies on terms that are more easily achieved through provisions inserted in Chapter 11 plans than under the terms of the policies themselves will continue to oppose the insurers at every turn. Given the ferocity with which such battles are typically fought, bankruptcy courts might

do well to consider the Seventh Circuit's observation that commercial parties ordinarily do not incur the expenses of litigation unless their financial, contractual, or legal rights are truly threatened:

The person suing for breach of contract or for a tort must satisfy the court that he has standing to bring such a suit, but in practice such suits are brought only by persons harmed by the supposed wrong, and his standing to sue is self-evident.

Eason v. Gen'l Motors Acceptance Corp., 490 F.2d 654, 657 n.10 (7th Cir. 1973). *See also* In re Verdi, 241 B.R. 851, 859 (E.D. Pa. 1999) (“[i]f a party believes itself affected by some event enough to take the trouble to raise it as an issue, it can usually be assumed that that party has a sufficient interest in the issue to be held to have standing to assert it”). If asbestos bankruptcy plans really don't affect insurers, as contended by those who oppose insurers, then why do insurers want so desperately to be heard in asbestos bankruptcy cases?

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