

Insurance Issues in Asbestos Bankruptcy

Michael G. Zanic

David F. McGonigle

Eric T. Moser

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Insurance Neutrality

- What is insurance neutrality?
 - “Insurance neutrality” broadly refers to a debtor’s efforts to leave the interests of its insurers unimpaired and unaltered during the course of its bankruptcy case, particularly in connection with a plan of reorganization, and to preserve insurance coverage disputes for resolution outside of bankruptcy.

Insurance Neutrality (cont)

- Insurance neutrality can be accomplished in a number of different ways.
 - Structurally
 - No reliance on insurance assets in connection with plan funding
 - No assignment of insurance assets and no requirement of insurance-related findings
 - Protective Plan Language
 - Super-preemptory and neutrality provisions

Insurance Neutrality (cont)

- Potential benefits of insurance neutrality:
 - Streamlined bankruptcy proceedings
 - Preservation of coverage issues for resolution in a potentially more suitable forum
 - Reduced potential for case disruption
 - No insurer standing

Insurer Standing

- Insurers, like all litigants, must satisfy minimum constitutional and statutory standing requirements in order to participate in an insured-debtor's bankruptcy case, whether in the bankruptcy court or on appeal.
- Insurer standing must be evaluated on an issue-by-issue basis.

Standing in the Bankruptcy Court

- 11 U.S.C. 1109(b) provides that “[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.
- Insurers generally do not have standing in their capacity as insurers.

Standing in the Bankruptcy Court (cont)

- Minimum article III requirements for standing in federal court:
 - (1) Injury in fact that is “concrete,” “distinct and palpable,” and “actual or imminent.”
 - (2) Injury must be “fairly traceable” to conduct complained of.
 - (3) Substantial likelihood that requested relief will remedy alleged injury

Standing in the Bankruptcy Court (cont)

- Where insurance neutrality is achieved, insurers generally lack standing to appear and be heard in connection with the insured-debtor's case.
 - In re Mid-Valley, Inc., 305 B.R. 425, 435 (Bankr. W.D. Pa. 2004) (holding that insurers lacked standing to object to appointment of FCR or move for dismissal of chapter 11 case).
 - In re Fuller-Austin Insulation, No. 98-2038-JJF, 1998 WL 812388, *3 (D. Del. Nov. 10, 1998) (holding that insurers lacked standing to object to confirmation).

Standing in the Bankruptcy Court (cont)

- Insurers generally do have standing to be heard with respect to the limited question of whether a debtor's plan is in fact insurance neutral.
 - In re Keck, Mahin & Cate, 241 B.R. 583, 596 (Bankr. N.D. Ill. 1999) (recognizing an insurer's right to object to plan confirmation, but only with respect to "plan provisions that allegedly affect its interests.").
 - In re A.P.I. Inc., 331 B.R. 828, 861 (Bankr. D. Minn. 2005) (holding that insurers lacked standing to object to confirmation "except insofar as the plan touches on the relationship of indemnitor and indemnitee, under contract and applicable law.").

Standing to Appeal

- The requirements for standing to appeal are more stringent than those for “party in interest” standing in the bankruptcy court.
- Appellate standing extends only to “persons aggrieved” by a bankruptcy court order

Standing to Appeal (cont)

“Person aggrieved” standard requires a showing that the challenged order resulted in:

- Diminished interest in property;
- Increased burdens; or
- Impairment of rights.

See In re PWS Holding Corp., 228 F.3d 224, 249
(3d Cir. 2000)

Standing to Appeal (cont)

- Under the person aggrieved standard, insurers do not have standing to appeal, among other things:
 - The confirmation of a plan that is insurance neutral. See In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004).
 - The reinstatement of claims against an insured-debtor. See Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737 (3d Cir. 1995).

Recent Decisions of Note

- In re Congoleum Corp., 426 F.3d 675 (3d Cir. 2005) (insurers had standing to appeal order authorizing retention of special insurance counsel based on alleged violations of the NJ Rules of Professional Conduct)

Recent Decisions of Note (cont)

- In re A.P.I. Inc., 331 B.R. 828, 852-53 (Bankr. D. Minn. 2005) (overruling insurer objections to transfer of insurance rights to trust because “the transfer to the trust of property like insurance coverage is clearly contemplated by the statute; and the Debtor and the holders of asbestos-related claims are not to be penalized for the Debtor exercising those options.”).
- In re ACandS, Inc., 311 B.R. 36, 41 (Bankr. D. Del. 2004) (holding that certain insurance policies “can be assigned to the trust in their entirety under Pennsylvania law, notwithstanding the anti-assignment provision they contain.”).

Pre-Packaged Bankruptcies

- A pre-packaged bankruptcy case is one in which the negotiation, documentation and solicitation of support for a plan are all completed before the bankruptcy case is filed.
- Prepackaged cases are negotiated and approved in advance, meaning less time spent in chapter 11 and less risk to ultimate outcome.

Pre-Packaged Bankruptcies (cont)

- Insurance neutrality issues in prepackaged bankruptcy case are generally the same as in a traditional “free fall” bankruptcy case – *i.e.*, if insurer rights are not impaired, they have no right to be heard.
- Insurers do not have the right to prevent their insureds from negotiating a prepackaged plan of reorganization.