CURRENT INSURANCE ISSUES IN MAJOR ASBESTOS BANKRUPTCIES

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As a general rule, in mass tort bankruptcies insurance is one of the most important assets available to pay claims against the debtor's estate.[1] This is true in the recent spate of asbestos bankruptcies as well, even though many of the newest debtors spent years litigating and resolving asbestos coverage issues with their insurers.[2] For example, the reorganization plan proposed by the debtor in the Babcock & Wilcox bankruptcy case would, if confirmed, contribute to a trust insurance rights worth, according to the debtor, $1.15 billion.[3]

This article reviews some of the important insurance-related issues that have arisen in the recent major asbestos bankruptcies. Space does not permit a comprehensive review of all matters in these cases that have touched upon insurers or insurance.

One surprising lesson learned from reviewing these matters is that many insurers that thought they had resolved their exposure to a particular debtor's asbestos problems find that they still have interests that need to be protected in these cases. As a result, insurers – even those that have entered into settlements with the asbestos debtors – may find it advisable to monitor the bankruptcy proceedings of these asbestos policyholders in order to protect their interests when necessary.

BABCOCK & WILCOX

Enjoining Suits Against Non-Debtor Affiliates to Protect Insurance Assets

As a result of the automatic stay,[4] the first thing that happens when an asbestos defendant files for Chapter 11 is that all litigation against it immediately ceases. Litigation against non-debtor affiliates is not, however, within the scope of the stay, and therefore may continue.[5] Thus, at the start of its bankruptcy case, Babcock & Wilcox and its affiliate debtors (collectively, "B&W") filed an adversary proceeding in the bankruptcy court seeking to enjoin all asbestos personal injury lawsuits against B&W's *non-debtor affiliates* (including, but not limited to, its parent company, McDermott International).[6] Among other things, B&W argued that failure to enjoin such actions could deplete B&W's insurance assets, since its non-debtor affiliates could look to B&W's insurance policies to cover defense and indemnity costs. That would interfere with its reorganization efforts, B&W argued, because its insurance was an integral asset

of the estate needed for a successful reorganization. The requested injunction was issued and has been extended several times, most recently through January 15, 2002.[7]

Subsequently, B&W filed another adversary proceeding, this time seeking to extend the automatic stay to Atlantic Richfield Co. ("ARCO"), its co-defendant in a pre-petition non-asbestos toxic tort suit filed in federal court in Pittsburgh.[8] In essence, B&W argued (i) it shared insurance assets with ARCO that would be depleted, to B&W's detriment, if the toxic tort suit were permitted to go forward against ARCO, and (ii) unless the automatic stay was extended, the federal court in Pittsburgh might make factual determinations that could thereafter be used against B&W pursuant to the doctrine of collateral estoppel. The bankruptcy court granted the underlying plaintiffs' motion to dismiss both B&W's request for preliminary injunctive relief and the adversary proceeding itself. Both B&W and ARCO appealed to the district court, which on May 18, 2001 issued an order affirming the bankruptcy court's dismissal order.[9] Citing Fifth Circuit precedents,[10] the district judge concluded that the proceeds of the insurance policies were not property of the estate because they were to be paid directly to the claimants, not to the debtor or the estate. This order was not appealed.

B&W's insurers found themselves in a difficult dilemma in this matter. Because providing policy benefits to ARCO arguably would deplete coverage B&W was also entitled to, could the insurers provide policy benefits to ARCO without violating the automatic stay? If they did not provide coverage to ARCO because of the stay, would the insurers breach their contractual obligations to ARCO?

In an effort to resolve this dilemma, two insurers – American Nuclear Insurers and Mutual Atomic Energy Underwriters – filed an adversary proceeding complaint in the bankruptcy court against B&W and ARCO.[11] The complaint, in the nature of an interpleader, alleged: that ARCO had demanded that these insurers pay defense and indemnity on ARCO's behalf; that, because ARCO and B&W shared the limits of the policies, every dollar paid on ARCO's behalf, for either indemnity or defense, eroded coverage (because defense was within limits) that otherwise would be available to B&W; and that, because the underlying suit was stayed as to B&W but not ARCO, the insurers were concerned that they would be put in a position of either violating the automatic stay if they paid ARCO or, instead, breaching their duty to provide coverage to ARCO if they complied with the stay.

Consequently, the insurers asked the court to declare their rights and responsibilities with respect to the coverage. The insurers also moved to preliminarily enjoin claims for payment under the shared limits of their policies.[12] Their motion stated:

> ANI is faced with the competing interests of its two insureds. If it accedes to ARCO's demands, it will necessarily dissipate insurance assets of the Debtor's estate. If it does not fund ARCO's defense, it may expose itself to claims by ARCO of breach of contractual duties and bad faith. This situation can and should be remedied by an injunction from this Court so that, even

> while the [underlying suit] proceeds against ARCO, the insurance assets available to the Debtor will not be dissipated.[13]

On July 9, 2001, ARCO moved to dismiss the complaint and opposed the motion for preliminary injunctive relief.[14] It characterized the complaint as being based on arguments already rejected by both the bankruptcy court and the district court in the adversary proceeding filed by B&W. It separately objected to the motion for injunctive relief on the ground, *inter alia*, that it was breathtakingly overbroad, given that it sought to enjoin the presentation of "any claim" against the insurers under their policies.

Also on July 9, 2001, B&W responded to the motion for preliminary injunctive relief. It argued that new case law authority should lead the Court to reconsider its earlier ruling dismissing B&W's complaint in the related adversary proceeding. It also objected to the breadth of the relief sought by the insurers, since it would literally bar *B&W itself* from asserting any coverage claim under its own coverage.[15]

On August 6, 2001, the bankruptcy court made a minute entry granting ARCO's motion to dismiss the insurers' complaint and denying the insurers' motion for preliminary injunctive relief.[16] The court gave its reasons in an order dated August 29, 2001.[17] The court concluded that a Pennsylvania state court hearing an earlier-filed coverage action was "able and fully competent" to decide the coverage and allocation issues, that the defense and indemnity benefits under the policies "are not the property of the Debtor's estate," and that the court lacked subject matter jurisdiction over the insurers' complaint.

London Adversary Proceeding.

On April 4, 2001, Certain Underwriters at Lloyd's, London ("London") filed two lawsuits involving a coverage-in-place settlement it had previously entered into with B&W. One suit was filed in the federal district court for the Eastern District of Louisiana against McDermott International, B&W's parent. London filed the second suit as an adversary proceeding against B&W in the bankruptcy court for the Eastern District of Louisiana.[18] In short, London alleged that B&W and McDermott vitiated their rights to insurance under the coverage-in-place agreement (the "CIP") because B&W gave copies of the agreement, in violation of confidentiality provisions in the agreement, to both the official Committee of Asbestos Claimants and the court-appointed Futures Representative. London further alleged that the provisions of B&W's proposed reorganization plan violated the CIP by setting up an asbestos trust, with both the London policies and the CIP assigned to the trust, that placed another entity (the trust) in charge of claims management. This would violate the CIP, London alleged, because the agreement requires that B&W or McDermott be personally responsible for claims management. [19]

In addition, both the Asbestos Claimants Committee and the Future Claims Representative moved to intervene in the adversary proceeding as defendant

and potential counterclaimants. The Committee claimed an interest in the subject matter of the case in that there was up to $900 million in unexhausted products coverage as well as non-products coverage not subject to aggregate limits, all of which could potentially be used under a plan of reorganization to satisfy claims asserted by the Committee's constituency. The Futures Representative pointed out that the interests of his constituents as to the timing of insurance payments might differ from the interests of the Committee's constituents. On September 13, 2001, the district court entered an order permitting both the Committee and the Futures Representative to intervene because their constituencies have a legally cognizable interest in the suit, since policy proceeds – potentially "the single largest asset of the debtor" – would fund payments to victims under any plan.[20]

On July 23, 2001, B&W answered London's complaint and asserted counterclaims. Among the defenses asserted by B&W were the following: the "breach" alleged by London was not material and therefore could not give rise to termination of the CIP; the confidentiality provision of the CIP does not serve any principal purpose of the CIP, thus a breach of that provision cannot be "material;" any disclosure of the CIP to creditors of the bankruptcy estate was privileged, and cannot be grounds for a claim of breach, because it was in furtherance of B&W's "obligations to disclose information to its creditors;" any disclosure to creditors of the bankruptcy estate is tantamount to a disclosure pursuant to court order, expressly permitted under the CIP; and London's breach claims are "a pretext for the actual motivations of Underwriters in attempting to terminate the CIP and thereby to avoid continuing to honor the coverage obligations of the CIP under which they have been providing coverage to B&W since 1990."[21]

B&W's counterclaims allege that London and Equitas materially breached the CIP by repudiating it and declaring they have no further obligations under it, and by now asserting defenses to coverage of asbestos claims that London had previously withdrawn or waived by entering into the CIP. B&W also sought a declaration that London remained obligated to perform under the CIP.[22]

Also on July 23, McDermott answered the complaint, asserting many of the same defenses, but not asserting any counterclaims.[23]

On September 6, 2001, the district court adopted a discovery plan and pretrial schedule dividing the case into two phases for purposes of discovery and motion practice. The order schedules a jury trial to commence on April 15, 2002, estimated to last for two weeks.[24]

Insurers' Interest in Suits Regarding Voidability of 1998 Inter-corporate Transfers

On April 30, 2001, B&W filed an adversary proceeding lawsuit against several of its affiliates (including B&W's immediate parent, B&W Investment Company ("BWICO"), and B&W's subsidiary, BWX Technologies ("BWXT")) seeking a declaration that certain inter-corporate transactions that took place involving these entities during

1998 are not voidable transfers because, *inter alia*, B&W was not insolvent when the transfers took place.[25]

Travelers Casualty & Surety Company and Travelers Indemnity Company thereafter filed a motion seeking leave to intervene as plaintiffs in B&W's lawsuit.[26] The Travelers entities, which previously settled with both B&W and McDermott all issues relating to coverage for asbestos bodily injury claims, alleged that they were interested in the outcome of the suit because B&W had recently stated that it "will seek to maximize insurance coverage available for the benefit of all creditors," thereby suggesting it might dispute the validity and/or scope of the earlier settlement. In the alternative, Travelers sought an order that any determination made by the Court concerning the debtor's solvency at the time of the BWICO transactions would not be binding on Travelers, thus protecting Travelers' right to be heard on this issue at a later time without being prejudiced by any findings in this case.[27]

Two other insurers that had long ago settled coverage disputes with B&W, International and U.S. Fire, filed a "response" to Travelers' motion.[28] Unlike Travelers, these insurers did not read B&W's statement as an indication that B&W intended to dispute the validity or scope of any insurance settlement agreements. Nevertheless, these insurers wanted to apprise the court of their settlements and ask the court to enter Travelers' alternative proposed order, ruling that any issues adjudicated in the context of the solvency proceeding "will have no binding effect on any insurer in the context of B&W's Chapter 11 case and that all insurers will have a full and fair opportunity to be heard on all issues relevant to insurance."

The court heard argument on Travelers' motion to intervene on September 26, 2001. Initially, the court disagreed with Travelers that B&W had given any indication it intended to undo past insurance settlements. "I've never known of a case in which the insured doesn't try to increase the insurance coverage. . . . What kind of insured goes into a case, any kind of case on any subject and says I want the insurance coverage lessened? They always say they want to increase it. That doesn't indicate that they're going to do anything about unscrambling settlements that were entered into. . . . I think you all are seeing bogeymen."[29] Nevertheless, the court indicated it would grant the alternative relief requested by Travelers, even though "all of that is simply declaring what I think the law is anyhow, so – I think it's all probably a vain and useless act, but if it makes everybody's insurance company feel better, we'll go ahead and do it that way."[30]

Travelers' Adversary Proceeding Re Scope of Prior Settlements

On November 5, 2001, Travelers Indemnity Company and Travelers Casualty & Surety Company filed an adversary proceeding in the bankruptcy court seeking a declaration concerning the scope of settlement agreements the Travelers entities entered into with B&W and its affiliates in 1989 and 1997.[31]

Under those agreements, Travelers alleges, B&W agreed to resolve all disputes regarding Travelers' obligation to defend or indemnify asbestos-related claims. However, the complaint notes, the disclosure statement B&W filed in February, 2001 in support of its proposed plan of reorganization states, after pointing out that B&W has approximately $1.15 billion in products liability insurance, as follows: "However, if the Debtors or the Asbestos Settlement Trust are able to recover under other non-products coverage, the coverage is limited only by the insurance companies' ability to pay." (In other words, to the extent claims could be characterized as other than products claims, aggregate limits applicable only to products/completed operations claims would not apply.)

Apparently concerned about B&W's statement, Travelers' adversary proceeding complaint alleges that "[a]n actual case or controversy exists . . . regarding the extent to which the [two settlement agreements] release Travelers from any and all obligations to provide defense or indemnity for asbestos liability claims against the Debtors." Travelers accordingly asked the court to declare that its settlement agreements release it from all liability to B&W for asbestos-related liabilities, "irrespective of whether such claims fall within the products/completed operations hazard of the Policies." At press time, B&W had not responded to Travelers' complaint.

ARMSTRONG WORLD INDUSTRIES

Safeco's Failed Attempt to Prevent CCR's Draw on Bond

On March 28, 2001 Safeco Insurance Company filed an adversary proceeding complaint seeking injunctive and declaratory relief against the Center for Claims Resolution ("CCR") seeking to enjoin CCR's draw of a $56.1 million bond issued by Safeco to Armstrong to pay Armstrong's obligations under certain "group settlement agreements" with plaintiffs' asbestos firms.[32] Safeco alleges that CCR attempted to draw down on the bond as of February 28, 2001 and that when Safeco did not pay at that time CCR filed suit against Safeco in federal district court in Alexandria, Virginia. Safeco asserts in its complaint that it could be highly prejudicial to the interests of Armstrong and its creditors if Safeco were to pay the bond amount because, *inter alia*, payment could (i) create more than $100 million in top-priority administrative claims against the debtor, (ii) violate the automatic stay, and (iii) improperly prefer some creditors over others.

Safeco thus requested that the bankruptcy court preliminarily enjoin CCR's draw on the bond. Safeco further requested that, if "it is ultimately determined that CCR's draw on the Bond will have a negative or prejudicial impact upon the Debtor's efforts to successfully reorganize, then CCR should be permanently enjoined from drawing on the Bond." In the alternative, Safeco requested a declaration as to how much, if anything, Safeco must pay on Armstrong's behalf and when the payment should be made (Safeco asserted that the bond amount exceeds Armstrong's actual obligations by more than $20 million), and an injunction against CCR taking any further actions in its pending Virginia lawsuit.

On April 9, 2001, CCR moved to dismiss Safeco's suit on the grounds of lack of standing and lack of subject matter jurisdiction.[33] On May 1, 2001, the court granted CCR's motion to dismiss, finding that Safeco, a non-debtor, lacked standing to seek to extend the automatic stay.[34] The Court subsequently issued a series of orders staying all proceedings in this matter until at least mid-September, 2001.

Stipulation with Liberty Mutual re ADR

On September 27, 2001, Armstrong and Liberty Mutual Insurance Company filed a stipulation concerning a multi-phase ADR proceeding between them that had commenced pre-petition. In the ADR, Armstrong seeks a determination that policies issued by Liberty provide additional coverage for asbestos-related bodily injury claims. The parties stipulated that the automatic stay does not apply to Phase III of the ADR, which involves matters being prosecuted by Armstrong, and that the stay (if applicable) should be lifted as to Phase IV (involving a reformation claim by Liberty).[35]

G-I HOLDINGS

Adversary Proceeding Concerning D&O Insurance

On January 30, 2001, G-I and its chairman, Samuel Heyman, filed suit against Reliance and Great American, G-I's D&O insurers, seeking damages for breach of contract and bad faith and a declaration that plaintiffs are entitled to coverage with respect to several lawsuits alleging that certain corporate transactions involving G-I and Heyman were fraudulent.[36] On March 2, 2001, Reliance and Great American moved to dismiss the complaint, arguing that the underlying claims were actually based on exposure to asbestos, and therefore barred under the policies' bodily injury exclusion and pollution exclusion (which expressly applied to asbestos claims).[37] On April 10, 2001, the debtor and the other plaintiffs opposed the motion to dismiss and cross-moved for summary judgment concerning the insurers' duty to defend.[38] The plaintiffs argued that there is no question but that the fraudulent conveyance claims against them are "wrongful acts" within the meaning of the insuring agreement of the policies, and that the policies' pollution exclusions and "CGL exclusions" do not preclude coverage of claims relating to fraudulent conveyances.

Reliance and Great American responded by moving to stay the entire action in deference to Reliance's state-law rehabilitation proceedings, commenced May 29, 2001. On August 23, 2001, plaintiffs opposed that motion, arguing that there is no basis at all for staying the case as against Great American, which is solvent and not part of the rehabilitation proceedings.[39] They also argued that a stay as to Reliance was not warranted either, because either a rehabilitated Reliance or the Pennsylvania state guaranty fund would have to pay claims under the D&O policy, the stay order issued by the Pennsylvania rehabilitation court exceeded its powers, and the Bankruptcy Code in

effect trumps the state law rehabilitation scheme. The motion was not decided at press time.

Assumption of Settlement Agreement with NY Superintendent of Insurance

On April 2, 2001, G-I moved to assume, as an executory contract, a pre-petition settlement agreement with the New York Superintendent of Insurance pursuant to which, *inter alia*, (i) the Superintendent, on behalf of several insolvent insurers, agreed to pay G-I $4.8 million on account of asbestos bodily injury claims and (ii) the debtor agreed to let the Superintendent audit certain G-I records and to make copies of certain materials for the Superintendent at cost. The debtor argued that under Third Circuit law, a pre-petition settlement agreement could properly be construed as an executory contract. On April 23, 2001, the motion was approved and the agreement was deemed an executory contract.[40]

OWENS-CORNING

Continental's Motion for Declaration of Rights.

On March 5, 2001, Continental Casualty Corporation filed a motion seeking an order establishing its rights and responsibilities under an agreement (known as the "buckets agreement") between it and Owens-Corning subsidiary Fibreboard Corporation.[41] Continental alleged that it had entered into an agreement with Fibreboard to pay certain asbestos claims as they came due, but that following Owens-Corning's bankruptcy filing (Fibreboard also filed at the same time), Fibreboard had instructed Continental to cease making such payments since, in Fibreboard's view, continuation of the payments violated the automatic stay. Not surprisingly, asbestos claimants clamored for the payments to continue, citing a trilateral agreement among the claimants, Continental, and Fibreboard as well as other similar agreements. Continental, caught in the middle, and disagreeing with Fibreboard's analysis but not being willing to risk contempt of court for violating the automatic stay, sought an order from the Bankruptcy Court telling it what to do.

On May 29, 2001, the debtor filed a "notice of stipulation"[42] with Continental requesting bankruptcy court approval of an agreed-upon resolution. The stipulation provides that Continental could pay so-called "first bucket" claims without violating the automatic stay, because payment of such "first bucket" claims was, under the trilateral agreement, the sole responsibility of Continental, with funds coming from Continental's general account, and Owens-Corning and Fibreboard did not object to Continental paying such claims. (In other words, such payments did not erode any insurance limits or diminish the debtors' estates.) The stipulation also provided, however, that payment of other claims ("committed claims") was prohibited by the automatic stay; because Fibreboard holds a reversionary interest in the funded account used to pay "committed claims," payment of such claims had the potential to diminish Fibreboard's assets. The stipulation preserved the ability to deal with these issues

differently in connection with any plan of reorganization. The stipulation further seeks to protect Continental by obligating Fibreboard to seek injunctive relief in favor of Continental in the event that any claimant tries to recover from Continental payment of funds subject to the automatic stay, and providing that Continental would enjoy a permanent injunction against such claims under any "channeling injunction" issued in connection with a reorganization plan.

Settlement with National Union Re D&O Coverage Dispute

On November 6, 2001, Owens Corning filed a motion, under Rule 9019 of the Rules of Bankruptcy Procedure, requesting court approval of its settlement of a coverage dispute with its D&O carrier, National Union Fire Insurance Company of Pittsburgh, PA.[43] According to Owens Corning's motion, in 1991 Owens Corning and several of its officers and directors were sued in a stockholders' securities class action. National Union thereafter declined a request for defense and indemnity. Owens Corning and the other defendants then defended the suit on their own, reaching a settlement that was approved in 1995.

In late 1995, Owens Corning filed a coverage suit against National Union, seeking a declaration of coverage and reimbursement of its defense and settlement costs. In 1999, the court in the coverage suit entered judgment in favor of Owens Corning in the amount of $8,869,570.24, plus prejudgment interest, fees, and expenses, "plus interest and bills to be rendered." After the judgment was affirmed on appeal, in September, 2001 National Union paid Owens Corning more than $14.389 million, contending that payment satisfied the judgment. Owens Corning disagreed, contending that the payment did not include approximately $130,000 in post-judgment interest and attorneys' fees in connection with the appeal. The compromise called for National Union to make an additional payment of $112,000 within ten days of the bankruptcy court's approval of the new settlement agreement.

The Court had not yet ruled on Owens Corning's motion at press time.

W.R. GRACE

Hartford's "Request for Direction"

On June 13, 2001, Hartford Accident & Indemnity Company, First State Insurance Company, and Twin City Fire Insurance Company filed a "request for direction."[44] The request indicated that in October, 1998, the insurers had entered into a settlement with Grace resolving a coverage dispute concerning certain underlying asbestos claims that required the insurers to make payments by certain dates. Insurers made the expected pre-petition payments, but stated that they were uncertain, because of the Chapter 11 filing, whether to continue making payments post-petition. Under the agreement, payments were made by wire transfer to a bank account under Grace's name. The matter was resolved five months later when the court issued an "agreed order" providing, among other things, that the insurers and Grace "each agree to honor

the terms of the Settlement Agreement," that the insurers shall make payments owed to Grace under the agreement "in the amounts and at the times set forth therein," and that the parties "accept the terms of this order without prejudice to and with full reservation of their respective rights and interests."[45]

Subsequently, these insurers also responded to a motion by the debtor seeking authority to settle "small" claims (less than $1 million) with no notice or just limited notice. The insurers said that, while they "appreciate Debtors' stated concern for cost and efficiency, . . . to the extent Debtor intends to seek insurance coverage for [such small claims, the insurers] should receive notice of the proposed settlements and an opportunity to object."[46] The insurers later withdrew their objection after the proposed order was modified to clarify the debtor's obligations to give notice to its insurers of proposed settlements. The added language states: "[N]othing in the Omnibus Procedure shall alter any requirements under the Debtors' insurance policies. . . . [W]ith respect to any claims resolved pursuant to the Omnibus Procedure for which there may be insurance coverage, the Debtors will seek such insurance coverage in accordance with the terms of the Debtors' insurance policies and any amendments, notice provisions or agreements thereto."[47]

USG CORPORATION

AIG Motion Regarding Implementation of Previous Insurance Settlement

On August 29, 2001, Lexington Insurance Company and American International Group (collectively, "AIG") filed a motion for an order directing USG to execute and deliver to AIG, upon payment of amounts called for under an insurance settlement agreement, certain releases called for in the agreement. In 1990, USG and AIG entered into a settlement agreement resolving certain disputes over coverage of asbestos claims against USG. The agreement effected a novation of eight policies with respect to asbestos claims. Under the agreement, AIG was to make periodic payments to USG, under compromised limits of liability. The agreement provided for the delivery of certain releases and, in the event of any bankruptcy by USG, a court order authorizing performance under the settlement agreement.[48]

According to the motion, on May 30, 2001, USG presented Lexington with a bill for a periodic payment of slightly more than $12 million which, when paid, would exhaust three of the novated policies, entitling Lexington to releases under the agreement. AIG expressed concern in its motion that "with the intervening bankruptcy of USG, . . . USG may not perform its policy obligations, specifically the obligations to issue policy releases once limits are exhausted as to each policy, even if Lexington fully performs its obligations." AIG therefore requested a court order authorizing USG to provide the releases called for in the agreement once AIG made the required periodic payment.

On September 17, 2001, USG filed a "response" to the Lexington-AIG motion stating that debtors "do not object to the Court directing [USG] and Lexington to

perform their obligations under the Settlement Agreement." USG made clear that it did not agree with all of the statements made in the motion. However, the response noted, USG and the movants had reached agreement on all but one issue – whether interest was due on a particular payment.[49]

On September 20, 2001, the court entered an order directing USG, upon receipt of payments required by the Settlement Agreement, "to perform all of its obligations under the Settlement Agreement," including executing releases as provided in the agreement. The order further requires that Lexington pay interest to USG beginning from a date USG offered as a compromise.[50]

CONCLUSION

Insurers would be well-advised to monitor developments in asbestos bankruptcies filed by their policyholders – even those they settled with long ago. As the foregoing list of active matters demonstrates, even insurers which thought they had resolved or capped their exposure under policies issued to an asbestos debtor may find they have interests at stake in the bankruptcy proceedings that need to be protected.

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1 *See, e.g.*, A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1001 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), *quoting* In re Johns-Manville Corp., 40 B.R. 219, 229 (S.D.N.Y. 1984).

2 *See, e.g.*, Armstrong World Indus., Inc. v. Aetna Casualty. & Sur. Co., 45 Cal. App.4th 1, 52 Cal. Rptr.2d 690 (1996); Maryland Cas. Co. v. W.R. Grace & Co., 23 F.3d 617 (2d Cir. 1993); Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co., 53 F.3d 762 (6th Cir. 1995).

3 Joint Disclosure Statement Under Section 1125 of the Bankruptcy Code with Respect to the Joint Plan of Reorganization Proposed by Debtor The Babcock & Wilcox Company, Debtor Diamond Power International, Inc., Debtor Babcock & Wilcox Construction Co., Inc. and Americon, Inc., In re Babcock & Wilcox Co., Case No. 00-10992 (Bankr. E.D. La. Feb. 22, 2001). On the other hand, USG stated in documents it filed with the Securities and Exchange Commission on August 14, 2001, that it currently has only $76.3 million in insurance funds to cover the claims. USG Corp. Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, Form 10-Q, August 14, 2001, at p. 37.

4 11 U.S.C. §362(b)

5 *See, e.g.*, Lynch v. Johns-Manville Corp., 710 F.2d 1194 (6th Cir. 1983).

6 Complaint for Declaratory Relief and Injunctive Relief and Application for Temporary Restraining Order, The Babcock & Wilcox Co. v. Bearce (In re The Babcock & Wilcox Co.), Adversary Proc. No. 00-129 (Bankr. E.D. La. Feb 22, 2000).

[7] Order Granting Temporary Restraining Order and Setting Hearing on Preliminary Injunction, The Babcock & Wilcox Co. v. Bearce (In re The Babcock & Wilcox Co.), Adversary Proc. No. 00-129 (Bankr. E.D. La. Feb 22, 2000). The court announced the extension of the injunction at a hearing on October 17, 2001; at press time, however, no order had been entered.

There is case law suggesting that B&W's adversary proceeding may have been unnecessary, in that claims by a non-debtor against insurance policies in which the debtor has an interest are themselves subject to the automatic stay. *See, e.g.*, Ford Motor Credit Corp. v. Feher (In re Feher), 202 B.R. 966, 970 (Bankr. S.D. Ill. 1996) ("in view of the fact that [the debtor] has a shared interest in any proceeds paid under the policy, the proceeds constitute property of [the debtor's] estate").

[8] *See, e.g.*, Complaint for Declaratory Relief and For Injunctive Relief, The Babcock & Wilcox Co. v. Hall (In re The Babcock & Wilcox Co.), Adversary Proc. No. 00-1051 (Bankr. E.D. La. April 4, 2000); Memorandum of Law in Support of Complaint for Declaratory Relief and For Injunctive Relief, The Babcock & Wilcox Co. v. Hall (In re The Babcock & Wilcox Co.), Adversary Proc. No. 00-1051 (Bankr. E.D. La. April 10, 2000).

[9] Order and Reasons, In re The Babcock & Wilcox Co., et al., Adversary Proc. No. 01-1051 (Bankr. E.D. La. May 18, 2001).

[10] *E.g.*, Louisiana World Exposition, Inc. v. Federal Ins. Co. (In re Louisiana World Exposition, Inc.), 832 F.2d 1391, 1399 (5th Cir. 1987) (policy proceeds are not property of the estate where the debtor is not entitled to receive the proceeds and payment of the proceeds to a third party would not adversely affect the debtor's estate). This remains a matter of some debate, both within and outside the Fifth Circuit. *See, e.g.*, Ford Motor Credit Co. v. Stevens (In re Stevens), 130 F.3d 1027, 1030 (11th Cir. 1997) (determination of whether policy proceeds are property of the estate depends on "the nature and type of the insurance policy involved and its relationship to the bankruptcy estate"); Equinox Oil Co. v. Anthill Constr. Co. (In re Equinox Oil Co.), 2001 WL 649806 (E.D. La. June 11, 2001) (proceeds of an indemnity policy, under which the debtor is to be reimbursed for losses owed to third parties, are property of the estate); Landry v. Exxon Pipeline Co., 260 B.R. 769 (M.D. La. 2001) (concluding, after an extended discussion and citation of many cases on both sides of the issue, that proceeds of liability insurance policies payable to non-debtors are not property of the debtor's estate).

[11] Complaint for Interpleader, American Nuclear Insurers v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1188 (Bankr. E.D. La. June 5, 2001).

[12] Interpleader Plaintiffs' Motion to Preliminarily Enjoin Claims for Payment Under Shared Limits of Nuclear Energy Liability Insurance Policies Insuring Debtor, American Nuclear Insurers v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1188 (Bankr. E.D. La. June 5, 2001).

[13] *Id*. at 2.

[14] Motion of Atlantic Richfield Co. to Dismiss Interpleader of American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters, American Nuclear Insurers v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1188 (Bankr. E.D. La. July 9, 2001); Opposition of Atlantic Richfield, Co. to the Motion of American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters for a Preliminary Injunction, American Nuclear Insurers v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1188 (Bankr. E.D. La. July 9, 2001).

[15] B&W's Memorandum of Points and Authorities in Response to Interpleader Plaintiffs' Motion to Preliminarily Enjoin Claims for Payment, American Nuclear Insurers v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1188 (Bankr. E.D. La. July 9, 2001).

[16] Minute Entry, American Nuclear Insurers v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1188 (Bankr. E.D. La. Aug. 6, 2001).

[17] Order Granting the Motion of Atlantic Richfield Company to Dismiss the Interpleader of American Nuclear Insurers and Mutual Atomic Liability Underwriters or, Alternatively, for Abstention, American Nuclear Insurers v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1188 (Bankr. E.D. La. Aug. 29, 2001).

[18] *See* Certain Underwriters at Lloyd's, London v. McDermott Int'l, Inc., No. 2:00cv558 (E.D. La. April 4, 2001); Certain Underwriters at Lloyd's, London v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1187 (Bankr. E.D. La. April 4, 2001).

[19] On July 2, 2001, the district court issued orders (i) granting London's motion to withdraw the reference of the bankruptcy court adversary proceeding to the district court and (ii) consolidating the two matters. *See* Order and Reasons Granting Motion for Partial Withdrawal of the Reference, Certain Underwriters at Lloyd's, London v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1143(B) (E.D. La. July 2, 2001); Order Consolidating Cases and Setting Status Conference, Certain Underwriters at Lloyd's, London v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1143(B) (E.D. La. July 2, 2001).

[20] Order and Reasons, In re The Babcock & Wilcox Co., et al, No. 2:01cv912 (E.D. La. Sept. 13, 2001).

[21] The Babcock & Wilcox Company's Answer and Counterclaims, Lloyds, London v. McDermott Intl., Inc., Lloyds, London v. The Babcock & Wilcox Co. v. Lloyds, London, Adversary Proc. No. 01-1143(B) (E.D. La. July 23, 2001).

[22] *Id*.

[23] Answer of McDermott International, Inc., Lloyds, London v. McDermott Intl., Inc., Lloyds, London v. The Babcock & Wilcox Co., Adversary Proc. No. 01-1143(B) (E.D. La. July 23, 2001).

[24] Discovery Plan and Pretrial Schedule, Lloyds, London v. McDermott Intl., Inc., Lloyds, London v. The Babcock & Wilcox Co. v. Lloyds, London (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1143(B) (E.D. La. Sept. 6, 2001). Perhaps as a result of the publicity involving the London adversary proceeding and the heightened sensitivity involving potential violations of settlement confidentiality provisions, on September 4, 2001, Owens Corning filed a motion in its bankruptcy case seeking an order authorizing it to disclose – to the Futures Representative, the Asbestos Claimants Committee, and the Unsecured Creditors Committee – information concerning both pending and resolved asbestos personal injury and property damage claims, to assist in the process of valuing pending asbestos claims and estimated future asbestos liabilities. Owens Corning stated that a court order "is a prerequisite to the turnover of this information . . . to avoid the possible breach by Debtors of affirmative confidentiality covenants contained in many of their settlement agreements." Motion to Authorize The Disclosure Of Certain Settlement And Claims Database Information Relating To Pending And Resolved Asbestos-Related Claims, In re Owens Corning Corp., No. 1:00-03837 (Bankr. D. Del. Sept. 4, 2001).

[25] Complaint of Debtor-Plaintiff for Declaratory Judgment, The Babcock & Wilcox Co. v. Babcock & Wilcox Investment Co., et al. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1155 (Bankr. E.D. La. April 30, 2001).

[26] Travelers' Motion to Intervene, The Travelers Indemnity Co. v. The Asbestos Claimants' Committee v. The Babcock & Wilcox Co., et al. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1155 (Bankr. E.D. La. Aug. 27, 2001).

[27] Travelers may have been concerned that the court would conclude that any solvency ruling made during the adversary proceeding would be binding against Travelers, even though it was not a party, because it had an opportunity to participate. *See, e.g.*, UNR Indus., Inc. v. Continental Cas. Co., 942 F.2d 1101 (7th Cir. 1991), *cert. denied*, 503 U.S. 971 (1992), where the court concluded that a plan's valuation of asbestos claims was binding on an insurer that did not participate in plan negotiations, in part because the insurer had an opportunity to participate.

[28] Response of International Insurance Company and United States Fire Insurance Company to the Motion by the Travelers Indemnity Company and Travelers Casualty and Surety Company to Intervene in the Solvency Proceeding, The Travelers Indemnity Co. v. The Asbestos Claimants' Committee v. The Babcock & Wilcox Co., et al. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1155 (Bankr. E.D. La. Sept. 18, 2001).

[29] Transcript of Proceedings, In re The Babcock & Wilcox Co., Adversary Proc. No. 01-1155 (Bankr. E.D. La. Sept. 26, 2001), at 15-16.

[30] *Id.* at 30.

[31] Declaratory Judgment Complaint, The Travelers Indemnity Co. v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), Adversary Proc. No. 01-1510 (Bankr. E.D. La., filed Nov. 5, 2001). The copy of the complaint on file in the clerk's office is

redacted, presumably to protect from disclosure certain confidential aspects of the settlement agreements at issue.

The complaint alleges (¶ 9) that the plaintiffs were contemporaneously filing a motion to withdraw the reference of this adversary proceeding so that it will proceed in the district court rather than the bankruptcy court.

[32] Amended Verified Complaint for Injunctive and Declaratory Relief, Safeco Ins. of America v. Center for Claims Resolution, Inc. (In re Armstrong World Indus., Inc.), Adversary Proc. No. A-01-175 (Bankr. D. Del. March 28, 2001).

[33] Defendant's Motion to Dismiss, Safeco Ins. of America v. Center for Claims Resolution, Inc. (In re Armstrong World Indus., Inc.), Adversary Proc. No. 01-00175 (JJF) (Bankr. D. Del. April 9, 2001).

[34] Memorandum Order, Safeco Ins. of America v. Center for Claims Resolution, Inc. (In re Armstrong World Indus., Inc.), Adversary Proc. No. 01-175-JJF (D. Del. May 1, 2001).

[35] Stipulation and Order Modifying Automatic Stay to Permit Continuation of Alternative Dispute Resolution Proceeding, In re Armstrong World Indus., Inc., Adversary Proc. No. 00-4471 (JJF) (Bankr. D. Del. Sept. 27, 2001). The stay of 11 U.S.C. § 362 applies to claims – including claims for declaratory relief – filed *against* debtors pre-petition (*see, e.g.*, Minoco Group of Cos. v. First State Underwriters Agency (In re Minoco Group of Cos.), 799 F.2d 517, 519 (9th Cir. 1986), but by its terms does not apply to suits or claims *by* debtors.

[36] Complaint, G-I Holdings v. Reliance Ins. Co., Adversary Proc. No. 01-3054 (Bankr. D.N.J. Jan. 30, 2001),

[37] Notice of Defendants' Motion to Dismiss Complaint, G-I Holdings, Inc. v. Reliance Ins. Co. (In re G-I Holdings, Inc.), Adversary Proc. No. 01-3054 (RG) (Bankr. D.N.J. March 2, 2001).

[38] Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment, G-I Holdings, Inc. v. Reliance Ins. Co. and Great Am. Ins. Co. (In re G-I Holdings, Inc.), Adversary Proc. No. 01-3054 (RG) (Bankr. D.N.J. April 10, 2001).

[39] Plaintiffs' Motion in Opposition to Reliance Insurance Company's Motion to Stay this Action in Its Entirety, G-I Holdings, Inc. v. Reliance Ins. Co. and Great Am. Ins. Co. (In re G-I Holdings, Inc.), Adversary Proc. No. 01-3054 (RG) (Bankr. D.N.J. Aug.23, 2001).

[40] Order Approving Assumption of Executory Contract with the Superintendent of Insurance for the State of New York Providing for Payment of $4,800,000 to Debtor-In-Possession, In re G-I Holdings, Inc., Bankruptcy No. 01-30135 (RG) (Bankr. D.N.J. April 23, 2001).

[41] Motion For Determination of Rights, In re Owens Corning Corp., Case No. 00-03837 (JKF) (Bankr. D. Del. March 5, 2001). At an April 23, 2001 status conference, the judge noted that this motion would have to be reconfigured as an adversary

proceeding given that it sought declaratory relief, which can only be obtained in an adversary proceeding. *See* Rule 7001(9) of the Federal Rules of Bankruptcy Procedure.

[42] Stipulation and Agreed Order Re: Status & Disposition of Funds in Committed Claims Account & Related Matters under Buckets Agreement, In re Owens Corning Corp., Case No. 00-03837 (JKF) (Bankr. D. Del. May 29, 2001).

[43] Motion for Approval of Settlement Agreement Between Owens Corning and National Union Fire Insurance Company of Pittsburgh, Pennsylvania, In re Owens Corning Corp., No. 00-3837 (JKF) (Bankr. D. Del., Nov. 6, 2001).

[44] Request for Direction from Bankruptcy Court by Interested Parties Hartford Accident and Indemnity Co., First State Ins. Co. and Twin City Fire Ins. Co., In re W.R. Grace & Co., Case No. 01-01139-JJF (Bankr. D. Del. June 13, 2001).

[45] Agreed Order Resolving Request for Direction From Bankruptcy Court By Interested Parties Hartford Accident and Indemnity Company, First State Insurance Company and Twin City Fire Insurance Company, In re W.R. Grace, No. 01-1139 (JJF) (Bankr. D. Del. Nov. 5, 2001). The order further provides that the Settlement Agreement "is an enforceable contract that is binding on the Hartford Defendants and the Debtors in accordance with the terms therein, however, that nothing herein shall be construed as an assumption or rejection by the Debtors of the Settlement Agreement, or that the Settlement Agreement is executory in nature."

[46] Response to Motion to Approve Omnibus Procedural for Settling Certain Claims & Causes of Action Brought By or Against Debtors In A Judicial Administrative, Arbitral or Other Action or Proceeding, In re W.R. Grace & Co., Case No. 01-01139-JJF (Bankr. D. Del. June 22, 2001)

[47] Order Authorizing and Approving an Omnibus Procedure for Settling Certain Claims and Causes of Action Brought by or Against the Debtors in a Judical, Administrative, Arbitral or Other Action or Proceeding, In re W.R. Grace & Co., Case No. 01-01139-JJF (Bankr. D. Del. July 31, 2001)

[48] Motion of Lexington Insurance Company and AIG to Authorize and Direct Performance of Insurance Settlement Agreement or Alternatively to Require Assumption or Rejection of the Agreement, In re USG Corporation, Case No. 01-2094 (RJN) (Bankr. D. Del. Aug. 29, 2001).

[49] Debtors' Response to Motion of Lexington Insurance Company and AIG to Authorize and Direct Performance of Insurance Settlement Agreement or Alternatively to Require Assumption or Rejection of the Agreement, In re USG Corporation, Case No. 01-2094 (RJN) (Bankr. D. Del Sept. 17 2001).

[50] Order Authorizing and Directing Performance of Insurance Settlement Agreement, In re USG Corporation, Case No. 01-2094 (RJN) (Bankr. D. Del Sept. 20, 2001).