WHAT'S BEHIND THE RECENT WAVE OF ASBESTOS BANKRUPTCIES?

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When W.R. Grace & Co. earlier this month became the sixth major asbestos defendant to file for bankruptcy since January, 2000, its chairman said that "the state court system for dealing with asbestos claims is broken" because "Grace cannot effectively defend itself against unmeritorious claims."[1] He said Grace made the bankruptcy filing because "[t]he best forum for available to Grace to achieve predictability and fairness in the claims settlement process is through a federal court-supervised Chapter 11 filing."[2]

Why have companies such as Grace, Babcock & Wilcox, Armstrong World Industries, GAF, Owens-Corning, and Pittsburgh Corning concluded that Chapter 11 of the Bankruptcy Code is "the best forum available" to resolve their asbestos problems? The reason is that bankruptcy uniquely permits an asbestos defendant to put a permanent end to asbestos litigation against it and resolve liability issues in a coordinated and integrated fashion. Also, more recent asbestos debtors are using their bankruptcy filings in an increasingly aggressive fashion. Whereas many prior asbestos bankruptcies appeared to be little more than an exercise in how to distribute the debtor's assets among competing claimants, some of the asbestos defendants who have most recently sought Chapter 11 relief are trying to use bankruptcy to reduce their overall asbestos liability, in an effort to preserve the ownership interests of their existing shareholders.

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[1] April 2, 2001 press release titled "W.R. Grace & Co. Files Voluntary Chapter 11 Petition To Resolve Asbestos Claims" (the "Grace Press Release"), available on Grace's web site (www.wrgrace.com).

[2] *Id*. For general background on the the failure of the civil litigation system adequately to address asbestos issues, *see* Plevin, Schwartz & Kalish, "Don't Bankrupt Asbestos," Legal Times (March 19, 2001) at 68.

The Automatic Stay

The first thing that happens when an asbestos defendant files for Chapter 11 is that all litigation against it immediately stops. Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, provides an "automatic stay" that enjoins virtually all litigation against the debtor immediately upon the filing of a bankruptcy case.[3] By terminating its involvement in thousands of suits in one fell swoop, the debtor eliminates the staggering cost of defending these suits. The stay also prohibits – at least until a plan of reorganization is confirmed – any payments to asbestos claimants. This puts an end to the outflow of settlement funds that cripples the debtor's cash flow. In short, the cessation of litigation activity and settlement payments gives the debtor breathing room to begin solving the problems presented by the asbestos litigation.

The automatic stay does not halt litigation against co-defendants, parent companies, subsidiaries, officers, directors, or other persons or entities that have not themselves filed for bankruptcy relief. However, a common tactic is for debtors to attempt to use their bankruptcy filing to obtain an injunction, under 11 U.S.C. § 105, prohibiting suits against parent or subsidiary companies that have not themselves submitted to the jurisdiction of the bankruptcy court. For instance, in the *Babcock & Wilcox* case the debtor obtained an injunction barring suits against its parent company, McDermott International.[4] Similarly, in the bankruptcy case of GAF, the debtor obtained an injunction prohibiting suits against its principal non-debtor subsidiary, BMCA.[5] In *Pittsburgh Corning* as well, the debtor obtained an injunction barring prosecution of suits against PPG Industries or Corning Incorporated.[6] These injunctions barred the continuation of

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[3] The stay is subject to a number of exceptions specified in the statute itself, such as regulatory actions by the government. *See* 11 U.S.C. § 362(b). The bankruptcy court can also terminate the stay, or modify its coverage, upon motion of a party in interest in the bankruptcy case. *See* 11 U.S.C. § 362(d).

[4] *See* 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. 00-1029 (Bankr. E.D. La. Feb. 23, 2000); Order Extending Preliminary Injunction, The Babcock & Wilcox Co. v. Bearce (In re The Babcock & Wilcox Co.), Adversary Proc. No. 00-1029 (Bankr. E.D. La. Jan. 18, 2001) (extending preliminary injunction through April 17, 2001).

[5] *See* Order Granting Temporary Restraining Order, G-I Holdings, Inc. v. Those Parties Listed On Exhibit A to Complaint (In re G-I Holdings, Inc.), Adversary Proc. No. 01-3013 (Bankr. D.N.J. Jan. 19, 2001).

[6] *See* Order Granting Temporary Restraining Order And Setting Hearing on Preliminary Injunction, Pittsburgh Corning Corp. v. Those Parties Listed On Exhibit A to Complaint (In re Pittsburgh Corning Corp.), Adversary Proc. No. 00-2161 JKF (Bankr. W.D. Pa. April 16, 2000).

existing suits as well as the filing of new suits. By obtaining these injunctions, the debtors protected the assets of these companies from attack.[7]

Injunctions have also been sought to stop litigation against companies formerly affiliated with the debtor, particularly where the other companies either have a right to be indemnified by the debtor against such claims or where the companies potentially have rights to the same insurance policies as the debtor, since allowing those entities to deplete the debtor's insurance assets could have an adverse impact on the debtor and its constituents. Recently, the debtor in W.R. Grace obtained a preliminary injunction enjoining all lawsuits against several other companies, including Sealed Air Corporation and Fresenius AG, that were sometimes named as a co-defendant with Grace in asbestos cases. Grace argued that continuation of such suits against Sealed Air and Fresenius would adversely affect Grace's bankruptcy estate because Grace had previously agreed, in connection with its sales of certain non-asbestos businesses to them, to indemnify Sealed Air and

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[7] For example, Babcock & Wilcox filed an adversary proceeding complaint seeking to extend the automatic stay to Atlantic Richfield Co. ("ARCO"), its co-defendant in a pre-petition non-asbestos toxic tort suit in federal court in Pittsburgh. 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 made that could thereafter be used against B&W pursuant to the doctrine of collateral estoppel. This particular attempt to extend the stay was unsuccessful; the bankruptcy court denied B&W's request for preliminary injunctive relief and granted the underlying plaintiffs' motion to dismiss the adversary proceeding itself. Minute Entry, The Babcock & Wilcox Co. v. Hall (In re The Babcock & Wilcox Co.), Adv. Proc. No. 00-1051 (Bankr. E.D. La. Oct. 10, 2000). Both B&W and ARCO appealed to the district court.

Finally, such motions are often filed to halt litigation against current or former officers, directors, or employees. Grace's adversary proceeding complaint sought such relief, for example. *See also* American Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.), 963 F.2d 855, 860-61 (6th Cir. 1992); In re Johns-Manville Corp., 26 B.R. 420 (Bankr. S.D.N.Y. 1983), *aff'd* , 40 B.R. 219 (S.D.N.Y. 1984), *rev'd in part sub nom.*, Occidental Chem. Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 41 B.R. 926 (S.D.N.Y. 1984).

See generally Celotex Corp. v. Edwards, 514 U.S. 300, 307-12 (1995); In re Eagle-Picher Indus., 963 F.2d 855, 860 (6th Cir. 1992); A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1002 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986).

Fresenius against any asbestos-related claims.[8] On May 1, 2001, the Court issued an order staying and enjoining all of the actions sought to be enjoined by Grace "pending a final judgment in this adversary proceeding or further order of this Court."[9] The order further provided that it did "prevent anyone from providing notice to Insurance Carriers . . . or otherwise exercising their rights under the Insurance Policies, provided that they do not seek reimbursement or payment under any of the Insurance Policies without further order of this Court."

The stay also does not stop any litigation filed *by* the debtor. However, the debtor may wish to have at least some of its pre-bankruptcy lawsuits centralized and coordinated in the bankruptcy court. Suits in other federal courts can be transferred by motion under the general federal transfer statute, 28 U.S.C. § 1404, or its bankruptcy-specific analog, 28 U.S.C. § 1411. Suits pending in state court can be removed to federal court, even if there is no diversity and no federal question and even though the regular time for removal has passed: various provisions in the federal judicial code (i) extend federal jurisdiction to non-diversity, non-federal question matters relating to the bankruptcy case and (ii) authorize removal within 90 days of the bankruptcy filing.[10] These provisions make it possible in many cases for the debtor to

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[8] *See* Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction Staying All Asbestos-Related and Fraudulent Transfer Claims Against Affiliated Entities, W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co., Adversary Proc. No. 01-00771 (Bankr. D. Del., filed April 2, 2001).

[9] Order Granting Preliminary Injunction, W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co., Adversary Proc. No. 01-00771 (Bankr. D. Del., May 1, 2001). The order defined the actions being enjoined as "any case filed or pneidng in any court as follows: a) against Affiliated Entities that arise from alleged exposure to asbestos indirectly or directly allegedly caused by Debtors; or b) for which there may be coverage under the Insurance Policies [in turn, defined as 'those insurance policies that may provide coverage for asbestos-related claims asserted against the Debtors']; or c) against Affiliated Entities alleging fraudulent transfer or fraudulent conveyance claims; or d) against Insurance Carriers alleging coverage for asbestos-related liabilities."

[10] The provision that extends federal jurisdiction to non-diversity, non-federal question matters "related to" the bankruptcy case is 28 U.S.C. § 1334. The courts generally give the term "related to" a broad interpretation. *See, e.g.,* Wood v. Wood (In re Wood), 825 F.2d 90, 93 (5th Cir. 1987).

28 U.S.C. § 1452 permits removal of any action that is within federal jurisdiction under 28 U.S.C. § 1334. Bankruptcy Rule 9027(a)(2) generally permits petitions to remove already-pending actions to be filed within 90 days of the filing of the bankruptcy petition. Fed. R. Bankr. P. 9027(a)(2)(A). *But see* Fed. R. Bankr. P. 9027(a)(2)(B) and (C) (setting other time periods in certain instances). On motion, these time periods can be extended. Fed. R. Bankr. P.

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centralize all litigation involving it in a single court (either the bankruptcy court where the case is filed or the district court in that district) that can issue consistent, coordinated rulings.

The Claims Process

Notwithstanding the intervention of the automatic stay, the debtor's asbestos-related liabilities must still be addressed. As the debtor noted in W.R. Grace, "[w]hile the automatic stay will stop this uncontrolled flow of claims, the central goal of the case must be to define a universe of valid claims and provide for the payment of such claims through a post-confirmation trust."[11]

Generally speaking, there are two types of claims. The first type is "present claims" by persons who assert that, as of the date of the bankruptcy filing, they have already manifested asbestos-related injuries or diseases. The second type is so-called "future claims" that will, at some indeterminate future time, be asserted by persons who were exposed to asbestos in the past but have not yet developed any illnesses or injuries. Discussion of "future claims" will be deferred to the next section of this article.

The debtor will ask the court to establish a "bar date," which is a deadline by which "present claims" must be filed against the debtor. All such claims that are not filed with the bankruptcy court before the bar date deadline are forever barred. Thus, once the bar date passes, the debtor knows with

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9006(b)(1); Jandous Elec. Constr. Corp. v. City of New York (In re Jandous Elec. Constr. Corp.), 106 B.R. 48 (Bankr. S.D.N.Y. 1989); In re St. Joseph's Hospital, 103 B.R. 643 (Bankr. E.D. Pa. 1989).

It is possible that the bankruptcy court will abstain under 28 U.S.C. § 1334(c) after a state court action is removed to federal court. In all cases, a bankruptcy court may choose to abstain. *See* 28 U.S.C. § 1334(c)(1) (a bankruptcy court may voluntarily abstain "in the interest of justice"). In some circumstances, a bankruptcy court *must* abstain, and remand the matter to state court, if certain requirements are met. *See* 28 U.S.C. § 1334(c)(2), 28 U.S.C. § 157(b)(4). Where an action has been removed from state court, the federal court may remand "on any equitable ground." 28 U.S.C. § 1452(b). *See generally* In re United States Brass Corp., 110 F.3d 1261, 1264-66 (7th Cir. 1997).

[11] Informational Brief at 53, In re W.R. Grace & Co., No. 01-01139 (Bankr. D. Del., filed April 2, 2001).

certainty the universe of persons who assert that they have already suffered asbestos-related injuries or diseases.[12]

Recent battles in some of the asbestos bankruptcy cases have concerned the amount of detail that a claimant must submit as part of his or her proof of claim. In most bankruptcies, proofs of claim are submitted on summary forms that provide an extremely limited amount of information about the claim – far less information, in most cases, than even the most generally-pleaded notice pleading complaint.[13] However, in the *Babcock & Wilcox* bankruptcy case, for example, the debtor obtained an order, over the objections of the official committee of asbestos claimants, requiring asbestos personal injury claimants to submit a customized proof of claim that provided the following detailed information in addition to that required by the official proof of claim form: (i) the year in which the claimant was diagnosed with a particular asbestos-related injury; (ii) whether the claimant was exposed to asbestos from B&W equipment; (iii) the total number of years of exposure, and the first and last years of exposure; and (iv) the name and location of the facility(ies) where the claimant was exposed to asbestos from B&W equipment.[14]

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[12] In most bankruptcies, the court sets a single bar date for all prepetition claims. For ease of administration, however, asbestos debtors and other mass tort debtors have occasionally requested a separate bar date for personal injury claims. *See, e.g.*, In re The Babcock & Wilcox Co., 2000 WL 1511175 at *1 (E.D. La. Oct. 6, 2000) (bar date established for asbestos bodily injury claims); In re Dow Corning Corp., 142 F.3d 433 (table),1998 WL 180594 (6th Cir. 1998) (bar date for established for injuries allegedly caused by breast implants); In re Eagle-Picher Indus, Inc., 137 B.R. 679, 682 (Bankr. S.D. Ohio 1992) (discussing bar date for asbestos bodily injury claims).

[13] *See* Official Form No. 10, Federal Rules of Bankruptcy Procedure.

[14] *See, e.g.,* Order and Reasons, In re The Babcock & Wilcox Co., No. 00-0558, Bankruptcy Case No. 00-10992 (E.D. La. Aug. 25, 2000), at 15-27; Order and Reasons, In re The Babcock & Wilcox Co., No. 00-0558, Bankruptcy Case No. 00-10992 (E.D. La. Oct. 6, 2000); Order Regarding Debtor's Motion For Entry Of An Order Establishing A Bar Date, Approving The Proof Of Claim Forms, And Approving The Form And Manner Of Notice, In re The Babcock & Wilcox Co., No. 00-0558, Bankruptcy Case No. 00-10992 (E.D. La. Oct. 30, 2000). The debtor had actually requested even more detailed information, but the court found the debtor's proposed form to be "unnecessarily detailed" and unduly burdensome on claimants, and so determined that the debtor's proposed form had to be "substantially modified." Order and Reasons, In re The Babcock & Wilcox Co., No. 00-0558, Bankruptcy Case No. 00-10992 (E.D. La. Aug. 25, 2000), at 21, 22.

Once the universe of potential "present claims" is identified with certainty, the next step is to determine the validity and value of the claims. Outside bankruptcy, of course, this determination can only be made in a binding way by full-blown trials, in courts scattered throughout the country, of literally tens of thousands of individual asbestos lawsuits. It is the prohibitive cost of such litigation that has made it impossible, as a practical matter, for asbestos defendants to weed out the meritorious claims from those that lack merit.

Bankruptcy, however, provides a tool that can accomplish the seemingly impossible. The procedure, called "estimation" of claims, is authorized by Section 502(c) of the Bankruptcy Code, 11 U.S.C. § 502(c). No set procedure exists governing how claims should be estimated; the only requirement is that the estimation procedure chosen by the court satisfy due process requirements. For example, in one of the earliest cases to use estimation under the Bankruptcy Code, the court estimated the value of a $700 million securities fraud claim against the debtor following a one-day trial in which there were no witnesses and the "evidence" consisted of documents and attorney summaries of how various witnesses would testify if called.[15]

Thus, debtors can be expected to advocate an estimation process that is quick, efficient, and likely to lead to a low valuation. Among other things, the debtor will likely seek to have the bankruptcy court identify common issues presented in a large number of claims and then determine those issues – by either trial or summary judgment-type procedures – across a large number of claims, all at once.[16] Claimants also have an interest in speed and efficiency, but likely will resist any methodology that they feel tramples their due process rights or is skewed to a low valuation.

Not surprisingly, how estimation should proceed, when it should take place, and for what purpose, has led to pitched battles in the most recent wave of asbestos bankruptcies. In the *Babcock & Wilcox* case, for example, the official Asbestos Claimants' Committee argued that estimation of the debtor's liability for asbestos claims could be determined by the bankruptcy court, prior to the bar date, based largely on analysis by experts and the debtor's prepetition history of paying claims. The Committee alleged that "estimation in the bankruptcy court is not intended to fix the amount of specific claims for purposes

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15 *See* Matter of Baldwin-United Corp., 55 B.R. 885 (Bankr S.D. Ohio 1985).

16 Because determination of certain issues must take place in the district court, rather than the bankruptcy court (*see* 28 U.S.C. § 157(b)(5)), asbestos debtors have regularly asked the district court to assume jurisdiction of certain claim-related issues. *See, e.g.,* In re The Babcock & Wilcox Co., 2000 WL 422372 (E.D. La. April 17, 2000); Informational Brief at 54-56, In re W.R. Grace & Co., No. 01-01139 (Bankr. D. Del., filed April 2, 2001).

of distribution," but instead, "[i]n the present case, the purpose of the estimation process is to establish the outer limit of the aggregate value of the asbestos-related claims, both present and future," to assist in negotiations over a plan of reorganization.[17] The debtor responded that claims estimation should take place in the district court after the bar date and, rather than determining "a hypothetical 'outer-limit'" of its asbestos liability, should instead determine the debtor's actual liability for specific claims, after taking into account the district court's rulings on certain "threshold issues of liability" having widespread application to large numbers of claims.[18] The debtor also argued that its past claim settlement history is irrelevant to any calculation or estimation of their overall asbestos liability.[19]

The Plan of Reorganization

The ultimate goal of the Chapter 11 process is to confirm a plan of reorganization that makes provision for all claims against the debtor, thus

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[17] Memorandum In Support Of Motion By Asbestos Claimants' Committee To Initiate Claims Estimation Procedure, In re The Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La., filed Dec. 27, 2000), at 3, 4.

[18] Debtor's Response to the Asbestos Claimants' Committee's ('ACC') Motion To Initiate Claims Estimation Procedure, In re The Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La., filed Feb. 6, 2001) ("Debtor's Response"), at 1. The district court had previously ruled that it, rather than the bankruptcy court, would decide the following "threshold liability issues": "the appropriate standard of liability, the availability of punitive damages, the validity of claims by unimpaired individuals, the validity of claims based on unreliable scientific evidence of disease and/or causation, the appropriate statute of limitations, and the applicability of the sophisticated purchaser and government contractor defense." In re The Babcock & Wilcox Co., 2000 WL 422372 (E.D. La. April 17, 2000), at *5, *4. B&W argued that permitting the bankruptcy court to conduct a claims estimation would "subvert" this ruling by the district court. Debtor's Response at 1.

Similarly, in a brief filed on the first day of its case, W.R. Grace advised the court that it too would seek to litigate a series of "threshold issues," including the following: "(1) the validity of claims by those who remain unimpaired; (2) the reliability of scientific evidence concerning whether Grace's vermiculite products can cause disease at all; (3) the absence of sufficient proof concerning exposure to Grace products; and (4) whether exposure is sufficient to constitute a substantial contributing factor to a claimant's alleged disease." Informational Brief, In re W.R. Grace & Co., No. 01-01139 (Bankr. D. Del., filed April 2, 2001), at 63-64 (footnotes omitted).

[19] Debtor's Response at 2, 5-7.

enabling the debtor to enjoy the "fresh start" envisioned by Congress as one of the major purposes of the Bankruptcy Code. In most bankruptcies, this "fresh start" is obtained by making provision just for prepetition claims against the debtor. Asbestos cases are different, however, because of the number of "future claims" – that is, claims by persons exposed to asbestos prepetition who have not, as of the time of the filing of the petition, suffered any diagnosable injuries or illnesses. The Bankruptcy Code definition of "claim," although broad, has been construed to not include "claims" by uninjured persons.[20] Thus, it would seem, an asbestos debtor could be bereft of any chance to obtain a fresh start, because it might be inundated by a crippling wave of "future claims" after emerging from Chapter 11.

Following the lead of the court in the Johns-Manville bankruptcy case,[21] Congress in 1994 enacted special legislation governing reorganization plans of asbestos debtors that, among other things, makes provision for payment of "future claims." This section, 11 U.S.C. § 524(g), authorizes reorganization plans that "channel" all claims – including all "future claims" – to a court-approved trust provided that the court previously appointed a "futures representative" to negotiate on behalf of the "future claimants." Because all asbestos claims (including all "future claims") are "channeled" to the trust (through the mechanism of an injunction that prohibits any claims other than those asserted directly against the trust), the debtor can emerge from bankruptcy with assurance that its asbestos liabilities are behind it.

This peace of mind comes at a heavy cost, however. To meet the requirements of Section 524(g), a plan of reorganization must, among other things, dedicate at least a majority share of the company's stock to compensation of asbestos claims. In many cases, the claimants' share has been closer to 80-90%.

There are many variables that must be negotiated, among several constituencies, before a consensual plan of reorganization can be achieved. The principal variables are:

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[20] *See, e.g.,* In re Piper Aircraft Corp., 162 B.R. 619 (Bankr S.D. Fla.), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd sub nom.* Epstein v. Official Committee of Unsecured Creditors (In re Piper Aircraft Corp.), 158 F.3d 1573 (11th Cir. 1995); In re Correct Mfg. Corp., 167 B.R. 458, 459 (Bankr. S.D. Ohio 1994). The asbestos trust provision of the Bankruptcy Code refers to future "demands," rather than future "claims," and defines "demand" as "a demand for payment, present or future, that . . . was not a claim during the proceedings leading to the confirmation of a plan of reorganization." *See* 11 U.S.C. § 524(g)(5)(A).

[21] In re Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom*. Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

1. What consideration is being paid into the asbestos trust for ultimate distribution to asbestos claimants (*i.e.*, cash, stock, insurance proceeds, etc.)?

2. How will the consideration be divided among the "present claims" and the "future claims"?

3. What criteria will be used to determine if a particular claimant is entitled to compensation?

4. Will any entities other than the debtor (*e.g.,* non-debtor affiliates, insurers, etc.) be entitled to protection from claims via the "channeling injunction"? If so, who are they and what, if anything, are they each contributing in exchange for enjoying the protection provided by the injunction?[22]

In the most recent wave of asbestos bankruptcies, only Babcock & Wilcox has so far filed a plan of reorganization. That plan may or may not be a harbinger for how asbestos reorganization plans will look in the future, since it was filed prior to the conclusion of negotiations with the official committee of asbestos claimants, in order to preserve the debtor's "exclusive period" for filing a

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[22] There are, of course, a potentially infinite number of variables to be negotiated, depending on the particular circumstances. For example, provision must also be made in the plan for claims other than asbestos claims – if such claims are significant in amount relative to the debtor's ability to pay, then there may be a need to determine, through negotiation, what sort of payment is made to holders of such non-asbestos claims.

The importance of the channeling injunction is illustrated by the Manville trust's recent announcement of a general 60-day moratorium in payment of claims. The Claims Resolution Management Corporation, wholly owned by the Manville trust, announced last month that it had received "almost twice as many claims during 2000 as it received during 1999." March 26, 2001 Memorandum from David Austern, President, Claims Resolution Management Corporation, to "Attorneys Who File Manville Trust Claims," at 1. *See* "Manville Claims Management Corp. Issues 60-Day Moratorium; Pro Rata Share To Be Examined," Mealey's Litigation Report: Asbestos, Vol. 16, No. 5 (April 6, 2001), at 5-6. "The nearly 60,000 claims filed during 2000 was the greatest number of claims the Trust has received in one year with the sole exception of 1989, the first full year of Trust operations." *Id*. Moreover, during the first ten weeks of 2001, the Trust received more than twice the number of claims it received during the same period in 2000. *Id*. If these claims could have been asserted against reorganized Manville, rather than being channeled to the trust, the new Manville would obviously be staggering under the weight of this increased claim volume.

plan.[23] In any event, the key elements of the Babcock & Wilcox plan are as follows:

- The plan establishes an asbestos trust under Section 524(g) of the Bankruptcy Code, funded by: (i) certain insurance rights of the debtor having an estimated value of more than $1.15 billion; (ii) a promissory note from B&W in the amount of $100 million, payable out of available net cash flow over ten years; and (iii) $50 million in cash from B&W. If B&W is unable to make payments under the $100 million promissory note, a majority of B&W voting stock would be transferred to the trust.[24]

- All asbestos claims against B&W, its affiliates, and certain others would be "channeled" to the asbestos trust. B&W and the others would be protected from all present and future putative asbestos claims by a permanent injunction against the assertion of such claims.

- The plan divides asbestos claims into several different classes claims: asbestos personal injury claims (Class 4); settled asbestos claims (Class

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[23] Under 11 U.S.C. § 1121, at the outset of a Chapter 11 case the debtor has the exclusive right to propose a plan of reorganization. That exclusive period can be extended by order of the bankruptcy court. The Babcock & Wilcox plan was filed at the end of an extension of the exclusive period, the debtor apparently having concluded either that the time was ripe to propose a plan or that the court was unlikely to further extend the exclusive period. If the debtor proposes a plan during the exclusive period, it also has a period of time during which it has the exclusive right to solicit plan acceptances from parties in interest.

The Babcock & Wilcox plan is reproduced in Mealey's Litigation Reports: Asbestos, Vol. 16, No. 5 (April 6, 2001), § B.

[24] Underlying the Babcock & Wilcox plan is the following premise: if the amount of allowed asbestos claims is actually less than the company's net worth, then it is not insolvent and the equity interest of its parent company, McDermott International, should be protected rather than eliminated under a plan. *See* Debtor's Response at 3. That is why the Babcock & Wilcox plan proposes to transfer company stock only in the event of an inability to make payments under the promissory note. *See* 11 U.S.C. § 524(g)(2)(B)(i)(III) (a channeling injunction may be issued only if the asbestos trust established by the plan "is to own, *or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares . . .*") (emphasis supplied). It may fairly be anticipated that the debtor in the GAF case may try to take a similar approach, given the value of its non-debtor subsidiary BMCA, which apparently has no direct asbestos exposure.

5);[25] asbestos property damage claims (Class 6); and "derivative" asbestos claims (*e.g.*, contribution claims) (Class 7). Classes 4, 5, and 6 would be paid under the terms of the asbestos trust and a claims distribution procedure specified in the plan; Class 7 claims would be discharged without payment.

- The plan imposes stringent, objective qualifying criteria for persons filing claims against the bankruptcy trust based on an alleged asbestos-related nonmalignancy. B&W divides asbestos personal injury claims into four categories: malignant mesothelioma; lung cancer; other cancer; and "severely disabling asbestosis." In particular, B&W proposes to compensate only those nonmalignancies that qualify under the category of "Severely Disabling Asbestosis." To qualify, a claimant must establish (i) evidence of an ILO reading of 2/1 or greater; (ii) evidence of lung capacity of 70% or less based on acceptable PFT measurements (FVC, TLC or DLCO); and (iii) certification by an examining physician that the claimant is totally disabled as a result of an asbestos-related disease.[26]

Conclusion

Absent legislative relief or more rigorous case handling by the courts, bankruptcy will remain an attractive option for besieged asbestos defendants because it provides a palette of tools not available in any other forum. Only bankruptcy provides a debtor with the possibility of resolving claims in an efficient and comprehensive way and the ability to put asbestos liabilities completely in the past. As a consequence, we can expect more asbestos bankruptcies during the next few years.

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[25] This class of claims consists of claims arising out of asbestos exposure where, although the claimant and B&W entered into a settlement agreement prior to B&W's bankruptcy filing, no settlement payment has been made.

[26] In contrast, the requirements established under the Manville trust were: (i) a baseline ILO reading of 1/0; and (ii) lung capacity of 80% or less. The Manville trust had no requirement for certification by a physician that the claimant was disabled.